No. 20A137

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

REPLY TO APPLICATION FOR EMERGENCY WRIT OF INJUNCTION

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PARTIES

Applicants are Harvest Rock Church, Inc. and Harvest International Ministry, Inc., itself and on behalf of its 162 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.

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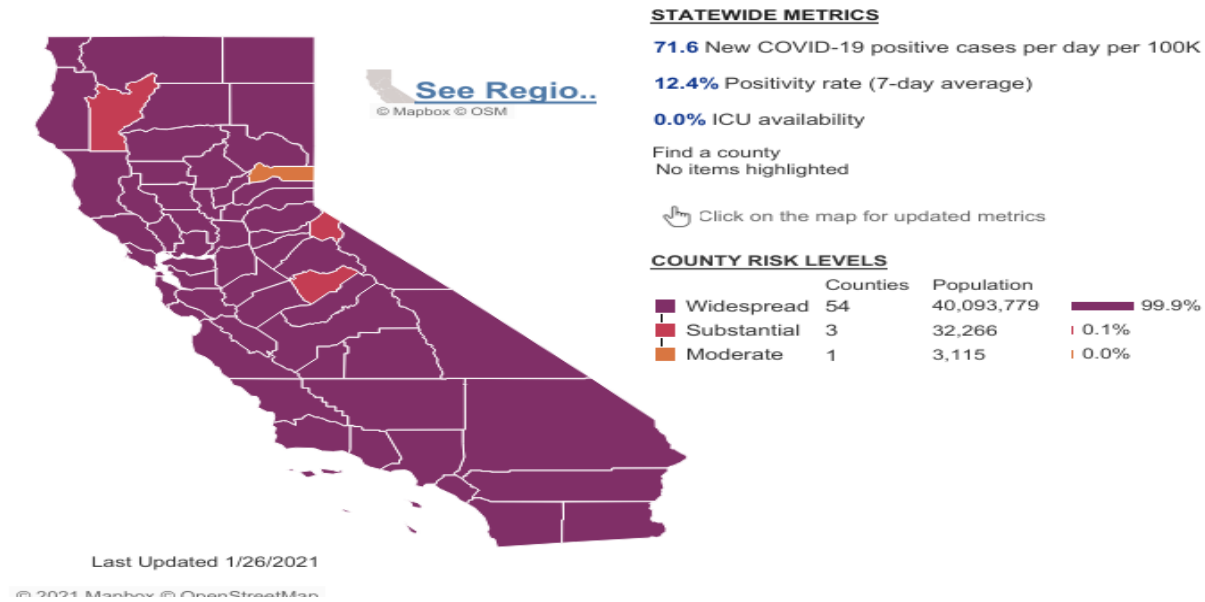
INTRODUCTION

California imposes the most severe restrictions on places of worship in the country. As of the last update on January 26, 2021, 54 Counties in California – representing **99.9% of the population** – are in Tier 1 under the Governor's Blueprint for a Safer Economy. The below image – from California's official Blueprint website – demonstrates how widespread the Governor's most severe restrictions are in California.[1]

Image 1 – Blueprint Map



The consequence of the sea of purple in the above "color-coded executive edict" is that **indoor worship services are completely prohibited for 99.9% of Californians, including the vast majority of Applicants' Churches**. (*See* Appendix of Exhibits, "App," Ex. J, Joint Statement, at 1.) Yet, food packing and

[1] Blueprint for a Safer Economy, *Current tier assignments as of January 26, 2021*, https://covid19.ca.gov/safer-economy/ (last visited January 29, 2021)

processing, laundromats, and warehouses have no capacity limits, liquor and grocery stores have a 50% capacity with no numerical cap, and big box centers, shopping malls, laundromats, and destination centers have a 25% capacity with no numerical cap. (*See* Addendum, "Addendum," at 2.) For the 0.9% of Californians in Tier 2 Counties, the Governor permits limited indoor worship at 25% capacity or 100 individuals, whichever is less. (App. Ex. J, Joint Statement at 1.) Yet, other similar congregate gatherings have no numerical limit, including museums, gyms, and fitness centers. (Addendum at 3.) And, for the lone County designated Tier 3 (0.01% of the population), religious worship is only permitted at 50% capacity or 200 people, whichever is less. (App. Ex. J, Joint Statement at 2.) Yet again, in addition to a long list of other similar congregate gatherings, museums, gyms, fitness centers, family entertainment centers, cardrooms, and satellite wagering have no numerical cap. (Addendum at 4.)

