No. 20A_____

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

Emergency Application for Writ of Injunction
Relief Requested before November 29, 2020

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QUESTIONS PRESENTED

(1) Whether the Free Exercise Clause of the First Amendment prohibits the government from discriminating against houses of worship by restricting the size of religious gatherings while exempting or giving other preferential treatment to comparable nonreligious gatherings occurring inside the same houses of worship or to other comparable nonreligious gatherings occurring externally.

(2) Whether this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), issued decades before the First Amendment was incorporated against the States and 60 years before strict scrutiny became the governing standard in First Amendment cases, dictates a separate standard for determining First Amendment liberties in times of declared crisis.

(3) 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 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.

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, Case No. 20-55907, 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 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. 20-55907, Petition for Rehearing En Banc of denial of motion for injunction pending appeal currently pending (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. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Injunction Pending Appeal (C.D. Cal. September 16, 2020), reproduced in Appendix 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 Motion for Preliminary Injunction (C.D. Cal. September 2, 2020), reproduced in Appendix 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. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Temporary Restraining Order (C.D. Cal. July 20, 2020), reproduced in Appendix as Exhibit D.

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To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
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Pursuant to Sup. Ct. Rules 20, 22 and 23 and 28 U.S.C. §1651, Applicants Harvest Rock Church, Inc. and Harvest International Ministry, Inc. (collectively "Churches"), herby move for an emergency writ of injunction **before Sunday, November 29, 2020** against 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 Churches' fundamental right to religious exercise to constitutional orphan status.

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***. Emergency relief is needed now to prevent criminalizing constitutionally protected religious exercise.

For **over nine months**, the Governor has continued to discriminate against Churches' 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.

Despite his nine-month reign of executive edicts subjugating Californians to restrictions unknown to constitutional law, the Governor continues to impose draconian and unconscionable prohibitions on the daily life of all Californians that even the Governor disregards at his own whim.

Bill Melugin & Shelly Insheiwat, *Fox 11 obtains exclusive photos of Gov. Newsom at French restaurant allegedly not following COVID-19 protocols*, FOX11 (Nov. 17, 2020), *available at* https://www.foxla.com/news/fox-11-obtains-exclusive-photos-of-gov-newsom-at-french-restaurant-allegedly-not-following-covid-19-protocols.

For the Governor, COVID-19 restrictions are apparently optional and penalty free. But for Churches or anyone worshipping in their own home with someone who does not live there, COVID-19 restrictions are mandatory and enforced via criminal penalties. If Churches host a *religious* gathering (of even 2 people) in their own church, the Orders impose criminal sanction. "**When laws do not apply to those who make them, people are not being governed, they are being ruled**."[1] "[F]reedom for me, but not for thee, has no place under our Constitution." *Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J., concurring).

As a brief sample of the restrictions currently imposed on Churches' religious exercise, the Blueprint issued by the Governor:[2]

(1) **Tier 1**, *prohibits gathering for any indoor worship services in over 41 counties* (including many where Churches are located and 94% of the population) and, where indoor worship is not prohibited, prohibits gathering for indoor worship with 101 or more individuals, or over 25% capacity (whichever is lower);

(2) **Tiers 1-4**, *prohibits singing or chanting during religious worship* in counties where indoor worship remains permissible;

(3) **Tiers 1-4**, *prohibits gatherings inside private homes* for small-group Bible studies and worship services; and

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[1] *Mainer v. Pritzker*, Case No. 2020-CH-10 at 77 (Ill. Cir. Ct. 4th Judicial Cir. 2020), *available at* https://courts.illinois.gov/appellatecourt/highprofile/2020/5200163-Supporting-Record3.pdf (emphasis added).

[2] A simplified chart outlining the restrictions and exemptions provided for in the Blueprint is attached hereto as Addendum 1

(4) **Tiers 1-4**, imposes *internal* discriminatory treatment permitting nonreligious gatherings in the Churches to feed, shelter, and provide social services and "necessities of life" such as nonreligious counseling to an unlimited number of individuals while prohibiting or severely restricting (depending on the Tier) religious gatherings and worship *in the same church building*.

(5) **Tier 2**, *restricts religious worship to 25% capacity or 100 people, whichever is less*; but permits laundromats, warehouses, and meat packing plants with no restriction, allows "essential retail" to operate at 50% with no numerical cap, museums to operate at 25% capacity with no numerical cap; gyms and fitness centers to operate at 10% capacity with no numerical cap; and malls, destination centers and swap meets at 50% capacity with no numerical cap.

(6) **Tier 3**, *restricts religious worship to 50% capacity or 200 people, whichever is less*; but permits laundromats, warehouses, meat packing plants and essential retail to operate with no restriction, museums to operate at 50% capacity with no numerical cap; gyms and fitness centers to operate at 25% capacity with no numerical cap; and family entertainment centers and cardrooms at 25% capacity with no numerical cap.

The Governor prohibits or restricts "gatherings" in Churches or private homes, but he publicly encourages thousands of protesters singing and chanting.

JURISDICTION

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Ninth Circuit, from the order of the Central District of California

denying Applicants' motion for preliminary injunction. This Court has jurisdiction under 28 U.S.C. §1651.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

A. Applicant Churches and Religious Ministries.

Applicant Churches comprise Appellant Harvest Rock Church, Inc., a Christian church with multiple campuses in California, including in Pasenda, Los Angeles, Irvine, Corona, Orange, and Riverside Counties, and Applicant Harvest International Ministries, Inc., an association of Churches in Pasadena, with 162 member churches throughout California. (Verified Complaint, "V. Compl.." ¶¶ 40, 41, 48, 54 (attached hereto in the Appendix as Exhibit E.) Churches have and exercise the sincere religious belief that its fundamental purpose is to worship God as an assembled body of believers, where the church ministers the Gospel of Jesus Christ to its congregants, and its congregants receive biblical instruction and minister to the needs of one another and the community. (V. Compl. ¶¶ 48, 49, 51, 54, 55, 57.)

