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' *Renewed* Emergency Application for Writ of Injunction Relief Requested Before December 12, 2020

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

Counsel for Applicants

QUESTIONS PRESENTED

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

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

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

PARTIES

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

RULE 29 DISCLOSURE STATEMENT

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

DIRECTLY RELATED PROCEEDINGS

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-55907, currently pending preliminary injunction appeal (9th Cir. 2020).

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

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-55907, Petition for Rehearing En Banc of denial of motion for injunction pending appeal currently pending (9th Cir. 2020).

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

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

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

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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]

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

Pursuant to Sup. Ct. Rules 20, 22 and 23, 28 U.S.C. §1651, and 28 U.S.C. §2101, Applicants Harvest Rock Church, Inc. and Harvest International Ministry, Inc. (collectively "Applicants"), herby file this ***renewed*** application for an emergency writ of injunction—requesting relief **before this Sunday, December 13, 2020**—against Respondent Governor Newsom's Emergency Proclamation and subsequently issued stay-at-home orders, including the currently operative "Blueprint for a Safer Economy" (the "Blueprint"), which establishes a statewide framework of four Tiers with sector-specific restrictions in each tier and imposes an unconstitutionally discriminatory regime that relegates Applicants' fundamental right to religious exercise to constitutional orphan status.

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

[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*].

a Writ of Injunction on December 1, 2020. On December 3, 2020, after referring the First Application to this Court, this Court issued the following Order:

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

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

On the next morning, December 4, Applicants filed a renewed Motion and Memorandum of Law for a TRO and Preliminary Injunction. (A copy of Applicants' Renewed Motion for TRO and Preliminary Injunction is reproduced in the Renewed Appendix as Exhibit C.) Applicants also filed a notice requesting the district court to issue injunctive relief without the delay of a hearing due to the irreparable harm. The Governor opposed the requested relief, stating that although "Plaintiffs requested an injunction of California's restrictions on worship services, the Supreme Court did not

grant one." (Renewed Appendix, Ex. E.) The Governor also argued that this Court did not issue the injunction in *Catholic Diocese* "merely because of New York's severe restriction on worship services" . . . but "because the New York Governor made comments that appeared to target a religious community" (Renewed Appendix, Ex. E at 2.) Yet, this Court said that "even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Catholic Diocese*, 2020 WL 6948354, at *1.

On Monday, December 7, Applicants filed a response in the district court emphasizing the harsher restrictions in California compared to New York and the impending criminal threats against Harvest Rock Church, the pastors, staff, and parishioners. Applicants also pointed the district court to this Court's case law when it Court Grants, Vacates, and Remands (GVR) a case for further consideration in light of its recent decision involving similar cases.

On December 8, at 5:00 PM Easter Time, the district court held a ten-minute hearing refusing to address the requested relief. Instead, the district court accepted the request of the Governor to kick the can down the road (yet again) so that the Governor could file yet another brief on December 14, followed by a hearing on December 18. **But, the Governor had plenty of time to file a response to the Renewed Motion for TRO, but his requests for further briefing was only meant to further delay Applicants' requested relief**. Delay for delay's sake is plainly unconstitutional, particularly where irreparable harm is being suffered each day. The district court was wholly unconcerned about the irreparable harm currently

being imposed on Applicants or addressing this Court's decision in *Catholic Dioceses*. And, as for the Governor's request for additional briefing, it is absurd at this point. Applicants and the Governor have submitted thousands of pages of briefing and argument, including at the district court, the Ninth Circuit, and this Court, all on the precise question at issue in Applicants' Renewed Motion for TRO and Preliminary Injunction. The notion that additional briefing is required for the district court to address the merits of Applicants' emergency relief is plainly absurd. *Catholic Diocese* settled the matter, and the duty of the district court was clear. Yet, it refused to perform that obligation and issue the TRO.

Applicants argued that yet another delay was tantamount to a denial of the requested relief and asked the district court to issue a denial of the TRO and PI to permit Applicants to proceed to the Ninth Circuit. The district court refused to do so, and it stated Applicants could consider their relief denied but that no written order would be forthcoming. Without a written order, Applicants have no redress to appeal to the Ninth Circuit. Applicants only recourse for relief is to ask this Court to issue an injunction while the case proceeds below. The irreparable harm in this case is real, serious, and ongoing each day, especially with the written threat of criminal prosecution from the Pasadena Criminal Prosecutor and the impending Christmas season – one of the two most important Christian holy days of the year.

