No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

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

Respondent.

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

Applicants' Emergency Application for Writ of Injunction

Relief Requested Before January 31, 2021

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32853
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Counsel for Applicants

QUESTIONS PRESENTED

The questions presented are of grave importance to "the Nation's essential commitment to religious freedom," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), especially in the current times of pandemic and uncertainty. As this Court unequivocally held in an appeal of similar COVID-19 restrictions on religious gatherings, "even in a pandemic, **the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (emphasis added) (*Catholic Diocese*). Indeed, "[t]he restrictions at issue here, by effectively barring many from attending religious worship services, strike at the very heart of the First Amendment's guarantee of religious freedom." *Id.* And, as Justice Gorsuch succinctly stated, "**[i]t is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques**." *Id.* at 72 (emphasis added).

The questions presented are:

(1) Whether the Ninth Circuit and district court erred in finding, despite the unequivocal holding of *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) that a **total ban on all** in-person religious worship survive First Amendment scrutiny, and that Applicants are not likely to succeed on the merits of their Free Exercise claim against the Governor's total prohibitions and

discriminatory restrictions on religious worship services in the Regional Stay at Home Order and Tier 1 of the Blueprint?

(2) Whether the Ninth Circuit and district court erred in holding that Applicants are not likely to succeed on the merits of their Free Exercise claim against the Governor even when numerous other similar secular congregate assemblies and activities are permitted?

(3) Whether the Ninth Circuit and district court erred in holding that, despite exempting many of the exact same industries highlighted by *Catholic Diocese* as demonstrative of a lack of narrow tailoring, the total ban of all worship in the Regional Stay at Home Order and the Blueprint are narrowly tailored?

(4) Whether the Establishment Clause of the First Amendment and this Court's holding in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) that "[n]either a state nor the Federal Government . . . can force or influence a person to go to or remain away from church against his will" is violated when a State prohibits or forbids upon criminal penalty houses of worship from assembling regardless of the size of the house of worship or the religious doctrine or practice.

PARTIES

Applicants are Harvest Rock Church, Inc. and Harvest International Ministry, Inc., itself and on behalf of its numerous member Churches in California. Respondent is Hon. Gavin Newsom, in his official capacity as Governor of the State of California.

RULE 29 DISCLOSURE STATEMENT

Applicants Harvest Rock Church, Inc. and Harvest International Ministry, Inc. hereby state that they are both nonprofit corporations incorporated under the laws of the State of California, do not issue stock, and have no parent corporations, and that no publicly held corporations 10% or more of their respective stock.

DIRECTLY RELATED PROCEEDINGS

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, No. 20-56357, Order denying Applicants' Motion for Injunction Pending Appeal (9th Cir. Jan. 25, 2020), reproduced in Appendix to Applicants' Emergency Application for Writ of Injunction as Exhibit A.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Injunction Pending Appeal (C.D. Cal. December 22, 2020), reproduced in Appendix to Applicants' Emergency Application for Writ of Injunction as Exhibit B

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Renewed Motion for Temporary Restraining Order and Preliminary Injunction (C.D. Cal. December 21, 2020), reproduced in Appendix to Applicants' Emergency Application for Writ of Injunction as Exhibit C.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20A94, Order granting petition for writ of certiorari, vacating decisions of the Ninth Circuit and Central District of California, and remanding for reconsideration in light of *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), reproduced in Appendix to Applicants' Emergency Application for Writ of Injunction as Exhibit D.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-56357, currently pending preliminary injunction appeal (9th Cir. 2020).

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-55907, Motion for Injunction Pending Appeal by 2-1 decision with Judge O'Scannlain dissenting (9th Cir. October 1, 2020), reproduced in Appendix to Applicants' Emergency Application for Writ of Injunction as Exhibit E.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Injunction Pending Appeal (C.D. Cal. September 16, 2020), reproduced in Appendix to Applicants' Emergency Application for Writ of Injunction as Exhibit F.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Preliminary Injunction (C.D. Cal. September 2, 2020), reproduced in Appendix to Applicants' First Application for Writ of Injunction as Exhibit G.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Temporary Restraining Order (C.D. Cal. July 20, 2020), reproduced in Appendix to Applicants' First Application for Writ of Injunction as Exhibit H.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES..iii

RULE 29 DISCLOSURE STATEMENT...iv

DIRECTLY RELATED PROCEEDINGS..iv

TABLE OF CONTENTS...vi

TABLE OF AUTHORITIES..viii

JURISDICTION...5

INTRODUCTION...6

REASONS FOR GRANTING THE APPLICATION...8

I. APPLICANTS HAVE A CLEAR AND INDISPUTABLE RIGHT TO RELIEF UNDER THIS COURT'S *CATHOLIC DIOCESE* DECISION BECAUSE A TOTAL PROHIBITION ON RELIGIOUS WORSHIP SERVICES WHILE MYRAID NONRELIGIOUS ORGANIZATIONS ARE EXEMPTED CANNOT WITHSTAND STRICT SCRUTINY..................8

II. UNDER *CATHOLIC DIOCESE* AND THE SUBSEQUENT DECISIONS OF NUMEROUS CIRCUIT COURTS, TIER 1 AND THE REGIONAL STAY AT HOME ORDER ARE SUBJECT TO AND CANNOT SURVIVE STRICT SCRUTINY..20

A. The Governor's Orders Substantially Burden Applicants' Sincerely Held Religious Beliefs..20

B. Because The Orders Impose Total Prohibitions And Discriminatory Restrictions On Applicants Religious Worship Services While Leaving Scores Of Nonreligious Gatherings Open Without Restrictions, They Are Not Narrowly Tailored Or The Least Restrictive Means..21

C. The Governor's So-Called Experts, And Their Speculative Testimony, Do Not And Cannot Overcome The Binding Decision Of *Catholic Diocese*, Which Rejected The Same Contentions Presented By The Governor In This Matter....................................25

III. APPLICANTS HAVE A INDISPUTABLY CLEAR RIGHT TO RELIEF AGAINST THE GOVERNOR'S INTERNAL DISCRIMINATION OF THEIR RELIGIOUS WORSHIP SERVICES AND NONRELIGIOUS ACTIVITIES IN THE SAME BUILDING....28

IV. APPLICANTS HAVE A INDISPUTABLY CLEAR RIGHT TO RELIEF AGAINST THE GOVERNOR'S PROHIBITION ON THE RELIGIOUS EXERCISE OF SINGING AND CHANTING....29

V. APPLICANTS HAVE AN INDISPUTABLE RIGHT TO RELIEF ON THEIR CLAIMS THAT THE GOVERNOR'S ORDERS VIOLATE THE ESTABLISHMENT CLAUSE....31

VI. *CATHOLIC DIOCESE* DEMAND A FINDING THAT HARVEST CHURCHES HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF....33

A. Applicants Suffer Irreparable Harm Each Day The Orders Remain In Place....34

B. Applicants Suffer Under The Yoke Of Threatened Closure Of Their Churches Every Day The Orders Remain In Place....35

C. Applicants Comply With Safety Protocols....36

VII. APPLICANTS SATISFY THE OTHER REQUIREMENTS FOR EMERGENCY INJUNCTIVE RELIEF....37

A. *Catholic Diocese* Compels A Finding That The Balance Of The Harms Favors Injunctive Relief....37

B. *Catholic Diocese* Compels A Finding That The Public Interest Favors Injunctive Relief....38

CONCLUSION....39

TABLE OF AUTHORITIES

CASES

Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (9th Cir. 2020)..............10, 18, 22, 23

Ashcroft v. ACLU, 542 U.S. 656 (2004)..22

Bruni v. City of Pittsburgh, 824 F.3d 353 (3d Cir. 2016)......................................23

Burson v. Freeman, 504 U.S. 191 (1992)...22

Calvary Chapel Dayton Valley v. Sisolak,
982 F.3d 1228 (9th Cir. 2020)..*passim*

Calvary Chapel Lone Mountain v. Sisolak,
831 F. App'x 317 (9th Cir. 2020)...10, 20, 24, 38

