No. 20A94

In the Supreme Court of the United States

HARVEST ROCK CHURCH, INC., ET AL.,

Applicants,

v.

GAVIN NEWSOM,

Respondent.

OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
THOMAS S. PATTERSON
Senior Assistant Attorney General
SAMUEL T. HARBOURT
Deputy Solicitor General
BENJAMIN M. GLICKMAN
Supervising Deputy Attorney General
SETH E. GOLDSTEIN*
Deputy Attorney General

CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 210-6063
Seth.Goldstein@doj.ca.gov
**Counsel of Record*

TABLE OF CONTENTS

Page

Statement ... 1
  A. Factual background ... 1
  B. Procedural history ... 10
Argument ... 13
I. Plaintiffs have not established that a writ of injunction from this court would be appropriate at this time ... 15
  A. This Court should allow the lower court to address the recent ruling in *Roman Catholic Diocese* in the first instance ... 16
  B. Plaintiffs have not established a clear right to relief ... 18
  C. The equitable factors weigh against emergency relief from this Court ... 34
II. This is not an appropriate case for this Court to conduct plenary review before the judgment of the court of appeals ... 38
Conclusion ... 40

TABLE OF AUTHORITIES

Page

CASES

Aaron v. Cooper
357 U.S. 566 (1958) 38

Animal Legal Def. Fund v. U.S. Food & Drug Admin.
836 F.3d 987 (9th Cir. 2016) (en banc) 17

Church of the Lukumi Babalu Aye, Inc. v. Hialeah
508 U.S. 520 (1993) 19

Coleman v. Paccar, Inc.
424 U.S. 1301 (1976) (Rehnquist, J., in chambers) 38

Conforte v. C.I.R.
459 U.S. 1309 (1983) (Rehnquist, J., in chambers) 16

Cross Culture Christian Ctr. v. Newsom
445 F. Supp. 3d 758 (E.D. Cal. 2020) 5

Dep't of Commerce v New York
139 S. Ct. 2551 (2019) 18, 39

Jacobson v. Massachusetts
197 U.S. 11 (1905) 33, 39

Lux v. Rodrigues
561 U.S. 1306 (2010) 15, 18

Manuel v. City of Joliet
137 S. Ct. 911 (2017) 17

Mount Soledad Mem'l Ass'n v. Trunk
134 S. Ct. 2658 (2014) 39

Prince v. Massachusetts
321 U.S. 158 (1944) 36

Respect Maine PAC v. McKee
562 U.S. 996 (2010) 15

Roman Catholic Diocese of Brooklyn v. Cuomo
592 U.S. ___, slip op. (2020) (per curiam) .... *passim*

TABLE OF AUTHORITIES
(continued)

Page

Ross v. California
139 S. Ct. 2778 (2019) 18

South Bay United Pentecostal Church v. Newsom
___ F. Supp. 3d ___, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020) 5, 32

South Bay United Pentecostal Church v. Newsom
No. 19A1044, 140 S. Ct. 1613 (2020) .... *passim*

United States v. Clinton
524 U.S. 912 (1998) 38

Winter v. Natural Res. Def. Council, Inc.
555 U.S. 7 (2008) 15, 36

STATUTES

Cal. Health & Safety Code § 17920.3 31

COURT RULES

Ninth Cir. R. 3-3 39

Sup. Ct. R. 11 .... 38, 39

Sup. Ct. R. 23.3 16

GOVERNMENT ORDERS AND GUIDANCE

California Department of Public Health, *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ 8, 9

California Department of Public Health, *Blueprint for a Safer Economy*, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19 CountyMonitoringOverview.aspx 7

California Department of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx 9, 31, 32

TABLE OF AUTHORITIES
(continued)

Page

California Department of Public Health COVID-19 Information, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immuni zation/ ncov2019.aspx 1

California Department of Public Health, *COVID-19 Industry Guidance: Campgrounds, RV Parks, and Outdoor Recreation*, https://files.covid19.ca.gov/pdf/guidance-campgrounds-outdoor-recreation--en.pdf 28

California Department of Public Health, *COVID-19 Industry Guidance: Expanded Personal Care Services*, https://files.covid19. ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf........ 26

California Department of Public Health, *COVID-19 Industry Guidance: Sporting Events at Outdoor Stadiums and Racetracks*, https://files.covid19.ca.gov/pdf/guidance-outdoor-live-professional-sports--en.pdf 20

California Department of Public Health, *COVID-19 Industry Guidance: Shopping Malls, Destination Shopping Centers, and Swap Meets* https://files.covid19.ca.gov/pdf/guidance-shopping-centers--en.pdf........ 9

California Department of Public Health https://www.cdph.ca.gov/ Programs/CID/DCDC/CDPH%20 Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf........ 8

California Department of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance 8, 9

California Department of Public Health, *Limited Stay at Home Order* (Nov. 19, 2020) https://www.cdph.ca.gov/Programs/ CID/DCDC/Pages/COVID-19/limited-stay-at-home-order.aspx........ 10

Centers for Disease Control and Prevention, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, https://www.cdc. gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html 24

TABLE OF AUTHORITIES
(continued)

Page

Centers for Disease Control and Prevention COVID Data Tracker at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html 1

Los Angeles County Department of Public Health Order (Nov. 28, 2020), http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/ HOO_SaferatHome_SurgeResponse.pdf 10

State of California, *Tracking COVID-19 in California—Coronavirus COVID-19 Response*, https://covid19.ca.gov/state-dashboard/#top 1

OTHER AUTHORITIES

Cook & Freeman, *Despite County Announcement of Outbreak, Awaken Church Holds Sunday In-Person Services*, The San Diego Union Trib., Nov. 28, 2020, *available at* https://www.sandiegouniontribune.com/news/health/story/2020-11-28/county-announces-covid-19-outbreak-at-awaken-church-asks-people-to-quarantine-if-exposed 29

COVID-19 Return to Work Agreement with DGA, IATSE, SAG-AFTRA and Teamsters/Basic Crafts, September 21, 2020, https://www.sagaftra.org/files/sa_documents/ReturnToWorkAgreement_wAMPTP.pdf 27

Gallagher, *COVID Vaccine Update*, BBC News, Nov. 23, 2020, https://www.bbc.com/news/health-51665497 2

Gardiner, *Newsom Appeals to California Protesters: Consider Others, Stay Home*, San Francisco Chron., July 2, 2020, *available at* https://www.sfchronicle.com/politics/article/Newsom-appeals-to-California-protesters-Consider-15383308.php 33

Johns Hopkins University & School of Medicine, Coronavirus Resource Center, https://coronavirus.jhu.edu/data/new-cases 1

TABLE OF AUTHORITIES
(continued)

Page

Molina, *Catholics Resume First Communions and Baptisms Outdoors*, Wash. Post, Aug. 28, 2020, *available at* https://www.washingtonpost.com/national/religion/catholics-resume-first-communions-and-baptisms-outdoors/2020/08/28/937ea71c-e968-11ea-bf44-0d31c85838a5_story.html 35

O'Kane, *"We've been essential for 2,000 years": California church holds service indoors despite coronavirus warnings*, CBS News, July 20, 2020, https://www.cbsnews.com/news/harvest-rock-church-california-coronavirus-lockdown-violation-services/ 30, 31

Press Release, Pfizer and Biontech to Submit Emergency Use Authorization Request Today to the U.S. FDA for COVID-19 Vaccine (Nov. 20, 2020), https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-submit-emergency-use-authorization 2

Shapiro et. al., Supreme Court Practice § 17.13(b) (11th ed. 2019) 15

Stadnytskyi et al., *The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, Proceedings of the National Academy of Sciences (May 4, 2020), https://tinyurl.com/y8d6jmk8 3

Sun*, First 6.4 Million Doses of Pfizer's Coronavirus Vaccine Could Go Out in Mid-December, Washington Post*, Nov. 24, 2020*, available at* https://www.washingtonpost.com/health/2020/11/24/vaccine-plan-first-doses/ 2

STATEMENT

A. Factual Background

1. In late May of this year, when this Court last considered California's efforts to confront the COVID-19 pandemic, approximately 1.7 million Americans had contracted the virus and 100,000 had died.[1] Today, those numbers are approximately 13.1 million Americans infected and more than 265,000 dead, including more than 19,000 Californians.[2] At present, the disease is surging, with some 160,000 new cases nationwide in each of the last seven days—the highest rate since the pandemic began.[3] And while California has fared better than States with more permissive public health policies, California's numbers also are spiking: The number of daily positive tests has more than tripled in less than a month—to more than 15,000 positive tests per day—and the number of hospitalizations has increased by nearly half.[4]

---

[1] *See* Opposition of State Respondents to Emergency Application for Writ of Injunction at 1, *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 140 S. Ct. 1613 (2020).

