No. 20-56357

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEST ROCK CHURCH, INC.; HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California,

Plaintiffs–Appellants

v.

GAVIN NEWSOM,
in his official capacity as Governor of the State of California,

Defendant–Appellee

On Appeal from the United States District Court
for the Central District of California (Los Angeles)
In Case No. 2:20-cv-06414-JCB-KK before the Honorable Jesus G. Bernal

REPLY IN SUPPORT OF PLAINTIFFS–APPELLANTS' THIRD EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EMERGENY MOTION UNDER CIRCUIT RULE 27-3

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs–Appellants, Harvest Rock Church, Inc. and Harvest International Ministry, Inc., state they are domestic nonprofit corporations incorporated under the laws of the State of California, neither has a parent corporation, and neither issues stock.

Dated: April 14, 2021

/s/ Daniel J. Schmid

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"This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."[1]

LEGAL ARGUMENT

I. THE GOVERNOR'S PURPORTED MODIFICATION OF HIS DISCIRMINATORY AND UNCONSTITUTIONAL RESTRICTIONS ON RELIGIOUS WORSHIP DOES NOT NEGATE THE NEED FOR EMERGENCY INJUNCTIVE RELIEF.

A. The Supreme Court Has Held Three Times that Modification of Limits on Religious Worship Services Does Not Moot Claims for Injunctive Relief Against Such Restrictions.

The Governor attempts to avoid yet another injunction against his unconstitutionally discriminatory regime by claiming that he has voluntarily modified his discriminatory regime. (Dkt. 74, Opposition to Emergency Motion for Injunction Pending Appeal, "Opp'n," at 13-14.) This is irrelevant as a matter of law. As the Supreme Court just recognized (again): **[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case**." *Tandon*, 2021 WL 1328507, *1 (emphasis added). Moreover, the Supreme Court made clear in *Tandon* that "**litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use**

[1] *Tandon v. Newsom*, No. 20A151, 592 U.S. ___, 2021 WL 1328507, *2 (U.S. Apr. 9, 2021) (emphasis added).

their power to reinstate the challenged restrictions." *Id.* (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020)).

Tandon was the most recent iteration of this clear holding. As *Catholic Diocese* held, a temporary change in restrictions is plainly insufficient to overcome a mootness inquiry. 141 S. Ct. at 68. Here, much like in *Catholic Diocese*, the Governor contended that a change in the numerical restrictions on religious gatherings removed any need for further injunctive relief. *Id.* There, as here, the dissenting Justices requested that the Court stay its hand because the Governor of New York had changed his restrictions. *Id.* ("The dissenting opinions argue that we should withhold relief because the relevant circumstances have changed [because] the Governor reclassified the areas in question."). Additionally, the dissenting Justices argued – much like here – that plaintiffs could simply "renew their requests if this recent reclassification is reversed." *Id.*

But, fatally for the Governor, the majority unequivocally rejected that proposition. Indeed, the majority held that "**[t]here is no justification for that proposed course of action**," **and that "[i]t is clear the matter is not moot**." *Id.* (emphasis added). The reason for this was simple: "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified." *Id.* Much like here, *Catholic Diocese* noted that "[t]he Governor regularly changes the classification of particular areas without prior notice," which

the Court noted would harm the applicants "before judicial relief can be obtained." *Id.* Put simply, the Court held that given the ever-changing nature of COVID-19 restrictions on religious worship services, "**there is no reason why [Churches] should bear the risk of suffering further irreparable harm in the event of another reclassification**." *Id.* at 68-69 (emphasis added).

Justice Gorsuch further elaborated on the reason the issue was not moot despite the reclassification:

> Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. **So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.**
>
> **To my mind, this reply only advances the case for intervention**. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. **So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my**

> **view, just another sacrifice of fundamental rights in the name of judicial modesty.**

Id. at 71-72 (Gorsuch, J., concurring) (emphasis added).

As is equally true here, "[i]t is easy enough to say it would be a small thing to require the parties to refile their applications later." *Id.* at 72. "But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. **Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services.**" *Id.* (emphasis added). It was for that reason Justice Gorsuch thought a finding of mootness would impose the precise harm from which the congregations were seeking relief. Justice Kavanaugh elaborated even further, succinctly stating that "**[t]here is no good reason to delay issuance of the injunctions**" **despite the changed restrictions**." *Id.* at 74 (Kavanaugh, J., concurring) (emphasis added).

And, in *High Plain Harvest Church v. Polis*, the Governor of Colorado and the dissenting Justices all contended that the matter was moot because the Governor had lifted all restrictions. 141 S. Ct. 527, 528 (2020). Specifically, the dissenters argued that "this case is moot" because "High Plains Harvest Church has sought to enjoin Colorado's capacity limits on worship services [and] Colorado has lifted all those restrictions." *Id.* (Kagan, J., dissenting). The majority rejected that contention,

granted certiorari, vacated the lower court's denial of injunctive relief, and required the lower courts to reconsider the issue in light of *Catholic Diocese*. *Id.* at 527.