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)...ii

City of Boerne v. Flores, 521 US. 507 (1997)...22

Elrod v. Burns, 427 U.S. 347 (1976)..34

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947)................................iii, 32

Gillette v. United States, 401 U.S. 437, 449 (1971)...32

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006)..22

Harvest Rock Church v. Newsom, Gov. of CA, No. 20A94,
592 U.S. ___, 2020 WL 7061630 (U.S. Dec. 3, 2020)...2

Harvest Rock Church v. Newsom, No. 20-55907,
2020 WL 7075072 (9th Cir. Dec. 3, 2020)..2

Harvest Rock Church v. Newsom, 982 F.3d 1240 (9th Cir. 2020).............................7

Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728 (9th Cir. 2020).......11, 18, 25, 29

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012)..30

Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011)....................................37

Lund v. Rowan Cnty., 863 F.3d 268 (4th Cir. 2017)..32

Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020)................21

McCullen v. Coakley, 134 S. Ct. 2518 (2014)..23

Monclova Christian Acad. v. Tuledo-Lucas Cnty. Health Dep't,No. 20-4300,
2020 WL 7778170 (6th Cir. Dec. 31, 2020)...11

On Fire Christian Ctr., Inc. v. Fischer,
453 F. Supp. 3d 901 (W.D. Ky. Apr. 11, 2020)..20, 37, 38

Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049 (2020)............29, 30

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020)...............*passim*

Thomas v. Rev. Bd. of Ind. Emp. Security Div., 450 U.S. 707 (1981)................21, 22

Watson v. Jones, 80 U.S. 679 (1871)...30

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..................................32

STATUTES

28 U.S.C. §1651...1, 5

28 U.S.C. 2101...1, 5

Sup. Ct. Rules 20...1

Sup. Ct. Rules 22...1

Sup. Ct. Rules 23...1

OTHER

Americans Mental Health Ratings Sink to New Low, Gallup (Dec. 7, 2020),
https://news.gallup.com/poll/327311/americans-mental-health-ratings-sink-
new-low.aspx..39

Hebrews 10:25...20

Jonathan Reid, et al., *Comparing the Respirable Aerosol Concentrations and Particle Size Distributions Generated by Singing, Speaking and Breathing* (Aug. 20, 2020), *available at* https://chemrxiv.org/articles/preprint/Comparing_the_Respirable_Aerosol_Concentrations_and_Particle_Size_Distributions_Generated_by_Singing_Speaking_and_Breathing/12789221 RG.2.2.36405.29926..........31

Lauren Moss, *Singing no riskier than talking for virus spread*, BBC News (Aug. 20, 2020), https://www.bbc.com/news/health-53853961..........31

Mental Health, Substance Abuse, and Suicidal Ideation During the COVID-19 Pandemic—United States, June 24–30, 2020, CDC (Aug. 14, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf..........38

Pat Ashworth, *Singing might not be so great a risk, after all*, Church Times (June 4, 2020), https://www.churchtimes.co.uk/articles/2020/5-june/news/uk/singing-might-not-be-so-great-a-risk-after-all..........31

"It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."[1]

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

Pursuant to Sup. Ct. Rules 20, 22 and 23, 28 U.S.C. §1651, and 28 U.S.C. §2101, Applicants Harvest Rock Church, Inc. and Harvest International Ministry, Inc. (collectively "Applicants"), herby file this application for an emergency writ of injunction—requesting relief **before this Sunday, January 31, 2020**—against Respondent Governor Newsom's Emergency Proclamation and subsequently issued stay-at-home orders, including the currently operative "Blueprint for a Safer Economy" (the "Blueprint"), which establishes a statewide framework of four Tiers with sector-specific restrictions in each tier and imposes an unconstitutionally discriminatory regime that relegates Applicants' fundamental right to religious exercise to constitutional orphan status.

The total ban on all in-person worship in California is the most severe in the nation. Appellants have been under that total ban since July 13, 2020. Each day, the pastors, staff, and parishioners of Harvest Rock Church face threats of daily criminal charges and fines for assembling with even one person for worship. These threats have been placed in writing by the Pasadena Criminal Prosecutor and the Public Health Department.

[1] *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, -- S. Ct. --, 2020 WL 694835 (U.S. Nov. 25, 2020) (Gorsuch, J., concurring) (emphasis added) [hereinafter *Catholic Diocese*].

On November 23, 2020, Applicants filed an Application for an Emergency Writ of Injunction to the Hon. Justice Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit. (*See* Emergency Application for a Writ of Injunction (No. 20A94, Nov. 23, 2020.) Justice Kagan requested a response from the Governor, which he filed on November 30, and Applicants submitted their Reply in Support of the First Emergency Application for a Writ of Injunction on December 1, 2020. On December 3, 2020, after referring the Application to this Court, this Court issued the following Order:

> The application for injunctive relief, presented to Justice Kagan and by her referred to the Court, is treated as a petition for a writ of certiorari before judgment, and the petition is granted. The September 2 order of the United States District Court for the Central District of California is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to remand to the District Court for further consideration in light of *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. —— (2020).

Harvest Rock Church v. Newsom, Gov. of CA, No. 20A94, 592 U.S. ___, 2020 WL WL 7061630 (U.S. Dec. 3, 2020) (hereinafter "GVR Order," a copy of which is reproduced in Appendix as Exhibit D.) That same day, the Ninth Circuit issued its order vacating its prior decision and the previous orders of the district court denying injunctive relief, and it remanded the matter to the district court for further consideration in light of this Court's *Catholic Diocese* decision. *See Harvest Rock Church v. Newsom*, No. 20-55907, 2020 WL 7075072 (9th Cir. Dec. 3, 2020). **Unfortunately, this Court's clear roadmap in *Catholic Diocese* was ignored by the district court and the Ninth Circuit on remand and only injunctive relief from this Court**

can correct the lower courts' perpetual refusal to afford Applicants the relief to which they are entitled under *Catholic Diocese*.

For **197 days**, the Governor has continued to discriminate against Applicants' religious worship services while permitting myriad nonreligious entities to continue to gather without numerical restrictions *inside the same house of worship* and in other external comparable congregate assemblies; publicly encouraging and supporting mass protestors, rioters, and looters to gather without numerical restriction in blatant disregard for his own Orders; and has purported to prohibit religious worship services—**even in the private homes of Californians**—despite the fundamental protections enshrined in the First Amendment.

As a result of the Governor's COVID-19 restrictions on religious worship, Harvest Rock Church has received letters from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena and from the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatening up to 1 year in prison, daily criminal charges and $1,000 fines against the pastors, church, governing board, staff, and parishioners, which includes a threat to close the church. (*See* Appendix, Ex. L.) Specifically, the letter stated: "**Any violations in the future will subject your Church owners, administrators, operators, staff, and parishioners to the above-mentioned criminal penalties as well as the potential closure of your Church**." (*Id.* (emphasis added).) And, those criminal penalties included "punishment of up to one year in jail

and a fine **for each violation**." (*Id.* (emphasis added).) Emergency relief is needed now to prevent criminalizing constitutionally protected religious exercise.

Despite the "seismic shift" that this Court's *Catholic Diocese* opinion rendered on similar COVID-19 restrictions, *see Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020), and the overwhelming mountain of precedent issued after *Catholic Diocese*, the Ninth Circuit and the district court have continued to ignore the unconscionable, unconstitutional, and irreparable harm that is being imposed on Applicants every day the orders are in place and continue to ignore the plain teaching of this Court's *Catholic Diocese* decisions. "**Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical**." 141 S. Ct. at 70 (Gorsuch, J., concurring) (emphasis added). The decisions below permit it to become exactly that, and it is past time for this Court to put the First Amendment back on the job for Applicants. A GVR Order from this Court was not sufficient to make the Ninth Circuit or the district court see the clear error of their ways, and only an emergency injunction from this Court will put a stop to the unconstitutional restrictions being imposed on Applicants every day the Governor's Orders remain in place.

