No. 20-56357

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs–Appellants

v.

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

Defendant–Appellee

On Appeal from the United States District Court
for the Central District of California (Los Angeles)
In Case No. 2:20-cv-06414-JCB-KK before the Honorable Jesus G. Bernal

PLAINTIFFS–APPELLANTS' REPLY IN SUPPORT EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EMERGENY MOTION UNDER CIRCUIT RULE 27-3

Mathew D. Staver (Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Nicolai Cocis
Law Office of Nicolai Cocis
25026 Las Brisas Road
Murrieta, CA 95262
(951) 695-1400
nic@cocislaw.com

Attorneys for Plaintiffs–Appellants

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs–Appellants, Harvest Rock Church, Inc. and Harvest International Ministry, Inc., state they are domestic nonprofit corporations incorporated under the laws of the State of California, neither has a parent corporation, and neither issues stock.

Dated: December 29, 2020

/s/ Daniel J. Schmid

Mathew D. Staver (Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Nicolai Cocis
Law Office of Nicolai Cocis
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(951) 695-1400
nic@cocislaw.com

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"Let my people go."[1]

INTRODUCTION

Despite the rising tide of binding precedent since the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (hereinafter "*Catholic Diocese*"), including this Court's decisions in *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 7350247 (9th Cir. Dec. 15, 2020) and *Calvary Chapel Lone Mountain v. Sisolak*, No. 16274, 2020 7364797 (9th Cir. Dec. 15, 2020), and this week's Second Circuit's opinion, the Governor continues to flee from the law and misrepresent the restrictions in the Blueprint.

The Governor contends that his restrictions on Appellants' religious worship services are permissible because (1) *Catholic Diocese* does not mandate the application of strict scrutiny, (2) this Court's *Calvary Chapel Dayton Valley* and *Calvary Chapel Lone Mountain* decisions enjoining restrictions on religious gatherings less severe than those at issue here do not mandate that application of strict scrutiny, (3) that the state can mandate the form and manner of worship must be outside for all religious services no matter the particular doctrine or facilities (or lack thereof) or climate, and (4) that his regime, the most restrictive in the nation, should not be analyzed under strict scrutiny and would even survive strict scrutiny when other far less restrictive regimes do not. (*See*, dkt. 7-2, Opposition to

[1] *Exodus* 5:1 (King James Version).

Emergency Motion for Injunction Pending Appeal, "Opp'n," at 12-30.) **Not a single point the Governor makes in his Opposition overcomes the fatal blow that *Catholic Diocese* struck upon his unconstitutional regime of color-coded executive edicts against Appellants' religious worship services.**

Contrary to the Governor's contentions, no one is claiming that *Catholic Diocese* overruled the relevant test of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). (Opp'n. at 13-17.) *Catholic Diocese* informed this Court and all lower courts how *Lukumi* is to be applied in these circumstances. Yet, the Governor ignores *Catholic Diocese*. Where – as here – there are **some** secular gatherings that are treated more favorably than religious worship services – regardless of what those nonreligious gathering are – the Governor must justify his disparate treatment of religious gatherings and survive strict scrutiny. Indeed, as Justice Gorsuch succinctly stated: "**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**." *Catholic Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring) (emphasis added).

The mounting precedent of *Catholic Diocese*, this Court's decisions in *Calvary Chapel Dayton Valley* and *Calvary Chapel Lone Mountain*, and the newly minted decision from the Second Circuit in *Agudath Israel of Am. v. Cuomo*, No.

20-3572, 2020 WL 7691715 (2d Cir. Dec. 28, 2020) dooms the Governor's total prohibitions on indoor religious worship services in Tier 1 and his discriminatory restrictions on religious worship services in Tiers 2-4. The time has come to end the Governor's discriminatory treatment of houses of worship.

"**[E]ven in a pandemic, the Constitution cannot be put away and forgotten**." *Catholic Diocese,* 141 S. Ct. at 68 (emphasis added).