B. This Court, and a Number of Others, Have Held that Modification or Removal of Restrictions Is Insufficient to Moot Claims for Injunctive Relief against Discriminatory Restrictions on Religious Worship.

Numerous courts, including this Court, have likewise concluded that a temporary change in COVID restrictions is insufficient to moot a claim. *See, e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020) (holding that because the restrictions could be restored, the need for injunctive relief was not moot); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020) (same). *See also Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157 (1st Cir. 2021) ((“The plaintiffs contend that, even though EO 34 has been superseded by EO 57, their request for injunctive relief from the self-quarantine requirement is not moot because it pertains to an executive action that the Governor voluntarily rescinded and could unilaterally reimpose. . . . **We agree**.” (emphasis added)); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (holding that because restrictions could be restored, motion for preliminary injunction not moot); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020) (holding motion for preliminary injunction not moot despite changed restrictions); *Roman Catholic Archbishop of Wash. v. Bowser*, No. 20-cv-03625 (TNM), 2021 WL 1146399 (D.D.C. Mar. 25, 2021) (same).

C. The Governor's Statements and Blueprint Demonstrate the Need for Further Injunctive Relief Against the Constant Threat of Reinstated Restrictions.

The Governor admits that a return to previous restrictions is possible. (Opp'n at 2 (noting that the Blueprint would be lifted by June 15 only if "hospitalizations remain low and all state residents 16 and older have access to the vaccine"); (*id.* (noting only that it is unlikely the Governor will resurrect the previous restrictions "any time soon").) In fact, in his own statement, the Governor explicitly stated that **he maintains "the option to revisit the June 15 date if needed**." (*See* Statement of Governor Gavin Newsom (Apr. 6, 2021), https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/ (emphasis added)); *see also* (Opp'n at 10 n.11 (citing same).) Moreover, the text of the Blueprint specifically contemplates the return to previous restrictions should the Governor deem it necessary. (*See* II-ER-049.)

Given these undeniable facts, the instant request for further injunctive relief pending appeal is not moot under *Tandon*'s clear holding. Indeed, "although California officials changed the challenged policy shortly after [Plaintiffs' motion] was filed," "**officials with a track record 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time**." 2021 WL 1328507, *2 (emphasis added) (quoting *South Bay United Pentecostal Church v.*

Newsom, 141 S. Ct. 716, 720 (2021) (Gorsuch, J.). So, yet again, the Governor is contending that his "new benchmarks" promise a "restoration of liberty just around the corner." *South Bay*, 141 S. Ct. at 720. The case is not moot and injunctive relief is still called for against his discriminatory capacity restrictions in every Tier of the Blueprint. (*See* dkt. 71, Emergency Motion for Injunction Pending Appeal, at 8-18.)

Moreover, the Governor's continued defense of his unconstitutional Blueprint undermines any claims that he has changed his mind concerning his persecution of religious congregants in California. Throughout his Response here, the Governor continues that defense, despite the fact that the Supreme Court just noted it has "summarily rejected" his contentions concerning his COVID restrictions **five times**. *Tandon*, 2021 WL 1328507, *2.

If the Governor has no intention to return to his previous restrictions "any time soon," as he claims (Opp'n at 2), then he suffers no harm by the issuance of an injunction prohibiting him from reinstating his unconstitutional restrictions. His strident opposition to such injunctive relief counsels against a finding that Plaintiffs have no need of further injunctive relief.

II. PLAINTIFFS' REQUEST FOR EMERGENCY RELIEF IS NOT IMPORPER BECAUSE THIS COURT ALONE HAS JURISDICTION OVER PLAINTIFFS' CLAIMS.

The Governor contends that Plaintiffs' request for further injunctive relief pending appeal is "procedurally improper" because Plaintiffs have not submitted

evidence to the district court. (Opp'n at 12.) This, too, is incorrect. In fact, it is the Governor who misunderstands the procedural propriety of Plaintiffs' motion in the instant litigation. This Court alone have jurisdiction to entertain Plaintiffs' requests. Indeed, "**[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal**." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (emphasis added); *United States v. Sadler*, 480 F.3d 932, 941 (9th Cir. 2007) ("Once a notice of appeal is filed, the district court loses jurisdiction over a case.") Thus, because Plaintiffs filed their notice of appeal concerning the district court's denial of its motion for preliminary injunction (II-ER-033), this Court is the only forum in which Plaintiffs can bring their instant claims for relief from the Governor's discriminatory restrictions. Thus, Plaintiffs' requested relief is properly before this Court and Plaintiffs "remain entitled to [emergency injunctive] relief where [they] remain under a constant threat that government officials will use their power to reinstate the challenged restrictions." *Tandon*, 2021 WL 1328507, *1 (cleaned up).