Each of the Churches also has and exercises the sincere religious belief that it must order its worship and community support according to the commands and standards in the Bible. (V. Compl. ¶¶ 50, 58.) Churches believe they must assemble for worship, in-person, as a critical requirement of both obedience to the Bible and fulfillment of the church's fundamental purpose, and to do so even more in times of peril and crisis. (V. Compl. ¶¶ 48–50, 54, 57, 58, 65.)[3] Worship includes singing praise

[3] Citing, e.g., *Hebrews* 10:25 ("[24] And let us consider how to stir up one another to love and good works, [25] not neglecting to meet together, as is the habit of some, but encouraging one another, and all the more as you see the Day drawing near." (ESV)).

to God. (V. Compl. ¶¶ 59–64.)[4] Churches also meet in small home groups to worship, study the Bible, fellowship, and minister to each other's needs. (V. Compl. ¶¶ 52, 53, 56.) The Churches cannot obey the Bible's command to gather and worship via the Internet. (V. Compl. ¶¶ 48, 54.)

Each of the Churches has and exercises the sincere religious belief that the Bible commands them to provide food, clothing, shelter, and counsel to the needy and afflicted. (V. Compl. ¶¶51, 55.) Harvest Rock Church operates a ministry at its churches called the Hope Center, staffed by church leaders and volunteers, which provides support for those with financial, familial, emotional, and spiritual needs in its communities. (V. Compl. ¶ 51.) Many of Harvest International's churches likewise provide food, financial and other support, and biblical and social-service-type counseling in their church buildings. (V. Compl. ¶ 55.)

B. COVID-19 Restrictions and Exemptions under the Orders.

1. Evolution of the Restrictions and Exemptions from the Emergency Proclamation to the Blueprint.

For nearly nine months, Governor Newsom and his designee, the California State Public Health Officer, have issued and amended a series of orders and directives in response to COVID-19 (the "Orders"), extensively restricting when, where, and how Californians may exercise their constitutionally protected liberties, including gathering for religious worship according to conscience, while exempting myriad businesses and nonreligious activities from comparable gathering

[4] Citing, e.g., *Hebrews* 2:12 ("I will declare thy name unto my brethren, in the midst of the church will I sing praise unto thee." (KJV)); *Psalm* 59:16 ("I will sing aloud of your steadfast love in the morning. For you have been to me a fortress and a refuge in the day of my distress." (ESV)).

restrictions. (V. Compl. ¶¶ 66–103; Joint Statement for Injunction Pending Appeal (reproduced in the Appendix as Exhibit F), at 2–8.)

The Governor's COVID-19 scheme of restrictions and exemptions began with his Emergency Proclamation, issued March 4, 2020, proclaiming a "State of Emergency" in California due to COVID-19, which has no expiration by its own terms. (V. Compl. Ex. A.) Proceeding from the Emergency Proclamation, the Governor's Orders most relevant to this Application are as follows:

- The March 12 Executive Order N-25-20 states that all residents of California "are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures." (V. Compl. Ex. B.)

- The March 19 Stay-at-Home Order, issued by the State Public Health Officer at the Governor's direction, **orders** "all individuals living in the State of California to **stay home** or at their residence," but **exempts** travel for 16 expansive "federal critical infrastructure sectors" with **130 subsectors**, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "**food, shelter, and social services, and other necessities of life** for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers (such as

Wells Fargo and Chase centers), and (g) "radio, television, and media service" organizations (of any size), and numerous other exempted businesses and operations (of any size); but **does not exempt travel to attend religious worship**. (V. Compl. Ex. C (emphasis added); V. Compl. Ex. D, V. Compl. Ex. E.) The March 19 Stay-at-Home Order does not impose any numerical or other limitations on people participating in the exempted activities, apart from advising that "they should at all times practice social distancing." (V. Compl. Ex. C.)

- The March 19 Executive Order N-33-20 incorporates and puts the full power of the Governor's office behind the Stay-at-Home Order, directs the Governor's Office of Emergency Services "to take necessary steps to ensure compliance" with the order, and gives notice to the public that the order is enforceable pursuant to California Government Code § 8665, which provides that violating the Governor's orders is a misdemeanor criminal offense punishable by up to a $1,000 fine, six months in jail, or both. (V. Compl. Ex. E.)

- The April 28 Essential Workforce Guidance, prepared by the State Public Health Officer pursuant to Executive Order N-33-20, **exempts** from the Stay-at-Home Order an expanded 13 sectors and **173 subsectors** of businesses and operations in so-called "Essential Critical Infrastructure," similar to the "federal critical infrastructure sectors" adopted in the Stay-at-Home Order, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "**food, shelter, and social services, and**

other necessities of life for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers, and (g) "radio, television, and media service" organizations (of any size), and new categories not covered in the Stay-at-Home Order, such as (h) "laundromats, laundry services, and dry cleaners," (i) law and accounting firms, real estate offices, and other professional services (of any size), (j) businesses that produce, store, transport and distribute cannabis, and (k) workers supporting California's entertainment industry, studios, and other related entertainment establishments, and numerous other exempted businesses and operations (of any size); and **exempts for the first time** "Clergy for essential support and faith-based services," but **imposes** a unique qualifier on religious worship not applicable to other "Essential" services, limiting exempt "faith-based services" to those "that are **provided through streaming or other technologies** that support physical distancing and state public health guidelines." (V. Compl. Ex. G.)

- The May 25 Worship Guidance, pursuant to further executive and public health orders providing for the modification of stay-at-home restrictions, **authorizes the limited reopening** of places of worship for in-person religious worship at "25% of building capacity or a maximum of 100 attendees, whichever is lower," after "a county public health department's approval of religious services," but **imposes** a combination of significant restrictions on places of worship, including temperature

screenings upon entering a church, eye-protection and gloves for workers, face coverings for employees, volunteers, and attendees, posting signage throughout the facility to inform attendees of the face covering and glove requirements, discouraging use of shared items such as Scriptures and Hymnals, discontinuing use of offering plates, discouraging handshakes or hugging of any kind, discontinuing singing, group recitation, and similar practices, and others. (V. Compl. Exs. H, J.)