The Blueprint permits warehouses, bus stations, airports, train stations, big-box stores, grocery stores, liquor stores, marijuana dispensaries, swap meets, family entertainment centers, museums, and countless other congregate activities while either totally banning indoor religious gatherings or placing numerical caps not that are not impose of similar non-religious gatherings. **Appellants (and every one of their congregants, staff, attendees, and members) have now suffered under the threat of criminal sanction, closure of their Churches, imprisonment, and fines since July 18, 2020**. Yet, no relief has been forthcoming.

As Judge O'Scannlain noted, the date Appellants requested for relief was "hardly arbitrary." *Harvest Rock Church, Inc. v. Newsom*, No. 20-56357, 2020 WL 7647556. *1 (9h Cir. Dec. 23, 2020). Indeed, Appellants have fought for relief for many months and their requested relief sought to preserve their sacred calendar:

> The church seeks immediate action from our court so that its members can worship on Christmas Day, one of the most sacred holy days in the Christian calendar. And it is not the church's fault that it finds itself in this predicament. The church moved for a temporary restraining order

> against California's worship-related restrictions as soon as this case was remanded following a decision by the Supreme Court—yet it had to wait more than two weeks before the district court ruled on that motion. When the district court finally denied its motion two days ago, Harvest Rock Church filed a notice of appeal the same day. The next day, yesterday, the church moved for an emergency injunction from our court.

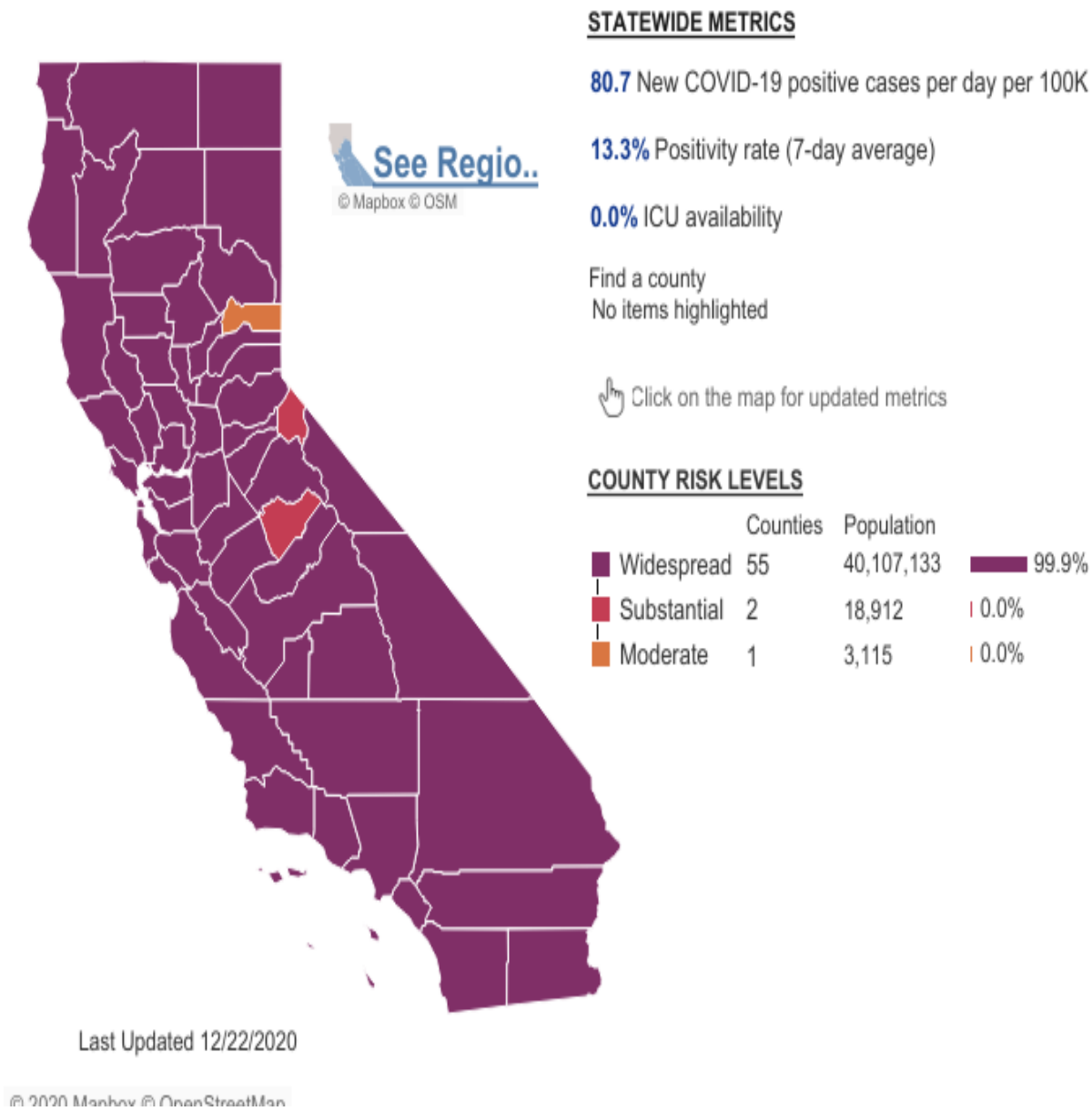
Id. (emphasis added).