Applicants have been subject to complete prohibitions and severe restrictions for nearly eleven months, have been forced to choose between jail and attending Church on the Holy Day of Easter and the Day of Pentecost, and now another Holy Season of Christmas due to the lower courts' refusal to act. Despite a clear directive from this Court in *Catholic*

***Diocese* and the GVR Order in the instant matter, the Ninth Circuit and the district court have flouted this Court's precedent and ignored the irreparable harm being imposed on Applicants each and every day.**

The time has come to end these severe restrictions on religious freedom. The lower courts had their chance, and except for Judge O'Scannlain, they have refused to follow this Court's clear roadmap. The emergency application for a writ of injunction should be granted, and the Governor enjoined from enforcing his unconstitutional prohibitions on religious worship. Clearly, a GVR Order from this Court has not taught the lower courts the appropriate lesson and sending Applicants back with another GVR Order would only further impose the irreparable and unconstitutional injury from which Applicants have been begging for relief for **197 days with no end in sight**. This Court's decision in *Catholic Diocese* demands relief.

JURISDICTION

Applicants sought relief from this Court requesting an emergency writ of injunction pending appeal. Applicants obtained the GVR Order of this Court on December 3, 2020. On remand, after failing to receive a preliminary injunction from the district court, Applicants sought an emergency injunction pending appeal from from the district court, which was denied on December 22, 2020, and also from the Ninth Circuit, which was denied on January 25, 2020. This Court has jurisdiction under 28 U.S.C. §1651 and by virtue of 28 U.S.C. 2101(e).

INTRODUCTION

Applicants have struggled to obtain the religious freedom that the First Amendment and this Court's *Catholic Diocese* decision demand for **197 days**. (*See* App. Ex. I, Verified Complaint "V. Compl.".) Yet, at every turn, Applicants are sent away empty handed only to remain subject to the most restrictive COVID-19 regulations in the country. For each of those seemingly unending **197 days** of unconstitutional injury, **Applicants have been subject to a total prohibition on their religious worship services and remain subject to a total prohibition on religious worship services today**. How long must Applicants beg for relief before it will be afforded to them as the Constitution demands.

After receiving the GVR Order from this Court on December 3, 2020, Applicants immediately moved to a TRO and preliminary injunction in the district court. The district court delayed issuing a decision on that renewed motion for **17 days**. (App. Ex. C.) Applicants moved for an emergency injunction pending appeal with the district court that was also denied the next day. (App. Ex. B.) Applicants then took an emergency appeal to the Ninth Circuit and requested an emergency injunction pending appeal so that they might be able to gather for worship services on the Holy Day of Christmas. That requested relief was also denied, despite Judge O'Scannlain's critical point: "[t]he requested deadline is hardly arbitrary: **The church seeks immediate action from our court so that its members can worship on Christmas Day, one of the most sacred holy days in the Christian**

calendar." *Harvest Rock Church v. Newsom*, 982 F.3d 1240, 1240 (9th Cir. 2020) (O'Scannlain, J., concurring in part) (emphasis added).

Despite filing the IPA with the Ninth Circuit on December 23, 2020, the Ninth Circuit requested briefing, then requested supplemental briefing, held oral argument, and then requested a second set of supplemental briefing on questions already answered by *Catholic Diocese*. On January 25, **33 days later**, **the Ninth Circuit finally issued its decision on the emergency motion denying Applicants the relief *Catholic Diocese* demands**. (App. Ex. A.)

Since the institution of this action, Applicants have been completely prohibited from gathering for indoor worship services for **197 days**. Since the day this Court issued its GVR order in the instant case, Applicants have been waiting to no avail for relief from any court for **53 days**. In *Catholic Diocese*, this Court said that 13 and 7 days were too long to force a Church to await constitutionally demanded relief. 141 S. Ct. at 68. As Justice Gorsuch noted, "**[i]n far too many places, for far too long, our first freedom has fallen on deaf ears**." *Id.* at 70 (emphasis added). That is nowhere more evident than on the continuing the "burden on the faithful who have lived for months under [California's] unconstitutional regime unable to attend religious services." *Id.* at 72 (Gorsuch, J., concurring).

In the IPA denial below, Judge O'Scannlain correctly pointed out that the court's denial of injunctive relief here cannot be reconciled with *Catholic Diocese*. Indeed, he said that denying injunctive relief here is "woefully out of step" with *Catholic Diocese* and that

> A simple straightforward application of these controlling precedents compels what should be the obvious result here: **California's uniquely severe restrictions against religious worship services—including its *total ban* against indoor worship in nearly the entire state—are patently unconstitutional**.

(App. Ex. A, at 3 (O'Scannlain, J., specially concurring) (emphasis added).) As he noted, "the court's refusal to so do [in California] **cries out for correction**." (*Id.* (emphasis added).) "Under any meaningful examination, California's complete ban on indoor worship fails strict scrutiny—just as New York's and Nevada's more permissive regimes did before." (App. Ex. A at 9) Citing *Catholic Diocese* and the Ninth Circuit's previous *Calvary Chapel Dayton Valley* decision, Judge O'Scannlain noted that "neither court appeals to have had much difficulty reaching" the conclusion that discriminatory restrictions on religious worship services violates the First Amendment. (*Id.*). "**Until now**." (*Id.* (emphasis added).) It is time to relegate California's draconian and tyrannical reign of anti-religious discrimination to the dustbin of constitutional history.

REASONS FOR GRANTING THE APPLICATION

I. APPLICANTS HAVE A CLEAR AND INDISPUTABLE RIGHT TO RELIEF UNDER THIS COURT'S *CATHOLIC DIOCESE* DECISION BECAUSE A TOTAL PROHIBITION ON RELIGIOUS WORSHIP SERVICES WHILE MYRAID NONRELIGIOUS ORGANIZATIONS ARE EXEMPTED CANNOT WITHSTAND STRICT SCRUTINY.

In *Catholic Diocese*, this Court noted that the treatment afforded to other nonreligious gatherings or so-called "essential" businesses mandated the application of strict scrutiny. The Court explicitly mentioned numerous examples of disparate treatment that are equally present here:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all **plants manufacturing chemicals and microelectronics and all transportation facilities**.

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (emphasis added). Moreover, "[t]he disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." *Id.* "[A] large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id.* (cleaned up).

Justice Gorsuch elaborated further,

> the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include **hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too**. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians.

Id. at 69 (bold emphasis added; italics original) (Gorsuch, J., concurring). Indeed, in New York, "People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops." *Id.*

Justice Kavanaugh similarly noted New York's disparate treatment of worship, which is equally present here:

> New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. **In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all**.

Id. at 73 (emphasis added) (Kavanaugh, J., concurring).

The Ninth Circuit, too, was faced with many of the identical discriminatory restrictions at issue here, and found them to mandate strict scrutiny. "Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities." *Calvary Chapel Dayton Valley*, 982 F.3d at1233; *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317, 317 (9th Cir. 2020) (same).

As Justice Gorsuch noted, "[i]n recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples." *Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). Justice Kavanaugh opined that caps on places of worship "do not apply to some secular buildings in the same neighborhoods," *id.* at 73 (Kavanaugh, J., concurring), like "a grocery store, pet store, or big-box store down the street." *Id.*

In *Agudath Israel of Am. v. Cuomo*, the Second Circuit similarly noted that while worship services were restricted to 10 or 25 people, other so-called "essential

businesses" were permitted without similar restrictions, including grocery stores, hospitals, liquor stores, pet shops, financial institutions, news media, certain retail stores, and construction. 983 F.3d 620, 626, 632 (2d Cir. 2020).

In *Monclova Christian Acad. v. Tuledo-Lucas Cnty. Health Dep't*, the Sixth Circuit also noted that certain religious schools were prohibited from gathering for in-person instruction while other nonreligious gatherings were not so restricted, including "gyms, tanning salons, office buildings, and the Hollywood Casino." No. 20-4300, 2020 WL 7778170, at *3 (6th Cir. Dec. 31, 2020).

