No. __-____

In the
Supreme Court of the United States

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.

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

Emergency Application for a Writ of Injunction
Relief Requested by January 9, 2021

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Question Presented

In recent weeks, California Governor Newsom and unelected public health bureaucrats on the State and County level have issued executive orders and public health directives to help control the spread of COVID-19 which prohibit in-person religious services or otherwise restrict in-person religious gatherings more strictly than secular activities. *See* Executive Orders N-33-20 and N-60-20 and Public Health Directives, attached as Appendices 5, 6, 7, 9, 13, 15, and 17. While harshly and unconditionally limiting congregate worship, the Order, and directives issued pursuant to the Order, permit shopping malls, marijuana dispensaries, grocery stores, repair shops, childcare facilities, airports, public transportation, and other services to open at reduced capacity, depending on which "Tier" a region or county currently stands.

Given this Court's recent ruling in *Roman Catholic Diocese of Brooklyn v. Cuomo*, *Harvest Rock Church v. Newsom*, and other similar cases, the questions presented here are:

- Whether the Free Exercise, the Free Speech, and the Freedom of Assembly Clauses of the First Amendment prohibit the government from discriminating against houses of worship by banning in-door services while exempting, or otherwise giving preferential treatment, to non-religious activities; and
- Whether the U.S. Court of Appeals for the Ninth Circuit erred by failing to enter an injunction pending appeal in this case prohibiting enforcement of

Newsom's Executive Order, CDPH directives, or county public health orders after this Court published its decision in *Diocese of Brooklyn*.

Parties and Rule 29.6 Statement

The following list provides the names of all parties to the present Emergency Application for Writ of Injunction and the proceedings below:

Applicants are Wendy Gish, Patrick Scales, James Moffatt, and Brenda Wood. Ms. Gish attends Shield of Faith Family Church in San Bernardino County, California. Patrick Scales is the head pastor of Shield of Faith Family Church in San Bernardino, California. James Dean Moffatt is the senior pastor at Church Unlimited in Riverside County, California. Brenda Wood is the senior pastor at Word of Life Ministries International, Inc. in Riverside, California.

Respondents are Gavin Newsom, in his official capacity as the Governor of California, and Xavier Becerra, in his official capacity as the Attorney General of California.

Both the State and the County are Defendants in the U.S. District Court for the Central District of California and are the Appellees in the U.S. Court of Appeals for the Ninth Circuit. Applicants only seek an injunction against the State Defendants, specifically against enforcement of Executive Order N-33-20 and N-60-20. The County Defendant-Appellees, while still parties in the underlying appeal, have represented that they will only seek to enforce the State order. Thus, Applicants do not seek an injunction pending appeal against the County Defendants

or Appellees, and Applicants have therefore not included them in this Emergency Application.

The Applicants are all individuals. This brief is filed on their behalf. For this reason, there is no nongovernmental corporation interest to disclose pursuant to Rule 29.6.

Decisions Below

The U.S. Court of Appeals for the Ninth Circuit denied Applicants' request for an injunction pending appeal without explanation. The order denying the request, Docket Entry No. 103, is attached as Appendix 1. The U.S. District Court for the Central District of California also denied Applicant's request for an injunction pending appeal. That order is attached as Appendix 20.

The opinion denying the motion for a temporary restraining order from the U.S. District Court for the Central District of California, dated April 23, 2020, is available at 2020 WL 1979970 (C.D. Cal. 2020) and is attached as Appendix 2. The order granting defendants' motion to dismiss, dated July 8, 2020 (in chambers) is available at 2020 WL 6193306 (C.D. Cal. 2020) and is attached as Appendix 3. The District Court denied Applicant's Motion for Reconsideration on October 9, 2020 but did not enter judgment until December 11, 2020. The October 9, 2020 opinion is available at 2020 WL 6054912 (C.D. Cal. 2020) and is attached as Appendix 4.

Jurisdiction

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Ninth Circuit. This Court has jurisdiction under 28 U.S.C. § 1651.