- The revised July 1 Worship Guidance expressly **prohibits singing and chanting** in worship, and reimposes the indoor worship limitation of 25% of building capacity or maximum of 100 people, whichever is lower. (V. Compl. Ex. K.)

- The revised July 6 Worship Guidance changed the singing and chanting prohibition to apply only indoors. (V. Compl. Ex. L.)

- On July 13 the Governor announced the reinstatement of previously relaxed stay-at-home restrictions for the 30 counties on the California Department of Public Health (CDPH) County Monitoring List, which restrictions **banned in-person worship services** in those counties. (V. Compl. ¶¶ 94, 95.)

- The ensuing July 13 Health Order closed indoor operations throughout the state for certain non- "Essential Critical" businesses, and additionally specified the **closure of places of worship** and certain other businesses in counties on the County Monitoring List. (V. Compl. Ex. M.)

- The July 29 Worship Guidance continued the ban on indoor worship singing, and the numerical restriction for indoor worship of 25% of building capacity or 100 people, whichever is fewer. (Joint Statement, Ex. C.) It notes:

> Precise **information about the number and rates of COVID-19 by industry or occupational groups, including among critical infrastructure workers, is not available at this time.** There have been **multiple outbreaks in a range of workplaces, indicating that workers are at risk** of acquiring or transmitting COVID-19 infection. Examples of **these workplaces include places of worship**, hospitals, long-term care facilities, prisons, **food production, warehouses, meat processing plants, and grocery stores**.

(Joint Statement Ex. C (emphasis added); V. Compl. ¶ 93).

- The August 28 Health Order authorizes the current scheme of COVID-19 restrictions in California, implemented on August 28 under the umbrella designation "**Blueprint for a Safer Economy**" (the "Blueprint"), which is a framework of risk tiers and sector-specific restrictions within each tier, applied and periodically adjusted, county-by-county, throughout the State.[5] (Joint Statement at 1–2, 4 and Ex. H.) Counties may move in both directions within the Blueprint tier framework—from a more restrictive tier to a less restrictive tier, and back to a more restrictive tier again. (Joint Statement at 1.)

2. Blueprint Restrictions and Exemptions.

a. Restrictions on Houses of Worship.

As applied to the "Places of Worship" sector, which includes Churches, the Blueprint identifies specific restrictions for each tier:

- **Tier 1-Widespread:** No in-person, indoor worship allowed; only outdoor worship permitted.

[5] The Blueprint tiers and corresponding sector restrictions as of September 21, 2020 are charted in the "Blueprint Sector Chart" (Joint Statement, Ex. A.) Each county's tier classification as of September 15, along with population and other metrics, is shown in the "Blueprint Data Chart" (Joint Statement Ex. B.)

- **Tier 2-Substantial:** Allowed to open indoors at maximum of 25% capacity or 100 people, whichever is less; outdoor worship permitted.

- **Tier 3-Moderate:** Allowed to open indoors at maximum of 50% capacity or 200 people, whichever is less; outdoor worship permitted.

- **Tier 4-Minimal:** Allowed to open indoors at maximum of 50% capacity; outdoor worship permitted.

(Joint Statement 1–2.)

The numerous counties classified as Tier 1–Widespread under the Blueprint includes Los Angeles, Orange, and Riverside Counties where Applicant Harvest Rock Church's Los Angeles, Pasadena, Irvine, and Corona campuses are located (Joint Statement at 4.) Orange and Riverside Counties were under Tier 2, but have since been placed in Tier 1 again. Appellant Harvest International Ministry, Inc. has 162 member churches located throughout California in various Blueprint tiers. (Joint Statement at 5.).

b. Exemptions for Other Sectors.

For sectors other than places of worship, the Blueprint modified some restrictions and exemptions as compared to prior Orders, but left others in place. (Joint Statement at 5.) For example:

- **Grocery stores** are in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the July 29 Retail Guidance (Joint Statement at 5–6 and Ex. I.) The Blueprint permits grocery stores to operate at 50% capacity under Tier 1–Widespread and Tier 2–Substantial, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (Joint Statement at 5–6.)

- **Essential retail** stores, such as Walmart and Costco, are also now classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the July 29 Retail Guidance. (Joint Statement at 6.) The Blueprint permits essential retail stores to operate at 25% capacity under Tier 1, 50% capacity under Tier 2, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (*Id*.)

- **Laundromats** are classified in the "Limited Services" sector of the Blueprint, subject to the Industry Guidance and July 29 Limited Services Guidance (Joint Statement at 6–7.) The Blueprint allows laundromats to operate without numerical limits. (*Id*.)

- **Warehouses** are classified in the "Logistics and warehousing facilities" sector of the Blueprint, subject to the Industry Guidance and July 29 Logistics and Warehousing Guidance (Joint Statement at 7.) The Blueprint allows warehouses to operate without numerical limits. (*Id*.)

- **Food packing and processing** are classified in the "Critical Infrastructure" sector of the Blueprint (Joint Statement Ex. A, at 1). The Blueprint allows 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 classified in the "Critical Infrastructure" sector of the Blueprint (Joint Statement Ex. A at 1). 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. (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")

