Nos. 20-55445, 20-56324

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY GISH, *et al.*,
Plaintiffs and Appellants,

v.

GAVIN NEWSOM,
in his official capacity as Governor of California, *et al.*,
Defendants and Appellees.

On Appeal from the Judgment of the United States
District Court for the Central District of California
The Honorable Jesus G. Bernal
District Court Case Number: 5:20-00755-JGB-KK

APPELLANTS' OPENING BRIEF

HARMEET K. DHILLON
harmeet@dhillonlaw.com
MARK P. MEUSER
mmeuser@dhillonlaw.com
DHILLON LAW GROUP INC.
177 Post Street – Suite 700
San Francisco, CA 94108
Phone: 415.433.1700
Fax: 415.520.6593

GREGORY R. MICHAEL
gmichael@myllp.law
MICHAEL YAMAMOTO LLP
1400 Shattuck Ave., #412
Berkeley, CA 94709
Phone: 510.296.5600
Fax: 510.296.5600

Attorneys for Plaintiffs and Appellants Wendy Gish, Patrick Scales, James Dean Moffatt, and Brenda Wood.

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INTRODUCTION

There is no pandemic exception to the Constitution. Yet, for nearly a year, the Government has prohibited or severely restricted Appellants Wendy Gish, Patrick Scales, James Dean Moffatt, and Brenda Wood ("Church Members") and their congregations from engaging in communal worship.[1] The Government allows secular activities of an indistinguishable nature to continue provided that certain social distancing and capacity protocols are observed, while denying religious communities the opportunity to meet under the same standards.

For the duration of California's coronavirus lockdown, the Government has let the public stroll freely down the busy aisles of their local grocery store for an

[1] "Government" hereinafter refers to Defendants-Appellees Gavin Newsom, in his official capacity as Governor of California; Xavier Becerra, in his official capacity as Attorney General of California; Erin Gustafson, in her official capacity as the San Bernardino County Acting Public Health Officer; John McMahon, in his official capacity as the San Bernardino County Sheriff; Robert A. Lovingood, in his official capacity as a San Bernardino County Supervisor; Janice Rutherford, in her official capacity as a San Bernardino County Supervisor; Dawn Rowe, in her official capacity as a San Bernardino County Supervisor; Curt Hagman, in his official capacity as a San Bernardino County Supervisor; Josie Gonzales, in his official capacity as a San Bernardino County Supervisor; Cameron Kaiser, in his official capacity as the Riverside County Public Health Officer; George Johnson, in his official capacity as the Riverside County Executive Officer and Director of Emergency Services; Chad Bianco, in his official capacity as the Riverside County Sheriff; Kevin Jeffries, in his official capacity as a Riverside County Supervisor; Karen Spiegel, in her official capacity as a Riverside County Supervisor; Chuck Washington, in his official capacity as a Riverside County Supervisor; V. Manuel Perez, in his official capacity as a Riverside County Supervisor; and Jeff Hewitt, in his official capacity as a Riverside County Supervisor.

indefinite period of time; go to the hospital for certain types of elective surgeries; and even arrange for plumbers, electricians, and exterminators to come into their homes for extended periods. Currently, shopping malls, swap meets, and mass transit are allowed to open with social distancing and other limitations. Yet, the Church Members cannot go to church; meet for Bible study; attend a baptism; gather at church to pray and worship according to the dictates of their consciences; or even attend a funeral service for departed loved ones, regardless of the number of persons attending or the precautions they offer to take. The Government's ongoing criminalization of communal worship violates the Church Members' fundamental rights to religious liberty, freedom of speech and assembly, and due process and equal protection under the law and should be enjoined by the district court.

The Church Members respectfully request that this Court (1) vacate the Judgment of the district court in favor of the Government, (2) reverse the district court's orders dismissing the Church Members' claims as moot, (3) reverse the district court's order denying temporary and preliminary injunctive relief, and (4) remand to the district court with instructions to enter a preliminary injunction and to proceed in accordance with this Court's ruling. In the event that this Court affirms the district court's mootness determination, the Church Members

respectfully request that this Court vacate the unreviewed district court's order denying temporary injunctive relief.

ISSUES PRESENTED

1. Whether the district court erred by dismissing the Church Members' claims as moot where the Executive Order challenged by the Church Members remains in effect and the Government continues to restrict indoor religious worship pursuant to that Executive Order.

2. Provided that this action is not moot, whether the district court abused its discretion by failing to apply traditional scrutiny standards to the Church Members' claims, as required by the Supreme Court's recent holding in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), and by denying the Church Members' request for a temporary restraining order and preliminary injunction.

STATEMENT OF JURISDICTION

The district court had federal question subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a) and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367. The Church Members appeal from the district court's entry of final Judgment in favor of the Government and its dismissal of Church Members' claims with prejudice. 1-ER-2. Accordingly, this Court has

jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. For reasons addressed in detail below, this action is not moot.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Church Members filed their verified complaint in the U.S. District Court for the Central District of California on April 13, 2020.[2] 6-ER-1065. The complaint challenged, *inter alia*, Governor Newsom's March 19, 2020 Executive Order N-33-20 ("EO N-33-20") issued in response to the outbreak of the novel coronavirus, as well as related directives issued by the State Public Health Officer and San Bernardino and Riverside Counties. *Id.*

On April 23, 2020, the district court denied the Church Members' request for a temporary restraining order and preliminary injunction. 1-ER-61–69. The Church Members appealed the lower court's decision, but, pursuant to this Court's

[2] The verified complaint asserted the following causes of action: (1) violation of the Free Exercise Clause of First Amendment; (2) violation of the Establishment Clause of First Amendment; (3) violation of the Free Speech Clause of First Amendment; (4) violation of the First Amendment Freedom of Assembly; (5) violation of the Due Process Clause of Fourteenth Amendment by reason of vagueness; (6) violation of substantive rights protected by the Due Process Clause of Fourteenth Amendment; (7) violation of the Equal Protection Clause of Fourteenth Amendment; (8) violation of the Right to Liberty (Cal. Const. Art. 1, § 1); (9) Freedom of Speech (Cal. Const. Art. 1, § 2); (10) Freedom of Assembly (Cal. Const. Art. 1, § 3); and (11) Free Exercise and Enjoyment of Religion (Cal. Const. Art. 1, § 4). 6-ER1072-88.

instruction, will move to voluntarily dismiss that appeal as moot following the district court's entry of final Judgment in favor of the Government on December 11, 2020. 1-ER-2; 6-ER-1130. Accordingly, this Court is not expected to rule on the merits of that appeal.[3]

On and around May 25, the Government issued new directives entitled "COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies" and "California's Roadmap to Modify the Stay-at-Home Order." 2-ER-133–59. The updated "guidance" relaxed some restrictions and permitted limited in-person religious services. *Id.* Two days later, on May 27, the Government moved to dismiss the action as moot, which the district court granted on July 8, without benefit of a hearing. 1-ER-9–14.