For Applicant Churches, this means that the Governor's color-coded regime of religious discrimination **completely prohibits indoor religious worship services, even if it involves 1 person**. And, in Tiers 2 and 3, where religious services have a numerical cap while similar nonreligious gatherings do not, the Governor prohibits Applicants and their congregants from singing or chanting. (App. Ex. J., Joint Statement at 4.)[2] No similar restriction is placed on singing in the movie,

[2] Following the Ninth Circuit's decision in *South Bay United Pentecostal Church v. Newsom*, -- F.3d -- , 2021 WL 222814 (9th Cir. Jan. 22, 2021), the panel below issued an injunction against the 100 and 200 person numerical caps in Tiers 2-3. (App. Ex. A at 2.) However, as discussed *infra* Section II, that injunction is still constitutionally deficient because critical infrastructure is permitted to operate with no numerical caps and numerous other industries and sectors have more favorable percentage limitations.

music, or entertainment industries. Thus, the Governor's COVID-19 color-coded executive edicts have literally banned even "preaching to the choir." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).

Yet, in these same Counties where indoor religious worship services are completely prohibited or significantly restricted numerically, there are myriad exemptions for similar nonreligious gatherings. (*See* Addendum at 2-5.) Moreover, the Churches can conduct nonreligious meetings in the same buildings where worship is banned, including feeding, sheltering, and other social services and "necessities of life" such as counseling. Irreparable harm is being imposed on Applicants by virtue of the unconstitutional regime of the Governor's edicts, and injunctive relief is warranted now. This immediate threat cannot wait several months or more to be addressed. This Court gave the lower courts every opportunity to comport their decisions with the unequivocal mandates of *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) ("*Catholic Diocese*") in the previous GVR Order in the instant case. *Harvest Rock Church v. Newsom*, No. 20A94, 592 U.S. ___, 2020 WL 7061630 (U.S. Dec. 3, 2020), and both the district court and the Ninth Circuit below ran roughshod over that order.

As Judge O'Scannlain pointed out below, the Ninth Circuit's decision in *South Bay United Pentecostal Church v. Newsom*, -- F.3d --, 2021 WL 222814 (9th Cir. Jan. 22, 20201) and in the instant matter below are "**woefully out of step**" with this Court's *Catholic Diocese* decision. (App. Ex. A at 3 (emphasis added).) As he noted,

> **A simple, straightforward application of these controlling cases 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 and should be enjoined. The court's refusal to do so in *South Bay* cries out for correction**.

(*Id.* (emphasis added).)

Since March 19, 2020 – **315 days ago** – California "[a]t the flick of a pen" has imposed an unconstitutional regime of discriminatory restrictions and prohibitions on religious worship services. *Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring). Out of those 315 days, California has permitted religious worship services of any kind for a grand total of **48 days**.[3] Yet for each of those 315 days, California has permitted unlimited numbers of people to gather at myriad nonreligious businesses, establishments, protests, and gatherings. *Catholic Diocese*, not to mention the First Amendment itself, plainly prohibits such odious discrimination against the constitutionally protected exercise of religious worship services. As the Chief Justice has stated, "[n]umerical limitations of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive" and "raise serious concerns under the Constitution." *Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting). If 10 and 25 are unduly restrictive and constitutionally incongruous, there is no world in which a total prohibition on religious worship services can survive the swift condemnation of this Court. As Judge O'Scannlain noted, "[i]f fixed attendance caps of 25 or 50 people are too rigid and too extreme to withstand strict