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

The COVID-19 pandemic has brought into sharp relief many of the freedoms Americans enjoy. Governors and courts alike have been forced to balance essential interests. Governors have exercised more executive authority over the lives of the citizens of their states in the past nine months than they have in the course of decades of state government combined. This unprecedented exercise of executive authority to control a pandemic, however, has consistently violated freedoms guaranteed by the United States Constitution, not least the First Amendment's guarantees of Free Exercise of Religion, Free Speech, and Freedom of Assembly.

In the nearly nine months since governors issued the first COVID-related State executive orders, California continues to impinge significantly on indoor religious gatherings—prohibiting them entirely and unconditionally—while allowing comparable secular activities, such as obtaining a haircut, shopping, getting a car repaired, attending a farmers' market, or browsing the stacks at a local library. Governor Newsom's Executive Order N-33-20 (March 19, 2020, attached as Appendix 5) and Executive Order N-60-20 (May 4, 2020, attached as Appendix 6; collectively "Executive Order" or "Executive Orders") delegates significant authority to unelected state and county public health officers. Since the March 19, 2020 Executive Order, the State itself has issued a number of different, sometimes contradictory, orders and directives. While the specific dictates of the orders and directives may differ, they have one consistent theme: All treat houses of

worship more harshly, in terms of COVID restrictions, than secular businesses. Nearly all of the orders and directives prohibit houses of worship from offering in-person services or severely limit the number of people who can attend such services while permitting secular institutions far more generous attendance provisions as long as they implement certain practices designed to mitigate the spread of the virus. No such option is made available to otherwise comparable gatherings for religious worship.

The Executive Order mandates the unequal treatment of religious activities, and state public health officials have followed this directive as set forth below. Unfortunately, despite the clear unequal treatment and despite this Court's recent rulings prohibiting it, the U.S. Court of Appeals for the Ninth Circuit declined to issue an injunction pending appeal. Thus, pursuant to Sup. Ct. R. 20, 22 and 23, and 28 U.S.C. § 1651, Appellants-Applicants Gish, Scales, Moffatt, and Wood ("Applicants") respectfully request a writ of injunction precluding enforcement against Executive Orders N-33-20 and N-60-20 until such time as the case is fully resolved, including the disposition of any Writ of Certiorari that may be filed with this Court.

The Executive Orders affect Applicants' constitutionally guaranteed freedom and ability to practice their faith without State interference. While these orders and directives seemingly change at random with no consistency, all have the same effect of banning in-person religious gatherings while permitting non-religious gatherings that are otherwise similar in size and configuration. Furthermore, since March 19,

the California Department of Public Health (CDPH) has issued numerous "directives" pursuant to the Executive Orders, attached as Appendices 7, 9, 13, 15, and 17.

The relief requested through this Emergency Application is necessary for several reasons. Applicants have suffered numerous harms. The Executive Order and related dictates and county orders have prevented Applicants from exercising the rights guaranteed by the First Amendment, and there is no end in sight to this deprivation of Applicants' rights unless this Court acts to enjoin enforcement of the Executive Order. The Court of Appeals for the Ninth Circuit has declined to enter injunctions pending appeal, despite this Court's recent jurisprudence, making this application necessary.

Second, California's decision to treat religious and secular activities differently is a clear violation of this Court's promise of equality for Applicants' practice of their faith. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). Not only does California permit many secular activities to occur indoors, such as shopping, mass transit and the like; the State also permits these secular venues to operate and to accommodate large numbers of people so long as they follow certain mitigating practices, an opportunity the State does not provide Applicants seeking to engage in congregate worship utilizing the very same mitigation. As noted by Justice Gorsuch in his *Roman Catholic Diocese of Brooklyn*, 592 U.S. ___, 141 S.Ct. 63 (2020) concurring opinion, "Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment

prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." 141 S.Ct. at 69.

Third, Applicants have not enjoyed the same freedoms as people in New York or other states since this Court granted the requested relief in *Diocese of Brooklyn v. Cuomo*. While California has forced religious institutions to remain closed, worshippers in New York have enjoyed greater freedom to exercise their religion. During this Christmas season, while worshippers in New York have been able to exercise their First Amendment rights to attend Mass, Christmas Eve services and other seasonal religious services, Applicants were prohibited from doing so merely because they live in California and not New York. What this Court intended as a national standard in *Diocese of Brooklyn*,[1] federal courts in California have failed properly to apply, in this and other cases.