- Many **other sectors'** restrictions under the Blueprint are **less stringent** than those applicable to places of worship. For example:
    - Churches in Tier 2 may open for indoor worship at 25% capacity or 100 people, whichever is fewer. (Joint Statement at 1.) By comparison, laundromats, warehouses, and meat packing plants in Tier 2 (or any tier) may operate with **no percentage or numerical caps** (Joint Statement at 6–7; V. Compl. Ex. G); grocery and "essential" retail stores (*e.g.*, Walmart, Costco, and 'big box' stores) in Tier 2 may operate at 50% capacity, but with **no numerical cap** (Joint Statement at 5–6); museums in Tier 2 may operate at 25% capacity, but with **no numerical cap** (Joint Statement Ex. A at 2); gyms and fitness centers in Tier 2 may operate at 10% capacity, but with **no numerical cap** (Joint Statement at 3), and malls, destination centers, and swap meets may operate at 50% capacity but with no numerical cap. While Churches are caped at 100, Harvest Rock Church which seats 1250 people could have 125 or 625 if the limit was based on 10% or 50% rather than a numerical cap.
    - Churches in Tier 3 may open for indoor worship at 50% capacity or 200 people, whichever is fewer. (Joint Statement at 2.) By comparison, laundromats, warehouses, meat packing plants, grocery and "essential" retail

stores, malls, destination centers, and swap meets in Tier 3 may operate with **no percentage or numerical caps** (Joint Statement at 5–6; V. Compl. Ex. G); museums in Tier 3 may operate at 50% capacity, but with **no numerical cap** (Joint Statement Ex. A at 2); gyms and fitness centers in Tier 3 may operate at 25% capacity, but with **no numerical cap** (*Id.* at 3); and family entertainment centers and cardrooms in Tier 3 may operate at 25% capacity, but with **no numerical cap** (Joint Statement Ex. A at 5). While Churches are caped at 200, Harvest Rock Church which seats 1250 people could have 312 based on 25% and 625 at 50% rather than a numerical cap.

See also Addendum 1 Chart (outlining the restrictions on Houses of Worship that are not imposed on myriad other industry sectors with similar gathering risks).

C. The Governor's Public Support For Mass Protests.

From the end of May and into July, groups of thousands of people continually gathered throughout California cities for mass protests (including riots and looting) in violation of the Governor's Orders. (V. Compl. ¶¶ 104–118.) One example is depicted in the below photographs taken in Hollywood on Sunday, June 7:

(V. Compl. ¶ 112.)

Early in the protest period, on May 30, Governor Newsom released an official statement praising and encouraging the protesters in California to continue to gather in large numbers despite their flagrant violations of his own Orders. (V. Compl. ¶¶ 106–107.) Specifically, the Governor said, "we have seen **millions of people** lift up their voices in anger, rightfully outraged . . . . Every person who has raised their voice should be heard." (*Id.*) He continued, "I want to thank all those . . . who exercised their right to protest peacefully." (*Id.*)

On June 1, Governor Newsom held a news conference in which he expressed appreciation and gratitude for the thousands of protesters gathering in the streets in California in violation of his own orders. (V. Compl.¶ 104.) In that press conference, the Governor thanked the protesters, invoked God's blessing on them, and explicitly encouraged the protesters to continue to flout his orders: "Those that want to express themselves and have, **Thank You! God bless You. Keep doing it**." (*Id.*)

Governor Newsom has publicly stated that "people understand we have a Constitution, we have a right to free speech and we are all dealing with a moment in our Nation's history that is profound and pronounced." (V. Compl. ¶ 105.) In discussing the protesters' gathering by the thousands in the streets, Governor Newsom "expressed sympathy and showed support for the protesters," noting that he encouraged the protesters to engage in their constitutionally protected speech to advocate for their point because "people have lost patience" and need to protest. (V. Compl. ¶108.) Governor Newsom explicitly stated that he wants the mass protests to continue, despite his Orders, stating, "'your rage is real. **Express it so that we can hear it**.'" (V. Compl. ¶109.)

On June 5 the Governor called for new, more favorable treatment for mass protesters, stating, "'Protesters have the right not to be harassed . . . . Protesters have the right to protest peacefully. Protesters have the right to do so without being arrested . . . ." (V. Compl. ¶110.)

D. Enforcement Of The Orders Against 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. (A copy of Pastor Che Ahn's Declaration with the letter is reproduced in the Appendix as Exhibit G.) 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. (A copy of Pastor Che Ahn's Declaration with the letter is reproduced in the Appendix as Exhibit H.)

REASONS FOR GRANTING THE APPLICATION

I. CHURCHES HAVE AN INDISPUTABLE RIGHT TO RELIEF BECAUSE THE ORDERS' DISCRIMINATORY TREATMENT OF RELIGIOUS WORSHIP SERVICES VIOLATES THE FREE EXERCISE CLAUSE.

A. The Orders Must Satisfy Strict Scrutiny Because They Substantially Burden Churches' Religious Exercise And Are Neither Neutral Nor Generally Applicable.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court held certain laws prohibiting religious practices violated the First Amendment, concluding "that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." 508 U.S. at 524. The same can be said of the Orders here, which establish a scheme of gathering restrictions and exemptions that permit Churches to assemble an unlimited number of people in their church to provide and receive food, clothing, shelter, and counsel—as nonreligious social services—but prohibit religious preaching, communion, or other worship in the same church with the same people. Moreover, the scheme of restrictions and exemptions permit working, shopping, and patronizing myriad businesses and nonreligious activities involving groups and crowds of people, with no numerical limits, while prohibiting religious worship services of any size. Furthermore, the Governor has publicly commended and

encouraged mass protest gatherings by the thousands in violation of his Orders, granting a *de facto* exemption for the mass protests. Thus, ***the Orders discriminate between religious and nonreligious activities among similar groups of people, and even in the same church with the same people.*** The disparate treatment religion and religious exercise could not be clearer**.**

1. The Orders Substantially Burden Churches' Religious Exercise.

Churches 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. (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. 2020) (emphasis added). And Churches 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 Churches' 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 Orders prohibiting or restricting Churches' religious worship services inside their churches or private homes, and prohibiting singing even where limited worship is allowed, on pain of criminal sanctions, unquestionably and substantially burdens Churches' 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). *See also Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (same).

2. The Orders Are Neither Neutral Nor Generally Applicable Because They *Internally Discriminate* Between Churches' *Impermissible* Religious Worship Services And *Permissible* Nonreligious Activities In The Same Building For The Same Number Of People.