Judge O'Scannlain, too, observed in the previous appeal in this matter:

> [I]ndoor religious worship services are completely prohibited. . . . Yet, in these same counties, the State still allows people to go indoors to: spend a day shopping in the mall, have their hair styled, get a manicure or pedicure, attend college classes, produce a television show or movie, participate in professional sports, wash their clothes at a laundromat, and even work in a meatpacking plant.

Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting) (footnote omitted).

And, even in the decision at issue here, Judge O'Scannlain noted that

> in exactly the same locales where indoor worship is prohibited, California still allows a vast array of secular facilities to open indoors, including (**to name only a few**): retail stores, shopping malls, factories, food-processing plants, warehouses, transportation facilities, childcare centers, libraries, professional sports facilities, and movie studios.

(App. Ex. A at 4 (O'Scannlain, J.) (emphasis added).)

Under the Regional Stay at Home Order and Tier 1 of the Blueprint, the Governor imposes a **total prohibition** on religious worship services that is not imposed on so-called "critical infrastructure" sectors. (*See* App. Ex. A at 2.) The list of

exempt activities under the Regional Stay at Home Order contains **29 pages exempting 13 sectors and hundreds of subsectors of gatherings that are not subject to the total prohibition imposed on religious worship services**. (*See* App. Ex. N). While Applicants' religious worship services are banned if they include 1 person, the following sectors are but a sampling of the 29 pages of 13 categories of exemptions for nonreligious gatherings in other sectors.

In Tier 1 of the Blueprint, indoor worship services are completely prohibited – even if they include 1 person. (App. Ex. A at 2.) For sectors other than Places of Worship, the Blueprint modified some restrictions and exemptions as compared to prior Orders, but left others in place. (II-ER-053.) For example:

- **Grocery stores** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (App. Ex. I, V. Compl., ¶¶77–78; V. Compl. Ex. G), and became classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the **July 29 Retail Guidance** (Exhibit J, Joint Statement "JS," Ex. I.) Grocery stores could operate without capacity or numerical limit under the April 28 Essential Workforce Guidance (App. Ex. J, at 3-4), but the Blueprint permits grocery stores to operate at 50% capacity under Tier 1–Widespread. (App. Ex. J, at 3-4.)

- **Essential retail** stores, such as Walmart and Costco, which are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (App. Ex. I, V. Compl., ¶¶77–78; V. Compl. Ex. G), are also now classified in the "Retail" sector of the Blueprint, subject to the Industry

Guidance and the July 29 Retail Guidance. (App. Ex. J at 3.) Essential retail stores could operate without capacity or numerical limit under the April 28 Essential Workforce Guidance (App. Ex. J, at 3-4), but the Blueprint permits essential retail stores to operate at 25% capacity under Tier 1. (App. Ex. J, at 4.)

- **Laundromats** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (App. Ex. I, V. Compl., ¶¶77–78; V. Compl. Ex. G), and are now classified in the "Limited Services" sector of the Blueprint, subject to the Industry Guidance and **July 29 Limited Services Guidance** (App. Ex. J, at 3-4.) Both the April 28 Essential Workforce Guidance and the Blueprint allow laundromats to operate without numerical limits. (App. Ex. J, at 3-4.)

- **Warehouses** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (App. Ex. I, V. Compl., ¶¶77–78; V. Compl. Ex. G), and are classified in the "Logistics and warehousing facilities" sector of the Blueprint, subject to the Industry Guidance and **July 29 Logistics and Warehousing Guidance** (App. Ex. J, at 5.) Both the April 28 Essential Workforce Guidance and the Blueprint allow warehouses to operate without numerical limits. (*Id.*)

- **Food packing and processing** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (App. Ex. I, V. Compl., ¶¶77–78; V. Compl. Ex. G), and are classified in the "Critical Infrastructure" sector of the Blueprint (App. Ex. J, at 10). Both the April 28 Essential

Workforce Guidance and the Blueprint allow food packing and processing operations without numerical limits.

- The provision of "**food, shelter, and social services, and other necessities of life** for economically disadvantaged or otherwise needy individuals" is designated as "Essential Critical Infrastructure" under the April 28 Essential Workforce Guidance (App. Ex. I, V. Compl., ¶¶77–78; V. Compl. Ex. G), and is now classified in the "Critical Infrastructure" sector of the Blueprint (App. Ex. J, at 10.) Both the April 28 Essential Workforce Guidance and the Blueprint allow such provision without numerical limits. Furthermore, every version to date of the Worship Guidances exempts such activities, as well as schooling, from worship restrictions in the same church. (App., Ex. I, V. Compl. Ex. J (excluding from worship restrictions "food preparation and service, delivery of items to those in need, . . . school and educational activities, . . . counseling, . . .and other activities that places and organizations of worship may provide"); V. Compl. Ex. K (same); V. Compl. Ex. L (same); App. Ex. J, JS Ex. C (same).)

Under the Regional Stay at Home Order, the list of exempt activities under the Regional Stay at Home Order contains **29 pages exempting 13 sectors and hundreds of subsectors of gatherings that are not subject to the total prohibition imposed on religious worship services**. (*See* App. Ex. N at 1–2.) While Applicants' religious worship services are banned if they include 1 person, the following sectors are not subject to any numerical restrictions whatsoever:

(1) **Health Care/Public Health:** healthcare providers and caregivers, physicians, dentists, psychologists, mid-level practitioners, nurses, assistants

and aid, infection control . . . pharmacists, physical, respiratory, speech, and occupational therapists and assistants, social workers, . . . chiropractors **and 21 other categories of exempt health workers** (App. Ex. N at 2-4);

(2) **Emergency Services:** city police departments and fire stations, county sheriffs' offices, Department of Defense police and fire sector resources, private security organizations and 8 other categories of businesses (App. Ex. N at 5-6);

(3) **Food and Agriculture: groceries, pharmacies, convenience stores, and other retail that sells food and beverage products** (i.e., liquor stores) and animal/pet food, retail customer support service, information technology support staff, . . . **restaurants, food packaging and processing**, . . . livestock, poultry, seafood slaughter facilities . . . beverage production facilities, . . . sawmills and **18 other categories of other exempt Food and Agriculture workers** (App. Ex. N at 7-9);

(4) **Energy:** workers supporting the energy sector . . . support workers, customer service operations, call centers, and emergency response and customer emergency operations . . . emergency environmental remediation and monitoring . . . gas stations and truck stops and numerous other categories (App. Ex. N at 9-10);

(5) **Water and Wastewater:** Operational staff at water authorities, Operational staff at community water systems, Operational staff at wastewater treatment facilities, Workers repairing water and wastewater conveyances and performing required sampling and monitoring, operation staff for water distribution and testing, Operational staff at wastewater collection facilities, Operational staff and technical support for SCADA control systems, Chemical disinfectant suppliers for water and wastewater and personnel protection, and Workers that maintain digital systems infrastructure supporting water and wastewater operations (App. Ex. N at 11);

(6) **Transportation and Logistics: airports, heliports, and landing strips . . . Mass Transit and Passenger Rail** include[ing] terminals, operational systems, and supporting infrastructure for passenger services by transit buses, trolleybuses, monorail, heavy rail—also known as subways or metros—light rail, passenger rail, and vanpool/rideshare, and **20 other categories of exempt Transportation and Logistics workers** (App. Ex. N at 11-15);

(7) **Communications and Information Technology: workers who support radio, television, and media services**, including but not limited to front line news reporters, studio, and technicians for newsgathering, reporting, and publishing news and **20 other categories of exempt**

Communications and Information Technology workers (App. Ex. N at 15-18);