[3] As discussed more fully *infra* Section I, Applicants were subject to a total prohibition on religious worship from March 19 to May 25, 2020 (App. Ex. I, V. Compl. ¶84), were subject to a discriminatory 25% or 100 people restriction from May 26 to July 12, 2020 (App. Ex. I, V. Compl. ¶94), and have been subject to a total prohibition on religious worship since July 13, 2020.

scrutiny, how can a *complete ban* not be?" (App. Ex. A at 7 (italics original).) Enough is enough, and "[s]aying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist too long." *Id.* at 72 (Gorsuch, J., concurring). The Application should be granted, and the Governor enjoined from enforcing his blatantly unconstitutional restrictions on religious worship services.

LEGAL ARGUMENT

I. APPLICANTS HAVE SUFFERED IRREPARABLE HARM FOR 315 DAYS UNDER THE GOVERNOR'S EVER-CHANGING, COLOR-CODED REGIME OF RELIGIOUS DISCRIMINATION.

With the exception of the short-lived optimism this Court gave Applicants with its GVR Order of December 3, 2020 (App. Ex. D), Applicants have been suffering irreparable and unconscionable injury for **315 days** with no relief. The Governor instituted his unconstitutional regime with his first stay-at-home Order issued on March 19, 2020. (App. Ex. I, V. Compl. ¶68 and Ex. C.) That Order prohibited all individuals in the State of California from leaving their homes except to obtain critical infrastructure services. (*Id.*) Because Churches and religious worship services were not included in the critical infrastructure sector, the March 19 Order instituted a complete prohibition on religious worship services that continued to May 25.

That first total ban on religious worship continued for 66 days. On May 25 the Worship Guidance limited places of worship to 25% capacity or 100 people, whichever is less. (App. Ex. I, V. Compl. ¶84 and Ex. J.) No such capacity or numerical restriction was placed on critical infrastructure sectors. (App. Ex. I, V. Compl. ¶86.) Thus,

despite permitting religious worship to begin, it was unconstitutionally discriminatory as it exempted numerous nonreligious gatherings of like kind. And, in a classic example of an unconstitutional prior restraint, Churches were only permitted to reopen if they had the express approval of the local officials who had unbridled discretion to inform a Church was their religious worship activities were permissible at all. (App. Ex. I, V. Compl. ¶94.)

After 48 days of not totally banning but still discriminating,[4] the Governor once again imposed a total prohibition on religious worship services with the July 13 Public Health Order, which closed Churches in every county on the monitoring list. (App. I, V. Compl. ¶¶94-95.) That total prohibition continued with the institution of the Blueprint, which was instituted on August 28, 2020 (App. Ex. J, Joint Statement, at 1), continued through the December 3 Regional Stay-At-Home Order (*see* App. Ex A at 2), and continues to this day under the return to the Blueprint.

Applicants have been subject to unconstitutional restrictions on their First Amendment right to religious worship for <u>315 days</u>, and out of those, <u>267 days have included a total prohibition on religious worship</u>. How long must COVID-19 keep the First Amendment on a respirator?

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Governor's executive decrees here have left "minimal periods of time" in

[4] The Governor claims he tightened the restrictions again because of purported increases in the spread of COVID-19 in religious services. (Response at 36 n.36.) But, this ignores the fact, which was equally true in *Catholic Diocese*, 141 S. Ct. at 66, that there is **zero** evidence of any outbreak attributed to Applicants' worship services. (*See* App. Ex. M, ¶8.)

the rearview mirror. In *Catholic Diocese*, this Court plainly held that thirteen days and 7 days was too long to permit unconstitutional restrictions to continue. 141 S. Ct. at 68. If 7 and 13 days is too long to endure unconstitutional restrictions, then **there is no world in which 315 days of restrictions (267 of which involved a total prohibition) can survive the demands of the First Amendment**. As Justice Gorsuch succinctly put it, this Court "may not shelter in place when the Constitution is under attack." 141 S. Ct. at 71 (Gorsuch, J., concurring). California has laid siege to the First Amendment for almost an entire year. The time has come for this to end.