Fourth, several cases with similar fact patterns and legal issues are percolating in District Courts in California and the United States Court of Appeals for the Ninth Circuit.[2] Given recent decisions in these courts purporting to distinguish the facts in the cases before them and those in *Diocese of Brooklyn*, this Court's action is necessary to protect the Constitutional right of free exercise of

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[1] *See, e.g.*, *Harvest Rock Church v. Newsom*, 592 U.S. ___, 2020 WL 7061630 (2020), *Robinson v. Murphy*, ___ U.S. ___, 2020 WL 7346601 (2020), *High Plains Harvest Church v. Polis*, ___U.S. ___, 2020 WL 7345850 (2020), and *Agudath Israel of America v. Cuomo*, ___ U.S. ___, 2020 WL 6954120 (2020).

[2] *Harvest Rock Church v. Newsom*, 20-56357, 9th Cir. filed December 22, 2020; *South Bay v. Newsom*, 20-56358, 9th Cir. filed December 22, 2020; *Calvary Chapel San Jose v. Cody*, 20-cv-03794, N.D. Cal., filed June 9, 2020; and *Cross Cultural Christian Center v. Newsom*, 2:20-cv-00832, E.D. Cal. filed April 22, 2020.

religion for the Applicants. While curbing the spread of the virus is a noble and appropriate governmental goal, the Executive Orders arbitrarily discriminate against houses of worship and deprive Applicants of their freedom of conscience to worship as they believe proper, in violation of their rights to Free Exercise of Religion, Free Speech, and Freedom of Assembly as guaranteed by the First Amendment of the United States Constitution.

The State's exercise of power to shutter or severely restrict houses of worship requires the application of strict scrutiny. In this case, just as in *Diocese of Brooklyn*, the State's power has not been exercised in a neutral fashion. The State continues to exempt secular or commercial activities, such as indoor shopping, or to extend greater freedom to them than it does to houses of worship or, for that matter, congregate worship anywhere. The State also offers businesses the opportunity to employ practices intended to mitigate the spread of the virus such as social distancing and sanitizing stations as an incentive to permit greater attendance or as a condition of opening. Yet it refuses to allow Applicants' churches the same opportunity, all without enunciating a coherent scientific or medical basis for this distinction.

This Court has granted the relief requested recently in other cases. On November 25, 2020 this Court issued a *per curiam* opinion in *Diocese of Brooklyn* and followed that opinion with a December 3 order in *Harvest Rock Church v. Newsom, Gov. of California*, 592 U.S. ___, 2020 WL 7061630 (2020). In the former, this Court granted appellants' request for an emergency injunction pending appeal

and enjoined New York's COVID-19 restrictions as they applied to houses of worship until the final resolution of the case, including any review by this Court. In the latter, this Court vacated an order from the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit with instructions to reconsider in light of *Diocese of Brooklyn*. *See Harvest Rock Church*, 2020 WL 7061630 at *1.

As is the case for Applicants, courts must apply strict scrutiny to executive orders when those orders are not "neutral" and of "general applicability." *Diocese of Brooklyn*, 592 U.S. at ___, 141 S.Ct. at 67. In *Harvest Rock*, this Court required the Ninth Circuit and the District Court for the Central District of California—the very courts involved here—to reconsider a ruling impacting houses of worship, which was similar to the issues presented in this case. *Harvest Rock*, 2020 WL 7061630 at * 1.

To ensure that Applicants enjoy the same freedoms guaranteed by the Constitution as people in New York and across the country, this Court should act to ensure that its efforts to preserve core First Amendment rights in New York are applied equally across the country. For this reason, and those stated further in this brief, Applicants respectfully request that this Court grant their Request for a Writ of Injunction until this case is fully resolved, including the filing of any Writ of Certiorari.

I. Facts and Procedural Background

A. Procedural History

The Plaintiffs filed a verified complaint in the U.S. District Court for the Central District of California on April 13, 2020. The complaint challenged Governor Newsom's March 19, 2020 Executive Order N-33-20, which he issued in response to the outbreak of the novel coronavirus.

On April 23, 2020, the District Court denied Applicants' request for a Temporary Restraining Order (TRO). On May 25, Defendants issued new directives, attached as Appendix 10, relaxing some restrictions and permitting some, very limited, in-person religious services. Two days later, on May 27, Defendants filed their Motions to Dismiss, which the District Court granted on July 28, without the benefit of a hearing, finding that the May 25 directives mooted the Applicants' Complaint.[3] Because the Defendants, after securing the dismissal, issued new directives on July 13 reimposing substantially the same prohibitions as the March directive, attached as Appendices 11-12, Applicants filed for reconsideration on August 17, 2020. The District Court denied the motion on October 9, 2020, waiting however until December 11, 2020 to finally to enter Judgment in favor of the Defendants. The District Court also denied an injunction pending appeal.

[3] It would seem that the District Court misunderstood the precise order being challenged. The District Court looked at a Public Health Directive issued the same time as Newsom's March 19 Executive Order and found that a directive issued May 25, 2020 superseded the March 19 directive. Setting aside the fact that the CDPH reissued the more onerous directive after the case was dismissed, the Appellants' challenged (and are still challenging) the underlying Executive Orders. Should this Court agree and grant the injunction pending appeal, it would be against the Governor's Executive Orders, which Applicants submit would preclude enforcement of the discriminatory state health directives and county public health orders against them.

Applicants then filed their appeal with the U.S. Court of Appeals for the Ninth Circuit on December 18, 2020. Applicants requested both an injunction pending appeal and for an expedited briefing schedule on the merits. The Court of Appeals granted the request for an expedited briefing schedule but on December 23, 2020 denied, without explanation, the request for an injunction.

B. California's Executive Order and State Health Directives

California and Counties within the State have issued a cavalcade of Orders and Directives impacting houses of worship and Applicants' rights under the First Amendment. This procedural history attempts to make some form of sense of these shotgun blasts of regulation. Regardless of the confusion, two critical facts remain: First, all the orders and directives cite to, and derive their authority from, Governor Newsom's Executive Orders N-33-20 (March 19, 2020) or N-60-20 (May 4, 2020); and second, all the orders and directives single out houses of worship for harsher restriction than that afforded secular activities.

Governor Newsom issued an Executive Order on March 19, 2020. The Executive Order delegated significant authority to the California Department of Public Health. Failure to "heed" the Governor's orders or any directive issued under its authority is a "misdemeanor criminal offense punishable by up to a $1,000 fine, six months in jail, or both."[4] One of the major differences between the two orders is that the Governor omitted the word "heed" in his May 4, 2020 Executive Order. In fact, one of the Applicants, Rev. Moffatt, was fined $1,000 for violating the Order in

[4] See Cal. Gov. Code § 8665. The Executive Order provides that violations of it are punishable pursuant to Cal. Gov. Code § 8665.

Riverside County because he held a church service on Palm Sunday, April 5, 2020, pursuant to the March 19, 2020 order.

On or about March 22, 2020, the California Public Health Officer designated a list of "Essential Critical Infrastructure Workers," attached as Appendix 8. According to orders and directives herein described, if a worker, job description, or facility does not appear on the "Essential Critical Infrastructure Workers" list or otherwise receive special permission from the government to operate in-person events, that facility must remain closed. The only "faith-based" workers designated "essential," however, are those who can provide their services "through streaming or other technology."

On May 25, after Applicants filed suit and two days before Defendants filed their motions to dismiss, the CDPH issued amended guidelines that allowed for limited in-person religious services. The dismissal of Applicants' suit followed in due course on July 13, but mere days later, officials at CDPH amended the guidelines, largely reverting to its earlier order which prohibited in-person religious services.

Broadly, since March 19, 2020 CDPH has exercised the delegated authority numerous times, though the order from which CDPH derives its authority has remained unchanged. Each time CDPH exercises the delegated authority, it does so under the authority granted by the Executive Orders and in ways that harm Plaintiffs' freedom of conscience and ability to freely exercise their faith. Further, it seems to engage in a cynical game of cat-and-mouse, modifying the orders to moot

any legal issue presented to a court or avoid any judicial ruling that may constrain its authority until the action in question is dismissed.[5]

On August 28, 2020, California changed tactics again, adopting its "Blueprint for a Safer Economy" ("Blueprint," attached as Appendices 13 – 14, and 16). The Blueprint assigns counties to four color-coded "tiers" of "risk" dependent on the total number of positive 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. The tiered status of any county can change over time under the Blueprint. *Id.* Neither the severity of symptoms nor number of deaths is considered.

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

- Tier 1, or "purpose," 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 at all.
- 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

[5] Plaintiffs, though, focus their challenge not on the directives issued by CDPH but on the underlying March 19 Executive Order, which has not been amended, altered, replaced, or repealed.

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.

Consistent with California's practices, though, even the onerous Blueprint did not remain the standard for long. On December 3, 2020, Governor Newsom announced a "Regional Stay Home Order." ("Regional Order," Attached as Appendices 17-19). 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. 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. Even "non-essential" retail stores are allowed to

operate at 20% capacity. Houses of worship, though, must remain completely closed for in-person services, without regard to their facilities' capacity or any mitigation measures.

On December 3, just a few days after this Court published its decision in *Diocese of Brooklyn*, California once again issued its Regional Stay at Home Orders, doubling down on its policy of discriminating against houses of worship. 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. Through the Regional Order, Governor Newsom pushed over 94% of California's population, including those in the Counties of San Bernardino and Riverside, which includes Applicants, into Tier 1, or the so-called "purple" tier.

Notably, neither the Regional Order, nor the Blueprint have provisions for returning to full liberty. There is no "green" tier in the Blueprint because, as the Governor explained, "[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," KPIX CBS San Francisco Bay Area, August 28 2020. https://sanfrancisco.cbslocal.com/2020/08/28/gov-newsom-californias-new-simplified-color-coded-covid-reopening-guidelines/.

These orders have been consistent in only one way: 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 State has singled out Applicants' exercise of faith for harsher treatment than for shopping, doing laundry, purchasing marijuana, and so on. Put simply, the government forbids Applicants, under threat of criminal penalty, from attending Constitutionally-protected congregate worship while broadly permitting a range of secular activities.

C. The Applicants, Their Churches, and Plans to Mitigate the Spread of the Virus

The Applicants are all devoted adherents to their Christian faith. Prior to the excessive measures California instituted ostensibly to control the spread of COVID-19. Other Applicants are the lead or senior pastors of churches within San Bernardino and Riverside Counties in California.

Also prior to the COVID-19 pandemic, the Applicants' churches met regularly on Sundays and throughout the week. During those meetings, parishioners met with and encouraged one another, prayed, and worshipped according to the dictates of their consciences. The pastors also performed certain other ministries and sacraments only in person, such as baptisms and administering communion. Congregate worship, in short, is central to their exercise of religion.

The pastoral Applicants, upon learning of the coronavirus and the measures health officials were recommended to mitigate the spread, started implementing them 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. Similarly, Rev. Scales would ensure that those who desired to attend his church could be properly socially distanced along with taking other steps to mitigate the spread of the virus. But while institutions and businesses offering 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, Applicants are not afforded the same opportunities in California for the simple reason that they are engaged in religious worship.

II. Argument

> *[W]e hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men…*
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> ~ James Madison[6]

A. Standards and Reasons for Granting the Application

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens*

[6] James Madison, Memorial and Remonstrance Against Religious Assessments, June 20, 1785. National Archives, Founders Online. https://founders.archives.gov/documents/Madison/01-08-02-0163.

for Responsible Energy, Inc. v. NRC, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted).

Both a stay and an affirmative injunction may be issued by a Circuit Justice "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987). Unlike the issuance of a stay of a lower court order, however, "[a] Circuit Justice's issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C. J.) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J.)).

Generally, therefore, "[t]o obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are indisputably clear.'" *Id*. at 1306 (quoting *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C. J.). The Circuit Justice may also issue an injunction, however, "based on all the circumstances of the case," without having the order "construed as an expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014). The Court may also consider "a traditional ground for certiorari," such as whether "[t]he Circuit Courts

have divided on whether to enjoin the requirement." *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014).