After securing the dismissal, the Government revised its directives on July 13, reimposing operatively the same prohibitions as the March directives. 2-ER-75–80. The Church Members filed for reconsideration on August 17, 2020, which motion the district court denied on October 9, 2020, waiting however until December 11, 2020, to enter Judgment in favor of the Defendants. 1-ER-2–8. The Church Members then filed their notice of appeal with the district court on December 14, 2020. 6-ER-1129–30.

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[3] On December 23, 2020, this Court issued an order consolidating the Church Members' TRO appeal with the instant appeal. 6-ER-1130.

On December 18, 2020, the Church Members filed their emergency motion with this Court, requesting both an injunction pending appeal and for an expedited briefing schedule on the merits. This Court granted the request for an expedited briefing schedule but denied the request for an injunction on December 23, 2020. 6-ER-1130.

II. STATEMENT OF FACTS

A. The Government's COVID-19 Regulatory Framework

Governor Newsom's March 19, 2020 order, EO N-33-20, compels all Californians to comply with State public health directives issued by the California Department of Public Health ("CDPH") in response to COVID-19. 4-ER-602–03, 607. Failure to comply with EO N-33-20, and by extension any CDPH directive, is a "misdemeanor . . . punishable by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment." Cal. Gov't Code § 8665; 4-ER-603 (citing Government Code section 8665). EO N-33-20 remains in effect as of the filing of this Opening Brief and continues to be cited publicly by the CDPH as a source for its authority to enact its public health directives. Appellants' Request for Judicial Notice ("RJN") Exs. 2-A, p.13 & 2-B p. 3 ("multiple executive orders require compliance with [CDPH] orders . . . on March 19, 2020, Governor Newsom issued Executive Order N-33-20 . . .").

Several California counties issued local COVID-19 public health orders, supplementing the State's orders. 3-ER-321–23 (San Bernardino County order); 4-ER-655–70 (Riverside County order). After the Church Members filed suit challenging the orders issued by San Bernardino and Riverside Counties, those counties rescinded the applicable local orders and now rely expressly on the State's orders for purposes of enforcing COVID-19 restrictions. 3-ER-349; RJN Ex. 7.

B. The Continuously Evolving Policies Burdening Places of Worship Through Executive Fiat

Since the issuance of EO N-33-20, the CDPH has repeatedly used its authority under the order to issue and revise public health directives, ostensibly to slow the spread of COVID-19. A violation of any of these directives is a crime under the terms of EO N-33-20 and California law. *See, e.g.*, RJN Ex. 2B p. 3. The evolution of these restrictions has resulted in at least seven distinguishable regulatory regimes restricting or prohibiting the Church Members from holding or participating in church services. Each such regime and the period in which it was, or is, in place is described below.

1. Stay-at-Home Order I: No In-Person Church Services

March 19, 2020–April 28, 2020

On March 19, 2020, in conjunction with the issuance of EO N-33-20, the CDPH issued a Stay-at-Home Order, compelling "all individuals living in the State of California to stay home or at their place of residence except as needed to

maintain continuity of operations of the federal critical infrastructure sectors . . ..” 4-ER-602–03, 607.[4] On March 22, 2020, the CDPH further published a list of “Essential Critical Infrastructure Workers,” identifying with particularity those operations exempt from the order. 5-ER-846–60. Listed as a part of the “essential workforce” were coffee baristas, grocery store workers, laundromats employees, workers supporting the entertainment industry, and workers supporting ecommerce. *Id.* Places of worship and church services were not listed as “essential” activities and were therefore prohibited under EO N-33-20 and the associated CDPH directive, except with respect to “[f]aith based services that are provided through streaming or other technology.” *Id.* These restrictions were viewed broadly as prohibiting even drive-in religious services in which congregants were enclosed in separate vehicles, including by several counties. 5-ER-877. For ease of reference, this brief will refer to the applicable set of CDPH directives spanning March 19, 2020, to April 28, 2020, as “Stay-at-Home Order I.”

[4] The State Public Health Officer issued this directive. 4-ER-605. By statute, the State Public Health Officer is “the director of, and ha[s] control over the [CDPH].” Cal. Health & Saf. Code § 131005.

2. Stay-at-Home Order II: Drive-Up and Online Services, Only

April 28, 2020–May 4, 2020

On April 28, 2020—shortly after the Church Members filed suit on April 13, 2020—the Government revised its interpretation of its policies as allowing drive-up religious services as a form of "other technology." 1-ER-32:21–25; 3-ER-341 ("[t]he state has declared that drive-in worship services are allowed 'as long as the individuals engaged in such services abide by physical distancing guidelines and refrain from direct and indirect physical touching of others'"); 5-ER-877; ER 17:2-13, 295.

The shift in interpretation, however, did not permit Church Members to attend indoor services at church, even if the Church Members practiced social distancing, wore masks, limited their time spent inside the church, or reduced the number of persons at each church service. *E.g.*, 3-ER-341. This brief will refer to the applicable set of CDPH directives spanning April 28, 2020, to May 4, 2020, as "Stay-at-Home Order II."

3. Reopening Plan I: Drive-Up and Online Services Only

May 4, 2020–May 25, 2020

On May 4, 2020, Governor Newsom issued Executive Order N-60-20 ("EO N-60-20"). 2-ER-176–81. The order endorsed the CDPH's a four-stage reopening

plan (the "Reopening Plan") and required all California residents to "continue to obey State public health directives," pursuant to EO N-33-20. 2-ER-177.

Under the Reopening Plan, the Government periodically reviewed the risk posed by COVID-19 based on a number of fixed criteria. These criteria included, for example, the State's progress in acquiring personal protective equipment and hospital capacity. 2-ER-147–75, 189–91. Based on this periodic assessment, the Government would deem the State as being in one of four "stages" of reopening. *Id.* Stage 1 represented the highest level of risk to public health; Stage 4 represented the lowest level of risk and would coincide with the lifting of all COVID-19 restrictions. *Id.*

In Stage 2 of the Reopening Plan, offices, childcare services, pet grooming, manufacturing, and other sectors could resume operations provided that social distancing protocols were followed. 2-ER-193–94. Further, indoor retail, including shopping malls and swap meets, dine-in restaurants, and schools, could resume operations if the county government attested to having met certain criteria. 2-ER-201-02. Houses of worship, however, would not be allowed to resume indoor services until the State moved to Stage 3, absent a variance obtained by the county. 2-ER-172, 202.