[2] *See* Centers for Disease Control and Prevention COVID Data Tracker at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Nov. 29, 2020); California Department of Public Health COVID-19 Information, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx (last visited Nov. 29, 2020).

[3] *See* Johns Hopkins University & School of Medicine, Coronavirus Resource Center, https://coronavirus.jhu.edu/data/new-cases (last visited Nov. 29, 2020).

[4] *See* State of California, Tracking COVID-19 in California—Coronavirus COVID-19 Response, https://covid19.ca.gov/state-dashboard/#top (showing a daily rate of 4,529 on October 31, 2020, and a daily rate of 15,614 on November 28, 2020) (last visited Nov. 29, 2020); *id.* (hospitalized COVID patients nearly

COVID-19 is transmitted primarily by respiratory droplets containing the virus that causes the disease, which are exhaled when individuals breathe, talk, or sing. E.R. 29 ¶ 14 (Declaration of Dr. James Watt, M.D., M.P.H.).[5] Although a large number of people infected by the virus have no symptoms, even asymptomatic individuals may transmit the disease to others. E.R. 29-30 ¶¶ 13, 16. And there is not yet any cure or approved vaccine for the disease. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (*South Bay*) (Roberts, C.J., concurring in denial of application for injunctive relief).[6] Thus, the only current way to slow the spread of COVID-19 is by limiting the human interactions by which it may be spread. *See* E.R. 30 ¶ 16.

---

tripled from approximately 3,000 in late October to over 8,000 as of November 28).

[5] "E.R." refers to Plaintiffs' Excerpts of Record filed at docket entries 29-1 to 29-3 in the court of appeals. "S.E.R." refers to Defendant's Supplemental Excerpts of Record filed at docket entry 47.

[6] Pfizer recently submitted a request to the Food and Drug Administration for emergency-use authorization of a vaccine believed to be approximately 95% effective. *See* Press Release, Pfizer and Biontech to Submit Emergency Use Authorization Request Today to the U.S. FDA for COVID-19 Vaccine (Nov. 20, 2020), https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-submit-emergency-use-authorization. If approved, the federal government plans to begin distributing the vaccine in mid-December. *See Sun, First 6.4 Million Doses of Pfizer's Coronavirus Vaccine Could Go Out in Mid-December, Washington Post*, Nov. 24, 2020, *available at* https://www.washingtonpost.com/health/2020/11/24/vaccine-plan-first-doses/. Other vaccine candidates—including two others that have shown promising results—are pending. *See* Gallagher, *COVID Vaccine Update*, BBC News, Nov. 23, 2020, https://www.bbc.com/news/health-51665497.

The risk of transmission depends on several factors. First, the number of people involved in an activity matters: the more people who are gathered together, the greater the risk that one or more of them is infectious (even without knowing it) and the more people to whom the disease may be spread. E.R. 30 ¶ 18; Dkt. 42-2 at 12-14, 18 (amicus brief of leading epidemiologists and public health experts).[7]

Second, the nature of the activity matters. Epidemiologists have concluded that "[v]iral load"—the "number of viable viral particles" to which a person is exposed—determines whether the virus will "overcome the body's defenses and cause infection." Dkt. 42-2 at 9-10. As a consequence, the risk of transmission increases when infected individuals engage in activity that increases the viral load when they exhale, such as "speaking, chanting, shouting, and singing." E.R. 31 ¶ 22.[8] The risk of transmission is reduced by wearing face coverings and by maintaining six feet of separation between individuals from different households, but such measures do not eliminate the risk. E.R. 32 ¶ 25; *id.* at 34 ¶ 33. This is especially true when individuals are in close proximity for extended periods of time, during which the respiratory

---

[7] "Dkt." refers to the docket in the court of appeals below.

[8] *See also* Stadnytskyi et al., *The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, Proceedings of the National Academy of Sciences (May 4, 2020), (vocal activity such as "loud speech" "can emit thousands of oral fluid droplets per second," and "there is a substantial probability that" even "normal speaking causes airborne virus transmission in confined environments"), https://tinyurl.com/y8d6jmk8 (last visited Nov. 29, 2020).

droplets exhaled by an infected individual may accumulate into a dose large enough to overcome the immune system of other nearby participants and infect them. E.R. 31 ¶ 21; Dkt. 42-2 at 13 ("The longer a person spends in proximity to an infected person the more likely that person is to receive a high enough dose to become infected.").

Third, the location matters. The risk of transmission is lower outside because "wind and air temperatures and ultraviolet light . . . can negatively affect the virus and can disperse the virus particles." E.R. 31 ¶ 21. Indeed, "outside, aerosolized particles will disperse into much greater volumes of air—essentially an infinitely greater volume." Dkt. 42-2 at 12. Indoor gatherings thus "pose increased risk compared to outdoor gatherings because of reduced airflow and smaller contained spaces," which allow droplets containing the virus to accumulate. E.R. 31 ¶ 21; *see also id.* at 30-31 ¶¶ 18-21; Dkt. 42-2 at 18.

Indoor "congregate" activities, in which many people gather together in close proximity for extended periods of time, pose an especially great risk of transmission because of the combination of the number of people, the nature of the activity, and the location. *See* E.R. 30-32 ¶¶ 18-25; Dkt. 42-2 at 13-15. The risk is particularly high when such congregate activities involve singing or chanting, especially when they take place in buildings with limited ventilation. E.R. 31 ¶ 22, 28; Dkt. 42-2 at 16-18. This conclusion is unfortunately borne out by the many reports of indoor communal gatherings

(including indoor worship services) becoming "super-spreader" events, leading to hundreds or even thousands of infections. Dkt. 11-2 at 27-28; *see* E.R. 33 ¶ 28; Dkt 42-2 at 15.

2. In the absence of a vaccine or cure, California and many other jurisdictions have adopted emergency measures to slow the spread of the virus. The public health response to "the pandemic is a dynamic and fact-intensive matter," *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), and the State has adjusted its policies as the circumstances have changed and the scientific evidence has developed.[9] From the earliest days of the pandemic, those policies have recognized the importance of religious activities and have preserved opportunities for religious worship.

a. *Early policies*. In March, Governor Newsom proclaimed a state of emergency and then issued an executive order generally requiring individuals to stay at home except for those involved in certain federally recognized critical infrastructure sectors. E.R. 122-126, 144. Days later, California's Public Health Officer designated additional critical infrastructure sectors, including "[f]aith based services that are provided through streaming or other technology." S.E.R. 17; *see also Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758, 766 n.2 (E.D. Cal. 2020) (drive-in worship services also allowed).