II. EVERY TIER OF THE OPERATIVE BLUEPRINT IMPOSES ESPECIALLY HARSH AND DISCRIMINATORY TREATMENT ON APPLICANTS' RELIGIOUS WORSHIP SERVICES THAT ARE NOT IMPOSED ON NONRELIGIOUS GATHERINGS OF LIKE KIND.

A. The Ninth Circuit's Refusal To Enjoin The Total Prohibition On Religious Worship Services In Tier 1 Cannot Be Reconciled With *Catholic Diocese*.

The Ninth Circuit's decision below explicitly permits the Governor to retain his total prohibition on Applicants' religious worship services in Tier 1. (App. Ex. A at 2 ("This injunction does not prevent the State from enforcing . . . the total prohibitions against indoor worship under Tier 1 of the Blueprint.").) A total prohibition on religious worship services cannot be reconciled with *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**. California's total ban on worship is the most severe in the nation, and this prohibition has been in effect from May 19 to May 25, and from July 13, 2020, to the present.

Additionally, the Ninth Circuit was presented with a 50-person restriction on religious worship services in *Calvary Chapel Dayton Valley v. Sisolak*, 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 1228, 1234 (9th Cir. 2020); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020). 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).

B. The Total Prohibition On Religious Worship Services In Tier 1 Imposes Especially Harsh Treatment On Religious Services While Imposing No Limits On Numerous Critical Infrastructure Sectors And More Favorable Limitations On Others.

As discussed more fully in Applicants' Emergency Application (Application at 8-25), the total prohibition on religious worship services is especially harsh when compared to nonreligious congregate activities in the Critical Infrastructure Sectors. Under Tier 1 of the Blueprint, food packaging and processing, laundromats, and

warehouse, logistics, and warehousing facilities may operate **with no numerical or percentage cap whatsoever**. (*See* Addendum 1, Blueprint Tiers Chart, at 1.) Grocery stores may operate at 50% capacity with no explicit numerical cap (*id.*), and other retail stores (*e.g.*, big box stores such as Walmart, Lowes, Home Depot, etc.) may operate at 25% capacity with no restriction. (*Id.*) Yet, despite this favorable treatment for nonreligious gatherings, the Ninth Circuit explicitly permits the Governor to continue his discriminatory total prohibition on religious worship services in Tier 1. (App. Ex. A at 2.) Yet, throughout every Tier, the Governor continues his exemptions for Critical Infrastructure sectors that have no percentage or numerical limitations and more favorable percentage caps for other nonreligious gatherings. 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, music and film production, abortion clinics, and more. (*See* Emergency Application at 12-20.)

This discrimination is virtually identical to that found unconstitutional in *Catholic Diocese*.

> 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**.

Catholic Diocese, 141 S. Ct. at 66. (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.* (emphasis added) (cleaned up).

The same is true here, although the discrimination is worse. In Tier 1, hundreds of people may gather in laundromats, warehouses, big-box stores, grocery stores, manufacturing plants, and transportation locations, but Churches may not have an indoor worship service if it involves even one person. (Addendum at 2.) Thus, it is identical to what Justice Kavanaugh noted in *Catholic Diocese*, while Churches are totally banned "a grocery store, pet store, or big box store down the street does not face the same restriction" and "[e]ssential businesses and many non-essential businesses are subject to no attendance caps at all." 141 S. Ct. at 73 (Kavanaugh, J., concurring). The Ninth Circuit's decision cannot be reconciled with *Catholic Diocese*.

C. Injunctive Relief Is Still Needed As To Tiers 2-4 Because Nothing In The Ninth Circuit's Order Below Prohibits The Governor From Imposing Discriminatory Percentage Caps On Religious Worship Services, Which Every Tier Already Does.