From May 4, 2020, through at least May 25, 2020, much of the State, including San Bernardino and Riverside Counties, was assessed to be at Stage 2. 2-

ER-200–01, 249. As a result, the Church Members could not attend indoor services during this time. The directives in place with respect to places of worship from May 4, 2020, to May 25, 2020, will be referred to as "Reopening Plan I."

4. Reopening Plan II: Limited, Indoor Services Allowed

May 25, 2020–July 13, 2020

On May 25, 2020, the CDPH issued guidance materials pertaining to religious activities set to resume in Stage 3, or pursuant to any variances obtained by counties, in accordance with the Reopening Plan. 2-ER-133–45. The guidance provided, *inter alia*, that "[p]laces of worship must [] limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower." *Id.* This attendance limit was regardless of the houses of worships' size or any other safety protocols, such as increased ventilation or sanitization practices, implemented by churches. Upon receiving this new guidance, San Bernardino and Riverside Counties issued statements indicating that limited, indoor worship could resume provided such activities complied with the new guidance. 2-ER-276, 279.

The Church Members were therefore able to host or attend services in this limited capacity beginning on May 25. *Id.* They did so, however, under the Government's express threat that "[n]ot adhering to all of the guidelines in their entirely [sic] could result in . . . the re-closing of places of worship." 2-ER-279.

The regulatory regime in place from May 25, 2020, to July 13, 2020, will be referred to as "Reopening Plan II."

5. Reopening Plan III: Drive-Up and Online Services Only

July 13, 2020–August 28, 2020

On May 27, 2020—two days after allowing limited, in-person worship to resume under Reopening Plan II—the Government filed motions to dismiss the Church Members' claims as moot. 6-ER-1128. The district court granted the Governments' motions on July 8, 2020, over the Church Members' objection and without the benefit of a hearing. 1-ER-9–14.

On July 13, 2020, less than one week after the Court dismissed the Church Members' claims, the State reassessed its risk-level under the Reopening Plan and re-shuttered places of worship across much of California. 2-ER-75–95. The restrictions place from July 13, 2020, to August 28, 2020, shall be referred to herein as "Reopening Plan III," and were substantively the same as those under Stay-at-Home Order II and Reopening Plan I: drive-up and online services were allowed; indoor services were not.

6. Blueprint for a Safer Economy: Outdoor Services, Only

August 28, 2020–December 3, 2020

On August 28, 2020, the Government, utilizing the broad powers conferred by EO N-33-20, changed tactics again. The Government scrapped its Reopening

Plan and adopted in its stead a "Blueprint for a Safer Economy" (the "Blueprint"). RJN Exs. 3-4. The Blueprint assigns counties to one of four color-coded "tiers" of "risk" in accordance with the total number of positive COVID-19 cases per population unit and the percentage of positive COVID-19 test results in relation to the total number of tests administered by the county overall. RJN Exs. 3-4, 6A, & 6B. The tiered status of any county can change over time under the Blueprint. *Id.* The severity of symptoms and number of deaths are not considered.

The Blueprint treats houses of worship differently from secular businesses at each tier, as follows:

- Tier 1, or "purple," is labeled as "widespread." Under this tier, no in-person religious services are allowed, and only outdoor worship is permitted. Secular businesses, though, are subject to entirely different standards. Grocery stores, for example, may operate at 50% capacity, and large retail stores such as Walmart, Target, Sam's Club, and others may operate at 25% capacity. Other facilities, such as laundromats, warehouses, and food processing plants, may operate without numerical limits.
- Tier 2, or "red," is labeled as "substantial." Under this tier, houses of worship are permitted indoor worship at a maximum of 25% capacity or 100 people—whichever is less. Secular business, however, are again subject to a different standard. Grocery stores and retail stores such as those just listed

may operate at 50% capacity. And, again, other facilities, such as laundromats, warehouses, and food processing plants, may operate without numerical limits at all.

- Tier 3, or "orange," is labeled as "moderate." Under this tier, houses of worship may open with a maximum capacity of 50% or 200 people, whichever is less. At Tier 3, the State removes many of the capacity caps for secular businesses. Grocery stores, retail, and other facilities are permitted to operate without numerical limits.
- Tier 4, or "yellow," is labeled as "minimal." If a county is in this tier, houses of worship may open with a maximum capacity of 50%. Similar to Tier 3, the government removes nearly all capacity limits under Tier 4 for secular businesses.

RJN Exs. 3-4, 6A, & 6B. No part of the Blueprint calls for the complete reopening of places of worship; there is no "Tier 5" or green-colored risk level set forth in the Government's plans.

Riverside and San Bernardino Counties—where the Church Members live and worship—are currently in the heightened purple tier status, along with much of California. RJN Ex. 5. The Government, therefore, forbids the Church Members from attending indoor church services under penalty of criminal law. At the same time, in full compliance with the Government's orders, the Church Members and

others may engage in so-called "essential" business operations, including getting a massage or going to a toy store.

7. Regional Order: Outdoor Services, Only

December 3, 2020–present

Consistent with California's practice of relying on EO N-33-20 to make changes to its COVID-19 policies, even the onerous Blueprint did not remain the sole standard for long. On December 3, 2020, the CDPH issued a "Regional Stay Home Order" (the "Regional Order"). RJN Ex. 8. The Regional Order seems to combine the dictates of the earlier August 28 Blueprint by including a list of non-religious mass gatherings and activities along with the capacity at which they may remain open. *Id.* Most "essential" businesses, such as gas stations, marijuana dispensaries, pharmacies, grocery stores, farmer's markets, childcare, and so on are allowed to operate either fully or with some reduced capacity. *Id.* Even "non-essential" retail stores are allowed to operate at 20% capacity. *Id.* Houses of worship, though, must remain completely closed for indoor services, without regard to their facilities' capacity or any mitigation measures. *Id.*

The December 3 Regional Order differs only slightly from the Blueprint. Essentially, when effected an entire region is moved into "Tier 1" and when the region improves, individual counties are moved into the Tiers described in the Blueprint. *Id.* Through the Regional Order, Governor Newsom pushed over 94% of

California's population—millions of people—including those in the Counties of San Bernardino and Riverside, which includes the Church Members, into Tier 1, or the so-called "purple" tier. Notably, neither the Regional Order, nor the Blueprint have provisions for returning to full liberty.[5]

The Government's various orders described above have been consistent in only one significant respect: they have consistently applied different standards to businesses and secular activities as opposed to religious ones; and the latter standard is always more restrictive. In each instance the Government has singled out the Church Members' exercise of faith for harsher treatment than others who wish to shop, do laundry, purchase marijuana, and so on. Put simply, the Government forbids the Church Members, under penalty of criminal law, from attending indoor church services, and freely exercising their faith without Government menace.

[5] This is purposeful. Defendant Governor Newsom told the press, "[w]e don't put up green because we don't believe that there's a green light that says just go back to the way things were or back to the pre-pandemic mindset." "Gov. Newsom Outlines California's New Simplified, 4-Tier COVID-19 Reopening Guidelines," CBS SF Bay Area (Aug. 28, 2020) https://sanfrancisco.cbslocal.com/2020/08/28/gov-newsom-californias-new-simplified-color-coded-covid-reopening-guidelines/.

C. The Church Members, Their Churches, and Plans to Mitigate the Spread of COVID-19

The Church Members are all devoted adherents to their Christian faith. 5-ER-994–99, 1050–54. Reverends Moffatt, Scales, and Wood are the lead or senior pastors of churches within San Bernardino and Riverside Counties in California. *Id.* Prior to the excessive measures instituted by the Government, the Church Members regularly led or attended indoor religious services on Sundays, and throughout the week, at their respective churches. *Id.* During those meetings, parishioners met with and encouraged one another, prayed, and worshipped according to the dictates of their consciences. *Id.* The pastors must also perform certain other ministries and sacraments only in person, such as baptisms and administering communion. *Id.*

The pastoral Church Members, upon learning of the coronavirus and the measures health officials recommended to mitigate the spread, started implementing those measures voluntarily. For example, Rev. Moffatt ensured that his church building was cleaned and disinfected, parishioners were provided sanitizing materials and encouraged to sit at least six feet apart. 5-ER-1050-54. Similarly, Rev. Scales ensured that those attending his church could be properly socially distanced along with taking other steps to mitigate the spread of the virus. 5-ER-996–98. But while secular activities are provided the opportunity to soften the attendance restrictions placed on them by employing measures recommended

by state and federal health guidelines such as regular sanitizing and social distancing, these are opportunities the Church Members have not been afforded in California for the simple reason that they are engaged in religious worship.

STANDARD OF REVIEW

This Court reviews a district court's dismissal of an action for mootness de novo. *Rosemere Neighborhood Ass'n v. U.S. Env. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009); *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994). Factual determinations underlying the district court's mootness determination are reviewed for clear error. *Rosebrock v. Mathis*, 745 F.3d 963, 970 (9th Cir. 2014); *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010).

A district court's denial of a preliminary injunction is reviewed by this Court for abuse of discretion. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In deciding whether the district court has abused its discretion, the Court employs a two-part test: first the Court "determine[s] de novo whether the trial court identified the correct legal rule to apply to the relief requested; second, [the court] determine[s] if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 420 (9th Cir. 2019) (*citing Pimentel v. Dreyfus*, 670

F.3d 1096, 1105 (9th Cir. 2012)); *see also Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983).

SUMMARY OF THE ARGUMENT

The Government's ongoing criminalization of gatherings for religious purposes violates multiple provisions of the U.S. and California Constitutions, and continues to harm irreparably the Church Members and their congregations. Despite the continued enforcement of the underlying executive order challenged by the Church Members in this action, the district court has dismissed their claims as moot. In doing so, the district court misconstrued the Church Members' claims, and misapplied established precedent from the Supreme Court and this Court, which provide plainly that the Church Members' claims are not moot where any relief remains to be sought.

Even if the Government had retracted the executive order challenged by the Church Members—it has not—and the Government presently allowed the Church Members to attend indoor services—it does not—the Church Members' claims would still survive the Government's mootness challenge. The Government cannot moot the Church Members' actions simply by voluntarily ceasing its actions for a brief period of time and through discretionary executive measures alone, which may be easily rescinded at any time, as occurred here.

The district court also erred by denying the Church Members' request for temporary and preliminary injunctive relief. First, the district court abused its discretion by applying a never before recognized "minimal scrutiny" standard to analyze the violations of the Church Members' constitutional rights during the pandemic. The Supreme Court has already rejected the district court's reasoning. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) (applying strict scrutiny and enjoining New York's COVID-19 restrictions on places of worship).

Second, the court abused its discretion by concluding that the Government's edicts are neutral and generally applicable, and therefore considering the Church Members' Free Exercise claims under a standard of review below even rational basis review. 1-ER-68. The orders are neither neutral, nor generally applicable because they single out religious gatherings for explicit restrictions when similarly situated secular entities may remain open while following social distancing guidelines. Free exercise jurisprudence does not permit the government to allow some activities to proceed with risk, but then prohibit comparable religiously-motivated activities. Supreme Court precedent holds freedom of religion in much higher regard.

Finally, the district court chose not to address the Church Members' other claims in detail, stating they fail because the Orders were neutral. The Church

Members' other claims state independent bases for relief and should not have been dismissed out of hand.

The Church Members ask that this Court (1) vacate the Judgment of the district court in favor of the Government, (2) reverse the district court's orders dismissing the Church Members' claims as moot, (3) reverse the district court's order denying temporary and preliminary injunctive relief, and (4) remand to the district court with instructions to enter a preliminary injunction and to proceed in accordance with this Court's ruling. In the event that this Court affirms the district court's mootness determination, the Church Members respectfully request that this Court vacate the unreviewed district court's order denying interim injunctive relief.

ARGUMENT

I. THE CHURCH MEMBERS' CLAIMS WERE NOT MOOTED BY THE GOVERNMENT'S TEMPORARY SUSPENSION OF A SUBSET OF ITS RESTRICTIONS ON CHURCHES.

As discussed below, the Church Members' claims are not moot for the simple reason that the order they challenge, EO N-33-20, remains in effect. Even if this were not the case, however, at least two exceptions to the mootness doctrine apply to the facts of this case: The Government's voluntary cessation of its restrictions—which was indisputably temporary—does not moot the Church Members' claims; and the nearly year-long record of the Government revising

repeatedly its restrictions renders the facts of this case uniquely susceptible to being repeated yet left unreviewed by the courts.