In this case, the need is exigent, and the law is, by virtue of this Court's own recent jurisprudence, crystal-clear. Under those rulings, Christians in New York and other states may worship freely, especially during the holiday season, so long as they and the churches they attend follow reasonable health guidelines such as sanitization and distancing. In contrast, Christians in California, and particularly the Applicants, are not permitted to follow the dictates of their conscience and worship together in person with their fellow Christians. Allowing California to continue discriminating on the basis of religion will cause an inequality nationwide, where the First Amendment applies in some states and Circuit Court jurisdictions, but not in others, such as the Ninth Circuit or the State of California.

Again, as will be established below, Applicant's entitlement to vindication of their legal rights is indisputably clear. Put simply, California expressly place more stringent standards on houses of worship, preventing them from providing Constitutionally-protected services while permitting secular businesses to reopen at reduced capacity, with protocols in place to mitigate the spread, or without capacity limitations. The decision to single out houses of worship violates this Court's long-standing First Amendment jurisprudence, which demands that governments not discriminate against congregate worship.

Finally, injunctive relief from this Court appears to be the only option left for Applicants. Applicants made every effort to convince the District Court to

reconsider its decision, to no avail. The Ninth Circuit, which unlike the District Court did have had the benefit of this Court's decision in *Diocese of Brooklyn*, nonetheless denied Applicant's request for an injunction pending appeal. Without the requested relief from this Court—an injunction pending appeal and final resolution of the case—Applicants will not be able to act according to the dictates of their conscience for weeks if not months, and California will be able to "prohibit the free exercise of religion."

B. California's Executive Order Restrictions Prohibiting In-Person Religious Gatherings are Not Neutral or Generally Applicable Because They Provide Greater Freedoms for Secular Conduct

Where, as here, a state's COVID-19 orders restrict a church to a greater degree than mass transit, grocery stores, retail businesses, "'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*, 592 U.S. at ___, 141 S.Ct. at 67.

What is more, the Blueprint clearly discriminates against houses of worship by identifying them specifically and establishing standards for attendance in them that are different from those applied to secular activities. It is astonishing, until one gets all too used to it, to see how the orders and directives at issue here have

separate sections for "houses of worship" and other religious institutions that in almost every instance place greater restrictions on capacity and opening than those imposed on non-religious activities. It can hardly be suggested that the term "houses of worship" has "a secular meaning." Absent the same, the orders and directives can only be read as making patently distinct rules for worship and non-worship gatherings that are neither neutral nor of general applicability. *See Lukumi*, 508 U.S. at 533.

As listed above, California's occupancy restrictions on churches are plainly greater than those imposed on other industries—including those involving large numbers of people indoors (e.g., mass transit, shopping malls). 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, Diocese of Brooklyn*, 592 U.S. at ___, 141 S.Ct. at 66-67 (Expressing concern regarding New York's treatment of houses of worship compared to secular businesses, pointing out, for example, that "a large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day.' Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service.")

Under the First Amendment, a law burdening religion must satisfy strict scrutiny unless it is both "neutral" and of "general applicability." *Lukumi*, 508 U.S. at 531. If the law is both neutral and of general applicability it must still survive

rational basis review by the courts. *Id*. A law is not neutral if its object is to infringe on religious exercise. *Id.* It is also not generally applicable if it is substantially underinclusive as to its purposes—that is, if it "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree than [plaintiff's religious exercise] does." *Lukumi*, 508 U.S. at 432.

In this case, there is a distinguishing factor between cases from New York and cases from California. In New York, while the restrictions on houses of worship were onerous, at least churches, synagogues and mosques could offer some in-person services, though less freely than secular businesses. In California, churches, synagogues, and mosques are simply prohibited from offering in-person services, while secular businesses may operate either with some limits or no limits at all.