Though the Ninth Circuit's decision purports to enjoin the Governor from enforcing his numerical caps of 100 and 200 in Tiers 2-4 (App. Ex. A at 2), it still

violates *Catholic Diocese*. While this Court suggested that restricting religious worship services based on the size of the facility **might** be a less restrictive alternative to 10 or 25-person caps, 141 S. Ct. at 67, that is not what the Ninth Circuit ruled. "[I]**t 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**." *Id.* at 73 (Kavanaugh, J., concurring) (emphasis added). Even after enjoining the 100 and 200 person limits in Tiers 2-3, the Ninth Circuit's injunction below still permits the Governor to maintain his unconstitutional and discriminatory regime of against Applicants while exempting hundreds of other Critical Infrastructure sectors from any capacity or numerical limitation whatsoever and provides more favorable percentage limitations to nonreligious gatherings not provided to Applicants' religious worship services. "Essential businesses and many non-essential businesses are subject to no attendance caps at all" demonstrates that Governor has violated the First Amendment. *Id.* at 73.

> People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. ***That* is exactly the kind of discrimination the First Amendment forbids**.

Id. at 69 (Gorsuch, J., concurring) (bold emphasis added). Every Tier of the Blueprint is discriminatory. Tiers 2-4 impose especially harsh treatment on religious worship that is not imposed on other Critical Infrastructure or nonreligious gatherings.

But for a 50% capacity limitation on grocery stores and a 25% capacity limitation on big-box stores, shopping centers, malls, destination centers, and swap meets under Tier 1 (Addendum at 2), the Governor maintains his unconstitutional and discriminatory regime of against Applicants while exempting hundreds of other Critical Infrastructure sectors from any capacity or numerical limitation whatsoever and provides more favorable percentage limitations to nonreligious gatherings not provided to Applicants' religious worship services.

Additionally, as discussed more fully in Applicants' Emergency Application (Emergency Application at 28-29), Applicants 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").) But, the moment Applicants transition from feeding material food to those in need to feeding their souls with spiritual food, the Governor's Orders immediately prohibit them from gathering if even 1 person is present. Whether Applicants can meet in their buildings is determined by their activities – feeding, sheltering, socials services, and necessities of life are permitted with no capacity limits, but worship is banned in Tier 1 and several limited in Tiers 2-4.

1. Tier 2 Imposes Less Favorable Percentage Caps On Religious Worship Services Than Similar Nonreligious Gatherings.

In Tier 2, the restrictions (while effecting only a small fraction of the population of California) still impose discriminatory prohibitions on religious worship services and will do so when the Governor decrees that certain Counties are permitted out of Tier 1's total ban on religious worship services indoors. While the Ninth Circuit purported to enjoin the Governor from enforcing his strict numerical caps on Applicants' Churches in Tier 2 (App. Ex A at 2), its injunction fails to provide adequate relief because it still facilitates the discriminatory treatment.

In Tier 2, Applicants' Churches may operate at 25% capacity or 100 individuals, whichever is fewer, but hundreds of exempted Critical Infrastructure have no capacity limits. (Addendum at 3.) Food packaging and processing, laundromats, and warehouses may continue to operate **with no capacity limitations or numerical caps**. Even after enjoining the 100 person limit in Tier 2, the Ninth Circuit's injunction below still permits the Governor to maintain his unconstitutional and discriminatory regime of against Applicants while exempting myriad other Critical Infrastructure sectors from any capacity or numerical limitation whatsoever and provides more favorable percentage limitations to nonreligious gatherings not provided to Applicants' religious worship services (*Id.*) Grocery Stores, "Essential Retail" (*e.g.*, Walmart, Lowe's, Home Depot, and other "big box" stores), liquors stores, Shopping Malls, Destination Centers, and Swap Meets may operate at 50% capacity but with no explicit numerical cap. (*Id.*) Museums may

operate at 25% capacity but without an express numerical limit, and gyms may operate at 10% capacity with no numerical cap. (*Id.*) Ten percent capacity of Harvest Rock Church's 1250 seats is 125, and 25% is 312. **The capacity increases with the size of the building for every other similar congregate gatherings except places of worship**! Moreover, *the same discrimination runs through all four Tiers: (1) hundreds of Critical Infrastructure activities are exempt, and (2) Applicants have no capacity limits for non-worship activities while being banned or severely limited in Tiers 1-4*. That is plainly discriminatory and cannot survive *Catholic Diocese*'s unequivocal condemnation of similar restrictions.