A. The Church Members' Claims Seeking to Enjoin Executive Order N-33-20 Are Not Moot Because that Order Remains in Effect.

The doctrine of mootness requires a court to dismiss a case "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (quoting *Knox*, 567 U.S. at 307-08); *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016), as revised (Feb. 9, 2016).

Here, the Church Members' claims are not moot. The Church Members seek to enjoin the Government's enforcement of EO N-33-20 and seek complementary declaratory relief. 6-ER-1055–90. EO N-33-20 is currently in effect and has remained in effect since March 19, 2020. 1-ER-7; RJN Exs. 2A & 2B. The parties do not dispute this fact. Neither do they dispute that EO N-33-20 requires compliance with all "directives" issued by the State's public health agencies, nor

that failure to comply with that mandate constitutes a misdemeanor punishable by fine or imprisonment.

The CDPH has exercised its authority under EO N-33-20, on an almost continuous basis, for nearly a year. At each step of the way, EO N-33-20 has elevated what would otherwise be mere recommendations by the CDPH to that of an executive edict punishable as a crime. *Compare* 5-ER-823 (CDPH's March 16, 2020 recommendations) *with* 6-ER-1092–95 (EO N-33-20). Again, the Government does not and cannot credibly argue otherwise.

San Bernardino and Riverside Counties have also promised publicly to enforce the State's COVID-19 requirements. 3-ER-366; RJN Ex. 7. There is no reason to doubt this. As such, their withdrawal of local orders that largely tracked EO N-33-20 is a hollow point. As long as the Government—at either the state or local levels—remains free to enforce EO N-33-20, the Church Members have every reason to expect they will continue to suffer the very same irreparable harm alleged in their complaint.

The district court erred because it misconstrued the Church Members' claims as being asserted solely against the CDPH's various "guidance" documents and so-called "directives." To be clear: The Church Members do not seek to silence the CDPH or nullify any of its *bona fide* recommendations. The CDPH is free to recommend that churches suspend all indoors services; the Church

Members do not argue otherwise. The Government cannot, however, mandate compliance with any such recommendation without running the gauntlet of this Court's strict scrutiny. Because EO N-33-20 does precisely this, and the county governments have promised to enforce that order, the Church Members claims are not moot.

B. The Government Cannot Moot the Church Members' Claims by Voluntarily Ceasing Its Executive Actions for a Brief Period.

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Id.*, at 289, n. 10 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). However, a case might become moot in such circumstances provided a defendant overcomes the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Rosemere Neighborhood Ass'n*, 581 F.3d at 1173; *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968).

In analyzing whether a plaintiff's claim is mooted by a change in government policy, this Court distinguishes between policy changes resulting from

the legislative process and those made through executive fiat. *Rosebrock*, 745 F.3d at 971-972. This is because policies modified through executive action "could be easily abandoned or altered in the future," unlike legislative changes which are presumed to have occurred in good faith. *Id.* (citing *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). Thus, while courts have relatively less difficulty in finding a claim moot where a challenged statute was legislatively repealed, *see, e.g.*, *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006), finding mootness in the context of executive action "where the government is otherwise unconstrained should it later desire to reenact the [offending] provision" presents a far greater obstacle. *Rosebrock*, 745 F.3d at 971 (citing *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 928 (9th Cir. 1991)).

In either circumstance, however, the entirety of the harm asserted by the plaintiff must be eliminated by the policy change before the case may be deemed moot. *See, e.g.*, *Cuviello v. City of Vallejo*, 944 F.3d 816 (9th Cir. 2019) ("To determine whether a legislative change has rendered a controversy moot, we ask "whether the new ordinance is sufficiently similar to the [previously challenged] ordinance that it is permissible to say that the challenged conduct continues.") The mere lessening of the asserted harm does not render the plaintiff's claims moot. *Id.*

Here, there is no conceivable mootness argument that does not arise from the Government's voluntary cessation of its COVID-19 restrictions on places of worship. As explained above, this cessation never actually occurred. Even if it did, however, the Church Members' claims are not moot because the Government has failed to carry its heavy burden of showing that it is "absolutely clear" that the challenged conduct will not recur. Indeed, the challenged conduct has already recurred. The Government has once again forcibly shuttered all places of worship, yet still allows "essential" businesses to operate under less-restrictive measures. RJN Ex. 8.

Importantly, the Church Members' claims are not moot even in the event that the claims were, as the district court mistakenly held, dependent on any one CDPH policy or the various revisions thereof. The executive changes made by the CDPH to its policies have been, and likely will be, further modified or even reimplemented in the same or substantially similar form. Indeed, this has already occurred. RJN Ex. 8.

The sequence of events in this case also casts serious doubts as to whether the Government's initial policy change was made in good faith at all. The CDPH issued its COVID-19 guidance for places of worship on May 25, 2020. 3-ER-352. Two days later, the Government filed its motions to dismiss on mootness grounds, which the district court granted on July 8, 2020. 6-ER-1128. Before even one week

had passed, the Government reverted back to forcibly shuttering places of worship across much of California. 2-ER-75. Even if merely coincidental, the Court should not declare that the Government can voluntarily "cease" its actions for such a short time, only to restart after obtaining dismissal of claims asserting the deprivation of fundamental rights. Such precedent will undoubtedly be exploited by the government—even if not this particular Government—to the detriment of all.

C. The Circumstances Giving Rise to this Dispute Are Capable of Repetition Yet Evading Review by the Courts.

The Church Members are under a constant threat that the Government will prohibit them from hosting or attending religious services. *See, e.g.*, *Diocese of Brooklyn*, 141 S.Ct. at 68–69 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). If, as the district court held, the Church Members' claims are mooted each time the CDPH or Government revises its COVID-19 policies, the Church Members would be effectively precluded from obtaining any relief, whatsoever.

Applying for relief from the district court takes time; filing an appeal to this Court and, potentially, the Supreme Court also takes time. If the Church Members' claims are mooted by the independent actions of the Government at any point during that process, the case or appeal must be dismissed, and the Church Members must start over. Over the past eight months, the Church Members would have had to start over no less than seven times if they were required to amend their

claims with each passing policy revision. This reality would not only deny the Church Members any hope of obtaining lasting relief, merely by operation of court procedure, but also deny this Court the opportunity to review any appeal brought by the Church Members on its merits.