(8) **Government Operations and other community-based essential functions:** County workers responsible for determining eligibility for safety net benefits, Workers who support administration and delivery of unemployment insurance programs, income maintenance, employment service, disaster assistance, workers' compensation insurance and benefits programs . . . **real estate services and transactions**, and **18 other categories of exempt workers** (App. Ex. N at 18-20);

(9) **Critical Manufacturing:** Workers necessary for manufacturing of metals, industrial minerals, semiconductors, materials and products needed for supply chains of the critical infrastructure sectors, workers engaged in the manufacture and maintenance of equipment and other infrastructure for mining production and distribution, and **5 other categories of exempt Critical Manufacturing workers** (App. Ex. N at 20-21);

(10) **Financial Services:** Workers who are needed to process and maintain systems for processing financial transactions and services, including payment, clearing, and settlement; wholesale funding; insurance services; and capital markets activities, Workers who are needed to maintain orderly market operations to ensure the continuity of financial transactions and services, **Workers who are needed to provide business, commercial, and consumer access to banking and non-bank financial and lending services**, including ATMs, lending money transmission, and to move currency, checks, securities, and payments, and **4 other categories of exempt Financial Services workers** (App. Ex. N at 21-22);

(11) **Chemical and Hazardous Materials:** Workers supporting the chemical and industrial gas supply chains, including **workers at chemical manufacturing plants,** workers in laboratories, workers at distribution facilities, workers who transport basic raw chemical materials to the producers of industrial and consumer goods, including hand sanitizers, food and food additives, pharmaceuticals, textiles, building materials, plumbing, electrical and paper products and **9 other categories of exempt Chemical and Hazardous Materials workers** (App. Ex. N at 22-23);

(12) **Defense Industrial Base:** Workers who support the essential services required to meet national security commitments . . . including but are not limited to, space and aerospace workers, nuclear matters workers, mechanical and software engineers (various disciplines), manufacturing and production workers, IT support, security staff, security personnel, intelligence support, aircraft and weapons systems mechanics and maintainers, and sanitary

> workers . . . Personnel working for companies, and their subcontractors, who perform under a contract or subcontract to the Department of Defense and **numerous other exempts Defense Industrial Base workers** (App. Ex. N at 24-25);
>
> (13) **Industrial, Commercial, Residential, and Sheltering Facilities and Services:** Construction workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing, commercial, and mixed-use construction); and workers who support the supply chain of building materials from production through application/installation, including cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coatings, and employees who provide services that enable repair materials and equipment for essential functions, Workers such as plumbers, electricians, exterminators, and other service providers . . . Workers who support the supply chain of building materials . . . **Workers in hardware and building materials stores (i.e., "big-box" stores)**, consumer electronics, technology and appliances retail . . . Residential and commercial real estate workers . . . **Professional services such as legal or accounting services** . . . Workers supporting the entertainment industries, studios, or other related establishments (provided only that they follow social distancing), Workers who support food, shelter, and social services and other necessities of life, **Workers in laundromats**, laundry services, and dry cleaners **and 24 categories of exempt Industrial, Commercial, Residential, and Sheltering Facilities workers** (App. Ex. N at 25-28).

The Regional Stay at Home Order, like Tier 1 of the Blueprint and the July 13 Order, continues to ban all indoor religious worship no matter the size of the facility while exempting similar congregate secular gatherings—many of which were specifically mentioned as comparables in *Catholic Diocese* and the decisions from the Ninth Circuit in *Calvary Chapel Dayton Valley*, and the Second Circuit. Examples include: food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, retail stores, malls, transportation facilities, bus stations, train stations, airports, gambling centers, acupuncture facilities, garages, plants manufacturing chemicals and microelectronics, hardware stores, repair shops,

signage companies, accountants, lawyers, insurance agents, pet stores, film production facilities, and more. *See, e.g., Catholic Diocese*, 141 S. Ct. at 66; *id.* at 69 (Gorsuch, J., concurring); *id.* (Kavanaugh, J., concurring); *Calvary Chapel*, 982 F.3d at 1233; *Agudath Israel*, 983 F.3d at 626-27; *Harvest Rock*, 977 F.3d at 731 (O'Scannlain, J., dissenting); (App. Ex. A at 4 (O'Scannlain, J.).)

The litany of exemptions compared to the total ban on religious assemblies "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Catholic Diocese,* 141 S. Ct. at 66. When compared with the restrictions of 10 or 25 people at issue in *Catholic Diocese*, the Regional Stay at Home Order and Tier 1 of the Blueprint violates the First Amendment because a total prohibition is

> far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicant's services.

Id. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (same). Indeed, as Judge O'Scannlain pointed out: "**If fixed attendance caps of 25 or 50 people are too rigid and too extreme to withstand strict scrutiny, how can a *complete ban* not be?**" (App. Ex. A. at 7 (bold emphasis added; italics original).)

The fact remains that certain favored businesses can operate, but places of worship cannot. "**[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions**."

Catholic Diocese, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (bold emphasis added)). "Rather, once a State has created a favored class of businesses"—which the Regional Stay at Home Order and Tier 1 of the Blueprint both do—"the State must justify why houses of worship are excluded from the favored class." *Id.*

There is no world in which 29 pages of exempt business sectors creating hundreds of subcategories of exempt secular activities and facilities—all of which were present in *Catholic Diocese*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, *Agudath Israel*, and *Monclova Christian*—can be the least restrictive means available. "**[T]here is no world in which the Constitution tolerates color-coded executive edicts that open liquor stores and bike shops [and hundreds of other essential businesses] but shutter churches, synagogues, and mosques**." 141 S. Ct. at 72 (Gorsuch, J., concurring) (emphasis added)

Even a prior panel of the Ninth Circuit recognized that *Catholic Diocese* mandates injunctions against the Governor's draconian and unconstitutional orders. The Ninth Circuit in *Calvary Chapel Dayton Valley* held that Nevada's COVID-19 restrictions on religious worship services could not survive *Catholic Diocese* and must be enjoined. 982 F.3d at 1233 ("**The Supreme Court's decision in *Roman Catholic Diocese* compels us to reverse the district court**." (emphasis added)). Indeed,

> Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities. As a result, the restrictions in the Directive,

> although not identical to New York's, require attendance limitations that create the same “disparate treatment” of religion. Because “disparate treatment” of religion triggers strict scrutiny review—as it did in *Roman Catholic Diocese*—we will review the restrictions in the Directive under strict scrutiny.

Id. (citation omitted).

The restrictions on religious worship services in *Calvary Chapel Dayton Valley* were **less restrictive** than the total prohibition here under the Regional Stay at Home Order and Tier 1. Yet, *Calvary Chapel Dayton Valley* still held that “although less restrictive in some respects than the New York regulation reviewed in *Roman Catholic Diocese*—**is not narrowly tailored**.” *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (emphasis added). The Ninth Circuit enjoined the Nevada restrictions. *Id*. The same was true in a separate appeal issued by the Ninth Circuit on the same day. *Calvary Chapel Lone Mountain*, 831 F. App'x at 317 (same).

II. UNDER *CATHOLIC DIOCESE* AND THE SUBSEQUENT DECISIONS OF NUMEROUS CIRCUIT COURTS, TIER 1 AND THE REGIONAL STAY AT HOME ORDER ARE SUBJECT TO AND CANNOT SURVIVE STRICT SCRUTINY.

A. The Governor's Orders Substantially Burden Applicants' Sincerely Held Religious Beliefs.

Applicants have and exercise sincere religious beliefs, rooted in biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so even more in times of peril and crisis. (App. Ex. I, V. Compl., ¶¶48–54, 57–58, 65.) “[T]he Greek work translated church . . . literally means **assembly**.” *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 912 (W.D. Ky. Apr. 11, 2020) (cleaned up) (emphasis added). And Applicants also have

and exercise sincere beliefs that obedience to Scripture requires them to sing as, and in, their worship of God. (V. Compl., ¶¶59–64.) Though the Governor might not view church worship services and singing as fundamental to religious exercise—or "Essential Critical" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Governor's Orders prohibiting Applicants religious worship services inside their Churches, and prohibiting singing and chanting even where limited worship is allowed, on pain of criminal sanctions, unquestionably and substantially burdens Applicants' exercise of religion according to their sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added).