A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 533–34 (cleaned up). The First Amendment prohibits hostility that is "masked, as well as overt." *Id.* The Orders are not facially neutral, and they covertly or subtly depart from neutrality by treating Churches' religious services differently from its nonreligious services in the same building.

The March 19 Stay-at-Home Order adopted, and the April 28 Essential Workforce Order expanded further, dozens of categories and subcategories of businesses and activities wholly exempt from stay-at-home requirements, subject only to recommended social distancing. (V. Compl. Exs. C-E, G.) These activities include the provision of "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals," which maintain

their exemption in all tiers under the Blueprint. (V. Compl. Exs. D, G.) Churches may provide food, shelter, unemployment, family, or drug counseling, and any other social services for the "necessities of life" **in their church buildings, without any numerical restrictions.** But the Blueprint (and the prior Orders) prohibit or discriminate against gatherings for religious purposes to provide spiritual food, communion, or spiritual counseling for worship or study in the same building. The Blueprint bans ALL religious gatherings in Tier 1 and discriminates in Tiers 2-4.

In Tier 2 counties where Churches are permitted to have limited indoor worship of 25% capacity with no more than 100 people, they feed, shelter, or provide nonreligious social services or counseling for "necessities of life" for an unlimited number of people in the same building. (V. Compl. ¶¶ 84–92, 101; Joint Statement at 8-9.) Churches in Tier 1 where ALL religious gatherings are prohibited they are still exempt to feed, counsel, and provide social services and necessities of life. (V. Compl. ¶¶ 94–97)

The Orders *internally* discriminate between Churches' nonreligious and religious activities – allowing the former and banning the latter in the Blueprint Tier 1, and discriminate between nonreligious and religious activities in Tiers 2-4. The Orders are not neutral or generally applicable even when comparing *internal* activities of the Churches. "Indeed, 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 Church, Inc. v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting).

3. The Orders Are Neither Neutral Nor Generally Applicable Because They *Externally* Discriminate Between Churches' Religious Exercise, Which Are Totally Prohibited In Most California Counties, And Similarly Situated Nonreligious Activities.

a. The Orders explicitly permit myriad nonreligious activities without restriction.

As shown above, while religious worship is either prohibited or severely restricted under the Blueprint tiers, grocery stores, 'big box' retail stores like Walmart and Costco, warehouse home stores like Lowes and Home Depot, laundromats, warehouses, food processing plants, schools, museums, family entertainment centers, malls, destination centers, swap meets, and cardrooms, – all of which include similar nonreligious congregate activities to the Churches without numerical restrictions, or with numerical restrictions that are less stringent than those applied to places of worship. The disparate treatment of religious as compared to similar nonreligious congregate gatherings unquestionably and substantially burden the Churches' exercise of religion and violates the First Amendment.

As the Sixth Circuit held, twice,

> **Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so.** As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. **At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.**

Roberts v. Neace, 958 F.3d 409, 413-14 (6th Cir. 2020) (emphasis added).

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers." *Id.* at 414. Thus, the court rejected the Governor's suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport," *id.* at 416, and further explained,

> the reason a group of people go to one place has nothing to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, **why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.**

Id. (emphasis added). *See also Maryville Baptist Church, Inc v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (issuing injunction pending appeal against Kentucky's prohibition on in-person and drive-in worship services). The same is true here.

Regarding Gov. Newsom's clear discrimination in the Blueprint, Judge O'Scannlain in his dissent, wrote that in many counties in California

> indoor worship services are completely prohibited [but] 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, 977 F.3d at 731 (O'Scannlain, J., dissenting). He continued,

> the restrictions prescribed for "places of worship" limit attendance at in-person worship services as follows: (1) at the most severe, in counties designated to be "Tier 1" risks for COVID-19 spread, *no* in-person

> worship services may be held; (2) in Tier 2 counties, worship services may be held with no more than 25% of a building's capacity or 100 persons in attendance, whichever is fewer; (3) in Tier 3 counties, worship services can be held with no more than 50% of a building's capacity or 200 persons in attendance, whichever is fewer; and, finally, (4) in Tier 4 counties, worship services can be held with no more than 50% of a building's capacity, with no additional cap on attendance.

Id. at 733.

But, "[c]ritically, these same parameters do not apply broadly to all activities that might appear to be conducted in a *manner* similar to religious services—for example educational events, meetings, and seminars." *Id.* at 733-34. "Instead, each of these (and many other potentially similar) activities is regulated entirely separate from, and often more leniently than, religious services." *Id.* at 734. Indeed, "not *all* such activities are so tightly restricted" as religious services, and "so many *other* comparable secular businesses have been treated more favorably." *Id.*

Judge O'Scannlain correctly pointed out that many of the exempted activities or the activities treated more favorably – such as museums, gyms, shopping malls, family entertainment centers, warehouses, salons, and others – "involve gatherings of people from different households for extended periods of time—in many cases, hours on end." *Id.* at 736. "Yet, despite sharing these supposedly critical features of church attendance, these activities are all more open and available to Californians." *Id.* Judge O'Scannlain's reading of the Blueprint scheme under the Governor's Orders is correct beyond question. *See* Addendum 1 (outlining the discriminatory treatment afforded to Churches' religious worship services in every tier as compared to similar nonreligious activities).

b. The Governor's public support and encouragement of mass protestors, rioters, and looters demonstrates the Orders are not generally applicable.

The Governor has not only refused to enforce his COVID-19 stay-at-home restrictions upon the tens of thousands of protesters, he has openly encouraged them to continue. (V. Compl. ¶¶ 104–118.) Courts are noticing that open encouragement of protesters while prohibiting far smaller and less risky religious gatherings demonstrates a lack neutrality and generally applicability.

The constitutional incongruity of the Governor's encouragement of protesters while restricting worshippers was highlighted by Judge Ho's concurrence in *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020. Judge Ho first recounted,

> At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest

Id. at 180-81 (Ho., J., concurring). "But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them . . . ." *Id.* at 181.

> For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? **The answer is that they can't.** Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."