2. Tier 3 Imposes Less Favorable Percentage Caps On Religious Worship Services Than Similar Nonreligious Gatherings.

In Tier 3, Applicants may operate at 50% capacity or 200 people, whichever is less. (App. Ex. J, Joint Statement at 2; Addendum Chart at 4.) Food packaging and processing, laundromats, warehouses, grocery stores, "big box" stores, malls, destination centers, and swap meets **may all operate with any capacity or numerical restriction of any kind**. (Addendum at 4.) Even after enjoining the 200 person limit in Tier 3, the Ninth Circuit's injunction below still permits the Governor to maintain his unconstitutional and discriminatory regime of against Applicants while exempting myriad other Critical Infrastructure sectors from any capacity or numerical limitation whatsoever and provides more favorable percentage limitations to nonreligious gatherings not provided to Applicants' religious worship services. Museums are permitted 50% capacity but with **no numerical limitation**. (*Id.*)

Gyms, fitness centers, family entertainment centers, and cardrooms and satellite wagering centers may all operate at 25% capacity but with **no numerical limitation**. (*Id.*) Thus, even under *Catholic Diocese*'s suggestion that it may be less restrictive to tie limitations to the size of the building, the Governor's Blueprint in Tier 3 woefully fails to afford Applicants' Churches equal treatment with countless other gatherings. Again, *the same discrimination runs through all four Tiers: (1) hundreds of Critical Infrastructure activities are exempt, and (2) Applicants have no capacity limits for non-worship activities while being banned or severely limited in Tiers 1-4*. As Justice Kavanaugh noted, "**under 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**." *Id.* at 73 (Kavanaugh, J., concurring) (emphasis added). Yet, the Ninth Circuit plainly ignored that principle of black letter law and ran roughshod over the equal treatment the First Amendment demands.

As Justice Alito has succinctly opined, "[t]he idea that allowing [Churches] to admit 90 worshippers presents a greater public health risk than allowing [nonreligious gatherings] to operate at 50% capacity is hard to swallow, and the State's efforts to justify the discrimination are feeble." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2606 (2020) (Alito, J., dissenting). The restrictions in Tier 3 should likewise be hard for this Court to swallow, particularly in light of the binding mandates of *Catholic Diocese*, and the Governor's experts provide no spoon full of sugar to help that unconstitutional medicine to go down. (Application at 28-28.)

3. Tier 4 Imposes Less Favorable Percentage Caps On Religious Worship Services Than Similar Nonreligious Gatherings.

Finally, Tier 4 fares no better than any other Tier in the Blueprint because it likewise imposes discriminatory restrictions on religious worship services while exempting virtually every other industry, sector, and gathering. In Tier 4, Applicants' religious worship services may operate at 50% capacity with no numerical limitation. Thus, as it true in Tiers 2-3, the Ninth Circuit's injunction below still permits the Governor to maintain his unconstitutional and discriminatory regime of against Applicants while exempting myriad other Critical Infrastructure sectors from any capacity or numerical limitation whatsoever and provides more favorable percentage limitations to nonreligious gatherings not provided to Applicants' religious worship services. (Addendum at 5; App. Ex. J, Joint Statement at 2.) Food packaging and processing, laundromats, warehouses, logistics and warehousing facilities, grocery stores, big-box retail stores, liquor stores, shopping centers, malls, destination centers, swap meets, and museums **may operate without any capacity or numerical restriction whatsoever**. (Addendum at 5.) Gyms and fitness centers, family entertainment centers, cardrooms, and satellite wagering may all operate at 50% capacity with no numerical restriction. (*Id.*) Not to sound like a broken record, but it bears repeating that *the same discrimination runs through all four Tiers: (1) hundreds of Critical Infrastructure activities are exempt, and (2) Applicants have no capacity limits for non-worship activities while being banned or severely limited in Tiers 1-4.*