B. Because The Orders Impose Total Prohibitions And Discriminatory Restrictions On Applicants Religious Worship Services While Leaving Scores Of Nonreligious Gatherings Open Without Restrictions, They Are Not Narrowly Tailored Or The Least Restrictive Means.

Because the Regional Stay at Home Order and the Blueprint are neither neutral nor generally applicable, they must satisfy strict scrutiny, meaning the restrictions must be supported by a compelling interest and narrowly tailored. *Catholic Diocese*, 141 S. Ct. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 ("disparate treatment of religion triggers strict scrutiny"). As this Court has

recognized, this is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . ."). This is not that rare case. Indeed, as Judge O'Scannlain pointed out below, "**[u]nder any meaningful examination, California's complete ban on indoor worship fails strict scrutiny—just as New York's and Nevada's more permissive regimes did before**." (App. Ex. A at 8 (emphasis added).)

Whatever interest the Governor claims, he cannot show the orders are narrowly tailored to be the least restrictive means of protecting that interest. And it is the Governor's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Appellants] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added). Under that standard, "[n]arrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objectives." *Agudath Israel*, 983 F.3d at 633 (quoting *Thomas*, 450 U.S. at 718).

To meet this burden, the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it

"**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). *See also Agudath Israel*, 983 F.3d at 633 (same). And the Governor cannot meet the burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 134 S. Ct. at 495).

Since July 13, continuing through the Blueprint, and in all Regional Stay at Home Order counties, **the government has imposed a total prohibition on indoor religious worship services**—a total of **197 days** as of the filing of this Application. He tried nothing else and went straight to a total prohibition. That plainly fails the *McCullen* standard.

But, more importantly, *Catholic Diocese* and *Calvary Chapel Dayton Valley* demonstrate that the Governor cannot satisfy his burden here. In *Catholic Diocese*, this Court held that it was "hard to see how the challenged regulations can be regarded as narrowly tailored" because limits of 10 and 25 people were "far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the

pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicant's services." 141 S. Ct. at 67. If restrictions of 10 and 25 could not possibly be narrowly tailored, then **the Governor's total prohibitions (which are not similarly imposed on a host of nonreligious gatherings) cannot be narrowly tailored as a matter of law**. Indeed, it can get no more restrictive than a total prohibition, yet that is what has been in place since July 13 under every iteration of the Governor's never-ending reign of terror.

Additionally, the Ninth Circuit was presented with a 50-person restriction on religious worship services in *Calvary Chapel Dayton Valley*, and it similarly held that such a discriminatory restriction imposed on Churches, but not on other nonreligious gatherings was not narrowly tailored. 982 F.3d at 1234. Specifically, the court held that "although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*," the 50-person cap disparately imposed on only religious worship services "is not narrowly tailored" because other gatherings were not subject to the same restriction. *Id. See also Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same).

The Regional Stay at Home Order and Blueprint cannot survive strict scrutiny because they are not the least restrictive means available. As a matter of law, the Governor therefore cannot meet his burden under *Catholic Diocese* and *Calvary Chapel Lone Mountain*. The Governor's restrictions on Applicants' religious gatherings therefore violate the First Amendment, and the writ of injunction should issue. It is time for the Governor to meet his rightful constitutional condemnation.

C. The Governor's So-Called Experts, And Their Speculative Testimony, Do Not And Cannot Overcome The Binding Decision Of *Catholic Diocese*, Which Rejected The Same Contentions Presented By The Governor In This Matter.

The district court held that the Governor's so-called experts are somehow sufficient to overcome the clear constitutional precedent demonstrating that his Blueprint violates the First Amendment. (App. Ex. C at 8-11 (holding that the Governor's total prohibitions are permissible because indoor religious worship services are more dangerous than other nonreligious indoor gatherings.) The district court and the Governor's offensive stereotyping of houses of worship lacks support (and itself borders on animus). Without a shred of evidence, the district court found that Churches are somehow more dangerous than any other gathering and must be prohibited. The court made that astounding claim that churches – even the state-of-the-art concert venue where Pavarotti performed (Harvest Rock Church's Ambassador Auditorium) have less ventilation than every other commercial operation. This is offensive and nonsense. The Ninth Circuit's decision only affirms that unsupported conclusion by permitting the Governor to maintain his unconstitutional total prohibition on religious worship services in Tier 1 of the Blueprint and under the Regional Stay at Home Order. (App. Ex. A at 1-2.)

As Judge O'Scannlain pointed out, the Governor has already "conceded" that his so-called experts are "**not qualified as an expert to opine on what takes place at religious worship services or how people interact there as opposed to in other settings of public life**." *Harvest Rock Church*, 977 F.3d at 735 n.4 (O'Scannlain, J., dissenting) (emphasis added). Yet, despite that fatal concession, the

Governor continued to assert below that he can dust off his previously submitted "expert" testimony and claim it provides the magic bullet for him to escape his rightful constitutional condemnation. Though the panel below allowed him to do so, this Court should not. As Judge O'Scannlain noted in his opinion below, the evidence presented by the Governor to purportedly support a total ban on religious worship is "**far beyond the scientific expertise of an infectious disease specialist [because] the views of an epidemiologist can hardly compel deference on matters of religion**." (App. Ex. A at 6 (emphasis added).)

Even if the Governor had not conceded that his so-called experts are not experts at all, which he plainly did during previous oral argument in the Ninth Circuit, the precise arguments those "experts" are making here were presented to this Court in *Catholic Diocese* and **were rejected**. Thus, despite claiming that Applicants' religious worship services pose grave danger of the spread of COVID-19, and **though it is the Governor's burden to demonstrate satisfaction of strict scrutiny**, the Governor has not and cannot produce one shred of evidence linking Applicants or their worship services to the spread of COVID-19. The reason for this is simple, much like in *Catholic Diocese*: there is no evidence "that attendance at [Applicants'] services has resulted in the spread of the disease." *Catholic Diocese*, 141 S. Ct. at 68.

Moreover, not a single hypothesis the Governor presented below was unknown by the scientific and governmental communities at the time *Catholic Diocese* was decided. In fact, the precise arguments made by the Governor below and purportedly

supported by his "expert" declarants were made to this Court in *Catholic Diocese*, relied upon by the dissents to suggest the same result the district court reached below, and explicitly rejected by the majority as a sufficient basis to justify discriminatory restrictions on religious worship services that were more lenient than those at issue here. *Catholic Diocese*, 141 S. Ct. at 78 (Breyer, J., dissenting) (noting that "members of the scientific and medical communities tell us that the virus is transmitted" more easily in gatherings with features of religious worship services); *id.* at *79 (Sotomayor, J., dissenting) (noting that "medical experts tell us . . . large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time" pose a greater risk of spreading COVID-19 than other gatherings); *id.* ("'Epidemiologists and physicians generally agree that religious services are among the riskiest activities'" (citing amicus brief)).

As the Second Circuit recognized – equally true here – "the Governor's identification of those risks relied on broad generalizations made by public-health officials about inherent features of religious worship," [but] "the government must normally refrain from making assumptions about what religious worship requires." 2020 WL 7691715, at *8. Moreover,

> Even taking these assertions at face value, however, the Governor must explain why the Order's density restrictions targeted at houses of worship are more effective than generally applicable restrictions on the duration of gatherings or requirements regarding masks and distancing.

> The Governor may not, of course, presume that religious communities will not comply with such generally applicable regulations.

Id. (emphasis added).

Thus, it is not as though the Governor presented some novel theory heretofore unknown to COVID-19 litigation or that somehow escaped the minds of this Court in *Catholic Diocese*. The Governor is merely presenting the same so-called expert testimony to attempt to justify his unconstitutional prohibitions on religious worship services. When presented with the same theories and scientific testimony as that presented here, this Court unequivocally held that the applicants "have clearly established their entitlement to relief" and "have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." 141 S. Ct. at 64. Repackaging the same scientific testimony already rejected as insufficient justification for imposing discriminatory restrictions on religious worship services fails to overcome the binding precedent of *Catholic Diocese*.

