No. 20A94

IN THE SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

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

Respondent.

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

Applicants' Reply in Support of Emergency Application for Writ of Injunction

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

Counsel for Applicants

PARTIES

Applicants are Harvest Rock Church, Inc. and Harvest International Ministry, Inc., itself and on behalf of its 162 member Churches in California. Respondent is Hon. Gavin Newsom, in his official capacity as Governor of the State of California.

RULE 29 DISCLOSURE STATEMENT

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

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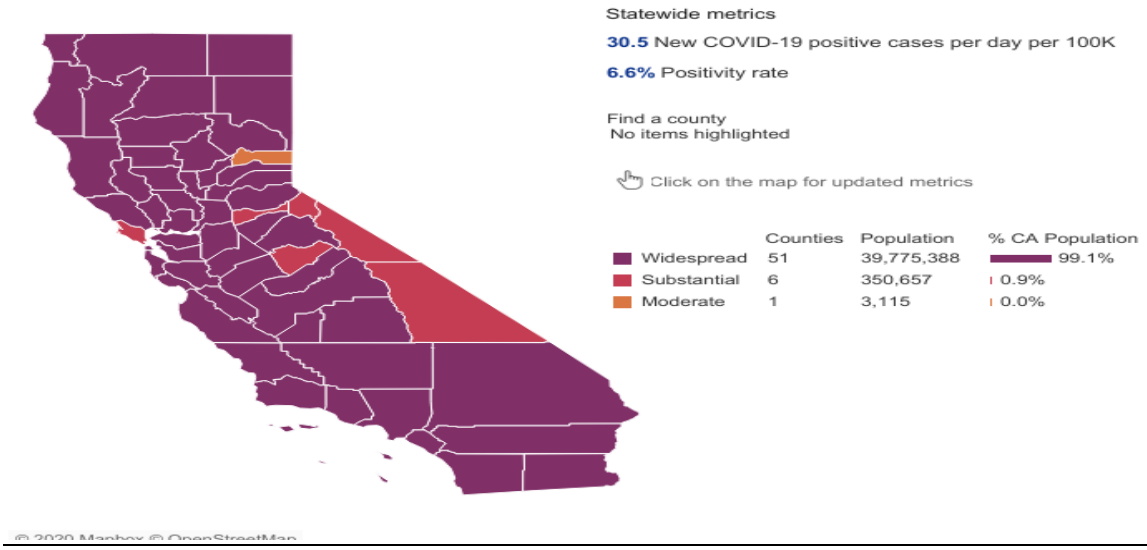
"It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."[1]

INTRODUCTION

As of November 28, 51 Counties in California – representing **99.1% of the population** – are in Tier 1 under the Governor's Blueprint for a Safer Economy. The below image –from California's official Blueprint website – demonstrates how widespread the Governor's most severe restrictions are in California.[2]

Image 1 – Blueprint Map



The consequence of the sea of purple in the above "color-coded executive edict" is that **indoor worship services are completely prohibited for 99.1% of Californians, including the vast majority of Applicants' Churches and congregants**. (*See* Application Exhibit F, Joint Statement, at 1.) Yet, food packing

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

[2] Blueprint for a Safer Economy, *Current tier assignments as of November 28, 2020*, https://covid19.ca.gov/safer-economy/ (last visited Nov. 30, 2020)

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

For Applicant Churches, this means that the Governor's color-coded regime of religious discrimination **completely prohibits indoor religious worship services, even if it involves 1 person**. And, in Tiers 2 and 3, where religious services have a numerical cap while similar nonreligious gatherings do not, the Governor prohibits Applicants and their congregants from singing or chanting. (Ex. F., Joint Statement at 4.) No similar restriction is placed on singing "Happy Birthday" in a restaurant or Christmas carols in a mall. Thus, the Governor's COVID-19 color-coded executive edicts have literally banned even "preaching to the choir." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).

Yet, in these same Counties where indoor religious worship services are completely prohibited or significantly restricted numerically, there are myriad exemptions for similar nonreligious gatherings. (*See* Addendum at 2-4.) Moreover, the Churches can conduct nonreligious meetings in the same buildings where worship is banned, including feeding, sheltering, and other social services and "necessities of life" such as counseling. Irreparable harm is being imposed on Applicants by virtue of the unconstitutional regime of the Governor's edicts, and injunctive relief is warranted now. Indeed, Harvest Rock Church, the pastors, staff, and parishioners labor every day under the threat of criminal charges, fines, and closure. This immediate threat cannot wait several months or more to be addressed.

LEGAL ARGUMENT

I. INJUNCTIVE RELIEF IS WARRANTED NOW, AND THE GOVERNOR'S CONTENTIONS TO THE CONTRARY WERE REJECTED IN *CATHOLIC DIOCESE.*

A. Delaying Consideration Of Applicants' Request For Injunctive Relief Imposes Further Irreparable Harm On Applicants.

The Governor contends that this Court should stay its hand because the lower court should review *Catholic Diocese* in the first instance. (Opposition to Emergency Application for Writ of Injunction, "Opposition," at 16-17.) A similar argument was rejected in *Catholic Diocese*. In effect, the Governor "argue[s] that [this Court] should withhold relief because the relevant circumstances have now changed." *Compare* (Opposition at 16), *with Catholic Diocese*, 2020 WL 6948354, at *3. Applicants Churches are still in the Tier 1 restrictions prohibiting **all religious worship services** indoors, and the urgency of relief needed by Applicants is greater than that

present in *Catholic Diocese*. Harvest Rock Church, the pastors, and parishioners face daily criminal threats, fines, and closure. (*See* Application Ex H ("Any violations in the future will subject your Church, owners, administrators, operators, staff, and parishioners to the above-mentioned criminal penalties as well as the potential closure of your Church.") As this Court held, "**there is no guarantee that we could provide relief before another weekend passes. The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm**." *Id.* (emphasis added).

B. Applicants Have Attempted To Secure Relief From The Lower Courts But Have Suffered Irreparable Harm Long Enough With No Relief From The Lower Courts, And No End In Sight.

Applicants have suffered under the unconstitutional yoke of the Governor's edicts prohibiting all indoor religious worship services since July 2020. (Application, Ex. E, Verified Complaint, at 2-13.) Applicants timely sought a temporary restraining order and preliminary injunction from the district court, which were both denied. (Application, Exs. C, D.) Applicants immediately requested an injunction pending appeal from the district court, which was also denied. (Application, Ex. B.) Applicants then immediately sought an injunction pending appeal from the Ninth Circuit below, which was also denied in a split decision. (Application, Ex. A.) This is the second time the Ninth Circuit denied such relief. *See South Day United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). While Applicants sought rehearing en banc (Opposition at 16), the Governor's response to that petition was filed **22 days ago**

and there has been no response from the Ninth Circuit as to whether it will entertain en banc review of Applicants' request for emergency relief.

The Governor's contention that sending Applicants home as "the most fair and efficient course" (Opposition at 16) is neither fair nor efficient. The Governor has done nothing to halt the daily criminal threats, fines, and closure.[3] Delay increases "the risk of the 'justice delayed' that means 'justice denied.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 112 (Breyer, J., concurring). This is precisely why this Court rejected similar contentions in *Catholic Diocese*. 2020 WL 6948354, at *3 (noting that the applicants' delay of 13 days in obtaining relief warranted this Court's prompt action to prevent irreparable harm). Justice Gorsuch noted, "the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be." *Id.* at *6 (Gorsuch, J., concurring). But, "this reply only advances the case for intervention" because "**[t]o turn away religious leaders bringing meritorious claims . . . would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty**." *Id.* (emphasis added).

> It is easy enough to say it would be a small thing to require the parties to "refile their applications" later. . . . But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. **Nor may we discount the burden on the faithful who have lived for months under New**

[3] The Governor contends that he has not enforced his regulations in a discriminatory manner. However, Churches throughout California have been subject to significant criminal penalties and legal actions for simply gathering for worship services. *See* Kathleen Wilson, *Judge issues injunction against Newbury Park chapel* Ventura County Star (Sept. 28, 2020), *available at* https://www.vcstar.com/story/news/2020/09/28/judge-injunction-godspeak-calvary-chapel-newbury-park-pastor-rob-mccoy/3556077001/; Fiona Kkelliher, *After threat of injunction, Santa Clara church backs away from indoor services* The Mercury News (Sept. 11, 2020), https://www.mercurynews.com/2020/09/11/threat-injunction-santa-clara-church-backs-away-from-indoor-services/ (noting that North Valley Baptist Church in Santa Clara was fined $112,750 for violating the Governor's orders).