---

[9] *See, e.g.*, *South Bay United Pentecostal Church v. Newsom*, ___ F. Supp. 3d ____, 2020 WL 6081733, at *13 (S.D. Cal. Oct. 15, 2020) (noting that "the State has continued to fine tune its restrictions 'to changing facts on the ground'").

The next month, the Governor announced a roadmap to guide reopening of the State. S.E.R. 22-34. As part of that reopening, on May 25, the State allowed in-person worship services to resume statewide, but limited attendance to 100 persons or 25% of building capacity, whichever was lower. E.R. 192. Shortly thereafter, this Court denied an application for an emergency injunction against that restriction. *See South Bay*, 140 S. Ct. at 1613. In June, the State removed numerical limits on outdoor religious services, S.E.R. 43, and required face coverings in community settings, E.R. 34 ¶ 33.

Unfortunately, the summer months saw a resurgence in COVID-19 infections and deaths. *See supra* p. 1, nn. 2-3. In response, relying on emerging scientific evidence about the disease and how it spreads, the State tightened restrictions in July. Among other things, the State discontinued indoor singing and chanting in schools, restaurants, and worship services, recognizing that such activities "negate the risk reduction achieved through six feet of physical distancing." E.R. 205, 219; *see* Dkt. 22-1 at 2-3. Given the more limited risk of transmission outdoors, however, singing and chanting during outdoor worship services remained unrestricted. *See* E.R. 219. Later in July, the State closed indoor operations of restaurants, bars, movie theatres, zoos, and museums statewide, and closed indoor operations of certain other activities (including worship services, gyms, and hair salons) in counties with elevated infection

levels. E.R. 232-234.[10]

b. *The Blueprint.* In August, after the spread of the virus had slowed in California, the State developed the "Blueprint for a Safer Economy," a detailed plan for reopening the State based on the experiences of the first six months of the pandemic and the latest scientific evidence about how the virus is transmitted. Dkt. 22-1 at 1. The Blueprint imposes restrictions on various sectors or activities based on the risk that they pose to public health, assessed in light of criteria such as the number of people involved, the nature of the activity, its duration, the ability to employ protective measures such as masks and physical distancing, and the degree of ventilation.[11] For most sectors and activities, the stringency of the restrictions varies depending on the background public health conditions in each county. Counties are assigned to one of four color-coded tiers, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), based on the county's adjusted case rate and related objective criteria. *See id.* The State reevaluates each county's tier status on a continual basis; as local conditions change, the State moves counties into tiers with greater or lesser restrictions. Dkt. 22-1 at 1.

---

[10] Outdoor worship services continued to be allowed throughout the State without any attendance limits. *See* E.R. 232-234.

[11] California Department of Public Health, *Blueprint for a Safer Economy*, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx (last visited Nov. 29, 2020).

Under this risk-based approach, in counties in Tier 1, the Blueprint prohibits indoor gatherings for certain businesses and activities—including museums, movie theaters, restaurants, and worship services—but allows such gatherings outside. *See* Dkt. 22-2 at 1-5 (table showing activity-by-activity breakdown of restrictions across the four tiers).[12] In other counties, the State allows houses of worship, movie theaters, and restaurants to operate indoors with capacity limitations: from the lesser of 25% capacity or 100 persons in Tier 2, to the lesser of 50% capacity or 200 persons in Tier 3, to 50% capacity in Tier 4. *See* Dkt. 22-1 at 1-3; Dkt. 22-2 at 1-5. Indoor protests and college lectures are separately subject to the same capacity restrictions and numerical caps as worship services.[13]

Other sectors and activities that pose less risk of transmission are subject to less stringent restrictions. For example, personal care services, hair salons, hotels, and "limited services" (such as laundromats and auto repair shops), which do not typically involve large numbers of people in close proximity, are

---

[12] *See also* California Department of Public Health https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf (updated version of table) (last visited Nov. 29, 2020).

[13] *See* Dkt. 22-1 at 2; Dkt. 22-5 at 3-4; California Department of Public Health, *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (drop down menu "Can I engage in political rallies and protest gatherings?") (last visited Nov. 29, 2020); California Department of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Higher education—updated October 1") (last visited Nov. 29, 2020).

permitted to open in all risk tiers subject to certain restrictions. Dkt. 22-2 at 1-3.[14] Other indoor activities that involve large numbers of people but only short periods of close proximity, such as retail stores and shopping malls, are permitted to open indoors; but they are subject to capacity restrictions in Tiers 1 and 2. Dkt. 22-2 at 1-2; *see also* California Department of Public Health, *COVID-19 Industry Guidance: Shopping Malls, Destination Shopping Centers, and Swap Meets*, https://files.covid19.ca.gov/pdf/guidance-shopping-centers--en.pdf (last visited Nov. 29, 2020) (requiring common areas and food courts to be closed or subject to the restrictions for restaurants).

Still other sectors and activities, such as gyms, wineries, bars, cardrooms, amusement parks, and offices, are subject to even more stringent restrictions. Dkt. 22-2 at 3-5. Indoor concerts, plays, and other artistic performances, which are congregate activities similar to worship services, are entirely prohibited.[15] Other gatherings not covered by existing guidance are permitted only outdoors in Tier 1, and are subject to a maximum of three households in all other tiers.[16]

---

[14] California Department of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Limited Services—updated October 20") (last visited Nov. 29, 2020).

[15] California Department of Public Health, *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (drop down menu "Are gatherings permitted for musical, theatrical, or artistic performances permitted?") (last visited Nov. 29, 2020).

[16] California Department of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020) https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx (last visited

c. *The November Surge*. On November 19, 2020, in light of rising case rates and increased hospitalizations, the State issued a limited stay-at-home order imposing a one-month prohibition against non-essential work and gatherings in Tier 1 counties from 10 p.m. to 5 a.m.[17] But case rates and hospitalizations have continued to surge in California—increasing at rates not even seen in the spring. *Supra* p. 1. That surge threatens to overwhelm the State's healthcare system, preventing it from treating COVID-19 patients and others requiring ICU care. The Governor and public health officials are actively monitoring the situation and considering additional temporary restrictions on secular activities in the areas hardest hit by the current surge. *See also* Los Angeles County Department of Public Health Order (Nov. 28, 2020) (imposing additional restrictions on secular activities effective until December 20, 2020), *available at* http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/HOO_SaferatHome_SurgeResponse.pdf.

B. Procedural History

1. Plaintiffs Harvest Rock Church, Inc. and Harvest Rock International Ministry, Inc. filed this lawsuit on July 17, 2020, shortly after California tightened restrictions in response to an earlier surge in cases. Plaintiffs

---

Nov. 29, 2020).

[17] California Department of Public Health, *Limited Stay at Home Order* (Nov. 19, 2020) https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/limited-stay-at-home-order.aspx.

alleged various constitutional violations, including a violation of the Free Exercise Clause, App. E, and moved for a temporary restraining order and a preliminary injunction, App. C-1.[18]

The district court denied a temporary restraining order because Plaintiffs failed to provide the Governor with notice of the motion. App. D. Thereafter, the district court denied the motion for a preliminary injunction. App. C. The court concluded that Plaintiffs were unlikely to succeed on their claim under the Free Exercise Clause because the State's orders "restrict indoor religious services similarly to or less than comparable secular activities" and rationally "further[] the interest of reducing COVID-19." *Id.* at 4.

Based on the unrebutted expert evidence submitted by the State, the court rejected Plaintiffs' assertion that permitted activities such as outdoor protests and food distribution pose as great a risk to public health as indoor worship services. It noted that Plaintiffs "failed to submit any expert testimony supporting this proposition," App. C-3 n.3, or to provide "any concrete information about the nature of these allegedly permissible activities," *id.* at 4. Indeed, the court observed that the "only evidence Plaintiffs submit in support of the motion is their verified Complaint." *Id.* at 3 n.4; *see id.* at 4 n.4 (explaining that a verified complaint does not establish any foundation for assertions not directly relating to the Plaintiffs).

---

[18] "App." refers to the appendix submitted by the Applicants, with the subsequent letter referring to the exhibit tab.

2. Plaintiffs appealed the denial of the motion for a preliminary injunction and filed an emergency motion in the court of appeals for an injunction pending appeal. Dkt. 6-1.

a. A motions panel of the court of appeals heard argument on the emergency motion on September 21 and denied the motion on October 1. *See* App. A. The court of appeals concluded that "[t]he evidence that was before the district court does not support Harvest Rock's arguments that the Orders accord comparable secular activity more favorable treatment than religious activity." *Id*. at 3. To the contrary, the evidence established that "[t]he Orders apply the same restrictions to worship services as they do to other indoor congregate events, such as lectures and movie theaters"—and that the State "completely prohibited" certain other comparable indoor activities such as attending concerts and watching sporting events. *Id*.

The court of appeals rejected Plaintiffs' attempt to compare indoor worship services to secular activities such as shopping that do not involve large numbers of people congregating in close proximity for prolonged periods. It noted that the State had submitted an expert declaration explaining that "the risk of COVID-19 is elevated in indoor congregate activities such as in-person worship services" and that Plaintiffs had failed to offer any competing evidence. App. A-3. "Because the district court based its order on the only evidence in the record as to the risk of spreading COVID-19 in different

settings," the panel concluded that "Harvest Rock is unlikely to show that the district court abused its discretion." *Id.* at 3-4.

b. Judge O'Scannlain dissented. App. A-5-19. He acknowledged that fighting "the ongoing global COVID-19 pandemic" is "a worthy and indeed compelling goal." *Id.* at 5. In his view, however, California was pursuing public health restrictions "against religious practices more aggressively than it does against comparable secular activities" that share some of the risk factors associated with worship services. *Id.* at 5-6, *see id.* at 14-16.

c. On October 15, Plaintiffs filed a petition for rehearing en banc of the motions panel's decision to deny an injunction pending appeal. Dkt. 37. In the alternative, the petition sought initial hearing en banc of the underlying appeal. *Id.* Three days later, the court of appeals ordered the State to file a response to that petition. Dkt. 38. The State filed its response on November 9, Dkt. 41-1, and the petition is currently pending before the court of appeals. Meanwhile, Plaintiffs' underlying appeal is proceeding on a parallel track. The State filed its answering brief on November 18, Dkt. 46, and the reply brief is due in early December, Dkt. 40.

ARGUMENT

Plaintiffs seek an immediate order from this Court enjoining California's current public health restrictions on indoor worship. Plaintiffs undoubtedly have a powerful interest in worshipping in the place and manner of their choosing. And California recognizes that this Court recently granted an injunction pending appeal concerning New York's 10- and 25-person occupancy

limits on indoor worship services. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, slip op. 1 (2020) (per curiam) (*Roman Catholic Diocese*). But similar relief is not warranted here in light of the particular circumstances of this case and the record below.

In *Roman Catholic Diocese*, this Court held that the plaintiffs were likely to succeed in showing that the challenged "regulations treat houses of worship much more harshly than comparable secular facilities." Slip op. 2 (per curiam); *see id.* at 2-5. Here, as the court of appeals below recognized, California applies the same restrictions to indoor worship as to comparable secular activities involving large groups gathering in close proximity indoors for prolonged periods. The unrebutted scientific evidence demonstrates why those activities pose a particularly grave threat of virus transmission during the current pandemic—and why other secular activities that are less stringently regulated by California, such as shopping in a grocery store, present less of a threat.

We recognize that the current restrictions interfere with Plaintiffs' legitimate interest in participating in indoor worship service—and the State is committed to relaxing those restrictions as soon as public health circumstances allow, as it has in the recent past. At present, however, that temporary interference is justified by the State's interest in limiting the transmission of COVID-19 through tailored, evidence-based policies that are proportional to the degree of risk posed by particular activities.

Moreover, the procedural posture of this case would make any injunctive order from this Court particularly inappropriate at this time. Plaintiffs have already filed an en banc petition seeking review of the court of appeals' denial of an injunction pending appeal. The court of appeals is poised to rule on that petition, after calling for and receiving a response from the State. Before this Court takes any action, it should allow the lower court an opportunity to promptly evaluate Plaintiffs' arguments in light of *Roman Catholic Diocese* and the current factual and legal circumstances in California, where COVID-19 is surging.

I. PLAINTIFFS HAVE NOT ESTABLISHED THAT A WRIT OF INJUNCTION FROM THIS COURT WOULD BE APPROPRIATE AT THIS TIME

A request for injunctive relief from this Court in the first instance "'demands a significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). The applicant must show that the "legal rights at issue" are "'indisputably clear,'" *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), and that the Court is likely to grant certiorari and reverse, *see* Shapiro et. al., Supreme Court Practice § 17.13(b), p. 17-38 (11th ed. 2019). As with injunctive relief generally, the applicant must also show "that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural*

Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see Roman Catholic Diocese*, slip op. 2 (per curiam). In addition, this Court does not normally grant equitable relief unless that relief was "first sought in the appropriate court or courts below." Sup. Ct. R. 23.3; *cf. Conforte v. C.I.R.*, 459 U.S. 1309, 1312 n.2 (1983) (Rehnquist, J., in chambers).

A. This Court Should Allow the Lower Court to Address the Recent Ruling in *Roman Catholic Diocese* in the First Instance

Plaintiffs' application arrives at this Court while the court of appeals is the midst of active proceedings to address Plaintiffs' motion for an injunction pending appeal. After a three-judge panel of that court denied the motion—quite correctly, under the circumstances—Plaintiffs chose to file a petition seeking en banc review of that denial rather than pursue immediate injunctive relief in this Court. *See* Dkt. 37.[19] The court of appeals promptly ordered the State to file a response to that petition, *see* Dkt. 38, which is now fully briefed and poised for decision. The underlying appeal of the district court's denial of a preliminary injunction will be fully briefed by early December, and Plaintiffs have also sought initial en banc consideration of that appeal. *See* Dkt. 37, 40. Under the circumstances, the most fair and efficient course would be for this Court to deny Plaintiffs' application without prejudice and allow the court of

[19] Plaintiffs' application does not even acknowledge the pending petition, let alone explain why this Court should grant injunctive relief before the court of appeals has acted on it.

appeals to promptly resolve Plaintiffs' pending en banc petition before this Court takes any action.