Despite this Court's GVR Order, **the district court has yet again refused to issue the constitutionally mandated injunctive relief Applicants' renewed motion for temporary restraining order and preliminary injunction**

requested. Despite this Court's unequivocal holding in *Catholic Diocese* that "the Governor's severe restrictions on applicants' religious services must be enjoined," 2020 WL 694835, *4, and the fact that the restrictions at issue here—**which completely prohibit religious worship services for 99.9% of all Californians and the vast majority of Applicants' Churches**—the district court refused to issue Applicants' requested TRO and preliminary injunction. In fact, the district court refused to even hear argument regarding the irreparable harm and the merits of this Court's decision in *Catholic Diocese*. Instead, the district court has acceded to the Governor's request to further brief issues already settled by this Court in *Catholic Diocese*, delayed decision on Applicants' request for a TRO and preliminary injunction until, at the earliest, the December 18th hearing (and probably much later while the court takes it under advisement), and placed its Article III imprimatur on the precise irreparable harm from which Applicants have desperately sought relief since July.

As discussed more fully *infra*, the district court's previous delays required Applicants to wait **59 days** before any written order was issued on their requested emergency relief. Forcing Applicants to endure that same delay yet again only imposes the precise harm from which they are begging for relief.

For **nearly ten months**, the Governor has continued to discriminate against Applicants' religious worship services while permitting myriad nonreligious entities to continue to gather without numerical restrictions *inside the same house of worship* and in other external comparable congregate assemblies; publicly encouraging and supporting mass protestors, rioters, and looters to gather without numerical

restriction in blatant disregard for his own Orders; and has purported to prohibit religious worship services—**even in the private homes of Californians—**despite the fundamental protections enshrined in the First Amendment. (*See* First Application at 18–30.)

As a result of the Governor's COVID-19 restrictions on religious worship, Harvest Rock Church has received letters from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena and from the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatening up to 1 year in prison, daily criminal charges and $1,000 fines against the pastors, church, governing board, staff, and parishioners, which includes a threat to close the church. (*See* Appendix of Exhibits to First Application for Writ of Injunction, "First Appendix," Exs. G, H.) Emergency relief is needed now to prevent criminalizing constitutionally protected religious exercise.

Despite the sea change that this Court's *Catholic Diocese* opinion rendered on similar COVID-19 restrictions, the district court is continuing to ignore the unconscionable, unconstitutional, and irreparable harm that is being imposed on Applicants every day the orders are in place. **Applicants have been subject to complete prohibitions and severe restrictions for nearly ten months, have been forced to choose between jail and attending Church on the Holy Day of Easter and the Day of Pentecost, and now are threatened with missing another Holy Season of Christmas due to the district court's refusal to act.** The time has come to relegate the unconstitutional and unconscionable restrictions

on Applicants' religious freedoms to their rightful place in the dustbin of constitutional history. The instant *renewed* emergency application for a writ of injunction should be granted, and the Governor enjoined from enforcing his unconstitutional prohibitions on religious worship. This Court's decision in *Catholic Diocese* demands nothing less.