> **York's unconstitutional regime unable to attend religious services**. **Whether this Court could decide a renewed application promptly is beside the point. The parties before us have already shown their entitlement to relief**. Saying so now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long,

Id. at *7 (emphasis added).

The Governor admits that prohibiting Applicants from hosting religious worship services is a substantial burden on their constitutionally protected religious exercise. (Opposition at 13 (recognizing that "Plaintiffs undoubtedly have a powerful interest in worshipping in the place and manner of their choosing."); (*id.* at 14 ("We recognize that the current restrictions interfere with Plaintiffs' legitimate interest in participating in indoor worship services."); (*id.* at 34 ("any challenged restriction that limits the ability of people of faith to attend services at their chosen place of worship will cause irreparable harm"); (*id.* at 35 (noting the "injury that is inherent in any restriction on attending in-person religious worship services")).

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

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

Id. at *9 (Kavanaugh, J., concurring) (emphasis added).

The Governor's request for this Court to stay its hand while the lower courts consider relief they have already rejected (numerous times) only works more irreparable harm each day the Governor's "color-coded executive edits" remain in place. Injunctive relief is warranted now.

II. APPLICANTS HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE HARM FROM HAVING THEIR RELIGIOUS WORSHIP SERVICES PROHIBITED AND CRIMINAL ENFORCEMENT THREATENED AGAINST THEM.

"There can be no question that the challenged restrictions, if enforced, will cause irreparable harm." *Catholic Diocese*, 2020 WL 6948354, at *3. Indeed, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Yet, here, the irreparable harm is even more pronounced for multiple reasons: (1) all of Applicants' Churches in Tier 1 are completely prohibited from hosting any religious worship services, regardless of the number in attendance, and (2) Applicants' Churches, pastors, staff, and parishioners face threats of ***daily criminal charges*** (each up to one year in prison), ***fines, and closure***.

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

"If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred." *Catholic Diocese*, 2020 WL 6948354, at *3. That alone was sufficient for this Court to find irreparable harm. And, it is all the more true here where Applicant Churches in Tier 1 (which represents 99.1% of all California residents and the vast majority of

Applicants' Churches) **are completely prohibited from having any worship service with even one person**. Unlike in *Catholic Diocese* where only "the great majority" of attendees and congregants would be barred, here, **every single attendee is prohibited from attending a worship service**. And worse, the Pasadena Prosecutor has threatened Harvest Rock Church with daily criminal charges and fines, and the Pasadena Public Health Department has threatened closure and attorney's fees. This is *per se* irreparable harm.

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

Not only are Applicants suffering irreparable harm on their right to worship, but they are also suffering irreparable harm by virtue of the governments' threat to criminally sanction them and **close their Churches**. On August 11, 2020, the Pastor of Harvest Rock Church received a letter from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena threatening criminal penalties, including fines and imprisonment, for being open for worship against the Governor's Orders and local health orders. (Application, 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**. (Application, Exhibit H.) There is no world where criminalizing and threatening closure of Applicants' Churches comports with the Free Exercise Clause. **Notably, the Governor makes no mention of this astounding threat. And he has done nothing to alleviate these serious threats.**

As in *Catholic Diocese*, "the Governor has fought this case at every step of the way." 2020 WL 6948354, at *6 (Gorsuch, J., concurring). Indeed, the Governor continues to assert – even before this Court – that the pandemic permits him to impose the **complete prohibitions on indoor religious worship services** and vigorously defends his unconstitutional regime. (Opposition at 18-34.) The same vigorous defense was found by this Court to warrant intervention in *Catholic Diocese*. 2020 WL 6948354, at *6 (Gorsuch, J., concurring). This Court should reject the Governor's continued efforts to evade review of his unconstitutional regime.

C. Applicants Comply With Safety Protocols.

In *Catholic Diocese*, this Court found it relevant that the applicants were willing to engage in social distancing and enhanced sanitization to protect their congregants. 2020 WL 69483545, at *1. The sworn testimony below demonstrates that Applicants here are doing likewise. (Application, Ex. E at 43-45 (noting that Applicants engage in social distancing, inform guests to wear masks,[4] and pay to have their Church professionally sanitized after each service).) Also similar to *Catholic Diocese*, there are no reported cases of COVID resulting from the Applicants' religious gatherings.