It is precisely for circumstances of the type presented here that courts have developed the now well-established mootness exception for disputes capable of repetition yet evading review. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973), holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Olmstead v. L.C.*, 527 U.S. 581, 594, n. 6 (1999). This doctrine applies to the facts of this case for the simple reason that it must—if it did not, the Government would be able to suppress fundamental liberties, in perpetuity, while those affected by the Government's actions are left with no path for recourse. Such a result cannot stand. Accordingly, the Court should vacate the Judgment entered by the district court and reverse its orders dismissing the Church Members' claims as moot.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING THE CHURCH MEMBERS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

Provided that the Court agrees with the Church Members that this action is not moot, the Court should reverse the district court's order denying interlocutory injunctive relief. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716,

730–731 (9th Cir. 2017) (reviewing the district court's denial of a preliminary injunction motion following its erroneous dismissal of the case on a non-merits ground).

Two sets of criteria are used to evaluate a request for injunctive relief in this circuit. *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the "traditional" criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) a likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the government is the opposing party, balancing of the harm and the public interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, the Court asks whether any significant "public consequences" would result from issuing the preliminary injunction. *Winter*, 555 U.S. at 24.

Alternatively, injunctive relief may be appropriate when a movant raises "serious questions going to the merits" and the "balance of hardships tips sharply in the plaintiff's favor," provided that the plaintiff is able to show there is a likelihood of irreparable injury and that the injunction is in the public interest. *All. for Wild Rockies*, 632 F.3d at 1131.

For the reasons addressed below, the Church Members meet all the criteria for preliminary injunctive relief. They have proved a clear violation of their constitutional rights; they will continue to be irreparably injured if relief is not granted; the balance of hardships tips in favor of protecting the Church Members' constitutional rights; and it is in the public interest to protect constitutional rights from government overreach.

A. The District Court Abused Its Discretion by Failing to Apply Traditional Scrutiny Analysis to the Church Member's Claims in Favor of a Never-Before Applied "Minimal Scrutiny" Standard.

The district court erroneously concluded that "traditional constitutional scrutiny does not apply" during an emergency and then invented a new standard of "minimal scrutiny" out of whole cloth. 1-ER-66 (citing *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905)). The Supreme Court has since rejected the district court's line of reasoning, holding that the traditional scrutiny framework applies even in a pandemic. *Diocese of Brooklyn,* 141 S.Ct. 63 (2020) (enjoining New York's COVID-19 restrictions as applied to house of worship). This district court's failure to apply long-established standards to the Church Members' claims constitutes an abuse of discretion and demands swift reversal by this Court. *Harvest Rock Church v. Newsom, Gov. of CA*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020).

B. The Church Members Are Likely to Succeed on the Merits of Their Claims.

1. The Government's criminalization of communal religious worship violates the Church Members' Free Exercise rights.

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940). Because of this fundamental protection, "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993). The requirements to satisfy this scrutiny are so high that the government action will only survive this standard "in rare cases," and the government bears the burden of proving it furthers a compelling interest and are pursued through the least restrictive means possible. *Id.*

Similarly, Article I, Section 4 of the California Constitution provides that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed." California Courts largely defer to the federal Free Exercise standard when examining potential constitutional violations. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004) (stating the

California Supreme Court has thus far not decided whether an independent interpretation of California's Free Exercise clause exists apart from the federal standard articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

"[I]f a law pursues the government's interest 'only against conduct motivated by religious belief,' but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 542–46). Laws that accomplish a "religious gerrymander," singling out religious practices while not restricting similar secular practices, are not generally applicable. *See id.* at 535–37. The Free Exercise Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *Id.* at 542. This is because "an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020).

Since the Free Exercise Clause "protect[s] religious observers against unequal treatment," *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020), prohibitions are not generally applicable if they "substantially underinclude non-religiously motivated conduct that might endanger the same governmental

interest that the law is designed to protect." *Wiesman*, 794 F.3d at 1079. Similarly, an overinclusive law that includes more protected conduct than necessary to achieve its goal is not generally applicable. *Lukumi*, 508 U.S. at 579. Accordingly, when COVID-19 orders restrict a church to a greater degree than "'essential' businesses," "acupuncture facilities, campgrounds, garages," "all plants manufacturing chemicals and microelectronics," "all transportation facilities," "a large store . . . that could 'literally have hundreds of people shopping there on any given day,'" or "factories and schools," the orders are neither neutral, nor generally applicable. *Diocese of Brooklyn*, 141 S.Ct at 67.

Here, the Government's complete shuttering of churches plainly imposes a greater burden than that imposed on secular activities—including those involving close, prolonged personal contact (e.g., massage therapists) or large numbers of people indoors (e.g., shopping malls). *See* RJN Exs. 4, 6A, 6B. The orders are simultaneously underinclusive—by permitting equally risky non-religiously motivated activities—and overinclusive—by proscribing religious activities to a degree greater than necessary, as made evident by "essential" businesses being allowed to continue operations. *See, e.g.*, *Diocese of Brooklyn*, 141 S.Ct at 67; *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at *7 (W.D. Ky. Apr. 11, 2020) (granting a temporary restraining order against Louisville's prohibition on religious gatherings); *First Baptist Church v. Kelly*, No.

20-1102-JWB, 2020 WL 1910021, at *6 (D. Kan. Apr. 18, 2020) (granting a temporary restraining order against Kansas State's prohibition on religious gatherings). The Government's orders are not neutral or of general applicability, meaning strict scrutiny applies.

To satisfy strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. *Diocese of Brooklyn*, 141 S.Ct at 67. The Government's Executive Order, here, and its enforcement of it, cannot be properly regarded as narrowly tailored to combat the spread of COVID-19. *See id.*

First, there is no evidence that Appellants have contributed to the spread of COVID-19, even when the Government briefly allowed limited indoor worship services. Under the traditional Free Exercise analysis—which the Supreme Court has made clear now applies in full force—the burden is on the Government to justify its unequal treatment of religious services. *See id; Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2609 (2020) (Kavanaugh, J., dissenting); *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 818 (2000). Yet, the Government has failed to provide any evidence in this case to support its many objectively unreasonable conclusions that, for example, standing in line to receive Holy Communion in a small church gathering poses a greater threat to public health than standing in line at Wal-Mart to purchase Christmas toys, or

sitting on a plane or in a shopping mall for hours at a time. The Government has therefore failed to satisfy its heavy burden under strict scrutiny.

Second, "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Diocese of Brooklyn*, 141 S.Ct at 67. In fact, the Government's own Blueprint schema provides dozens of examples: capacity limitations; mask-wearing requirements; and sanitization protocols. RJN Exs. 6A & 6B.