III. APPLICANTS HAVE A INDISPUTABLY CLEAR RIGHT TO RELIEF AGAINST THE GOVERNOR'S INTERNAL DISCRIMINATION OF THEIR RELIGIOUS WORSHIP SERVICES AND NONRELIGIOUS ACTIVITIES IN THE SAME BUILDING.

While Applicants may not gather with even 1 person for indoor religious worship services (*supra* Sections I-II), they may gather in their same buildings with an unlimited number of people to provide social services or "necessities of life" to feed, shelter, or counsel people. (*See* App. Ex. M at 27 (exempting from the Regional Stay at Home Order all "[w]orkers who support food, shelter, and social services, and other

necessities of life for economically disadvantaged or otherwise needy individuals").) This internal discrimination has been present since the original Stay at Home Order of March 19, 2020. It became worse on July 13 when all indoor worship was banned, and the same internal discrimination continues through the Blueprint, and the Regional Stay at Home Order. As Judge O'Scannlain pointed out previously, "even non-worship activities conducted by or within a place of worship are not subject to the attendance parameters" otherwise applicable to places of worship. *Harvest Rock*, 977 F.3d at 734 (O'Scannlain, J., dissenting). Such internal micromanagement of the affairs of Applicants' religious activities is plainly unconstitutional. *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("**State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion**." (emphasis added)).

IV. APPLICANTS HAVE A INDISPUTABLY CLEAR RIGHT TO RELIEF AGAINST THE GOVERNOR'S PROHIBITION ON THE RELIGIOUS EXERCISE OF SINGING AND CHANTING.

Applicants all have and exercise sincerely held religious beliefs that they are to sing to the Lord in the congregation of believers. (App. Ex. I, V. Compl. ¶¶ 59–64.) Yet, since July 13 and continuing to this day, the Governor prohibits Applicants from engaging in that sincerely held religious practice. The First Amendment prohibits such infringement. "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government

as well as those of faith and doctrine.'" *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) (emphasis added) (quoting *Kedroff v. Saint Nicholas Cathedral of Russion Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Indeed, "among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (cleaned up) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). "**State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion**." *Id.* (emphasis added).

The Governor has no authority to dictate the proper manner of religious worship or prohibit the free exercise of singing to the Lord. Indeed,

> **In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.** The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

Watson v. Jones, 80 U.S. 679, 728 (1871) (emphasis added).

The Governor's callous indifference to the constitutional infirmity of banning a deeply-held religious practice of singing to the Lord is foreign to the First Amendment. And, his argument that singing and chanting present increased health

risk is disputed by actual studies relating to COVID.[2] And, as is true of the disparate treatment of religious worship services in general, the July 6 Guidance for Religious Worship Services imposes singing and chanting prohibitions **only on religious worship services**. (App. Ex. I at 182 ("Discontinue singing (in rehearsals, services, etc.), chanting, and other practices and performances . . . .").) "**[E]ven in a pandemic, the Constitution cannot be put away and forgotten**." *Catholic Diocese,* 141 S. Ct. at 68 (emphasis added). The prohibition on singing and chanting cannot survive First Amendment review.

V. APPLICANTS HAVE AN INDISPUTABLE RIGHT TO RELIEF ON THEIR CLAIMS THAT THE GOVERNOR'S ORDERS VIOLATE THE ESTABLISHMENT CLAUSE.

The district court held that "restrictions on religious activity which are the same as restrictions on secular activity do not constitute government establishment—or disapproval—of religion." (App. Ex. C at 13.) This is plainly erroneous as a matter of fact and law. It is incorrect as a matter of fact because, as demonstrated *supra* Section I-II, the Governor's Orders do not treat religious activity the same as nonreligious activity. The Ninth Circuit ignored Applicants' arguments on this point.

---

[2] In fact, studies have shown that singing and chanting pose no greater risks than talking. *See, e.g.,* Jonathan Reid, et al., *Comparing the Respirable Aerosol Concentrations and Particle Size Distributions Generated by Singing, Speaking and Breathing* (Aug. 20, 2020), *available at* https://chemrxiv.org/articles/preprint/Comparing_the_Respirable_Aerosol_Concentrations_and_Particle_Size_Distributions_Generated_by_Singing_Speaking_and_Breathing/12789221; Christian J. Kähler & Rainer Hain, *Singing in choirs and making music with wind instruments – Is that safe during the SARS-CoV-2 pandemic?*, Inst. Fluid Mechanics and Aerodynamics, U. Bundeswehr Munich (June 2020), DOI: 10.13140/RG.2.2.36405.29926; *see also* Pat Ashworth, *Singing might not be so great a risk, after all*, Church Times (June 4, 2020), https://www.churchtimes.co.uk/articles/2020/5-june/news/uk/singing-might-not-be-so-great-a-risk-after-all; Lauren Moss, *Singing no riskier than talking for virus spread*, BBC News (Aug. 20, 2020), https://www.bbc.com/news/health-53853961.

“**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Where, as here, Applicants seek to be free from disparate treatment by the State, the very core of the Establishment Clause is at issue. “An attack founded on disparate treatment of “religious” claims invokes what is perhaps the central purpose of the Establishment Clause—**the purpose of ensuring governmental neutrality in matters of religion**.” *Gillette v. United States*, 401 U.S. 437, 449 (1971) (emphasis added). Indeed, the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). That mandate of preventing hostility towards religions is equally present in times of exigent circumstances, such as COVID-19. For, as “[a]n instrument of social peace, the Establishment Clause does not become less so when social rancor runs exceptionally high.” *Lund v. Rowan Cnty.*, 863 F.3d 268, 275 (4th Cir. 2017) (emphasis added). “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . **Neither can force nor influence a person to go to or to remain away from church against his will**.” *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added).

Here, the Regional Stay at Home Order and Tier 1 of the Blueprint have demonstrated official hostility towards religious worship by completely prohibiting worship *inside churches*, and banning the core religious practices of singing and chanting in the counties where indoor worship is still allowed, albeit severely restricted. Moreover, the Governor's total worship ban includes gatherings of small groups for in-home Bible studies or worship. (App. Ex. I, V. Compl., ¶¶73, 76–77, 94–97.) Violation of the Orders is punishable by criminal citation, and Applicants' pastors can be arrested for simply gathering their congregations for worship services. (V. Compl., ¶74.) Yet, no such criminal sanction or punishment has been threatened against the thousands of protesters continually gathering in flagrant disregard of the Governor's orders. (V. Compl., ¶¶104–118.) Such openly disparate treatment towards religious exercise constitutes official hostility towards religion in violation of the Establishment Clause.

VI. *CATHOLIC DIOCESE* DEMAND A FINDING THAT HARVEST CHURCHES HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

Irreparable harm is being suffered each and every day Applicants remain subject to the unconstitutional restrictions of the Regional Stay at Home Order and the Blueprint, coupled with daily criminal threats, fines, and closure. No pastor, church, or parishioner in America should have to choose between worship and prison. As Justice Kavanaugh also recognized,

> **There is also no good reason to delay issuance of the injunctions** . . . issuing the injunctions now rather than a few days from now will not only ensure that the applicants' constitutional rights are protected, but

> also will provide some needed clarity for the State and religious organizations.

Catholic Diocese, 141 S. Ct. at 74 (Kavanaugh, J., concurring) (emphasis added).

"There can be no question that the challenged restrictions, if enforced, will cause irreparable harm." *Id.* at 67. Indeed, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Yet, here, the irreparable harm is even more pronounced for multiple reasons: (1) all of Applicants' Churches in Regional Stay at Home Order and Tier 1 Counties are completely prohibited from hosting any religious worship services, regardless of the number in attendance, and (2) Applicants' Churches, and their pastors, staff, and parishioners face threats of ***daily criminal charges*** (each up to one year in prison), ***fines, and closure***.