III. THE RECORD BEFORE THIS COURT DEMONSTRATES THAT THE RESTRICTIONS IN EACH TIER ARE UNCONSTITUTIONALLY DISCRIMINATORY.

The Governor again chastises Plaintiffs for not presenting new "evidence" to the district court of the Governor's discriminatory treatment of religious worship

services in every Tier. (Opp'n at 14-19.) The record before this Court alone demands injunctive relief against his discriminatory restrictions in each Tier. Despite subjecting Appellants' religious worship services to 25% capacity in Tiers 1–2 and 50% capacity in Tiers 3–4, the Governor's Blueprint **exempts** the following sectors, industries, and gatherings **from all numerical or capacity restrictions**: food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations. (*See* dkt. 71, Addendum Chart.)

In Tier 1, in addition to the exempt categories just outlined, grocery stores and certain other retail stores are permitted to operate at 50% capacity. (*Id.*) In Tier 2, Grocery and "essential" retail stores (e.g., Walmart, Costco, and 'big- box' stores) in Tier 2 may operate at 50% capacity. (*Id.*) Yet, in both of those Tiers, Churches are restricted to 25% capacity. (*Id.*)

In Tiers 3-4, in addition to the exempt categories applicable in all Tiers, the Governor adds insult to constitutional injury by adding grocery stores, essential retail stores (*e.g.*, Walmart, Costco, and other 'big-box' stores), shopping centers, malls,

destination centers, and swap meets to the list **of entities that have no numerical or percentage capacity limitations whatsoever**. (*Id.*) Yet, Churches remain subject to a 50% capacity restriction in both Tiers. (*Id.*)

As the Supreme Court just affirmed (again) in *Tandon*, that some secular gatherings are treated better is all that is required to demonstrate a constitutional violation. *Tandon*, 2021 WL 1328507, *1 ("**It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue**." (emphasis added)). The Governor's Blueprint singles out religious worship for especially harsh treatment, and that cannot survive the Supreme Court's **five** separate opinions rejected this Court's previous analysis. The injunction pending appeal should issue immediately.

IV. THE GOVERNOR'S MODIFICATION OF THE SINGING AND CHANTING BAN IS STILL UNCONSTITUTIONAL.

The Governor contends that his singing and chanting prohibitions also escapes constitutional condemnation because it now allows "performers" to sing and chant during religious worship services. (Opp'n at 19.) This continues to ignore the discriminatory treatment of religious worship services. First, the Governor still affords preference to music, film, and television studios because there are no numerical restrictions placed upon such singing and chanting. The Governor's new guidance permits religious worship services to include performers (but not congregants in the audience) to engage in singing, chanting, and similar

vocalizations during indoor services subject to a masking requirement in all tiers and a limit of 10 vocal performers and enhanced distancing in Tier 1. (Response at 19 (citing Cal. Dep't of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Places of Worship and Cultural Ceremonies").) So, Plaintiffs' Churches may now have singing from a 10-person performance choir, but the congregants may not sing or chant, despite their sincerely held religious beliefs that compel them to do so. (III-ER-219, V. Compl. ¶¶ 60–64.) And, until the Governor amended his restrictions after *Harvest Rock Church* and *South Bay*, even a priest, rabbi, or pastor was prohibited from engaging in chanting Scripture or other religious texts, which is common in many religious services, including Appellants' services.

But, certain nonreligious gatherings are permitted to have indoor singing and chanting **without any numerical restrictions**. (*See* Cal. Dep't of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Music, film, and TC Production").) In the music, film, and television guidance, the Governor imposes no numerical restrictions and permits them to operate according to "safety protocols agree by labor and management." (*Id.*).

Here, again, *Tandon* provides the requisite condemnation to the Governor's discriminatory regime. "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous

than those activities even when the same precautions are applied." 2021 WL 1328507 *2. The Governor is trusting the music, film and television industry to set its own standards with labor and management, yet "assum[ing] the worst when people go to worship." *Id.* (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)). The First Amendment prohibits such disparate treatment, and so, too, should this Court.

CONCLUSION

For the foregoing reasons, this Court should issue the IPA as to the capacity restrictions in each Tier and as to the singing and chanting ban. Again, if the Governor has no intention of reinstating his unconstitutional restrictions as he contends in his Response, then he suffers no harm by being enjoined from returning to the regime that the Supreme Court has enjoined five times already.

Respectfully submitted,

Dated: April 14, 2021

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/s/ Daniel J. Schmid
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Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Daniel J. Schmid
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