As Supreme Court Justice Neil Gorsuch noted when addressing New York's restrictions in his concurring opinion in *Diocese of Brooklyn*:

> "[p]eople 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."

Diocese of Brooklyn, 141 S.Ct at 69. These same less-restrictive alternatives enable Californians to engage in a multitude of indoor activities without significantly jeopardizing public health, according to the Government's own orders. RJN Exs. 4, 6A, & 6B (e.g., shopping malls may remain open at 25% capacity). There is no reason this same logic does not extend to this case.

Third, the Government's discriminatory enforcement of the Executive Order against religious activities is manifestly apparent on the face of its public health directives. Entire industries, including transportation, manufacturing, and warehousing are entitled to preferential treatment as "essential" operations. *Id.* Even if Riverside and San Bernardino Counties were to move back into the lower "red" tier, bookstores, clothing and shoe stores, hair salons and barbershops, home and furniture stores, jewelry stores, libraries, shopping malls, retailers, and nail salons will be allowed to be opened at 50% capacity—while churches, along with museums, are limited to the lesser of 25% or 100 persons total. *Id.* The Government's disfavoring of religious activities is no mere accident or byproduct of complex regulations; it has chosen to burden specially the exercise of religion.

Because the Governments' orders "burden substantially more [religious exercise] than is necessary to further the government's interests," it is not narrowly tailored. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The Government may not enact more onerous restrictions on "places of worship" than similar secular venues. The Executive Order is not narrowly tailored, failing strict scrutiny.

2. The orders ban all public and private assembly in violation of the First Amendment to the U.S. Constitution and California Constitution.

The district court erred in its one-paragraph dismissal of the Church Members' multiple alternate, independent, and free-standing grounds for relief. 1-

ER-69. The First Amendment right to free speech and to peaceably assemble are fundamental rights protected by the U.S. and California Constitutions. U.S. Const. amend. I; Cal. Const. Art. I §§ 2-3; *Whitney v. California*, 274 U.S. 357, 373 (1927); *People v. Chambers*, 22 Cal. App. 2d 687, 706 (1937) ("laws should not infringe upon our guaranteed freedom of speech and lawful assembly."). California courts treat the prior restraint and overbreadth doctrine similarly to federal courts. *See Wilson v. Superior Court*, 13 Cal.3d 652, 658-62 (1975) (relying mostly on federal citations to analyze the prior restraint doctrine under the California Constitution); *In re J.M.*, 36 Cal. App. 5th 668, 680 (2019) (citing some federal cases and paralleling overbreadth doctrine analysis under California Constitution with that under the U.S. Constitution).

"Religious worship and discussion are protected speech under the First Amendment." *Widmar v. Vincent* ("*Widmar*"), 454 U.S. 263, 269, n. 6 (1981). Accordingly, "[t]he Constitution guarantees Appellants' right to associate for the purpose of engaging in activities protected by the First Amendment." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). When a government practice restricts fundamental rights, it is subject to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

The Government's orders constitute a prior restraint on the Church Members' fundamental rights to freedom of speech and assembly and therefore fail to pass constitutional scrutiny. Its orders are also substantially overbroad, producing a chilling effect on the Church Members' ability to engage in religious worship safely, pursuant to federal guidelines. RJN Ex. 1. As discussed above, the Government cannot overcome strict scrutiny on these facts. The CDC's social distancing guidelines are appropriate to limit the spread of COVID-19. *Id.* Imposing more restrictive requirements that target churches, while at the same time allowing restaurants, coffee shops, and marijuana dispensaries to operate more freely, is not the least restrictive means of achieving the Government's stated public safety goals.

In this case, law enforcement officers have unfettered discretion in enforcing the law because they are provided no standards—or even conflicting standards—as to when to enforce or exempt religious services from the law. *See, e.g.*, *Houston v. Hill*, 482 U.S. 451 (1987). Counties have already exercised that discretion to provide *ad hoc* exemptions for certain days of the year and have revised their interpretations of State orders to first prohibit and later allow drive-up services. 5-ER-1046. Order violators are liable for criminal penalties, further raising the stakes.

Requiring the Church Members to abstain from religious gatherings, under threat of criminal enforcement, and despite substantial modifications to satisfy the public health interests at stake (modifications that have been deemed acceptable in the cases of operations deemed "essential" by government decree, and by the federal government), violates Church Members' constitutional rights to free speech and peaceful assembly.

3. The Government's orders are void for reasons of vagueness.

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1115 (1997). Vague laws "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). If "arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id.* The problem with a vague regulation is that it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application." *Id*; *see also Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018).

Given the complexity of the interweaving policies and orders—which have confounded even the federal court below—and particularly in light of the fundamental rights at stake, the Church Members cannot reasonably be expected to understand precisely what is being ordered versus what is merely a recommendation. Statements by local officials have muddled the issue further. San Bernardino County, for example, indicated at one point that it "does not expect law enforcement to broadly impose citations on violators" and that "the expectation is that law enforcement will rely upon community members to use good judgment, common sense, and act in the best interest of their own health and the health of their loved ones and the community at large." 5-ER-1014. As no reasonable person can make sense of what conduct is permitted by the Government and what conduct will result in criminal penalties, the Government's orders are void for vagueness.

4. The orders violate Article I, Section 1 of the California Constitution.

All Californians "are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. Art. I, § 1. Understanding the basic fundamental right of liberty, California courts have held that Public Health Officials' authority is limited. Before exercising their full powers to quarantine, there must be "reasonable grounds [] to support the belief that the person so held is infected." *Ex*

parte Martin, 83 Cal. App. 2d 164 (1948). Public Health Officials must be able to show "probable cause to believe the person so held has an infectious disease . . . ." *Id.*

In a case that is somewhat analogous to what Californians are facing with the coronavirus pandemic of 2020, California courts found that Public Health Officials could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900). These courts found it "purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the personal liberty of complainant" who had "never had or contracted said bubonic plague; that he has never been at any time exposed to the danger of contracting it, and has never been in any locality where said bubonic plague, or any germs of bacteria thereof, has or have existed." *Jew Ho*, 103 F. at 10. In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000 people living in the twelve blocks of San Francisco Chinatown who were to be quarantined. The courts found it unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths.

California courts have found that "a *mere suspicion* [of a contagious disease], *unsupported by facts* giving rise to reasonable or probable cause, will afford *no justification at all* for depriving persons of their liberty and subjecting

them to virtual imprisonment under a purported order of quarantine." *Ex parte Arta*, 52 Cal. App. 380, 383 (1921) (emphasis added). Under prevailing law, the Church Members are presumed to be free of communicable disease unless and until the Government establishes otherwise. Requiring the Church Members to abstain from all religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates their California Constitutional liberty rights.

5. The Government violates the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment of the Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection requires the state to govern impartially—not draw arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Strict scrutiny under the Equal Protection Clause applies where, as here, the classification impinges on a fundamental right, including the right to practice religion freely, the right to free speech and assembly, and the right to travel, among others. *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988) ("When a law disadvantages a suspect class or impinges upon a 'fundamental right,' the court will examine the law by applying a strict

scrutiny standard."), *aff'd sub nom. Maynard v. U.S. Dist. Court for Cent. Dist. of California*, 915 F.2d 1581 (9th Cir. 1990). Under strict scrutiny review, the law can be justified only if it furthers a compelling government purpose, and, even then, only if no less restrictive alternative is available. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 257-58 (1974).

Here, the Government intentionally and arbitrarily categorizes individuals and conduct and then subjects each category to differing levels of restriction. The Government's recently-articulated, purportedly-neutral set of seven factors it uses to assess the risk of transmission does not help its case.[6] Indeed, the factors serve only to highlight the multitude of less restrictive alternatives available to reduce any risk otherwise posed by certain types of acts: mask mandates; physical distancing; duration limits; number of household limits; limitations on physical interactions; proper ventilation; and ensuring that church leaders have the tools and information needed to implement the same. The Government adopted none of

[6] The Government's seven-factor risk assessment is comprised of the following: "(1) ability to accommodate wearing masks at all times; (2) ability to allow physical distancing; (3) ability to limit the duration of exposure; (4) ability to limit the amount of mixing of people from differing households and communities; (5) ability to limit the amount of physical interactions of visitors/patrons; (6) ability to optimize ventilation; and (7) ability to limit activities that are known to cause increased spread." *South Bay Pentecostal Church v. Newsom*, No. 20-CV-00865-BAS-AHG 2020 WL 7488974, at *1 (S.D. Cal., Dec. 21, 2020).

these measures—at least with respect to churches—but has instead banned indoor religious services entirely.

For reasons discussed above, the Government has not, and cannot, satisfy strict scrutiny; its arbitrary classifications are not narrowly tailored measures that further a compelling government interest. Indeed, the Government's orders defy federal guidance, which provides that places of worship are "essential" across the country. RJN Ex. 1. Accordingly, the Government must permit the Church Members to engage in equivalent constitutionally protected activities provided that the Church Members also adhere to the social distancing guidelines established by the CDC.

C. The Church Members Face Imminent Irreparable Harm Absent Immediate Injunctive Relief.

Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary for courts dwell on the remaining three factors except to confirm that a showing has been made as to each. *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020); *but see Cuviello*, 944 F. 3d at 831 (noting that the analysis does not wholly collapse into the merits question). It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S.Ct at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "Unlike a monetary injury, violations of the First Amendment 'cannot be

adequately remedied through damages.'" *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1058 (C.D. Cal. 2016) (*citing Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).Without an injunction preventing the Government from further enforcing its worship restrictions, the Church Members will continue to suffer irreparable harm to their fundamental rights by being prohibited from practicing their religion in accordance with the tenets of their faith.

D. The Remaining Factors Weigh in Favor of Granting Injunctive Relief.

Where the government is the opposing party, balancing of the harm and the public interest merge. *See Nken*, 556 U.S. at 435. Thus, the Court asks whether any significant "public consequences" would result from issuing the preliminary injunction. *Winter*, 555 U.S. at 24. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*quoting Elrod*, 427 U.S. at 373). "Faced with . . . preventable human suffering, [the Ninth Circuit] ha[s] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (*quoting Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). Further, "the fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [movant's] favor." *Sammartano*, 303 F.3d at 973.

Here, at a minimum, the balance of hardships tips strongly in favor of granting relief because the Government's actions raise serious constitutional questions concerning the Church Members' fundamental rights. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights"); *see also Reed*, 523 F. Supp. 2d at 1101; *Sammartano*, 303 F.3d at 974.

Protecting religious liberty will result in positive consequences for the public. RJN Ex. 1 ("religious worship has particularly profound significance to communities and individuals . . ."). There is no increased risk to the public by allowing the Church Members to practice their faiths in accordance with federal guidelines issued by the CDC and pursuant to the same set of restrictions the Government applies to those engaged in comparable secular activities. *Id.* As such, there is no public interest justification for allowing the continued suspension of the Church Members' fundamental rights, and this Court should reverse the district court's order.

E. If This Court Determines that the Church Members' Claims Are Moot, It Should Vacate the District Court's Unreviewed Order Denying Temporary Injunctive Relief.

"A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513

U.S. 18, 24-25 (1994). Likewise, "a litigant should not be bound by an adverse unreviewed judgment 'when mootness results from unilateral action of the party who prevailed below.'" *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) (quoting *U.S. Bancorp*, 115 S.Ct. at 392). If this Court determines that the Church Members' claims are moot, it will be in no part the result of any acts by the Church Members. Accordingly, the Church Members respectfully request this Court vacate the district court's order denying a temporary restraining order and preliminary injunction to the extent it is left unreviewed by this Court.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court (1) vacate the Judgment of the district court, (2) reverse the district court's orders dismissing their claims as moot, (3) reverse the district court's order denying temporary and preliminary injunctive relief, and (4) remand to the district court for further proceedings in light of this Court's ruling.

In the event that this Court affirms the district court's Judgment, Plaintiffs-Appellants respectfully request that this Court vacate the district court's order denying interim injunctive relief.

December 31, 2020

Respectfully submitted,

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon (SBN: 207873)
Mark P. Meuser (SBN: 231335)

DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700

Gregory R. Michael (SBN: 306814)
MICHAEL YAMAMOTO LLP
1400 Shattuck Ave., #412
Berkeley, CA 94709
Phone: 510.296.5600
Fax: 510.296.5600

Attorneys for Plaintiffs and Appellants
Wendy Gish, Patrick Scales, James Dean
Moffatt, and Brenda Wood

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of FRAP 27(d). The Motion was prepared in Times New Roman 14-point font, and contains 10,664 words, as counted by Microsoft Word.

December 31, 2020

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2020, I filed the foregoing Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

December 31, 2020 /s/ Harmeet K. Dhillon
Harmeet K. Dhillon