A. Applicants Suffer Irreparable Harm Each Day The Orders Remain In Place.

"If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred." *Catholic Diocese*, 141 S. Ct. at 67-68. That alone was sufficient for the Supreme Court to find irreparable harm, and it is all the more true here where Applicants in virtually the entire state of California **are completely prohibited from having any worship service with even one person**. Unlike in *Catholic Diocese* where only "the great majority" of attendees and congregants would be barred, here, **every single attendee is prohibited from attending worship**. And, in *Catholic Diocese*, the Court found that 13 and 7 days was too long to suffer irreparable harm without

injunctive relief. *Id.* at 68. Here, Applicants' injury is worse, as they have been suffering the unconscionable and unconstitutional injury of total worship prohibitions for **197 days**.

B. Applicants Suffer Under The Yoke Of Threatened Closure Of Their Churches Every Day The Orders Remain In Place.

Not only are Applicants suffering irreparable harm on their right to worship, but they are also suffering irreparable harm by virtue of the governments' threat to criminally sanction them and **close their Churches**. On August 11, 2020, the Pastor of Harvest Rock Church received a letter from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena threatening criminal penalties, including fines and imprisonment, for being open for worship against the Governor's Orders and local health orders. (II-ER-189.) On August 18, 2020, the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatened in a letter daily criminal charges and $1,000 fines against the pastors, staff, and parishioners, **including closure of the church**. (App. Ex. L.) There is no world where criminalizing and threatening closure of Applicants' Churches comports with the Free Exercise Clause. **Notably, the Governor makes no mention of this astounding threat. And he has done nothing to alleviate these serious threats.**

As in *Catholic Diocese*, "the Governor has fought this case at every step of the way." 141 S. Ct. at 72 (Gorsuch, J., concurring). Indeed, the Governor continues to assert – even before this Court – that the pandemic permits him to impose the **complete prohibitions on indoor religious worship services** and vigorously

defends his unconstitutional regime. The same vigorous defense was found by *Catholic Diocese* to warrant intervention, and so, too, should it here. This Court should reject the Governor's continued efforts to impose his unconstitutional regime.

C. Applicants Comply With Safety Protocols.

In *Catholic Diocese*, this Court found it relevant that the applicants were willing to engage in social distancing and enhanced sanitization to protect their congregants. 141 S. Ct. at 66, and that the diocese "had been constantly ahead of the curve, enforcing stricter safety protocols than the State required," *id.*, and that the synagogue "rigorously implemented and adhered to all health protocols." *Id.* The uncontroverted sworn testimony below establishes that Applicants are likewise adhering to social distancing, engaging in enhanced sanitization, and implementing other mechanisms to protect their congregants. Indeed, Harvest Rock Church, at all of its campuses, "has been allowing for worship services only the number of people that allows for effective social distancing," "requires everyone to wear a mask into the building," "takes the temperature of everyone entering the building," and "spaces its attendees to achieve proper social distancing." (App. Ex. I, V. Compl. ¶¶120–123; App. Ex. M ¶5.) Moreover, Harvest Rock Church, at all of its campuses, "has its building and restrooms professionally sanitized after hosting each worship service." (App. Ex. I, V. Compl. ¶¶120–123; App. Ex. M ¶5.) Harvest International Ministry's member churches in California take the same precautions. (App. Ex. I, V. Compl. ¶124; App. Ex. M ¶6.) And, Harvest Churches have not been the source of any outbreak or spread of the virus, just as in *Catholic Diocese*. (App. Ex. M ¶8.).

VII. APPLICANTS SATISFY THE OTHER REQUIREMENTS FOR EMERGENCY INJUNCTIVE RELIEF.

A. *Catholic Diocese* Compels A Finding That The Balance Of The Harms Favors Injunctive Relief.

As *Catholic Diocese* unequivocally held, where nonreligious gatherings are subject to less restrictive measures than those impose on religious worship services, courts "have a duty to conduct a serious examination of the need for such a drastic measure." 141 S. Ct. at 68. And, as here, "it has not been shown that granting the applications will harm the public." *Id.* Indeed, the State "is in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). But, for Applicants, even minimal infringements upon First Amendment values constitute irreparable injury sufficient to justify injunctive relief. *Catholic Diocese*, 141 S. Ct. at 67; *see also Calvary Chapel Dayton Valley*, 982 F.3d a 1234 (same). As such, there is no comparison between the irreparable loss of First Amendment freedoms suffered by Applicants and the non-existent interest the Governor has in enforcing unconstitutional orders. Absent a preliminary injunction, Appellants "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky. 2020). The balance favors injunctive relief.

B. *Catholic Diocese* Compels A Finding That The Public Interest Favors Injunctive Relief.

As *Catholic Diocese* and this Court's two prior panels have said, the public interest is best served by enjoining the government from enforcing its discriminatory and unconstitutional restrictions against religious worship services. *Catholic Diocese*, 141 S. Ct. at 68 (holding that the public interest is best served by preserving constitutional rights because "even in a pandemic, the Constitution cannot be put away and forgotten"); *Calvary Chapel Dayton Valley*, 982 F.3d at 1232 n.3 (same); *id.* at 1234; *Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same). The same is true here, and the public interest is best served by protecting the rights of Applicants to engage in their constitutionally protected free exercise of religion. **"[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 453 F. Supp. 3d at 914 (emphasis added).

Moreover, the mounting evidence demonstrates that continued isolation from lockdowns is taking a far greater toll on the public interest than any virus ever could. As the Centers for Disease Control and Prevention (CDC) has reported, COVID-19 restrictions on gatherings have resulted "[s]ymptoms of anxiety disorder and depressive disorder increas[ing] considerably." *See Mental Health, Substance Abuse, and Suicidal Ideation During the COVID-19 Pandemic—United States, June 24–30, 2020*, CDC (Aug. 14, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf. Over 40% of those surveyed "reported at least one adverse mental or behavioral health condition"

because of the isolation caused by lockdowns and gathering restrictions. *Id.* at 1. In fact, **25% of young adults, ages 18–24 "reported having seriously considered suicide in the 30 days before completing the survey**." *Id.* (emphasis added). And, among that same age group, **74.9% reported "[a]t least one adverse mental or behavioral symptom**." *Id.* at 2 (emphasis added). The decline in mental health and rise in substance abuse and suicidal ideation, however, was reported in all age groups.

Yet, at the same time, a Gallup Survey conducted on the mental health of Americans found that **those who frequently attend religious worship services were the only group identified that did not experience a significant reduction in overall mental health rating**. *See Americans Mental Health Ratings Sink to New Low*, Gallup (Dec. 7, 2020), https://news.gallup.com/poll/327311/americans-mental-health-ratings-sink-new-low.aspx. If frequent Church attendance has a positive correlation to mental health and well-being during the COVID-19 era, which it does, then the public interest favors less restrictions on the constitutionally protected right to religious worship. *Catholic Diocese*, *Calvary Chapel*, and the First Amendment all demand an injunction.

CONCLUSION

Because the district court and the Ninth Circuit's decision below are wholly irreconcilable with *Catholic Diocese*, and because California's **total prohibition** on religious worship services is far more severe, much tighter, and more restrictive than

anything else in the Nation (and as restrictive as any COVID-19 regulation could be), the failure to the lower court's to issue injunctive relief to Applicants cannot withstand First Amendment scrutiny. Indeed, even a GVR Order from this Court was not sufficient to correct the error of the lower courts' ways in the instant matter, and re-issuing another GVR Order in the instant matter will only prolong Applicants unending quest for constitutional vindication even further. An emergency writ of injunction pending appeal is the only mechanism available to Applicants and should be issued immediately.

Dated this January 25, 2020.

Respectfully submitted,

Mathew D. Staver (Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32853
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Counsel for Applicants