Appellants have now been denied relief and deprived of protection for every Holy Day for the entire year. Appellants were prohibited from gathering to celebrate Easter in April, prohibited from gathering to celebrate the Holy Day of Pentecost in May, and were prohibited from gathering to celebrate the birth of their Lord on the Holy Day of Christmas. **How long must Appellants wait until the demands of the Constitution are finally afforded them**? Even one day is too long. Scripture demands of Appellants that they gather together for these events and that they sing praises to God, but the government has criminalized such religious activity for almost a year. **The First Amendment cannot sleep forever.** It is past time for this Court to let the houses of worship go. The IPA should issue immediately.

FACTUAL UPDATE

As of December 22, 55 Counties in California – representing **99.9% of the population** – are in Tier 1 under the Governor's Blueprint. 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 22, 2020*, https://covid19.ca.gov/safer-economy/ (last visited Dec. 28, 2020)

LEGAL ARGUMENT

I. THE GOVERNOR'S CONTINUED INSISTENCE ON RATIONAL BASIS REVIEW IN THE FACE OF PRECEDENT FROM THE SUPREME COURT AND THIS COURT IS IRRATIONAL.

A. The Prior Panel Rule Requires That This Court Find Strict Scrutiny Is The Governing Standard And That The Governor's Blueprint Fails It.

The prior panel rule of this Court requires that the Governor's discriminatory restrictions on Appellants' religious worship services must be subject to, and cannot survive, strict scrutiny. Indeed, "absent a rehearing en banc, **we are without authority to overrule controlling circuit precedent**." *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009) (quoting *Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1018 (9th Cir. 2009) (emphasis added)). *See also Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 959 (9th Cir. 2012) ("a prior panel decision is binding unless intervening Supreme Court or en banc authority compels a contrary conclusions") (cleaned up); *Rodriguez-Martinez v. Holder*, 498 F. App'x 713, 714 (9th Cir. 2012) ("we are not at liberty to overturn a decision of a prior panel").

The Supreme Court's precedent is clear, as is this Court's prior panels that noted *Catholic Diocese* represented "a seismic shift" in the analysis of COVID-19 restrictions on Appellants' religious worship services. *Calvary Chapel Dayton Valley*, 2020 WL 7350247, *3. The prior panel rule thus requires a finding that the Governor's restrictions must be subject to and cannot survive strict scrutiny, and

nothing the Governor argues here even comes close to suggesting a contrary result. *Catholic Diocese* and this Court's prior decisions demonstrate the Governor's Blueprint is riddled with constitutional infirmities that cannot be cured.