That approach is particularly warranted in light of recent legal and factual developments that are germane to Plaintiffs' request for injunctive relief but were not before the three-judge panel of the court of appeals when it denied the motion for injunction pending appeal. Most obviously, this Court has very recently issued a reasoned per curiam decision evaluating an application for an injunction pending appeal of COVID-19-related restrictions on indoor worship in New York. *See Roman Catholic Diocese*, slip op. 1-7 (Nov. 26, 2020). As explained below, that decision does not ultimately support an injunction in this case in light of the particular features of California's current restrictions and the record below. *See infra* pp. 18-38. But this Court is "'a court of review, not of first view,'" *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017), and the court of appeals should at least have an opportunity to evaluate Plaintiffs' request for an injunction in the light of this Court's new authority before this Court addresses the issue in the first instance.[20]

---

[20] To ensure expedited consideration of the issue in the court of appeals, the State would consent to a request by Plaintiffs for the en banc Ninth Circuit to immediately return control of the case to the motions panel for reconsideration of injunctive relief in light of *Roman Catholic Diocese*. *Cf. Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc) ("return[ing] control of the case to the three-judge" merits panel to "issue a new or an amended opinion"). Alternatively, this Court could grant certiorari before judgment (as Plaintiffs have requested) and then vacate the judgment of the district court denying preliminary injunctive relief and remand for that court to conduct expeditious proceedings in light of *Roman Catholic Diocese*

Moreover, the factual and legal circumstances have changed markedly since Plaintiffs filed their motion for an injunction pending appeal 80 days ago. Scientific knowledge concerning COVID-19 is rapidly developing and now provides even stronger support than before for the restrictions at issue. More importantly, like many other parts of the Nation, California is experiencing an unprecedented surge in COVID-19 cases, *see supra* p. 1, creating an even greater public health need for restrictions on prolonged communal gatherings in indoor places. Those changed circumstances bear heavily on the propriety of Plaintiffs' request for an injunction pending appeal, and it would be most appropriate for the lower court to have an opportunity to consider them before this Court considers granting equitable relief.

B. Plaintiffs Have Not Established a Clear Right to Relief

In any event, Plaintiffs have failed to demonstrate an "'indisputably clear'" right to relief as required to justify a writ of injunction from this Court. *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers). The State agrees that Plaintiffs and their congregants have a constitutionally protected interest in participating in worship services in their churches. And "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, slip op. 5 (per curiam). Even so, the State has a compelling interest in

---

and the State's current policy. *See infra* p. 40, n.29; *cf. Ross v. California*, 139 S. Ct. 2778 (2019) (granting petition for writ of certiorari before judgment, vacating judgment, and remanding for further consideration in light of *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)).

adopting evidence-based restrictions on in-person worship—and other comparable indoor activities—to combat the spread of COVID-19 during this pandemic. *See id.* at 4. And the record here shows that the State and its public health officials have treated the free-exercise rights of Plaintiffs and others with the great respect they deserve, and have adopted a carefully structured set of restrictions that comports with the First Amendment.

1. The "protections of the Free Exercise Clause" apply if a law or policy "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); *see id.* at 533 (describing "minimum requirement of neutrality"). Plaintiffs' principal claim is that California has violated the Free Exercise Clause by treating indoor religious services differently from comparable indoor secular activities. As the court of appeals recognized, however, that is incorrect. *See* App. A-3. The State "appl[ies] the same restrictions to worship services as" it does "to other indoor congregate events, such as lectures[,] movie theaters," and indoor political protests. *Id.* Each of these activities is permitted—subject to limitations on the number of participants and other public health safeguards—in counties in Tiers 2 through 4. Each is prohibited indoors in counties in Tier 1, which are experiencing the most dangerous conditions for transmission of the virus. Other indoor activities posing similarly high risks of transmission, such as dining in restaurants, exercising in gyms, or socializing in bars, are subject to

the same or greater restrictions; while still others, such as attending indoor concerts or professional sporting events, are prohibited altogether. *See supra* p. 9; *cf. South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("Similar or more severe restrictions apply to comparable secular gatherings . . . where large groups of people gather in close proximity for extended periods of time.").[21]

The need for these restrictions is supported by abundant scientific evidence. As the court of appeals concluded, the record below demonstrates that "the risk of COVID-19 is elevated in indoor congregate activities, including in-person worship services." App. A-3. The Governor submitted an expert declaration from Dr. James Watt, an epidemiologist with over two decades of experience as a public health official combatting infectious diseases. E.R. 27-28 ¶¶ 2-7. Dr. Watt explained that COVID-19 spreads primarily through respiratory droplets (and perhaps aerosolized particles as well) that are transmitted from one individual to another. E.R. 29 ¶¶ 14-15. The risk of such transmission is greatly increased when large numbers of people from different households gather because the more people that are gathered the more likely it is that one will be infected. E.R. 30 ¶ 18. That risk is increased further when

---

[21] Professional sports are open for spectators, but only in Tiers 3 and 4, and only outdoors and subject to capacity limitations. *See* California Department of Public Health, *COVID-19 Industry Guidance: Sporting Events at Outdoor Stadiums and Racetracks*, https://files.covid19.ca.gov/pdf/guidance-outdoor-live-professional-sports--en.pdf (last visited Nov. 29, 2020). No one can be a spectator at an indoor professional sporting event. *Id.*

groups gather in close proximity for extended periods of time—especially when they engage in vocal activities that increase the volume of respiratory droplets containing the COVID-19 virus that will be spread, which in turn increases the risk that participants will receive a sufficiently high dose to overcome their immune system and cause infection. E.R. 31 ¶¶ 21-22; *see* Dkt. 42-2 at 12. And the risk is increased even further when such gatherings take place indoors, where ventilation is limited and droplets containing the virus may accumulate. E.R. 31 ¶ 21.

As leading epidemiologists confirmed in an amicus brief below, "activities that present the highest risk of COVID-19 transmission are thus those which occur indoors, in poorly ventilated spaces, where many people from different social 'bubbles' congregate in close proximity for an extended period." Dkt. 42-2 at 16. "This includes indoor cultural events and performances, indoor demonstrations, and indoor religious worship services." *Id.*; *see also* E.R. 30 ¶19; E.R. 32 ¶ 28.

The scientific evidence also shows that the indoor activities that are subject to less stringent restrictions than worship services—such as shopping in stores or participating in workplace operations—pose a lower risk of transmission because they typically involve brief encounters between individuals rather than gatherings of large numbers of people for an extended

duration of time. *See* E.R. 32-33 ¶¶ 26-27.[22] As the epidemiologists told the court of appeals, such encounters are unlikely to transmit the virus because "an uninfected person needs to receive a certain dose for the virus to overcome the body's defenses and cause infection." Dkt. 42-2 at 10; *see supra* pp. 3-4. And "[b]oth the proximity of a non-infected person to an infected person and the length of time they spend in proximity affect the dose the uninfected person will receive." Dkt. 42-2 at 10.

Plaintiffs have not identified any evidence that rebuts this scientific understanding or that responds to the expert declaration submitted by the State. And while the judicial branch should not blindly defer to the expert judgments of local officials or abdicate its responsibility to evaluate constitutional challenges to public health policies, courts "must afford substantial deference to state and local authorities" regarding their scientific assessments and judgments about how "to impose tailored restrictions" that "balance competing policy considerations during the pandemic." *Roman Catholic Diocese*, slip op. 3 (Kavanaugh J., concurring).

2. Plaintiffs and the dissent below contend that California treats religious worship differently from "comparable secular activities." App. A-6; *see* Application 20-28. But they misunderstand the nature of the regulated activities, the State's policies, and the epidemiological concerns underlying

---

[22] Moreover, many workplaces are already "subject to stringent health and safety guidelines that can mitigate transmission." E.R. 32 ¶¶ 26; *see infra* p. 27.

those policies. Properly understood, the challenged restrictions do not involve the "disparate treatment" or "singl[ing] out" of "houses of worship for especially harsh treatment" that this Court identified in *Roman Catholic Diocese*, slip op. 3 (per curiam).

a. The dissent asserts that California's public health concerns about indoor worship services "fall flat" because in counties where indoor worship is allowed, congregants must observe physical distancing, wear masks, and refrain from singing and chanting. App. A-13. This Court raised similar concerns in *Roman Catholic Diocese*, noting that there was no evidence demonstrating why New York had not adopted "other less restrictive rules" "to minimize the risk to those attending religious services." Slip op. 4 (per curiam); *see also id.*, slip op. 1 (Gorsuch, J., concurring). Here, however, the record provides ample support for California's determination that less restrictive measures would be inadequate to prevent the spread of COVID-19. The State's epidemiological expert addressed those alternative precautions and concluded that they did not sufficiently mitigate the risks posed by indoor worship services and other comparable indoor activities. He explained that "[w]hile keeping six feet of separation between individuals and wearing face coverings can reduce the risk of disease transmission, any gathering increases the risk of individual and community transmissions." E.R. 30-31, ¶ 20. And that risk is increased even further where individuals are in close proximity for extended periods of time in an indoor location with limited ventilation (as in

an indoor worship service), especially if they are talking or singing. *See* E.R. 31-32 ¶¶ 21-25; *see supra* pp. 3-4.[23]

The dissent below also contends that "[t]he State more freely allows an abundance [of] activities to take place which, on their face, share the same risks factors that Dr. Watt identified as so concerning about church attendance." App. A-13-15 (citing, among other things, getting a haircut or manicure, working in a warehouse, and going to gyms or laundromats). It asserts that the State "offered no evidence to support the notion" that these activities "are somehow safer" than attending religious services. *Id.* at 13; *see also* Application 22-24. This Court expressed similar concerns in *Roman Catholic Diocese*, concluding that New York had not provided sufficient evidence to justify "disparate treatment" of businesses such as "camp grounds," "large store[s]," and "manufacturing facilities," slip op. 3 (per curiam); "hardware stores, acupuncturists, and liquor stores," slip op. 2 (Gorsuch, J., concurring); or "grocery store[s]" and "pet store[s]," slip op. 2 (Kavanaugh J., concurring).

---

[23] *Cf.* Centers for Disease Control and Prevention, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html (discussing evidence that cloth masks can block only approximately "50-70%" of "fine droplets and particles") (last visited Nov. 29, 2020); Dkt. 42-2 at 17-18 (although wearing a mask or face covering while singing decreases the risk of transmission, "when infected persons sang, they produced a number of droplet particles comparable to those produced through ordinary speech *without a mask*").

But the record here shows that California has adopted a tailored policy, with specific restrictions on indoor activities that are proportional to the public health risks associated with each activity. As discussed above, California's epidemiological expert specifically described how the risk of transmission "increases commensurately with the size of the group"; the nature of the activity (including the extent to which "members of the group are in close proximity to one another" and remain "in close proximity for extended periods"); and the location of the activity. E.R. 30 ¶ 18; E.R. 31 ¶ 21; *see* E.R. 30-33 ¶¶ 18-28. Those considerations explain why the State has adopted more permissive restrictions on the activities referenced by the dissent below, all of which pose lesser risks of COVID-19 spread than gathering in large groups indoors for an extended period of time (with the possible exception of exercising in a gym, which is subject to *more* restrictive capacity limitations than worship services, *supra* p. 9; Dkt. 22-2 at 3).

For example, "[b]rief encounters in grocery stores and during shopping excursions carry a lower risk of person-to-person spread." E.R. 32-33 ¶ 27. Shopping is less likely to involve extended vocal activity; it typically involves fewer close-proximity encounters; and, most important, shoppers are in proximity to each other for only a short period of time, which means that droplets containing the COVID-19 virus are less likely to accumulate into a dose sufficient to overcome the immune system. *See id.*; Dkt 42-2 at 19-20. Even so, California has imposed significant restrictions on shopping, which are

commensurate with the risk it poses. Retail stores—including grocery stores, big-box stores, and liquor stores—are subject to indoor capacity limitations. *Supra* p. 9. In Tier 1 counties, for example, grocery stores may not exceed 50% capacity, while shopping malls and most other retailers may not exceed 25% capacity. Dkt. 22-2 at 1-2; Dkt. 22-1 at 5-6. This case is thus quite different from *Roman Catholic Diocese*, where the Court noted that comparable categories of businesses were free to "admit as many people as they wish." Slip op. 3 (per curiam); *see id.*, slip op. 2 (Gorsuch, J., concurring) (emphasizing that New York "impose[d] *no* capacity restrictions" on many comparable activities).

Other activities addressed by the dissent below, such as "having one's hair cut" and "getting a manicure or pedicure," App. A-14, do involve closer proximity. But they are one-on-one encounters, rather than large group gatherings, and thus are less likely to involve infected individuals (or to spread the virus from a single infected person to numerous other people). E.R. 30 ¶ 18 ("risk increases commensurately with the size of the group"). Moreover, California requires providers of personal services to follow strict guidelines. For example, employees must use disposable gloves; both employees and customers must wear masks; and the businesses must ensure physical distancing—which often requires them to cap the number of appointments and customers at one time. *See* California Department of Public Health, *COVID-19 Industry Guidance: Expanded Personal Care Services*, https://files.covid19.

ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf (last visited November 29, 2020).

Certain other activities mentioned by the dissent—including factory labor, "playing . . . professional sports," and "filming a television show or movie," App. A-14—may at times involve sitting or working in proximity with others indoors. But they do not present the same risks as indoor worship services because "social interactions are typically brief and ancillary," and because additional safety precautions (such as mandatory testing and plexiglass shielding) can more feasibly be imposed. E.R. 32 ¶ 26*; see, e.g.,* Dkt. 22-12 (California Department of Public Health industry guidance for logistics and warehousing facilities); COVID-19 Return to Work Agreement with DGA, IATSE, SAG-AFTRA and Teamsters/Basic Crafts, September 21, 2020, at 4-12 (employment contingent on a negative test result and subsequent testing of up to three times a week depending on type of employee), *available at* https://www.sagaftra.org/files/sa_documents/ReturnToWorkAgreement_wAMPTP.pdf.[24]

And while some campgrounds in California remain open, *cf. Roman Catholic Diocese*, slip op. 3 (per curiam), camping occurs outside, where ventilation is much greater and the risk of infection commensurately lower, *see*

---

[24] *See also* Opposition of State Respondents to Emergency Application for Writ of Injunction 22-23, *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 140 S. Ct. 1613 (2020) (collecting examples of workplace regulations that mitigate the risk of COVID-19 spread or assist employers and the government in containing an exposure incident).

E.R. 31 ¶ 21. Even at campgrounds, moreover, California has closed "[o]utdoor spaces intended for gatherings and group functions, including pavilions, communal fire rings, public-use camp kitchens, and amphitheaters," and it has prohibited group bonfires, group campsites, and musical or other performances. California Department of Public Health, *COVID-19 Industry Guidance: Campgrounds, RV Parks, and Outdoor Recreation*, 3, 11 https://files.covid19.ca.gov/pdf/guidance-campgrounds-outdoor-recreation--en.pdf (last visited November 29, 2020).

b. Other considerations that led this Court to conclude that the restrictions challenged in *Roman Catholic Diocese* were likely unconstitutional are absent here. The Court noted allegations "that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included." *Roman Catholic Diocese*, slip op. 2 (per curiam). There are no similar allegations here, and California's restrictions avoid any such gerrymandering concerns by applying neutrally across each county based on objective public health data. *See supra* p. 7.

The Court also emphasized that New York categorized many businesses—but not churches—"as 'essential.'" *Roman Catholic Diocese*, slip op. 3 (per curiam); *see* slip op. 2 (Gorsuch, J., concurring) (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"). By contrast, since the early days of the pandemic, California has made clear that "faith based services" are a "critical infrastructure sector[]" and has identified workers providing faith-based services as "essential workforce." S.E.R. 7, 16, 17; *see supra* p. 5. And the State has endeavored to accommodate religious exercise and to relax restrictions on indoor worship services where possible. *See supra* pp. 5-8.