In Tier 4, where virtually everything is treated more favorably than religion, it is difficult to imagine a more odious form of discrimination. Indeed, "'restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614-15 (2020) (Kavanaugh, J., dissenting). "What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap. **California has not shown such a justification**." *Id.* at 1615 (emphasis added). California's failure is equally present today.

In fact, in Tier 4 (as is true in every other Tier of the Governor's Blueprint), Justice Gorsuch's question rings true: "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" *Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring), or here, working in a massive warehouse facility, shopping in a grocery stores, exploring an expansive big-box retail store, browsing one of California's massive shopping centers or malls, taking your family to a destination centers, bartering at a swap meet, and learning history at a museum (Addendum at 5), "**[w]ho knew public health would so perfectly align with secular convenience?**" *Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) (emphasis added).

The simple answer is, it doesn't. In fact,

> **This is a simple case**. . . . Large numbers and close quarters are fine in [critical infrastructure sectors]. But churches, synagogues, and mosques are

> banned from admitting more than 50[%] worshippers—no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. **But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.**

Calvary Chapel Dayton Valley, 140 S. Ct. at 2609 (emphasis added).

III. PROHIBITING APPLICANTS FROM ENGAGING IN THE RELIGIOUS EXERCISE OF SINGING PRAISES TO THE LORD WHILE PROVIDING A BLANKET EXEMPTION FOR THE MUSIC INDUSTRY VIOLATES THE FIRST AMENDMENT.

Since July 6, 2020 and continuing to this day, the Governor has prohibited Churches (and only Churches) from engaging in the constitutionally protected exercise of singing praises to their Lord. 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 . . . .").) Yet, at the same time and for every day that Applicants have been banned from singing and chanting, **the Governor explicitly permits music, film, and TV production to continue without limitation**. *See, e.g.*, *South Bay United Pentecostal Church v. Newsom*, -- F.3d --, 2020 WL 222814, *19 Appendix (9th Cir. Jan. 22, 2021). *See also Industry Guidance to Reduce Risk*, COVID19.CA.GOV (updated Jan. 26, 2021), https://covid19.ca.gov/industry-guidance/ (last visited January 29, 2021) ("Music, TV, and film production may resume.")

Such discrimination cannot withstand *Catholic Diocese*. As Judge O'Scannlain previously pointed out, many of the same activities the Governor allows without limitation or restriction involve the same activity as singing a hymn in Church. *Harvest Rock Church v. Newsom*, 977 F.3d 728, 736 (9th Cir. 2020) (O'Scannlain, J., dissenting) ("Some involve speaking loudly or shouting—for example, on an indoor television studio set filled with actors projecting lines and directors barking orders . . . which (unlike singing in a church) the State has permitted to continue.") Indeed, there can be no dispute that permitting **a music production** to operate indoors without restriction indisputably involves individuals singing songs, playing instruments, chanting, or otherwise engaging in the precise activity the Governor prohibits in Churches. The *raison d'etre* of a music production is to record people singing songs and making music, which includes wind instruments. The Governor permits the one and forbids the other. And, the Ninth Circuit held that the Governor may continue to impose his discriminatory "restrictions on singing and chanting at indoor worship services." (App. Ex. A at 2.) Dictating a Church may engage in its worship while exempting music production is foreign to the First Amendment.

Moreover, the discriminatory treatment of Applicant Harvest Rock Church is highlighted even further by the favorable treatment afforded to music production but not religious singing. Harvest Rock Church's Ambassador Auditorium is a state-of-the-art concert venue where Pavarotti performed and where the City of Pasadena frequently hosts symphony orchestras and other musical productions. Under the Governor's Orders, Harvest Rock Church is exempt from any capacity or numerical

limitation when using its auditorium for music production or presentations. But, if the same performers in the music production or performance then transitioned to a religious worship service involving singing, it is totally prohibited. Such an arbitrary and discriminatory regime cannot withstand First Amendment scrutiny.

IV. THE GOVERNOR'S INSISTENCE THAT HIS EXPERTS OVERCOME THE DEMANDS OF THE FIRST AMENDMENT WAS REJECTED IN *CATHOLIC DIOCESE* AND SHOULD BE REJECTED HERE.

The Governor's Response can essentially be boiled down to *Catholic Diocese* is inapplicable because our experts have said religious worship is too risky. Indeed, he claims that his record testimony is "quite different" than that present in *Catholic Diocese*. (Response at 38 n.38.) This is simply incorrect. As Applicants demonstrated previously, this Court has already been presented with this same argument and rejected it in *Catholic Diocese*. (*See* Emergency Application at 25-28.) Here, the Governor's experts contend that worship services pose greater risk than other exempted activities, which is precisely the argument presented in *Catholic Diocese*. 141 S. Ct. at 78-79 (discussing the testimony of medical amicus that "religious services are among the riskiest activities"). This Court rejected that as a sufficient basis for upholding discriminatory restrictions, and so, too, did the Second Circuit. 2020 WL 7691715, at *8. And, as Judge O'Scannlain noted below, much of the expert testimony "presents assertions about issues far beyond the scientific expertise of an infectious disease specialist." (App. Ex. A at 4.)

CONCLUSION

For the foregoing reasons, the injunction should issue.

Dated this January 29, 2020.

Respectfully submitted,

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No. 20A137

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

ADDENDUM

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TABLE OF BLUEPRINT TIERS AND SELECTED SECTOR RESTRICTIONS

TIER 1 Widespread	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**No indoor gathering; outdoor only**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	50% capacity with no maximum
	Other Essential Retail ('big box' stores)	25% capacity with no maximum
	Shopping Centers (Malls, Destination Centers, Swap Meets)	25% capacity with no maximum
	Museums	Outdoor only
	Gyms and Fitness Centers	Outdoor only
	Family Entertainment Centers	Outdoor only
	Cardrooms, Satellite Wagering	Outdoor only

TIER 2 Substantial	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**25% capacity or 100 people, whichever is fewer**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	50% capacity with no maximum
	Other Essential Retail ('big box' stores)	50% capacity with no maximum
	Shopping Centers (Malls, Destination Centers, Swap Meets)	50% capacity with no maximum
	Museums	25% capacity with no maximum
	Gyms and Fitness Centers	10% capacity with no maximum
	Family Entertainment Centers	Outdoor only
	Cardrooms, Satellite Wagering	Outdoor only

TIER 3 Moderate	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**50% capacity or 200 people, whichever is fewer**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	No building capacity or numerical limitation
	Other Essential Retail ('big box' stores)	No building capacity or numerical limitation
	Shopping Centers (Malls, Destination Centers, Swap Meets)	No building capacity or numerical limitation
	Museums	50% capacity with no maximum
	Gyms and Fitness Centers	25% capacity with no maximum
	Family Entertainment Centers	25% capacity with no maximum
	Cardrooms, Satellite Wagering	25% capacity with no maximum

TIER 4 Minimal	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**50% capacity with no maximum**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	No building capacity or numerical limitation
	Other Essential Retail ('big box' stores)	No building capacity or numerical limitation
	Shopping Centers (Malls, Destination Centers, Swap Meets)	No building capacity or numerical limitation
	Museums	No building capacity or numerical limitation
	Gyms and Fitness Centers	50% capacity with no maximum
	Family Entertainment Centers	50% capacity with no maximum
	Cardrooms, Satellite Wagering	50% capacity with no maximum