This Court in *Calvary Chapel Dayton Valley* issued a preliminary injunction, holding that Nevada's COVID-19 restrictions on religious worship services could not survive *Catholic Diocese* and must be enjoined. 2020 WL 7350247, at *4 ("**The Supreme Court's decision in *Roman Catholic Diocese* compels us to reverse the district court**." (emphasis added)). Indeed,

> Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. **Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities.** As a result, the restrictions in the Directive, although not identical to New York's, require attendance limitations that create the same "disparate treatment" of religion. Because "disparate treatment" of religion triggers strict scrutiny review—as it did in *Roman Catholic Diocese*—we will review the restrictions in the Directive under strict scrutiny.

Id. (emphasis added) (citation omitted).

The restrictions on religious worship services in *Calvary Chapel Dayton Valley* were **less restrictive** than the total prohibition here in Tier 1. *Compare id.* at *4 (noting that the Nevada restriction imposed a 50-person cap), *with* Addendum Chart at 1 (recognizing the Governor's current restriction as a complete prohibition in Tier 1).) Yet, this Court still held that "although less restrictive in some respects

than the New York regulation reviewed in *Roman Catholic Diocese*—**is not narrowly tailored**." *Calvary Chapel Dayton Valley*, 2020 WL 7350247, at *4 (emphasis added). This Court enjoined the Nevada restrictions. *Id*. The same was true in a separate appeal issued by this Court on the same day. *See Calvary Chapel Lone Mountain*, 2020 WL 7364797, at *1 (same).

B. Every Circuit Court To Address The Issue Of Covid-19 Restrictions Post-*Catholic Diocese* Has Found That Discriminatory Restrictions On Religious Worship Services Are Subject To And Cannot Survive Strict Scrutiny.

Only two Circuits have addressed the application of *Catholic Diocese* to the restrictions on religious worship services, and every decision has concluded that *Catholic Diocese* demands the restrictions of houses of worship fail the First Amendment. In addition to two decisions from this Court, the Second Circuit in *Agudath Israel* found that far less restrictions in New York cannot survive the First Amendment's mandates. In *Agudath Israel*, the Second Circuit held that "[t]he Governor's order is subject to strict scrutiny because it is not neutral on its face and imposes greater restrictions on religious activities than on secular ones." 2020 WL 7691715, *1. The Second Circuit held that *Catholic Diocese* mandates a finding that restrictions imposed on religious gatherings that are not similarly imposed on nonreligious gatherings survive strict scrutiny. *Id.* at *7 (holding that the Governor's

order "fail[ed] this basic standard by imposing on 'houses of worship' restrictions inapplicable to secular activities").

Astoundingly, even after the Supreme Court's *Catholic Diocese* decision, the Governor of New York (like the Governor here) continued to assert that his restrictions survive constitutional muster. *Id.* (noting that the Governor of New York "continues to argue that rational-basis review applies because those limits 'do not disfavor religious gatherings in houses of worship as compared with all secular activities that present a similar or greater degree of risk of COVID-19 spread'). Interestingly enough, **that is the precise argument the Governor makes here – even after *Catholic Diocese***. Like the Second Circuit, this Court must reject the Governor's continued denial of reality.

Indeed, the argument the Governor makes here (Opp'n at 20-26) is exactly the same made in *Agudath Israel*. 2020 WL 7691715, *7. And, **as it has been at every turn since *Catholic Diocese*, the Second Circuit squarely rejected it**. *Id.* (holding that – the same argument raised by the Governor here – "**only highlights the fact that the Order is not neutral towards religion**. Rational-basis review applies when a neutral and generally applicable policy incidentally burdens religion; **a policy that expressly singles out religion for less favored treatment, as here, is subject to strict scrutiny**." (emphasis added)). The Governor's continued insistence that he need only pass rational basis review has been rejected by the Supreme Court in

Catholic Diocese, twice by this Court in *Calvary Chapel Dayton Valley* and *Calvary Chapel Lone Mountain*, and now by the Second Circuit in *Agudath Israel*.