III. THE COLOR-CODED TIER RESTRICTIONS ARE MORE RESTRICTIVE THAN THOSE IN *CATHOLIC DIOCESE*, DISCRIMINATE BETWEEN RELIGIOUS AND NONRELIGIOUS GATHERINGS, AND VIOLATE THE FIRST AMENDMENT.

A. Completely Prohibiting All Indoor Worship Services Is Plainly Unconstitutional And Violates The Free Exercise Clause.

[4] Federal courts have found discriminatory mask mandates, which prohibit individuals from fully engaging in religious exercise, violate the First Amendment as well. *See, e.g.*, *Denver Bible Church v. Azar*, No. 1:20-cv-02362, 2020 WL 6128994, *11 (D. Colo. Oct. 15, 2020)

As demonstrated *supra* and admitted by the Governor (Opposition at 8), the Blueprint completely prohibits indoor religious worship services in 51 Counties representing 99.1% of the California population. *See supra* Image 1. In *Catholic Diocese*, this Court held that New York's capacity limitations of more than 10 or 25 people were "far more restrictive than any COVID-related regulations that have previously come before the Court." 2020 WL 6948354, at *2. Yet, the Governor's regulations here – which completely prohibit all indoor religious worship services for 99.1% of Californians – **are far more restrictive than those in *Catholic Diocese***. There can be no more restrictive regulations than a total ban on religious gatherings for the vast majority of Applicants' Churches. In Tier 1, Applicants are prohibited from gathering for any religious service with any number of people. Astoundingly, the same prohibition applies to any religious gathering in the private homes of Applicants' congregants, regardless of the size of that small Bible study or service.

As this Court has held: "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." *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15 (1947). The Blueprint does what this Court said no state is permitted to do. The First Amendment plainly prohibits banning all religious worship services, regardless of the justification given for such a prohibition. In fact, the Chief Justice's dissent in *Catholic Diocese* suggests that imposing a total prohibition on religious worship services is unconstitutional. *Catholic Diocese*, 2020 WL 6948354, at *9 (Roberts, C.J., dissenting) ("Numerical capacity limits of 10 and 25 people, depending on the

applicable zone, do seem unduly restrictive. **And it may well be that such restrictions violate the Free Exercise Clause**." (emphasis added)); *id.* ("the challenged restrictions raise serious concerns under the Constitution.").

If restrictions on 10 and 25 people "raise serious concerns under the Constitution," *id.*, then – as Justice Gorsuch plainly stated – "**there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques**." *Id.* at *7 (emphasis added). The Governor's total prohibition on Applicants' religious worship services of any number of people is simply unconstitutional and must be enjoined.

B. *Catholic Diocese* Prohibits The Governor's Discriminatory Treatment Between Religious Worship Services And Similarly Situated Nonreligious Gatherings.

In *Catholic Diocese*, this Court held that the applicant churches "clearly established their entitlement to relief pending appellate review" because they "made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." 2020 WL 6948354, at *1 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialieah*, 508 U.S. 520, 533 (1993)). Indeed, **"the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment**." *Id.* (emphasis added). In *Catholic Diocese*, in the "red zone" a church could host no more than 10 people, and "orange zone" churches were limited to 25 people. *Id.* at *2. But, in "red zones," "businesses categorized as 'essential' may admit as many people as they wish," and those "essential businesses"

included "acupuncture facilities, camp grounds, garages . . . plants manufacturing chemicals and microelectronics and all transportation facilities." *Id.* In the "orange zone," this Court noted that "[t]he disparate treatment is even more striking" because "[w]hile attendance at a house of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." *Id.*

As this Court held in *Catholic Diocese*, "[b]ecause the challenged restrictions are not 'neutral' and 'of general applicability,' they must satisfy strict scrutiny." 2020 WL 6948354, at *2 (citing *Lukumi*, 508 U.S. at 546). The same is true of the Governor's color-coded Blueprint and its discriminatory treatment of Applicants' religious worship services.

1. The Governor's Discrimination Between Applicants' Churches And Nonreligious Gatherings In Tier 1 Cannot Withstand Strict Scrutiny.

The Governor's color-coded Blueprint operates in much the same – yet even harsher – fashion than the regime enjoined in *Catholic Diocese*. For 99.1% of the population in Tier 1 Counties, no indoor religious worship service is permitted at all. (Ex. F., Joint Statement at 1.) In that same Tier 1, however, food packaging and processing plants, laundromats, and warehouses are permitted to operate **with no numerical or capacity restrictions**. (Ex. F, Joint Statement at 6-7; Addendum at 2.) Despite totally prohibiting indoor worship service regardless of the number of people present or the size of the building, the Governor permits Grocery Stores and liquor stores to operate at 50% capacity with no numerical cap, other "essential retail" at 25% capacity with no numerical cap, and "Malls, Destination Centers, and Swap

Meets" to operate at 25% capacity with no numerical cap, and laundromats with no percentage or numerical cap. (Joint Statement at 5; Addendum at 2.)

In *Catholic Diocese*, this Court held that limitations of 10 and 25 people for religious worship services represented some of the most restrictive in the country. 2020 WL 6948354, at *2 ("They are far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-bit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services."). Here, the restriction is even more restrictive and far more severe than that at issue in *Catholic Diocese*. In Tier 1, there is no religious service permitted indoors, regardless of the size of the building or the number of people.

A complete prohibition of religious worship services cannot be the least restrictive means. Nonreligious gatherings are not subject to complete prohibitions in Tier 1 and are permitted to operate without any numerical restriction whatsoever.

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

2020 WL 6948354, at *4 (Gorsuch, J., concurring).

In Tier 1, much the same is true here. Judge O'Scannlain's dissent below points out the similarity between the Governor's restrictions here and those Justice Gorsuch pointed out in *Catholic Diocese*:

> 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 728, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting). If the restrictions at issue in *Catholic Diocese* fail strict scrutiny by limiting religious worship services to 10 or 25 people, then a total prohibition of religious worship services – by definition – cannot be the least restrictive means available to the Governor. The Application should be granted because the Governor's Blueprint and discrimination against religious worship services fails strict scrutiny.

2. The Governor's Discrimination Between Applicants' Churches And Nonreligious Gatherings In Tiers 2-3 Cannot Withstand Strict Scrutiny.

The Governor also largely ignores the discriminatory restrictions imposed on Applicants' Churches in Tiers 2-3. Yet, those restrictions (while effecting 0.9% of the population) still impose discriminatory prohibitions on religious worship services and will do so when the Governor decrees that certain Counties are permitted out of Tier 1's reign of terror completely banning religious worship services indoors.

In Tier 2, the treatment of religious worship services is also clearly discriminatory. Applicants' Churches may operate at 25% capacity or 100 individuals, whichever is fewer, but other gatherings are not subject to such restrictions or specific

numerical limitation. (Addendum at 3.) Food packaging and processing, laundromats, and warehouses may continue to operate without capacity limitations or numerical caps. (*Id.*) Grocery Stores, "Essential Retail" (*e.g.*, Walmart, Lowe's, Home Depot, and other "big box" stores), liquors stores, Shopping Malls, Destination Centers, and Swap Meets may operate at 50% capacity but with no explicit numerical cap. (*Id.*) Museums may operate at 25% capacity but without an express numerical limit, and gyms may operate at 10% capacity with no numerical cap. (*Id.*) Ten percent capacity of Harvest Rock Church's 1250 seats is 125, and 25% is 312. The capacity increases with the size of the building for every other similar congregate gatherings except places of worship!

In Tier 3, the treatment of Applicant Churches' religious worship service is again unconstitutionally discriminatory. Applicants may operate at 50% capacity or 200 people, whichever is fewer. (Ex. F, Joint Statement at 2; Addendum at 4.) Food packaging and processing, laundromats, warehouses, grocery stores, "big box" stores, malls, destination centers, and swap meets may all operate with any capacity or numerical restriction of any kind. (Addendum at 4.) Museums are permitted 50% capacity but with no numerical limitation. (*Id.*) Gyms, fitness centers, family entertainment centers, and cardrooms and satellite wagering centers may all operate at 25% capacity but with no numerical limitation. (*Id.*) Using Harvest Rock Church as an example, 25% would permit 312 people and 50% permits 625 people, but places of worship in Tier 3 are limited no more than 200 people no matter the building size.

Thus, while this Court suggested that restricting religious worship services based on the size of the facility **might** be a less restrictive alternative to 10 or 25-

person caps, *Catholic Diocese*, 2020 WL 6948354, at *2, it is by no means the Governor's saving grace. The Governor's restrictions on religious worship services in Tiers 2-3 are precisely the type of discrimination prohibited by *Catholic Diocese*. The overall holding of *Catholic Diocese* emphasizes that the Governor is not permitted to treat religious worship services less favorably than other nonreligious gatherings. Indeed, as Justice Kavanaugh succinctly stated:

> The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. **But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions**.

Id. at *8 (Kavanaugh, J., concurring) (emphasis added). The fact that the Governor only imposes strict numerical caps on religious businesses while "[e]ssential businesses and many non-essential businesses are subject to no attendance caps at all" demonstrates that Governor has violated the First Amendment.

"**[E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty**." *Id.* at *3 (emphasis added). And,

> People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens

> there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. ***That* is exactly the kind of discrimination the First Amendment forbids**.

Id. at *4 (Gorsuch, J., concurring) (bold emphasis added). The Governor's color-coded executive edicts restricting religious worship should meet the same fate.

IV. THE LOWER COURT'S RELIANCE ON *SOUTH BAY* AND ITS CONCOMITTANT EXTENSION OF UNDUE DEFERENCE TO THE GOVERNOR WAS IN ERROR.

The Governor contends that Applicants erroneously cite *Jacobsen* as relevant to the instant Application, arguing that neither the district court nor the Ninth Circuit relied upon it to reject Applicants' claims for injunctive relief. (Opposition at 33.) The Ninth Circuit below and the district court placed great emphasis on the deferential standard that should be applied to government during a perceived pandemic. *See Harvest Rock Church*, 977 F.3d at 731 (relying upon the Chief Justice's concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) to note that deference to state governments is warranted during a perceived crisis); *Harvest Rock Church v. Newsom*, No. LACV 20-6414 JCB (KKx), 2020 WL 5265564, *3 (C.D. Cal. Sept. 2, 2020) ("the Governor has determined that these activities are essential services, and therefore must be exempted from other guidelines for the health and safety of California residents—a determination which is entitled to this Court's deference.").

Much like many courts before it, this undue level of deference derives its rationale from *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). "To justify its result,

the concurrence reached back 100 years in the U.S. Reports to grab hold of our decision in *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905)." *Catholic Diocese*, 2020 WL 6948354, *5 (Gorsuch, J., concurring). But, "***Jacobsen* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction**." *Id.* (emphasis added).

Contrary to the lower courts' unwarranted extension of undue deference to infringements on fundamental rights and their reliance on *Jacobsen* to do it, "*Jacobsen* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id.*

> Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

Id.

"Even if judges may impose emergency restrictions on rights that some have found hiding in the Constitution's penumbras, **it does not follow that the same fate should befall the textually explicit right to religious exercise**." *Id.* (emphasis added). As Justice Gorsuch noted, "no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic." *Id.* at *6. Noting the heavy reliance lower courts have placed on *Jacobsen*, Justice Gorsuch continued,

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, **we may not shelter in place when the Constitution is under attack**. Things never go well when we do.

Id. (emphasis added). *See also id.* at *8 (Kavanaugh, J., concurring) ("[J]udicial deference in an emergency or crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.").

There is no pandemic pause button on the First Amendment. "Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long." *Id.* at *6 (Gorsuch, J., concurring). Indeed, "**[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.** Rather than applying a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause." *Id.* at *5 (emphasis added).

V. THE PUBLIC INTEREST ALSO FAVORS INJUNCTIVE RELIEF.

The Governor contends that the public interest does not favor injunctive relief here because the COVID-19 pandemic is simply too risky to permit indoor religious worship services "at this time," and the Governor's prohibitions on religious worship are merely "temporary." (Opposition at 36.) As the district court in Pennsylvania recently held, however, "temporary" "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." *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 55106990, *9 (W.D. Pa. Sept. 14, 2020) (emphasis added). This is precisely why this Court held, in *Catholic Diocese*, that "even in a pandemic, the Constitution cannot be put away and forgotten," 2020 WL 6948354, at *3, and "it has not been shown that granting the applications will harm the public." *Id.*

Indeed, "the public has a profound interest in men and women of faith worshipping together [in person] in a manner consistent with their conscience." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020). Put simply, "**at this point and in this place, the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment**." *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (emphasis added).

The Governor's "color-coded executive edicts" violate the cherished liberties enshrined in the First Amendment, and the public has no interest – pandemic or not – from seeing the government enforce unconstitutional restrictions on Applicants' religious worship services. *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). The injunction should issue.

CONCLUSION

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

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Respectfully submitted,

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

Counsel for Applicants