Id. (emphasis added).

Judge Ho noted, "To survive First Amendment scrutiny, however, those orders must be applied consistently, not selectively. And it is hard to see how that rule is

met here [in light] of the recent protests." *Id.* at 182. He continued, "It is common knowledge, and easily proved, that protesters do not comply with social distancing requirements. But instead of enforcing the Governor's orders, officials are **encouraging the protests**—out of an admirable, if belated, respect for First Amendment rights." *Id.* (emphasis added). That is equally true here, where thousands of protesters have gathered, yet the Governor publicly and unequivocally supported their flagrant violations of his orders. (V. Compl. ¶¶ 104–111). "**If protests are exempt from social distancing requirements, then worship must be too.**" *Spell*, 962 F.3d at 182 (emphasis added).

Of particular relevance, Judge Ho cited a brief filed by the United States in another case against Governor Newsom in observing that "California's political leaders have expressed support for such peaceful protests and, from all appearances, have not required them to adhere to the now-operative 100-person limit . . . . **It could raise First Amendment concerns if California were to hold other protests to a different standard**." *Id.* (emphasis added). Much like here, "**public officials cannot devalue people of faith while elevating certain protesters**. **That would offend the First Amendment—not to mention the principle of equality for which the protests stand**." *Id.* at 183 (emphasis added).

As Judge Ho stated, " "Those officials took no action when protesters chose to ignore health experts and violate social distancing rules. **And that forbearance has consequences**." *Id.* (emphasis added).

> The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. **In these troubled times, nothing should**

> **unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution**.

Id. (emphasis added).

Similarly, as recounted in *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020), the Governor of New York and the New York City Mayor openly encouraged protesters gathering in large numbers in New York, 2020 WL 3488742, *4–5, while continuing to prohibit in-person religious gatherings. *Id.* at *5-6. The court issued a preliminary injunction enjoining the enforcement of the "ever changing maximum number of people" for religious worship because the disparate treatment for protesters as compared to religious congregants in a worship service violated the First Amendment. *Id.*, at *8 ("[I]t is plain to this court that the broad limits of that executive latitude have been exceeded.").

"Mayor de Blasio's simultaneous pro-protest/anti-religious gatherings message . . . clearly undermines the legitimacy of the proffered reason for what seems to be a clear exemption, no matter the reason." *Id.* at *12. Indeed, "[t]hey could have also been silent. **But, by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of special treatment.**" *Id.* at *12 (emphasis added).

The same result should obtain here. The Orders discriminate between nonreligious and religious gatherings, and now sweep in Bible study and worship in private homes with anyone who does not live there. (V. Compl. ¶¶ 48–58, 73, 83–94.) The Orders dictate the manner in which Churches may worship by prohibiting singing and chanting where indoor worship is allowed, and by allowing provision and receipt of approved social services by unlimited numbers in the same church buildings

where religious worship services are either banned or several limited. (V. Compl. ¶¶ 71–73, 78, 98–103.) And the Governor has imposed these draconian restrictions on Churches while openly celebrating and encouraging mass gatherings for protests. (V. Compl. ¶¶ 104–111.) The Court should issue the injunction pending appeal.

B. Churches' Right To Relief Is Indisputably Clear Because The Orders Cannot Survive Strict Scrutiny.

1. The Governors' Disparate Treatment Of Comparable Nonreligious Activities Of Similar Nature Substantially Diminishes Any Assertion Of A Compelling Interest.

When "[a] speech-restrictive law with widespread impact" is at issue, "**the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights**." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Here, because the Orders infringe upon Churches' free speech, assembly, and religious exercise rights, the government "must do more than simply posit the existence of the disease sought to be cured. **It must demonstrate that the recited harms are real, not merely conjectural**." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (emphasis added). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978)

To be sure, preventing disease represents a "compelling interests of the highest order." *On Fire*, 453 F. Supp. 3d at 910. Churches do not doubt the desire to diminish

the spread of COVID-19. But where the Governor permits similar nonreligious congregate gatherings (even in the same church building) while banning religious gathering or otherwise discriminating such activities, and encourages preferred protest gatherings to violate his Orders, assertions of a compelling interest are substantially diminished. Put simply, the Orders "cannot be regarded as protecting an interest of the highest order . . . **when [they] leave[] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (same). Where the government creates a large system of exceptions, such as California's system of exempted businesses where people can gather without limit, the Supreme Court has recognized that such exceptions "can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011)). The Orders thus "have every appearance of a prohibition that society is prepared to impose upon [AWMI's religious gatherings] but not on itself." *The Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring). In fact, the Orders suggest that the Governor is prepared to accept the risk of gatherings at liquor, warehouse, supercenter, and so-called "non-essential" retail stores, **thousands of protestors in the streets of California**, and his own dinner party with friends, but cannot stomach Churches' assembly for a religious worship service, even with strict social distancing that is good enough for others. The Governor cannot permit broad swaths

of gatherings, carrying the same (if not greater) risk than that posed by Churches' gatherings, and still claim constitutional compliance.

2. The Orders Are Not The Least Restrictive Means.

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, **[Churches] 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).

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). 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). "It is not enough to show that the Government's ends are compelling; the means must be

carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "There must be a fit between the . . . ends and the means chosen to accomplish those ends." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011).

The Governor fails this test. The Governor prohibits and severely restricts religious gatherings while exempting myriad "Essential Critical" businesses and nonreligious activies involving similar congregate activates. (V. Compl. ¶¶ 68–97, 104–118.) The Governor's decision "has consequences," 962 F.3d at 183 (Ho, J., concurring), and the consequence here is that the Orders fail strict scrutiny.

Examples abound of less restrictive approaches that the Governor neither tried nor considered. (V. Compl. ¶¶ 126–139.)