The Constitution simply does not permit that Governor to make value judgments as to what gatherings are permissible. If certain nonreligious gatherings (whether they be food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, big-box retail stores, malls, destination centers, transportation facilities, bus stations, train stations, airports, gambling centers, etc.) are permitted to gather without limitation or with more favorable restrictions while religious gatherings are prohibited or more severely restricted, strict scrutiny is the standard. In fact, the litany of comparable gatherings listed by *Catholic Diocese*, this Court, and the Second Circuit include: casinos, bowling alleys, retail businesses, restaurants, arcades, acupuncture facilities, campgrounds, garages, plants manufacturing chemicals and microelectronics, transportation facilities, hardware stores, liquor stores, bicycle repair shops, signage companies, accountants, lawyers, insurance agents, pet stores, big-box stores, bus stations, airports, Hollywood production facilities, and numerous other secular entities. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 66; *id.* at 69 (Gorsuch, J., concurring); *id.* (Kavanaugh, J., concurring); *Calvary Chapel*, 2020 WL 7350247, at *4. In fact, **in every Tier of the Governor's Blueprint, only religious worship services are subject to total prohibitions are strict numerical caps.** (Addendum at 1-4.) And, that

discrimination exists despite mirroring the numerous comparable gatherings the Supreme Court and this Court found to be unconstitutional in *Catholic Diocese* and *Calvary Chapel*.

C. No One Disputes That *Catholic Diocese* Applied *Lukumi*, But The Governor Misunderstands That *Catholic Diocese* Created A Sea Change Regarding COVID Restrictions on Houses of Worship and Instructed Lower Courts To Follow This Constitutional Roadmap.

The Governor make the unremarkable argument that *Catholic Diocese* applied the current framework of *Lukumi*. (Opp'n at 26.) No one disputes that. But his misses the point that *Catholic Diocese* created a sea change in regarding COVID restrictions on houses of worship. The Governor continues to veer off course and refuses to follow the constitutional roadmap. *Catholic Diocese* held, unequivocally, "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." 141 S. Ct. at 66. This Court, too, recognized that *Catholic Diocese* cannot be read to allow "treat[ing] numerous secular activities and entities significantly better than religious worship services" as anything more than "disparate treatment of religion," which must survive strict scrutiny. *Calvary Chapel Dayton Valley*, 2020 WL 7350247, *3. The Second Circuit also held that *Catholic Diocese* has informed lower courts that strict scrutiny is mandated where "a policy

that expressly singles out religion for **less favored treatment, as here, is subject to strict scrutiny**." *Agudath Israel*, 2020 WL 7691715, at *7 (emphasis added).

As this Court previously held in *Calvary Chapel Dayton Valley*, *Catholic Diocese* leaves no room for altering that fundamental conclusion. In fact, ***Catholic Diocese* compels a reversal of the district court when – as here – it fails to enjoin discriminatory restrictions on religious worship services**. 2020 WL 7350247, at *4 (holding that *Catholic Diocese* "compels us to reverse the district court"). The Constitution, *Catholic Diocese*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, and *Agudath Israel* all compel a single result: the Governor's discriminatory restrictions on religious worship cannot pass constitutional muster. The Governor's treatment of Appellants' constitutionally protected religious exercise must be subject to – and cannot survive – strict scrutiny. The IPA should issue immediately.

II. THE GOVERNOR'S CONTENTION THAT HIS TOTAL PROHIBITIONS AND DISCRIMINATORY RESTRICTIONS ON RELIGIOUS WORSHIP SERVICES ARE NARROWLY TAILORED HAS ALREADY BEEN REJECTED BY THE SUPREME COURT AND THIS COURT.

A. The Governor's Contention That No Religious Worship Services Are Prohibited Because Plaintiffs May Simply Go Outside Is As Offensive As It Is Irrelevant.

The Governor contends that his Tier 1 total prohibitions are not really "total prohibitions" because Appellants can simply worship outside. (Opp'n at 14.) This is

as offensive as it is irrelevant. The Governor's contention is essentially that he treats Appellants better than others because he "allows" them to worship outside. (*Id.*) *Catholic Diocese* and the First Amendment require more. As Justice Kavanaugh noted,

> 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. . . . Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.

Catholic Diocese, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (emphasis original).