JURISDICTION

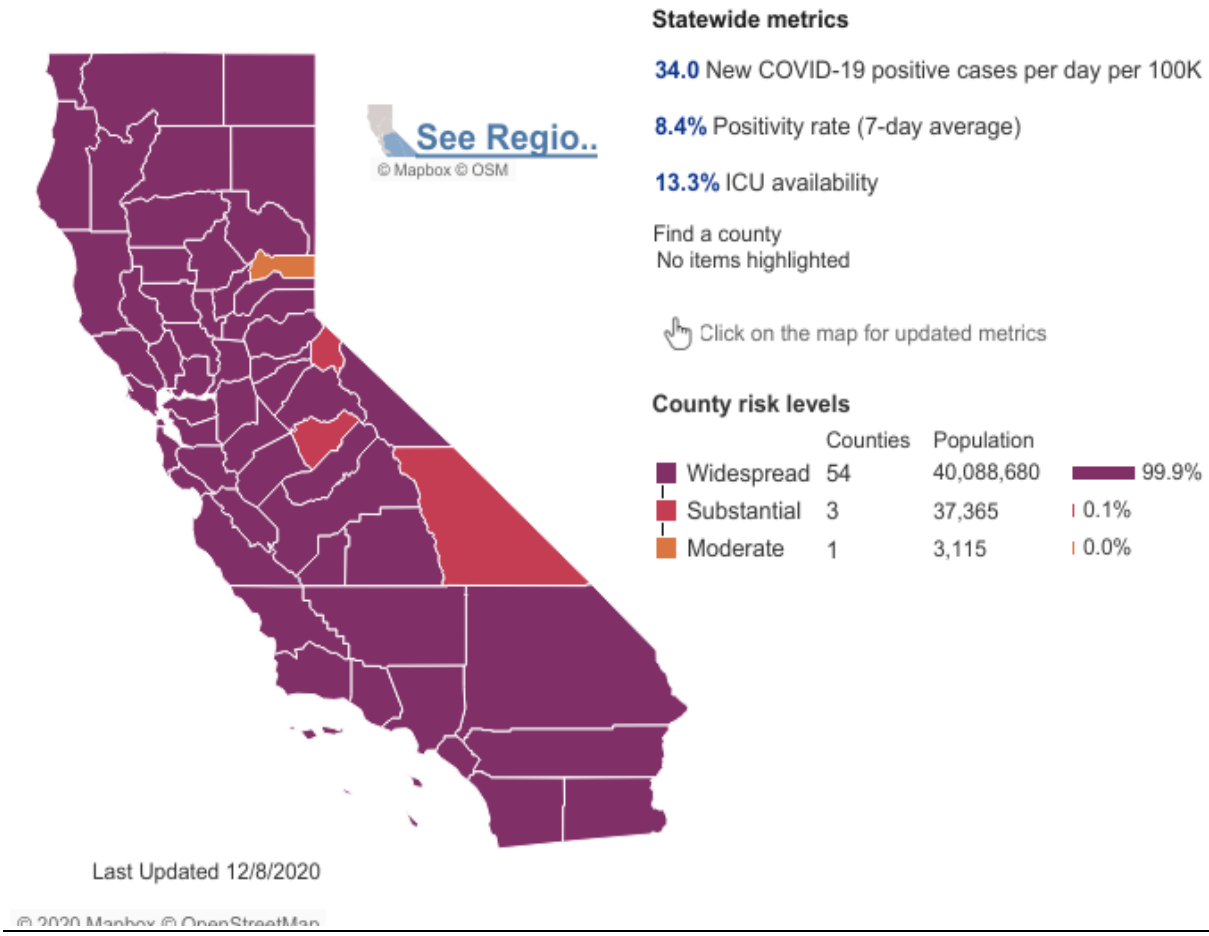
Applicants sought relief from this Court requesting an emergency writ of injunction pending appeal. Applicants obtained the GVR Order of this Court on December 3, 2020, which was fulfilled by the Ninth Circuit below, but have been ignored by the district court. This Court has jurisdiction under 28 U.S.C. §1651 and by virtue of 28 U.S.C. 2101(e).

INTRODUCTION

As of December 8, 54 Counties in California—representing **99.9% of the population**—are in Tier 1 under the Governor's Blueprint for a Safer Economy. The below image—from California's official Blueprint website—demonstrates how widespread the Governor's most severe restrictions are in California.[2]

[2] Blueprint for a Safer Economy, *Current tier assignments as of December 8, 2020*, https://covid19.ca.gov/safer-economy/ (last visited December 8, 2020).

Image 1 – Blueprint Map



The consequence of the sea of purple in the above "color-coded executive edict" is that **indoor worship services are completely prohibited for 99.9% of Californians, including the vast majority of Applicants' Churches and congregants**. (*See* First Appendix, Exhibit F, Joint Statement, at 1.) Yet, food packing 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 First Application, "Chart," at 2.) For the 0.1% of Californians in Tier 2 Counties, the Governor permits limited indoor worship at 25% capacity or 100 individuals,

whichever is less. (Joint Statement at 1.) Yet, other similar congregate gatherings have no numerical limit, including museums, gyms, and fitness centers. (Chart 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. (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. (Chart at 4.)

For Applicants, 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. (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* Chart 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**

every day by virtue of the unconstitutional regime of the Governor's edicts, and the district court's failure to abide by this Court's binding instruction in *Catholic Diocese* warrants injunctive relief instantly. 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, but that is precisely the fate that the district court has imposed upon Applicants by ignoring this Court's binding precedent.

FACTUAL DEVELOPMENTS

A. It Took the District Court 59 Days to Consider Applicants' Previous Request for Emergency Relief and Issue a Written Order Allowing Applicants to Seek Injunctive Relief From the Appellate Court.

Prior to seeking the relief requested from this Court in the First Emergency Application, Applicants appropriately and timely sought relief in the lower courts at every stage. Applicants instituted this action on July 17, 2020, filing a Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction in the district court. (First Appendix, Ex. E.) On July 20, 2020, the district court denied Applicants' motion for a temporary restraining order and set a briefing schedule on Applicants' motion for preliminary injunction. (First Appendix, Ex. D.) After briefing concluded and the district court held a hearing on Applicants' request for a preliminary injunction on August 8, in which the district court *verbally* denied Applicant's preliminary injunction and indicated it would expeditiously deny the preliminary injunction in a written order. However, the district court did not issue its written denial on Applicants' motion for preliminary injunction until September

2, a full three weeks (21 days) after its promised expedited decision. (First Appendix, Ex. C.) **Thus, in the first instance, Applicants were deprived of their cherished constitutional liberties for 47 days under the threat of jail and significant daily fines**.

During the hearing on Applicants' motion for preliminary injunction, the district court indicated it would deny Applicants' motion for an injunction pending appeal but that it would act on it very expeditiously. Applicants filed that motion for an injunction pending appeal on August 21, 2020 (notably, while Applicants were still waiting for the promised expeditious denial of a preliminary injunction), but the district court yet again delayed Applicants' requested relief and did not issue its written denial of the injunction pending appeal until September 16. (First Appendix, Ex. B.) Thus, in the second instance, despite a promise to expeditiously issue its decision so that Applicants could pursue further relief in the Ninth Circuit, **the district court delayed another 26 days before issuing its written order allowing Applicants to seek an injunction pending appeal from the appellate court**.

All told, despite being fully briefed on the emergency nature of the requested relief and the ongoing irreparable harm that was being imposed on Applicants each day relief was denied, **the district court failed to issue an order that ultimately permitted Applicants to seek injunctive relief on appeal for 59 days**.

Notably, too, it took the Ninth Circuit another **20 days** to finally issue its decision denying Applicants the emergency injunctive relief they were diligently and

desperately seeking. (First Appendix, Ex. A.) Thus, in total, **Applicants' efforts to secure emergency relief in the lower courts took 79 days, and every one of those days worked an irreparable injury on Applicants' cherished constitutional liberties and brought with it a constant, daily threat of jail time and other criminal penalties**.

B. This Court's GVR Order, the Ninth Circuit's Order, and Applicants' Renewed Motion for TRO and Preliminary Injunction.

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

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

(Renewed Appendix, Ex. A, GVR Order). That same day, the United States Court of Appeals for the Ninth Circuit issued its order vacating its prior decision and that of

the district court denying injunctive relief and remanding the matter to the district court for further consideration in light of this Court's *Catholic Diocese* decision. *See Harvest Rock Church v. Newsom*, No. 20-55907, 2020 WL 7075072 9th Cir. Dec. 3, 2020) (Renewed Appendix, Ex. B.)

C. The District Court Continues to Impose Irreparable Harm on Applicants by Subjecting Their Renewed Motion for a TRO and Preliminary Injunction to More Delays and Refusing to Provide the Requested Injunctive Relief Prescribed by This Court.

On December 4, 2020, one day after this Court entered its GVR Order on Applicants' First Application (GVR Order, 2020 WL 7061630, at *1) and the Ninth Circuit vacated both its own order and the district court's denial of injunctive relief and remanded to the district court (Renewed Appendix, Ex. B, 2020 WL 7075072), Applicants filed a renewed motion for temporary restraining order and preliminary injunction in the district court. (A copy of Applicants' Renewed Emergency Motion for Temporary Restraining Order and Preliminary Injunction is reproduced in the Renewed Appendix as Exhibit C.) That same day, Applicants submitted a notice to the district court that a hearing was unnecessary and unwarranted given the unequivocal holdings of this Court in *Catholic Diocese*, and asserted that a TRO and preliminary injunction should be issued immediately.

The next day, despite Applicants' request for emergency relief before Sunday, December 6, 2020, the district court issued a scheduling order setting a hearing for Applicants' Renewed Emergency Motion for TRO and Preliminary Injunction for December 8, 2020—**two days after the requested relief date (facilitating another Sunday of unconstitutional prohibitions on Applicants' religious**

worship services). (A copy of the district court's scheduling notice is reproduced in the Renewed Appendix as Exhibit D.) On December 5, the Governor requested that the district court delay the hearing until December 18 to allow him to submit yet another brief featuring epidemiologists, purportedly to show why this Court's decision in *Catholic Diocese* should not be used to enjoin his even more restrictive prohibitions on Applicants' religious worship services. (A copy of the Governor's request for a delayed hearing is reproduced in the Renewed Appendix as Exhibit E.)

The December 8 hearing at 5:00 PM ET in the district court took place as scheduled, but—though it was noticed as a hearing on Applicants' Renewed Motion for TRO and Preliminary Injunction—involved no discussion whatsoever of Applicants' requested emergency relief, no discussion of this Court's *Catholic Diocese* decision, and no discussion of the merits of Applicants' request for emergency relief. The hearing lasted only ten minutes. In fact, the district court refused to permit Applicants to present any argument whatsoever and only stated that it was granting the Governor's requested delay and briefing and continuing the hearing to December 18. Thus, the district court will not reconsider its denial of injunctive relief in light of this Court's *Catholic Diocese* decision, as required by this Court's GVR Order, until December 18 at the earliest, at a hearing that—as the procedural history demonstrates—will not result in any timely disposition of Applicants' renewed request for emergency injunctive relief. In fact, with the procedural history of this case as a guide, **Applicants cannot hope for any form of relief for (at best) 21 days after the scheduled December 18th hearing, which would force them—**

yet again—to be subject to criminal sanctions for celebrating Christmas, one of the Holiest Days of the year. The district court is not taking serious either the irreparable harm suffered by Applicants or this Court's precedent in *Catholic Diocese* and express direction in this case.

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**." *Catholic Diocese*, 2020 WL 6948354, at *3 (emphasis added). Yet, the district court is forcing Applicants to not only bear that risk, but to suffer more delays and more irreparable harm each day it refuses to act. **This Court must remove the sword of Damocles hanging over Applicants and grant the relief the lower courts have refused to provide.**

REASONS FOR GRANTING THE RENEWED APPLICATION

Applicants' entitlement to relief in the instant Application is indisputably clear under this Court's holding in *Catholic Diocese*, where the applicant churches "clearly established their entitlement to relief" 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)). As demonstrated *infra*, the restrictions at issue here are far worse than those at issue in *Catholic Diocese* because they impose a **total prohibition on religious worship services for 99.9% of California and virtually all of Applicants' Churches**. And, as this Court's GVR Order in the

instant matter demonstrates, *Catholic Diocese* should have instructed the district court as to its constitutional obligations here. Unfortunately for Applicants, however, the district court ignored this Court's instructions, and the irreparable harm from which Applicants seek relief continues unabated. That must end, and it must end today.

As this Court unequivocally held nearly 75 years ago: "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 unconstitutional regime at issue here does what *Everson* 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 the Governor's imposition of 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.* ("[T]he 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.

I. THE URGENCY OF APPLICANTS' REQUESTED INJUNCTIVE RELIEF WARRANTS THIS COURT'S INTERVENTION NOW, AND THE DISTRICT COURT'S REFUSAL TO ISSUE INJUNCTIVE RELIEF AFTER THIS COURT'S UNEQUIVOCAL HOLDING IN *CATHOLIC DIOCESE* IMPOSES DAILY IRREPARABLE INJURY ON APPLICANTS.

The Governor contended that this Court should stay its hand because the lower court should review *Catholic Diocese* in the first instance. (Opposition to First Emergency Application for Writ of Injunction, "Opposition," at 16–17.) This Court gave the lower court a chance to do just that in its GVR Order (Renewed Appendix, Ex. A, 2020 WL 7061630, *1), but the district court has now refused to follow this Court's clear roadmap for the First Amendment analysis applicable to similar restrictions imposing unconstitutional and unconscionable injury on Applicants. Whether Applicants might have a chance to obtain relief in 10 days, at the next district court hearing, or—as the history of this case shows to be more likely—**21 to 59 days after** the hearing (if the district court follows this Court's orders at all) is beside the point. The First Amendment and *Catholic Diocese* demand more.

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**." *Catholic Diocese*, 2020 WL 6948354, at *3 (emphasis added). In fact, in *Catholic Diocese*, this Court noted that "[t]hirteen

days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago." *Id.* Here, the delay and the restrictions are far worse than a mere 13 days or one week. **Applicants have been denied relief at every turn by the lower courts since July 17th** (First Appendix, Ex. E), and the district court continues to refuse to prevent the irreparable harm Applicants suffer each day. Only this Court can stop that unconstitutional nonsense.

The district court's astounding lack of respect for this Court's clear roadmap in *Catholic Diocese* and its concomitant imposition of further 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. As 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).

That is precisely what the district court's delay is imposing on Applicants. Applicants are still in the Tier 1 restrictions (as are 99.9% of Californians) 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 and its pastors and parishioners face daily criminal threats, fines, and closure. (*See* First

Appendix, 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.").) The district court ignored all of these urgencies, and it ignored the urgencies noted in this Court's *Catholic Diocese* opinion to assert that further delay, briefing, and hearing are necessary. Yet, the district court's refusal to act leaves Applicants begging for the relief the Constitution demands and *Catholic Diocese* prescribed.

Sadly, the district court's failure to act in this matter has made Justice Gorsuch's concurrence in *Catholic Diocese* quite prescient:

> 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 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).

Unfortunately, returning to this Court "wondering whether future services will be disrupted as the High Holy Days were" and "preparing for Christmas," *id.*, with no relief forthcoming from the district court is precisely what Applicants have been forced to do because of the district court's refusal to follow the clear and binding precedent of *Catholic Diocese*. Not only has the district court refused Applicants'

requested injunctive relief at every instance and delayed decisions on Applicants' previous requests by a cumulative 59 days, is has now also subjected Applicants to further criminal fines, imprisonment, and sanctions for going to Church on the Holy Day of Christmas by denying the emergency relief requested by Applicants in this matter. (Renewed Appendix, Ex. C.) **And, despite *Catholic Diocese,* the district court is continuing to impose that unconstitutional restriction on Applicants due to its delay**.

Notably, Applicants' instant renewed application to this Court is precisely what the Court has suggested similarly situated applicants do when circumstances—such as those clearly at issue here—warrant returning to the Court for emergency relief. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 140 S. Ct. 2823, 2823–24 (U.S. 2020) (denying applicants' request for an emergency writ of injunction "without prejudice to filing a new motion for appropriate relief **if circumstances warrant**" (emphasis added)).

Moreover, even the dissenting Justices of this Court's *Catholic Diocese* decision recognized that returning to this Court for emergency relief is appropriate when necessary. Indeed, as Justice Breyer noted, if the circumstances warranted and relief was necessary from this Court, Applicants "could refile their applications here, by letter brief if necessary. And this Court, if necessary, **could then decide the matter in a day or two, perhaps even in a few hours**." *Catholic Diocese*, 2020 WL 6948354, at *11 (emphasis added) (Breyer, J., concurring, joined by Sotomayor, J., and Kagan, J.); *see also id.* at *9 (Roberts, C.J., dissenting) (noting that "we can act

quickly on their renewed applications" if emergency circumstances warrant intervention). It is plainly evident here that circumstances so warrant.

In his response to Applicants' First Emergency Application, the Governor admitted 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."); at 14 ("We recognize that the current restrictions interfere with Plaintiffs' legitimate interest in participating in indoor worship services."); 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"); at 35 (noting the "injury that is inherent in any restriction on attending in-person religious worship services").) Yet, when this Court vacated the district court's and Ninth Circuit's previous denials of injunctive relief under *Catholic Diocese*, providing a clear roadmap for vindicating Applicants' First Amendment rights in the face of COVID-19 executive orders, the Governor nevertheless continued to attempt to escape any review of his blatantly unconstitutional prohibitions on Applicants' religious worship services by asking—**yet again**—for more delays, more briefing, and more imposition of unconstitutional and unconscionable prohibitions on religious worship. (Renewed Appendix, Ex. F.)

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. Yet, the district court's continued delay and denial of emergency relief demanded by the First Amendment is imposing precisely that harm from which Applicants seek relief. As Justice Kavanaugh also recognized,

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

Catholic Diocese, 2020 WL 6948354, at *9 (emphasis added) (Kavanaugh, J., concurring).

Applicants brought their First Application prior to the issuance of this Court's *Catholic Diocese* decision, and Applicants respect this Court's GVR Order informing the district court to follow its instructions in *Catholic Diocese*. Indeed, circumstances such as this Court's issuance of *Catholic Diocese* while Applicants' First Application was pending is precisely why this Court issues GVR orders. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("a GVR order conserves the scarce judicial resources of this Court that might otherwise be expended on plenary consideration [and] assists the court below by flagging a particular issue that does not appear to have been fully considered"). As this Court has acknowledged, "[a]s a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. **But we fulfill our judicial responsibility by instructing lower courts to apply the new rule retroactively to cases not yet final**." *Griffin v. Kentucky*, 479 U.S. 314, 326 (1987) (emphasis added). *See also Lawrence*, 516 U.S. at 167 (same).

Unfortunately, Applicants' constitutional rights and cherished First Amendment liberties to attend religious worship services hang in the balance while the district court fails to countenance this Court's opinion in *Catholic Diocese*, fails to recognize the importance of this Court's GVR Order in the instant matter, and fails to fulfill its obligation to apply the new rule of *Catholic Diocese* in the instant matter. **And, every Justice of this High Court has affirmed Applicants' right to return to this Court when such a circumstance occurs**. *Catholic Diocese*, 2020 WL 6948354, at *3 (majority's recognizing injunctive relief is warranted immediately upon the showing for its need); *id.* at *9 (Roberts, C.J., dissenting) (recognizing that renewed applications for emergency relief are appropriate and that "applicants can return to this Court, and we could act quickly on their renewed applications"); *id.* at *11 (Breyer, J., concurring, joined by Sotomayor, J., and Kagan, J.) (noting that applicants can "refile their applications here, by letter brief if necessary" and noting that this Court could "decide the matter in a day or two, perhaps even a few hours").