In addition, the Court in *Roman Catholic Diocese* noted the absence in the record before it of any indication that churches subject to the challenged restrictions had experienced a COVID-19 outbreak as a result of in-person worship services. *See* slip op. 3-4 (per curiam). The record below, however, indicates a number of instances in which indoor worship services in California have led to super-spreader events—including 71 infections linked to a single indoor service in Sacramento in March and multiple rural California communities that experienced COVID-19 outbreaks tied to indoor services on Mother's Day. *See* Dkt. 11-2 at 27 & nn.16-17. Additional outbreaks arising from indoor worship services in California have been reported more recently. *See, e.g.*, Cook & Freeman, *Despite County Announcement of Outbreak, Awaken Church Holds Sunday In-Person Services*, The San Diego Union Trib., Nov. 28, 2020 ("San Diego County public health officials announced Saturday that an outbreak of COVID-19 cases had occurred at Awaken Church's facility.") *available at* https://www.sandiegouniontribune.com/news/health/story/2020-

11-28/county-announces-covid-19-outbreak-at-awaken-church-asks-people-to-quarantine-if-exposed.

Finally, in *Roman Catholic Diocese* the Court noted the lower court's finding "that the Diocese had been constantly 'ahead of the curve, enforcing stricter safety protocols than the State required.'" Slip op. 4 (per curiam); *see id.* ("Similarly, Agudath Israel notes that '[t]he Governor does not dispute that [it] ha[s] rigorously implemented and adhered to all health protocols"). While the same can surely be said of many congregations in California, it cannot be said of the Plaintiffs here. For example, the record here suggests that Plaintiffs' Pasadena church "is not operating in compliance with" state and local policies regarding "indoor services and the wearing of protective masks along with the requirement of social distancing." App. H (August 13, 2020 letter from Pasadena Office of the City Attorney to Harvest Rock Church). Plaintiffs do not appear to dispute that they have violated these policies. *See, e.g.*, Application 1, 17-18; *see also* O'Kane, *"We've been essential for 2,000 years": California church holds service indoors despite coronavirus warnings*, CBS News, July 20, 2020 ("A church in Pasadena, California, is defying Governor Gavin Newsom's orders to shut down and is continuing to hold indoor services amid the coronavirus pandemic"), *available at* https://www.cbsnews.com/news/harvest-rock-church-california-coronavirus-lockdown-violation-services/.

c. Nor do any of Plaintiffs' remaining arguments establish that the State is discriminating against religious institutions. Plaintiffs object that churches

are allowed to provide "'food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals,'" but are restricted from holding worship services in the same building. Application 20; *see id.* at 20-22; *see also* App. A-17 (dissent). As the district court noted, however, Plaintiffs "have failed to establish that these activities are anything like indoor worship" in terms of the associated public health risks. App. C-4; *cf.* Cal. Health & Safety Code § 17920.3 (imposing habitability requirements on housing). For example, "distributing food at a church is analogous to a grocery store, not an indoor event such as a concert," App. C-4; and, by definition, individual or family counseling does not involve large numbers of people.

Plaintiffs also contend that the State has prohibited in-home worship meetings, Bible studies, and life groups. *See* Application 3, 27. But the State's position is that, so long as the requirements in the relevant guidelines are satisfied, in-home worship services are allowed on the same terms as indoor worship services at churches. And any other restrictions on Plaintiffs' in-home activities are the result of the State's neutral and generally applicable policy on in-home gatherings.[25] Nor does the State's policy on indoor singing discriminate against religion, as Plaintiffs suggest. Application 27. As the

---

[25] *See* California Department of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020) https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx.

district court found, that restriction "applies equally to religious events and secular events." App. C-4; *see also South Bay United Pentecostal Church v. Newsom*, ___ F. Supp. 3d ____, 2020 WL 6081733, at *7 (S.D. Cal. Oct. 15, 2020); S.E.R. 59 (indoor protests permitted in high-risk counties if "singing and chanting activities are discontinued"); S.E.R. 110 (school "[a]ctivities that involve singing must only take place outdoors"); California Department of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020) https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx (prohibiting singing, chanting, shouting and cheering at all indoor gatherings).

Finally, Plaintiffs attempt to support their Free Exercise claim by faulting the State's response to the public protests that erupted this summer after George Floyd was killed while in police custody. *See* Application 25-28. As the district court noted, however, outdoor "protests are not equivalent to indoor religious services" from an epidemiological perspective. App. C-3. Outdoor gatherings pose a substantially lower risk of transmission than indoor gatherings because of differences in air flow, air temperature, and the amount of ultraviolet light. *See* E.R. 31 ¶ 21; *supra* p. 4; *see also South Bay*, 2020 WL 6081733, at *14 ("[B]y focusing on outdoor protests, 'Plaintiffs are comparing apples and oranges.'"). That is why California allows both worship services and political protests to take place outdoors throughout the State without

limiting the number of participants, while banning both activities in indoor spaces in some counties and imposing (identical) numerical restrictions on such indoor activities in the remaining counties. *See* Dkt. 22-1 at 3.

And despite Plaintiffs' suggestion that the Governor encouraged protesters to violate COVID-19 restrictions, *see* Application 25, the Governor in fact urged protestors to follow physical distancing and other COVID-19 precautions.[26] In addition, the record demonstrates that the State has enforced COVID-19 restrictions against protestors where appropriate: The California Highway Patrol has arrested protestors who violated the law. S.E.R. 172, ¶ 13. When the NAACP requested a permit for a rally to protest Floyd's death, the Highway Patrol denied the permit because organizers could not ensure that the event would comply with the State's policies on public protests. S.E.R. 170-171, ¶ 5. And other permits for gatherings that would have violated the COVID-19 restrictions have also been denied. S.E.R. 171, ¶ 7.

4. Plaintiffs' remaining claims fail to justify intervention by this Court. Remarkably, Plaintiffs devote five pages of their submission to addressing how "the application of *Jacobson v. Massachusetts* [197 U.S. 11 (1905)] to fundamental rights under the First Amendment is plainly in error,"

---

[26] *See* Gardiner, *Newsom Appeals to California Protesters: Consider Others, Stay Home*, San Francisco Chron., July 2, 2020, *available at* https://www.sfchronicle.com/politics/article/Newsom-appeals-to-California-protesters-Consider-15383308.php.

Application 32; *see id.* at 32-37, but neither the court of appeals nor the district court applied—or even cited—that decision. *See* App. A, C. Plaintiffs also advance a disparate treatment claim under the Establishment Clause, *see* Application 37-38, but they did not present that claim to the court of appeals in their motion for an injunction pending appeal. In any event, as the district court explained, the claim fails for the same reason as the Free Exercise claim: "the Orders treat religious services the same as comparable secular activities." App. C-4.

C. The Equitable Factors Weigh Against Emergency Relief From This Court

As this Court recently recognized, any challenged restriction that limits the ability of people of faith to attend services at their chosen place of worship "will cause irreparable harm" to some degree. *Roman Catholic Diocese*, slip op. 5 (per curiam). The State has endeavored to address the grave public health challenges of this moment while also accommodating the important interests of its residents in participating in religious services. As discussed, in counties in Tiers 2 through 4, indoor worship services may proceed subject to restrictions on attendance and other precautions. In counties in Tier 1, where indoor services are currently prohibited because of exigent public health circumstances, worship services are permitted outdoors (and through streaming video or other remote technology) without numerical restriction. *Supra* p. 8. Of course, these are imperfect substitutes. *See, e.g.*, *Roman Catholic Diocese*, slip op. 5 (per curiam) ("such remote viewing is not the same

as personal attendance"). But these policies reflect the State's recognition of the great value of religious freedom and free exercise to our society—and the State's commitment to allowing indoor, in-person worship to resume when and where the public health circumstances allow it.[27]

Apart from the injury that is inherent in any restriction on attending in-person worship services, Plaintiffs have not substantiated any other harm flowing from the challenged policies. They contend that the challenged restrictions harm them by "discriminat[ing] against Churches' religious worship services." *E.g.*, Application 1. As explained above, however, the restrictions on indoor worship activities are the same as—or more permissive than—those imposed on comparable secular gatherings that occur indoors and pose an equivalent threat to public health. And Plaintiffs have not presented any evidence that these neutral policies are enforced in a discriminatory fashion. Indeed, Plaintiffs have not made any evidentiary showing whatsoever to substantiate their assertions of harm. *See* Application 38-39; *supra* p. 11

---

[27] Churches throughout the State have been holding outdoor services during the pandemic. *See, e.g.*, Molina, *Catholics Resume First Communions and Baptisms Outdoors*, Wash. Post, Aug. 28, 2020, *available at* https://www.washingtonpost.com/national/religion/catholics-resume-first-communions-and-baptisms-outdoors/2020/08/28/937ea71c-e968-11ea-bf44-0d31c85838a5_story.html (discussing reopening of churches outdoors across California). California has no attendance cap on outdoor services. And the temperate climates in the Southern California counties where Plaintiffs' churches are primarily located (*see* Application 5) make outdoor services an option even during the winter months.

(discussing district court's finding that the "only evidence Plaintiffs submit[ted]" was "their verified Complaint").

Moreover, the equitable inquiry also considers "the balance of equities" and "the overall public interest." *Winter*, 555 U.S. at 26. States and local governments have the right and the responsibility to protect residents against deadly communicable diseases. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944); *Roman Catholic Diocese*, slip op. 5 (per curiam). The restrictions challenged here impose temporary restrictions on indoor gatherings "to address this extraordinary health emergency," *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), by diminishing the serious risk of "widespread transmission of the COVID-19 virus" that would occur if those gatherings were not regulated, Dkt. 22-4 at 3. Responding to the pandemic remains "a dynamic and fact-intensive matter." *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Consistent with the State's science-based approach to combatting the coronavirus, it will reassess the COVID-19 transmission risk in each county on a continual basis and will relax or remove the restrictions when considerations of safety and public health allow. But in light of the continued uncertainty surrounding this deadly virus, the current surge in cases and hospitalizations, and the lack of any cure or approved and widely distributed vaccine, that moment has not yet arrived.

Accordingly, under the particular circumstances of this case, Plaintiffs have not established that they are entitled to a writ of injunction at this time.

Should this Court disagree, however, it would be critical for it to tailor any injunction and preserve some latitude for state public health officials to limit the number of people attending large and communal gatherings indoors, in order to mitigate the resulting acceleration of the virus's spread. *Cf. Roman Catholic Diocese*, slip op. 5 (per curiam) ("[W]e should respect the judgment of those with special expertise and responsibility in this area."). Plaintiffs' central objection is to the temporary prohibition on indoor worship in counties in Tier 1. *See, e.g.*, Application 12, 21. This Court has recognized that the restrictions on indoor worship services in Tiers 2 through 4 are all "far" less restrictive than the New York restrictions that were enjoined in *Roman Catholic Diocese*. Slip op. 4 & n.2 (per curiam). As Justice Kavanaugh explained, "New York's 10-person and 25-person caps on attendance" went "much further" and were "much more severe than" the restrictions at issue in *South Bay*, which are equivalent to the current Tier-2 restrictions. *Roman Catholic Diocese*, slip op. 1 (Kavanaugh, J., concurring) ("In *South Bay*, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity."). *Id.* While the State firmly believes that the Tier 1 restrictions are constitutional and critical to preventing excessive spread of the virus in communities where transmission is surging, if the Court were to enjoin those restrictions it should leave the restrictions in Tiers 2 through 4 in effect, and specify that the State may impose the Tier 2 capacity limitations on counties in Tier 1. *Cf. Roman Catholic Diocese*, slip op. 1, 6 (per curiam)

(leaving in place policy restricting in-person worship services to 50% of maximum capacity).[28]

II. This Is Not an Appropriate Case for This Court to Conduct Plenary Review Before the Judgment of the Court of Appeals

Plaintiffs also ask this Court to grant certiorari before judgment and embark on plenary review of their claims, *see* Application 39-40, but they have not made the substantial showing necessary to justify that extraordinary step. Certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Even in important and time-sensitive cases, the "exercise of this power by the Court is an extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). That customary reticence is especially appropriate where it is apparent "that the Court of Appeals will proceed expeditiously to decide [the] case." *United States v. Clinton*, 524 U.S. 912 (1998); *see Aaron v. Cooper*, 357 U.S. 566, 567 (1958).

Here, the court of appeals is proceeding expeditiously: it swiftly resolved the motion for an injunction pending appeal; it promptly ordered a response to

---

[28] It would also be critical to allow the State to continue imposing requirements such as "social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services." *Roman Catholic Diocese*, slip op. 1 (Gorsuch, J., concurring). Thus, to the extent Plaintiffs are asking the Court to enjoin any such requirements, *cf.* Application 5-6 & n.4, the Court should deny that request.

Plaintiffs' petition for rehearing en banc and is presently deliberating on that petition; and it expedited briefing of the underlying appeal, which will be fully briefed by early December, with an argument soon to follow. *See* Dkt. 40; Ninth Cir. R. 3-3 (expedited procedures for preliminary injunction appeals). This case is not comparable to those few cases the Court has previously deemed to satisfy the "very demanding standard" of Rule 11. *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658, 2659 (2014) (Alito, J., statement respecting denial of certiorari before judgment); *see, e.g.*, *Dep't of Commerce v New York*, 139 S. Ct. 2551, 2565 (2019) (Court granted government's petition for a writ of certiorari before judgment because the decennial "census questionnaire needed to be finalized for printing by the end of June 2019").

Indeed, this case would not satisfy the less-demanding standard governing the Court's normal certiorari jurisdiction. As discussed above, the decision below is correct. And this case presents an exceptionally poor vehicle for providing definitive guidance on the legal issues raised by the Plaintiffs: It arose from a hurried preliminary injunction proceeding, and thus involves a record that is not nearly as developed as in other cases. The district court record was prepared before the State's current restrictions were in place, and thus is not specific to the policies that presently apply to Plaintiffs. And the court of appeals did not address or have occasion to rule on two of the three legal questions that Plaintiffs now ask this Court to resolve. *See* Application 32-37 (application of *Jacobson* to COVID-19); *id.* at 37-38 (Establishment

Clause claim, which Plaintiffs did not address in their motion for an injunction pending appeal filed in the court of appeals).[29]

CONCLUSION

The Court should deny the application.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
THOMAS S. PATTERSON
Senior Assistant Attorney General
SAMUEL T. HARBOURT
Deputy Solicitor General
BENJAMIN M. GLICKMAN
Supervising Deputy Attorney General

/s/ *Seth E. Goldstein*

SETH E. GOLDSTEIN
Deputy Attorney General

November 30, 2020

---

[29] As noted above, *supra* pp. 17-18, n.20, under these unique circumstances, the Court may wish to consider granting Plaintiffs' petition for certiorari before judgment for the limited purpose of vacating the judgment below and remanding for further proceedings in light of *Roman Catholic Diocese*. While unusual, that approach would be superior to the Court granting injunctive relief (or plenary review) at this juncture. It would allow the lower court to evaluate Plaintiffs' request for injunctive relief in the light of that new authority, including by assessing whether Plaintiffs are likely to succeed under the constitutional standards described by this Court, before this Court decides whether to grant the extraordinary relief requested by Plaintiffs.