The Governor's contention essentially boils down to the notion that "it has not acted out of antipathy towards religion," *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 930, 945 (9th Cir, 2020) (Collins, J., dissenting), but that is not the constitutional standard. "**The constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry**." *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) (italics original; bold emphasis added). That he has treated "some" secular gatherings better or worse than Appellants' religious worship services is irrelevant. Once the Governor permits nonreligious sectors to gather without limitation, he must justify why Appellants' religious gatherings cannot gather. He cannot do so. Indeed, "**[w]hat [the Governor] can't do is assume the**

worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Roberts*, 958 F.3d at 414 (emphasis added). That is precisely what the Governor argues he is permitted to do here, and it must fail.

In Tier 1, just as in *Catholic Diocese*, food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, big-box retail stores, malls, destination centers, transportation facilities, and many other so-called "essential" or "critical infrastructure" sectors are exempt from any numerical restriction or capacity limitation whatsoever, and others are subject to more favorable treatment than Plaintiffs' constitutionally protected religious services. (*See* Addendum at 1.).

B. The Second Circuit's Opinion In *Agudath Israel* Makes Plain That Even Percentage Capacity Limitations That Are Discriminatorily Imposed Only On Religious Worship Services Fails Narrow Tailoring Under *Catholic Diocese*.

Even the Governor's discriminatory percentage limitations on Appellants' religious worship services are unconstitutional under *Catholic Diocese*. Under the Tiers 2-4 of the Governor's current Blueprint, where indoor religious worships services subject to strict percentage and numerical caps – where numerical caps are not placed on non-religious gatherings. Yet, the Governor continues to ignore the actual discrimination inherent in the Blueprint, claiming that similar nonreligious gatherings are treated the same. (Opp'n. at 8.) This is simply false. (*See* dkt. 3-1,

Motion at 7-18.) The Second Circuit's recent decision makes plain that even the Governor's discriminatory percentage caps are unconstitutional.

> The Supreme Court's *Roman Catholic Diocese* opinion addressed only the fixed capacity limits, **but the same reasoning applies to the Order's percentage capacity limits, which by their own terms impose stringent requirements only on houses of worship. One could easily substitute the percentage capacity limits for the fixed capacity limits into the Supreme Court's discussion of strict scrutiny without altering the analysis. Thus, both the fixed capacity and percentage capacity limits on houses of worship are subject to strict scrutiny**.

Agudath Israel, 2020 WL 7691715, at *(emphasis added). Thus, leaving aside the fixed numerical caps imposed only on religious worship services (dkt. 3-1, Motion at 7-18), even the percentage caps discriminatorily imposed on Appellants' religious worship services are unconstitutional. The Governor not only fails to address this critical point, but he continues to misrepresent the fact that **houses of worship have numerical caps in Tier 2 (no more than 100) and Tier 3 (no more than 200 people) while non-religious gatherings have no numerical cap**.

III. THE GOVERNOR'S CONTINUED INSISTENCE THAT HIS SO-CALLED EXPERT TESTIMONY ALLOWS HIM TO CONTINUE TO DISCRIMINATE AGAINST RELIGIOUS WORSHIP SERVICES WAS PRESENTED TO THE SUPREME COURT AND PLAINLY REJECTED.

The Governor continues to assert that his so-called experts are somehow sufficient to overcome the clear constitutional precedent demonstrating that his Blueprint violates the First Amendment. (Opp'n. at 20-26.) The Governor's

offensive stereotyping of houses of worship lacks support (and itself borders on animus). Without a shred of evidence, he alleges Churches are somehow more dangerous than any other gathering and must be prohibited. He makes the astounding claim that churches – even the state-of-the-art concert venue where Pavarotti performed (Harvest Rock Church's Ambassador Auditorium) have less ventilation than every other commercial operation. This is offensive and nonsense.[3]

As Judge O'Scannlain pointed out, the Governor has already "conceded" that his so-called experts are "**not qualified as an expert to opine on what takes place at religious worship services or how people interact there as opposed to in other settings of public life**." *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 735 n.4 (9th Cir. 2020) (O'Scannlain, J., dissenting) (emphasis added). Yet, despite that fatal concession, the Governor continues to assert that he can dust off his previously submitted "expert" testimony and claim it provides the magic bullet for him to escape his rightful constitutional condemnation. He cannot.