As Justice Gorsuch noted, "[i]t has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions." *Id.* at *6 (Gorsuch, J., concurring). Here, Applicants have worked not only weeks for relief, **they have fought and struggled for nearly 6 months attempting to secure relief for their cherished First Amendment rights, and just when this Court's GVR Order gave them hope for a restoration of their constitutional rights, the district court ignored their cries and imposed yet another delay**. Irreparable harm is being

suffered by Applicants each day this Court stays its hand, and the district court's refusal to act only highlights the imperative need for this Court to issue immediate injunctive relief.

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 EVEN AFTER THIS COURT HANDED DOWN ITS UNEQUIVOCAL HOLDING IN *CATHOLIC DIOCESE*.

"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 Governor's Orders Remain in Place.

Applicants have and exercise sincere religious beliefs, rooted in Biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so even more in times of peril and crisis. (First Appendix, Ex. E, V. Compl. ¶¶ 48–54, 57–58, 65.) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F.

Supp. 3d 901, 912 (W.D. Ky. 2020) (emphasis added). And Applicants' Churches also have and exercise sincere beliefs that obedience to Scripture requires them to sing as, and in, their worship of God. (V. Compl. ¶¶ 59–64.) Though the Governor might not view church worship services and singing as fundamental to Churches' religious exercise—or "Essential Critical" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Orders prohibiting or restricting Applicants' religious worship services inside their churches or private homes, and prohibiting singing even where limited worship is allowed, on pain of criminal sanctions, unquestionably and substantially burdens Churches' exercise of religion according to their sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added). *See also Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (same)

"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 more so here where Applicants churches in Tier 1 (which represents 99.9% of all California residents and virtually all 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—even for the Holy Day of Christmas**. And worse, the Pasadena Prosecutor has threatened Harvest Rock Church, its pastors, congregants, operators, and attendees with daily criminal charges and fines, and the Pasadena Public Health Department has threatened closure and imposition of attorney's fees. This is *per se* irreparable harm.

B. Applicants Suffer Under the Yoke of Threatened Closures 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**. And, despite this Court's *Catholic Diocese* opinion, the district court's unconscionable and unconstitutional refusal to issue injunctive relief imposes that harm on Applicants even for the Christmas season. 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. (First Appendix, Ex. 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**. (First Appendix, 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.").) There is no world where criminalizing and threatening closure of Applicants' Churches comports with the Free Exercise Clause. **Notably, the district court ignored this astounding threat while continuing to ignore the harm imposed on Applicants each and every day. And the district court has done nothing but imposed unending agony on Applicants by ignoring these serious threats with its refusal to apply the clear import of *Catholic Diocese* and by failing to enjoin such unconstitutional government action prior to the Holy Day of Christmas**.

As in *Catholic Diocese*, "the Governor has fought this case at every step of the way." 2020 WL 6948354, at *6 (Gorsuch, J., concurring). Here, the Governor is still fighting this case at every step, including after this Court's clear pronouncements in *Catholica Diocese* and after Applicants sought a renewed motion for TRO and preliminary injunction after this Court's GVR Order. (Renewed Appendix, Ex. F.) Indeed, the Governor continues to assert—even after this Court's GVR Order and *Catholic Diocese*—that the pandemic permits him to impose the **complete prohibitions on indoor religious worship services** and vigorously defends his unconstitutional regime. (Renewed Appendix, Ex. F at 2 (arguing that "*Roman Catholic Diocese* does not mandate a temporary restraining order here" because this Court "enjoined a portion of the limits imposed by New York because the New York Governor made comments that appeared to target a religious community.").) The same vigorous defense was found by this Court to warrant intervention in *Catholic*

Diocese. 2020 WL 6948354, at *6 (Gorsuch, J., concurring). **It should warrant this Court's intervention here even more when lower courts refuse to apply this Court's unequivocal precedent to prevent daily irreparable harm**. This Court should reject the Governor's continued efforts to evade review of his unconstitutional regime. The time has long past for this Court to put an end to Applicants' suffering of unconstitutional, unconscionable, and irreparable harm. Applicants requested this relief before and were optimistic that this Court's GVR Order would facilitate their months-long struggle for relief. Applicants' optimism should have been actualized, but the district court has refused to abide by this Court's clear holding in *Catholic Diocese*, has refused to grant Applicants the requested injunctive relief mandated by *Catholic Diocese*, and has essentially cast Applicants into an unending sea of doubt wondering whether vindication of their clear constitutional rights will ever be forthcoming. This Court should conclude the seemingly unending journey of Applicants, and grant their Renewed Application.

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. (First Appendix, Ex. E at 43–45 (noting that Applicants engage in social distancing, inform guests to wear masks,[3] and pay to have

[3] 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).

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.

As demonstrated *supra*, the Blueprint completely prohibits indoor religious worship services in 54 Counties representing 99.9% 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 99.9% 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. The district court's refusal to halt the Governor's unconstitutional regime and issue a TRO and preliminary injunction plainly flouts this Court's decision in *Catholic Diocese*. The district court's failure to recognize the clear import of this Court's binding precedent in *Catholic Diocese*, its refusal to even hear argument concerning the import of the plain holding of *Catholic Diocese*, and its refusal to issue injunctive relief against government order **imposing**

the far more severe prohibition on any religious worship cannot stand. Applicants have no other avenue to obtain relief. Only this Court can put an end to the unconstitutional reign of terror under which Applicants suffer each day. The Renewed Application should be granted and an emergency writ of injunction issued,

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 *Lukumi*, 508 U.S. at 533). 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. Yet, the district court continues to ignore it, continues to impose further irreparable harm on Applicants, and continues to preclude Applicants from obtaining the injunctive relief to which they have now been entitled since this Court's November 25th decision in *Catholic Diocese*.

Under this Court's clear precedent, the Court's GVR Order in the instant matter requires the district court to "**apply the new rule [in *Catholic Diocese*] to cases not yet final**." *Griffin*, 479 U.S. at 326 (emphasis added). The district court's astounding refusal to do so plainly violates this Court's *Catholic Diocese* and other precedents, plainly violates the First Amendment, and unquestionably imposes unconstitutional and unconscionable injury on Applicants as they desperately seek emergency relief before yet another Holy Day passes them by without judicial intervention.

As noted *supra*, Applicants have now been forced to endure restrictions on their religious rights during the Holy Days of Good Friday and Easter, were forced to endure such restrictions during their cherished celebration of Pentecost, and now face yet another restriction on their right to celebrate the Holy Day of Christmas, celebrating the birth of their Lord Jesus Christ. How long must Applicants endure

this tyranny over their cherished liberties? How many Holy Days must Applicants suffer between choosing prison and celebrating their faith?

As one Article III court put it, "[f]or Christians, there is nothing minimal about celebrating Easter, the holiest day in the Christian Calendar." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky. 2020). Yet, under the Governor's Orders, Applicants were subject to criminal sanctions for attending Easter services. Then, again, at Pentecost in May. And, now, the district court's further delay threatens to impose yet another prohibition on Applicant's right to gather for a religious service celebrating the birth of their Lord, another foundationally important event for Applicants. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (recognizing Christians' celebration of Christmas as vital to their religion).

As this Court has held, "**[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses**." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (emphasis added). The district court has seemingly refused to recognize this Court's precedent, and its refusal to recognize the ongoing, irreparable, and unconstitutional injury on Applicants' religious exercise continues unabated. This Court must grant the Renewed Application and prevent Applicants from missing yet another Holy Day without the threat of crippling criminal sanctions. **Enough is enough**. No Applicants should be required to choose between celebrating the birth of their Lord Jesus Christ and prison. This Court's precedent, and the First Amendment itself, make that plain. Indeed,

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

Ex Parte Milligan, 71 U.S. 2, 120–21 (1866) (emphasis added).

Should the district court's unending delay prevail, it could well be said that exigencies demand discarding the First Amendment. Such nonsense is not the law.

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

Id. at 124. Applicants pray for the exercise of that same "watchful care" now. Though it is now "insisted that the safety of the country in time of [crisis] demands that this broad claim for [unending emergency deference] shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." *Id.* at 126. The district court's refusal to act in the face of this Court's binding and unequivocal pronouncement in *Catholic Diocese* warrants injunctive relief now.

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 99.9% of the population in California, **no indoor religious worship service is permitted at**

all. (*Supra* Image 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**. (Joint Statement at 6-7; Chart at 2.) Despite completely 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; Chart 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 and 3 cannot withstand strict scrutiny.

The Governor also largely ignores the discriminatory restrictions imposed on Applicants' Churches in Tiers 2 and 3. Yet, those restrictions (while effecting 0.1% 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. (Chart 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. <u>The capacity increases with the size of the building for every other similar congregate gathering except worship</u>!

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. (Joint Statement at 2; Chart at 4.) Food packaging and processing, laundromats, warehouses, grocery stores, "big box" stores, malls, destination centers, and swap meets may all operate with any capacity or numerical restriction of any kind. (Chart 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 and 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 PUBLIC INTEREST ALSO FAVORS INJUNCTIVE RELIEF.

As a district court in Pennsylvania recently held, "[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 5510690, at *9 (W.D. Pa. Sept. 14, 2020) (emphasis added) (footnote omitted). 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—in 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 their Renewed 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