> [O]ther Governors trusted the people of their states and exempted religious gatherings from any attendance limitations during this pandemic. The Governor has failed to cite any peer-reviewed study showing that religious interactions in those 15 states have accelerated the spread of COVID-19 in any manner distinguishable from nonreligious interactions. Likewise, common sense suggests that religious leaders and worshipers (whether inside or outside [the State]) have every incentive to behave safely and responsibly whether working indoors, shopping indoors, or worshiping indoors. **The Governor cannot treat religious worship as a world apart from nonreligious activities with no good, or more importantly, constitutional, explanation**.

Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 662 (E.D.N.C. 2020) (emphasis added) (footnote omitted). Churches have demonstrated they can observe the distancing and hygiene guidance deemed sufficient for exempt businesses and nonreligious gatherings. (V. Compl. ¶¶ 119–125.) There is no justification for depriving Churches of the same consideration or benefit going forward.

The Governor cannot demonstrate that he deployed the least restrictive means because his Orders, and their application,

> are **"underinclusive"** ***and*** **"overbroad."** They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that the Commonwealth has permitted . . . . Those . . . activities include . . . walking into a liquor store where other customers are shopping. The Court does not mean to impugn the perfectly legal business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is "essential," **so is [church]**.

On Fire, 453 F. Supp. 3d at, at 911 (emphasis added) (footnote omitted). Because of the Governor's failure to tailor his gathering restrictions to closely fit the safety ends he espouses, and failure to try other, less restrictive alternatives that he cannot demonstrate are not working in other jurisdictions across the country, Churches "can likely show that the broad prohibition against in-person religious services . . . is not narrowly tailored to achieve the stated public health goals where the comparable secular gatherings are subjected to much less restrictive conditions." *First Baptist Church v. Kelly*,455 F. Supp. 3d 1078, 1090 (D. Kan. 2020).

II. CHURCHES' RIGHT TO RELIEF IS ALSO INDISPUTABLY CLEAR BECAUSE THE APPLICATION OF *JACOBSEN V. MASSACHUSETTS* TO FUNDAMENTAL RIGHTS UNDER THE FIRST AMENDMENT IS PLAINLY IN ERROR.

A. *Jacobsen* Did Not Involve The First Amendment, And Was Decided Decades Before The First Amendment Was Incorporated Against The States And Sixty Years Before Strict Scrutiny Would Be Established As The Standard.

This Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is a significant contributing factor to the direct and substantial conflict among the circuit and district courts reviewing COVID-19 restrictions. A 115-year-old due process

opinion, with minimal progeny and substantial jurisprudential developments since its issuance, does not provide the standard in a contemporary First Amendment case. The majority of Churches' claims arise under the First Amendment. (V. Compl. ¶¶155-243.) *Jacobson*—importantly—did not involve such claims. Yet, the divided panel of the Ninth Circuit and the district court placed great emphasis on the *Jacobson* standard that was articulated long before the First Amendment even applied to the States and decades before this Court would introduce tiers of scrutiny. Indeed, it would not be until 1940 that this Court would first articulate the notion that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). *See also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech Clause); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (Establishment Clause).

It would not be for another quarter century that "exacting judicial scrutiny" would even enter the First Amendment lexicon in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), 50 years before the phrase "compelling interest" would enter First Amendment jurisprudence in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 65 (1957) (Frankfurter, J., concurring), and 60 years before strict scrutiny would be applied in its current form in *Sherbert v. Verner*, 374 U.S. 398 (1963). In recent years this Court has effectuated a monumental shift in how and when strict scrutiny is mandated in First Amendment cases. *See, e.g.*, *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017) ("*Reed v. Town*

of Gilbert[, 135 S. Ct. 2218 (2015)] then **worked a sea change in First Amendment law**." (emphasis added)); *see also Wollschlaeger v. Florida*, 848 F.3d 1293, 1332 (11th Cir. 2017) (Tjoflat, J., dissenting) (same).

Jacobson preceded these developments, did not involve the First Amendment, and could not foresee that First Amendment jurisprudence would require that restrictions on religious exercise survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 US. 507, 534 (1997). *Jacobson*, on the other hand, involved the extraordinarily deferential standard that state regulations during an emergency must be "beyond all question, a plain, palpable invasion of rights." 197 U.S. at 31. *Jacobsen* cannot be reconciled with First Amendment jurisprudence. The frequency of courts' citation to *Jacobson* in COVID-19 litigation around the country therefore raises a question of exceptional importance that this Court should clarify, lest the bedrock protections of the First Amendment be irretrievably discarded.

B. The Indefinite And Perpetually Reissued COVID-19 Restrictions Upon Religious Exercise Demonstrates That The Governor Has Turned Emergency Discretion Into An Impermissible Government By Executive Fiat, Which Is A Grave Threat To Constitutional Liberties.

The indefinite duration of the Governor's COVID-19 Orders also risks subjugating cherished constitutional rights to the dustbin of constitutional history by virtue of unchecked executive fiat. Such a regime is wholly foreign to the American experiment. Under the First Amendment, not to mention the entire regime established by the Constitution, a governor is not permitted to use exigent

circumstances to curtail the democratic process in perpetuity and usher in an undemocratic reign of governance by executive decree. "Although the *Jacobsen* Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that discretion limitless." *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 55106990, *6 (W.D. Pa. Sept. 14, 2020). And, since the time *Jacobsen* was decided well over a century ago, "there has been substantial development of federal constitutional law in the area of civil liberties [and] this development has seen a jurisprudential shift whereby federal courts **have given greater deference to considerations of individual liberties**, as weighed against the exercise of state police powers." *Id.* (emphasis added).

> Courts are generally willing to give **temporary** deference to **temporary** measures aimed at remedying a fleeting crisis. . . . **But, that deference cannot go on forever. . . . Faced with ongoing interventions of indeterminate length, "suspension" of normal constitutional levels of scrutiny may ultimately lead to the suspension of constitutional liberties themselves**.

Id. at *9 (emphasis added).

> While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions. **To do so risks subordinating the guarantees of the Constitution**, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution. This is especially the case where, as here, measures directly impacting citizens are taken outside the normal legislative or administrative process by Defendants alone. There is no question that our founders abhorred the concept of one-person rule. The decried government by fiat. **Absent a robust system of checks and balances, the guarantees of liberties set forth in the Constitution are just ink on parchment**. There is no question that a global pandemic poses serious challenges to governments and for all Americans **But the response to a pandemic (or any emergency) cannot be permitted to undermine our system of constitutional liberties**.

Id. at *10 (emphasis added).

"Using normal levels of constitutional scrutiny in emergency circumstances does not prevent governments from taking extraordinary actions to face extraordinary situations." *Id.* It just requires them to understand that the Constitution does not have a pause button in times of perceived crisis. Put simply, "**[t]he application of normal scrutiny will only require the government to respect the fact that the Constitution applies even in times of emergency**." *Id.* (emphasis added).

C. This Court's Precedent Makes Clear That Perceived Exigencies Of Any Kind Cannot Justify The Suspension Of Constitutional Liberties.

This Court's precedents, too, demand that perceived emergencies not be used as a pretext for the suppression of constitutional liberties. In *Ex Parte Milligan*, this Court made clear that exigencies do not permit the Constitution to be overridden by government officials. 71 U.S. 2, 119 (1866) ("By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rules or the clamor of an excited people."). Speaking of the Founders of the great American experiment, this Court noted that "[t]hose great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." *Id.* at 120-21. Indeed,

> The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads to directly to anarchy or despotism.

Id. at 120-21 (emphasis added).

This Court made these unequivocal statements in the middle of the Civil War, where there was no doubt greater urgencies of fellow countrymen warring against and slaughtering each other than of the unseen urgency of a virus. Yet, this Court held its ground:

> [I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired he blessing of liberty, consecrated by the sacrifices of the Revolution.

Id. at 124. Churches pray for the exercise of that same "watchful care" now.

Though it is now "insisted that the safety of the country in time of [crisis] demands that this broad claim for [unending emergency deference] shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." *Id.* at 126.

III. CHURCHES' HAVE AN INDISPUTABLE RIGHT TO RELIEF BECAUSE THE ORDERS PLAINLY VIOLATE THE ESTABLISHMENT CLAUSE.

In their Verified Complaint, Churches challenged the Orders as a violation the Establishment Clause. (V.Compl. ¶¶222-243.) The district court provided only

slapdash treatment of this claim, despite the unequivocal pronouncements from this Court's binding precedent. That decision is in conflict with this Court's Establishment Clause decisions. Most notably, in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947), this Court unequivocally held that **"[t]he 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 remain away from church against his will**." *Id.* at 15 (emphasis added). Also, this Court's precedents make clear that "[a]n attack founded on disparate treatment of religious claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring government neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971). Finally, in *Lynch v. Donnelly*, this Court held that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, **and forbids hostility towards any**. 465 U.S. 668, 674 (1984) (emphasis added). The *Everson*, *Gillette*, and *Lynch* triumvirate dictate that the Orders' disparate treatment of religious worship as compared to nonreligious gatherings at myriad other locations or nonreligious gatherings in Churches' own buildings violates the Establishment Clause. Put simply, the Orders force Churches and congregants to remain away from Church against their will, an indisputable violation of the Establishment Clause.

IV. CHURCHES ARE SUFFERING IRREPARABLE HARM AND WILL CONTINUE TO SO SUFFER ABSENT INJUNCTIVE RELIEF.

"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). Thus, demonstrating irreparable injury in this matter "**is not difficult**. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today." *On Fire*, 453 F. Supp. 3d at 913 (emphasis added). With each passing Sunday, Churches are suffering under the yoke of the Governor's unconstitutional Orders prohibiting Churches from freely exercising their sincerely held religious beliefs requiring assembling themselves together to worship God. Indeed, absent an injunction, Churches "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest . . . or some other enforcement action for practicing those sincere religious beliefs." *Id.* at 914. Conversely, an injunction enjoining enforcement of the Orders on Churches' responsibly conducted worship services will impose no harm on California. "[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute . . . ." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). And, "[i]njunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012).

V. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI PRIOR TO JUDGMENT.

Pursuant to 28 U.S.C. 2101(e), this Court is permitted to grant certiorari before judgment in the court of appeals. Such a pre-judgment grant of certiorari is warranted where, as here, "the public importance of the issues presented and the need for their prompt resolution" warrants this Court's intervention. *United States v. Nixon*, 41 U.S. 683, 687 (1974). Here, the issues presented in Churches' Application involve rights which this Court has characterized as "lying at the foundation of a free

government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). More importantly, there is a substantial circuit split concerning the issue of whether discriminatory COVID-19 restrictions on religious worship services are permissible under First Amendment. *Compare Maryville Baptist Church, Inc. v. Beshear,* 957 F.3d 610 (6th Cir. 2020), *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), and *First Pentecostal Church v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020) (all holding that COVID-19 restrictions placing discriminatory burdens on religious worship services compared to nonreligious gatherings are subject to and cannot survive strict scrutiny and granting injunctive relief), *with Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), *Harvest Rock Church v. Newsom*, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020), and *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) (all holding that *Jacobsen* controls the analysis of COVID-19 restrictions on First Amendment activity and denying injunctive relief). The circuit split could not be more pronounced.

Moreover, this Court currently has before it a Petition for a Writ of Certiorari from a fully developed record below presenting nearly identical questions to those at issue here. *See Elim Romanian Pentecostal Church v. Pritzker*, Case No. 20-569 (U.S. 2020). This Court's intervention to resolve the overwhelming circuit split is necessary, and certiorari should be granted.

CONCLUSION

For the foregoing reasons, Churches respectfully request that this Court grant the Application and grant certiorari to resolve these important questions.

Dated this November 20, 2020.

Respectfully submitted,

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No. 20A_____

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 TO APPLICATION FOR EMERGENCY WRIT OF INJUNCTION

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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	SECTOR/ACTIVITY	RESTRICTIONS
Substantial	**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