Even if the Governor had not conceded that his so-called experts are not experts at all, which he plainly did in this very case before this very panel, the precise arguments those "experts" are making here were presented to the Supreme Court in *Catholic Diocese* and **were rejected**. Thus, despite claiming that Appellants'

[3] The Governor claims that his so-called experts are unrebutted. (Opp'n at 20.) But, Appellants did submit the expert testimony of numerous medical professionals for the district court's consideration. (*See* dkt. 68-3.)

Churches and religious worship services pose the grave danger of the spread of COVID-19, and **though it is the Governor's burden to demonstrate satisfaction of strict scrutiny**, the Governor has not and cannot produce one shred of evidence linking Appellants' Churches and their worship services to the spread of COVID-19. The reason for this is simple, much like in *Catholic Diocese*: there is no evidence "that attendance at [Appellants'] services has resulted in the spread of the disease." *Catholic Diocese*, 141 S. Ct. at 68.

Moreover, not a single hypothesis the Governor presents here was unknown by the scientific and governmental communities at the time *Catholic Diocese* was decided. In fact, the precise arguments made by the Governor here and purportedly supported by his "expert" declarants were made to the Supreme Court in *Catholic Diocese*, relied upon by the dissents to suggest the same contention the Governor makes here, and explicitly rejected by the majority as a sufficient basis to justify discriminatory restrictions on religious worship services that were more lenient than those at issue here. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 78 (Breyer, J., dissenting) (noting that "members of the scientific and medical communities tell us that the virus is transmitted" more easily in gatherings with features of religious worship services); *id.* at *79 (Sotomayor, J., dissenting) (noting that "medical experts tell us . . . large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time" pose a greater risk of spreading

COVID-19 than other gatherings); *id.* ("'Epidemiologists and physicians generally agree that religious services are among the riskiest activities'" (citing amicus brief)).

As the Second Circuit recognized – equally true here – "the Governor's identification of those risks relied on broad generalizations made by public-health officials about inherent features of religious worship," [but] "the government must normally refrain from making assumptions about what religious worship requires." 2020 WL 7691715, at *8. Moreover,

> Even taking these assertions at face value, however, the Governor must explain why the Order's density restrictions targeted at houses of worship are more effective than generally applicable restrictions on the duration of gatherings or requirements regarding masks and distancing. The Governor may not, of course, presume that religious communities will not comply with such generally applicable regulations.

Id. (emphasis added).

Thus, it is not as though the Governor is presenting some novel theory heretofore unknown to COVID-19 litigation or that somehow escaped the minds of the Justices in *Catholic Diocese*. The Governor is merely presenting the same so-called expert testimony to attempt to justify his unconstitutional prohibitions on Appellants' religious worship services. When presented with the same theories and scientific testimony as that presented here, the Supreme Court unequivocally held that the applicants "have clearly established their entitlement to relief" and "have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the

public interest." 141 S. Ct. at 64. Repackaging the same scientific testimony already rejected as insufficient justification for imposing discriminatory restrictions on religious worship services fails to overcome the binding precedent of *Catholic Diocese*. The Governor's worn-out justifications for his unconstitutional regime have grown tired, and this Court must reject them.

CONCLUSION

For the foregoing reasons, this Court should issue the IPA.

Respectfully submitted,

Dated: December 29, 2020

/s/ Daniel J. Schmid
Mathew D. Staver (Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Nicolai Cocis
Law Office of Nicolai Cocis
25026 Las Brisas Road
Murrieta, CA 95262
(951) 695-1400
nic@cocislaw.com

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/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record. In addition, and in accordance with Counsel's Rule 27 Certification, counsel for Defendant–Appellee has also been served with a true and correct copy of the foregoing via electronic mail.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants