No. 20A120

**In the**
**Supreme Court of the United States**

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WENDY GISH, PATRICK SCALES, JAMES DEAN MOFFATT, AND BRENDA WOOD,
*Applicants*,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California,
*Respondents*.

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

# Reply in Support of Emergency Application for a Writ of Injunction


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## I. INTRODUCTION

Applicants' need for injunctive relief is dire. For over nine months now, the State of California has limited Applicants' First Amendment freedoms, imposing the State's value judgment that free religious expression and congregant worship— as opposed to essential things like marijuana, liquor, or retail shopping— are not *really* essential in the lives of religious adherents rather than respecting the high regard the Constitution places on religious freedom. The unconstitutionality of the State's enactments is plain, but the lower courts' application of inappropriate legal standards to Applicants' pleas for relief, as well as the State's constant shifting of the shape of regulation it uses to restrict Applicants' rights, have stymied Applicants' efforts.

Even after this Court's rejection of the *less onerous* restrictions at issue in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (*per curiam*) ("*Diocese of Brooklyn*"), the State immediately doubled down on its unconstitutional ban of in-person worship by issuing its Regional Stay At Home Order. App'x pp. 120-123. Even worse, in its opposition the State falsely represented to the Court that Applicants never challenged the applicable executive order on constitutional grounds. The State also argues cynically that Applicants' First Amendment rights should continue to be denied because the State has

repeatedly changed the label on its unconstitutional restrictions—something it has done *seven times* since the pandemic commenced.

Regardless of the label on the bottle, California's regulatory regime barring nearly all indoor worship while permitting secular activities of the same general nature violates Applicants' fundamental rights. This Court should put an end to the State's litigation and political gamesmanship and grant Applicant's request for immediate injunctive relief.

## II. ARGUMENT

### A. This Court Should Put an End to the State of California's Game of Constitutional Whack-A-Mole by Restoring Applicants' Constitutional Right to Practice Their Religion in Accord with the Dictates of Their Conscience.

Injunctive relief is necessary because the U.S. District Court, Central District of California, erroneously dismissed Applicants' claims as moot. In so doing, the District Court misapprehended the facts of this case, misapplied the law of mootness to those facts, and entered final judgment against Applicants. Further, both the District Court and the Ninth Circuit U.S. Court of Appeals denied Applicants' requests for injunctive relief pending appeal from that judgment. Absent this Court's intervention, therefore, Applicants will continue to suffer irreparable harm with no hope for immediate relief, despite their plain entitlement to it under *Diocese of Brooklyn*.

### 1. Executive Order N-33-20 is, and has always been, the basis for both the State public health agency's claimed authority to criminalize congregate religious worship and the focus of Applicants' legal challenge.

The State falsely suggests that Applicants "never challenged" the Executive Order or sought injunctive relief from the lower courts on constitutional grounds, somehow missing Applicants' *seven separate paragraphs* stating the Order is unconstitutional in Applicants' verified complaint alone. Supp. App'x. #21, ¶ 94, 105, 114, 123, 132, 140, & 149. The Applicants challenge, and have always challenged, the constitutionality of Executive Order N-33-20. Supp. App'x #22, pp. 243:8-11, 245:19-20, 246:22-26, 249:18-22, 250:15-18, 251:23-24, 254:11-15; Supp. App'x #23, pp. 345-346; and Supp. App'x #24, pp. 746-747, 754, 757, 759, & 761. Executive Order N-33-20 provides the California Department of Public Health ("CDPH") *carte blanche* power to impose criminal penalties on those who practice religious worship in a manner not ordained by the health directives issued by the CDPH. App'x. p. 29 (citing Cal. Health & Saf. Code § 8665). The CDPH proclaims publicly that the Governor's Executive Order provides it this power:

> Several Health and Safety Code provisions (listed in the order itself) authorize the California Department of Public Health to take action necessary to protect public health. In addition, multiple executive orders *require compliance* with such orders. For example, on March 12, 2020, Governor Gavin Newsom issued Executive Order N-25-20, which included as operative paragraph one, "[a]ll residents are to heed any orders and guidance of state and

> local public health officials, including but not limited to the imposition of social distancing measures, to combat the spread of COVID-19." Further, *on March 19, 2020, Governor Newsom issued Executive Order N-33-20, in which he reiterated his directive that all residents immediately heed state public health directives (which, in that Order, was in the context of the stay-at-home order).*

https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed January 14, 2021) (emphasis added).[1]

The State erroneously claims California Health & Safety Code § 120140 provides the State's health agency independent authority to compel compliance with the agency's directives. It does not. Section 120140 states that the CDPH may "take measures as are necessary to ascertain the nature of the disease and prevent its spread," including by "tak[ing] possession or control of the body of any living person, or the corpse of any deceased person." The statute does *not* provide the authority for health officials to impose *criminal* sanctions. Nor does the statute confer authority on the agency to enact standing criminal laws barring religious worship.[2]

[1] The Governor's Executive Orders N-25-20, N-33-20, and N-60-20 contain the same or similar operative language compelling the public to comply with all State public health directives.

[2] Unlike the Governor's Executive Orders, California Health & Safety Code Section 120140 also requires that the agency's actions be "necessary" to prevent the spread of the disease.

In contrast, the Governor's Executive Order N-33-20—the law challenged by Applicants from Day One of this litigation through today—does just that by ordering the public to comply with all directives that the agency may issue on pain of criminal penalty. That is why injunctive relief enjoining applicable sections of Executive Order N-33-20 is necessary to provide Applicants' the relief they request from this Court and why they have asked for such relief.

**2. The District Court's denial of injunctive relief rewarded the State's disingenuous practice of making public health directives perpetually moving targets unable to be challenged.**

Applicants have repeatedly sought injunctive relief from the lower courts to no avail. The District Court held that the Applicants' claims are moot and must be amended with each passing change to the CDPH's guidance materials, but these directives have been modified substantially no fewer than *seven* times since the time Applicants filed their complaint in April 2020. Requiring Applicants to follow the District Court's suggested procedure would have required Applicants to file seven amendments, each of which would and could have been mooted by a few mouse clicks by the Respondents. As Justice Gorsuch recently wrote:

> It is easy enough to say it would be a small thing to require the parties to "refile their applications" later. *Post*, at 77 (opinion of BREYER, J.). But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional

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

*Roman Catholic Diocese*, 141 S. Ct. at 72. The very same reasoning applies here.

And, indeed, the core controversy at issue, despite the State's ever-changing vehicles for achieving its discriminatory ends, remains the same as it was at the outset of the pandemic. Regardless of how its orders are couched, the State's regulations and enforcement still restrict Applicants' First Amendment freedoms to a greater degree than comparable secular activities and, when viewed in light of their core injury, are indistinguishable from those initially challenged. *See De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945) ("A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.").

Thus, it does not help the State to have added an industry or two to the essential list in iteration four of its order or to have raised an occupancy limit for another group in iteration six. In each and every instance, the snake oil in the bottle has remained the same and restricts indoor congregate gathering more than a trip to

Walmart, a cross-country trip on a plane, or a visit to the local marijuana dispensary; and in each case it does so unconditionally. As the majority explained in *Diocese of Brooklyn*, "[t]The Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." 141 S. Ct. at 68 (footnote omitted). Here too, requiring Applicants to return to the lower courts again and again to vindicate their constitutional rights against state power, already clothed in the mantle of presumed validity, would reward the State's gamesmanship and prevent Applicants from ever being in a position to receive their requested relief.

The courts below have, nonetheless, repeatedly failed to grant Applicants relief in line with that required by this Court's precedent. Forcing Applicants to again return to square one would work a manifest injustice.

### B. Injunctive Relief Is Proper to Restore Applicants' First Amendment Rights.

For the reasons discussed in Applicants' Emergency Application, injunctive relief is proper. *See* Application pp. 14–17. The circumstances are critical and exigent, as Applicants' religious rights have been restricted for over nine months with no end in sight. The legal rights at issue are "indisputably clear," as this Court taught in *Diocese of Brooklyn*, 141 S. Ct. at 66. And injunctive relief is "necessary

and appropriate" given lower courts' repeated rejection of this Court's clear guidance in these matters.

### 1. This Court already determined that a state's categorization of religious worship as more dangerous than shopping, public transportation, and manufacturing is neither neutral nor generally applicable.

Strict scrutiny applies if a law is (i) not neutral *or* (ii) not generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, *supra*, 508 U.S. 520, 542 (1993). Here, Executive Order N-33-20 and its implementing regulations are neither.

The State attempts to justify its position on distinctions already rejected by this Court in *Diocese of Brooklyn*, where the State of New York asserted that laws restricting in person religious worship were no more restrictive than those governing "acupuncture facilities, camp grounds, garages, … plants manufacturing chemicals and microelectronics and all transportation facilities." The Court found that, in fact, New York's regulations were not neutral or generally applicable. *Diocese of Brooklyn,* 141 S. Ct. at 66.

In that decision, the majority opinion pointed out the inevitably "troubling results" of permitting states to employ a double standard that allows hundreds to shop at a store on a given day, but prohibits a church from allowing more than 10 or 25 people for a worship service. *Id.* at 67. In concurrence, Justice Kavanaugh stated it was discriminatory to put numerical caps on houses of worship while "a

grocery store, pet store, or big-box store down the street does not face the same restriction." *Id.* at 73. The injury and injustice are that much greater when the State *completely bans* congregate religious worship, as does the State here, yet lets retail shopping and other commerce continue.

The State's platitudes and false characterizations of religious worship in its opposition cannot save it from the deficiencies of its rationalizations. With broad brushstrokes, the State's opposition suggests its policies targeting religious worship for greater restrictions are warranted because church services require individuals to be "in close proximity for extended periods of time in an indoor location with limited ventilation" and engage in activities like talking or singing. Opposition 43. These vague and unsupported statements, suggesting that Jews, Christians, Sikhs, Muslims, and Buddhists all worship in the same manner, with exactly the same levels of interaction, and in uniform buildings with "limited ventilation," would doubtless come as news to most religious adherents. So too would the State's suggestion that congregate worship necessarily requires prolonged close contact, singing and chanting, without ever opening windows or using heat and air conditioning. In fact, however, Applicants have never suggested to the State, or to any court, that it would be impossible for them to gather for worship with limited time and occupancy restrictions for their services, requirements for social distancing and masks, or with doors open and fans on to

ensure adequate ventilation. Nor is there any evidence to suggest that they could not, or would not, employ every available measure to protect attendees from the spread of COVID-19.

And this reason—the unjustifiable distinction between permitted and prohibited conduct based, not on safety considerations, but whether people are involved in congregate worship or not—is the "tell" in the government's far-reaching rationalizations of its regulations. Just as church worship can be long or short, shopping trips can be of unlimited duration. The State has no concern about ventilation issues at the local supermarket, and there is no evidentiary or other basis for it to assert that the air is any less fresh in house of worship.

The State's categorization of "religious worship" as a separate and inherently more dangerous activity than public transportation and grocery shopping, Opposition 33–34, and that "manufacturing and warehousing facilities" pose a lesser threat than indoor religious worship, Opposition 40, have already been roundly rejected by this Court. *See Diocese of Brooklyn*, 141 S. Ct. at 66–67. The lower courts' choice to nonetheless ignore this Court's holding and reasoning in *Diocese of Brooklyn* on remand in *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974 (S.D. Cal. Dec. 21, 2020) and *Harvest Rock Church, Inc. v. Newsom*, 2020 WL 7639584 (C.D. Cal. Dec. 21, 2020), rather than bolstering the State's already disavowed notions of what is constitutionally

permissible, further demonstrate the urgency with which this Court should act to protect its precedent and Applicants' First Amendment freedoms.

**2. There is no plausible argument that the State's restrictions on religious worship are narrowly tailored, which is why the State did not make one.**

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 does not argue that EO N-33-20 is narrowly tailored. No serious argument can be made that a mandate stating, "all residents are directed to immediately heed the current State public health directives" is "narrow." The injury caused by the overly broad nature of EO N-33-20—the Government's singling out of congregate worship for absolute restriction—is no different, and in fact is even more onerous, than the restrictions found unconstitutional by this Court in *Diocese of Brooklyn*.

Arguing, again, that congregate religious worship always involves "prolonged," close contact, singing and chanting, and limited ventilation, Opposition 43, the Government makes no effort to explain why, instead of making the constitutionally-protected activity of congregate worship a criminal offense, its diktat could not (a) limit the length of services; (b) employ social distancing; (c) require masks so that, along with social distancing, the dreading "singing and chanting" would pose no threat of infection; and (d) require ventilation equivalent to that required of secular and commercial activities. As stated above, Applicants

have never suggested that such limitations would necessarily be untenable or unlawful.

But EO N-33-20 is a broad-brush attack on congregate worship itself, as opposed to epidemiologically risky conduct that may take place in such a constitutionally privileged setting. And that is exactly what the Court struck down in *Diocese of Brooklyn*:

> Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. . . .
>
> Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue.

141 S. Ct. 67. The Court in *Diocese of Brooklyn* then went on to describe how the facilities available to the petitioners left room for ample social distancing and could not justify a total shutdown. "It is hard to believe that admitting more than

10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows." *Id.*

The same applies here. The Government has made no attempt to tailor EO N-33-20 to constitutional measurements, instead merely prohibiting an entire category of gathering *per se*. And that bright-line ban is based not on dangerous conduct shown by evidence to be inimical to such gatherings, but rather on broad, unproved generalizations. Moreover, this ban is directed not merely at *any* conduct, but at a right afforded special First Amendment protection that far predates *Diocese of Brooklyn* and COVID-19. For these reasons, EO N-33-20 is not narrowly tailored and, under strict scrutiny, fails to justify its ban on a core constitutional right.

## CONCLUSION

Applicants have suffered, and will continue to suffer, deprivations of their rights to freely exercise their faith, as promised by the U.S. Constitution, unless this Court grants the relief requested. The Applicants respectfully request that this Court enter an injunction prohibiting the enforcement of Governor Newsom's Executive Orders N-33-20 (March 19, 2020) and N-60-20 (May 4, 2020) against them pending final resolution in this case, including the filing and disposition of any Writ of Certiorari.

Respectfully submitted this 14th day of January, 2021.

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