C. The Violation of Applicants First Amendment Rights is Indisputably Clear and An Injunction is Necessary Because Lower Courts Are Not Properly Applying This Court's Holdings In *Diocese of Brooklyn*

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech… or the right of the people peaceably to assemble…" U.S. Const. Amend. I. Exercising one's religion involves not just a passive belief, but frequently also involves either performance of, or abstention from, physical acts, such as "assembling with others for a worship service" and

"participating in sacramental use of bread and wine." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

The First Amendment prohibits the government from even subtly "depart[ing] from neutrality on matters of religion. *See Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S.Ct. 1719, 1731 (2018), *citing Lukumi*, 508 U.S. at 534. A law that is "neutral" and "generally applicable" is not subject to strict scrutiny even if it has the incidental effect of burdening a religious belief or practice. *Employment Div.*, 494 U.S. at 879 (1990). But this "rule comes with an exception." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). When the policy "appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions," it "must run the gauntlet of strict scrutiny." *Id.* At 740. That is to say, when the government departs from neutrality and regulations are not of "general applicability," those regulations "must undergo the most rigorous of scrutiny," *Lukumi*, 508 U.S. at 546.

To satisfy strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. *Diocese of Brooklyn*, 592 U.S. ___, 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.* There are numerous reasons for this.

First, there is scant evidence, nor even so much as a legislative finding, that Applicants have contributed to the spread of COVID-19 by attending church, even when the Government briefly allowed limited indoor worship services. Under the

traditional Free Exercise analysis—which this Court has now made clear again applies in full force even after an emergency has been declared—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). Despite this, 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 going to a shopping mall, waiting in the checkout line for groceries, or having one's automobile repaired. 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*, 592 U.S. at ___, 141 S.Ct. at 67. In fact, the Government's own Blueprint schema provides dozens of examples of potentially less restrictive rules: capacity limitations; mask-wearing requirements; and sanitization protocols. These are all protocols that Applicant Pastors are not only willing to accept but which they tried implementing before the government nonetheless barred or severely limited in-person religious services regardless of whether such measures were employed. While businesses are permitted to open provided they implement protocols designed to minimize the spread of the virus, the government affords no such acknowledgment of the mitigating effects of such measures regarding houses of

worship. Instead, it has chosen to restrict their freedoms entirely and unconditionally.

There is no justification for such a distinction in treatment. As Justice 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, 592 U.S. ___ at, 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. *See* Appendix 18. (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 the state were to move Riverside and San Bernardino Counties back into the lower Tier 3, bookstores, clothing and shoe stores, hair salons and barbershops, home and furniture stores, jewelry stores, libraries, shopping malls, retailers, and nail salons would be allowed to be opened at 50% capacity—while churches, along with museums, would remain 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; instead, the State has chosen to burden specially the exercise of religion, which the Constitution itself recognizes as "essential."

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.

This Court likely intended for *Diocese of Brooklyn* to set a nationwide standard that lower courts would follow in similar cases. If *Diocese of Brooklyn* did not send the proper message, the handful of orders granting some measure of relief, vacating lower court decisions, and remanding for reconsideration consistent with the case should. Yet a brief examination of similar cases now pending in the various federal courts, including other cases this Court has remanded to the several Circuits or district courts within those Circuits, highlights the need for the Emergency Application for an Injunction and demonstrates that the lower courts are not prioritizing the preservation of Constitutional rights.

Since announcing the decision in Diocese of Brooklyn, this Court has issued orders in three cases, including *Agudath Israel of America v. Cuomo*, ___ U.S. ___, 2020 WL 6954120, *Robinson v. Murphy*, ___ U.S. ___, 2020 WL 7346601, *High Plains Harvest Church v. Polis*, ___U.S. ___, 2020 WL 7345850. In *High Plains*, this Court issued its order on December 15, the 10th Circuit remanded to the District

Court on December 17, and on December 18, the District Court ordered briefings by January 19. Similarly, in *Robinson*, this Court issued its order on December 15. On December 17, the 3rd Circuit remanded to the District Court, which has taken no further action on the matter.

The problem also persists in a handful of other cases. The Northern District of California refused to enter a temporary restraining order against restrictions on indoor services in *Calvary Chapel San Jose v. Cody*, 2020 WL 7428322 (N.D. Cal. 2020). On December 21, the Central and Southern Districts refused to enter temporary restraining orders in *Harvest Rock Church v. Newsom*, 2020 WL 7639584 (C.D. Cal. 2020) and *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974 (S.D. Cal. 2020). In the U.S. Court of Appeals for the Sixth Circuit, the court refused to enter an injunction for religious schools in-person instructions in *Pleasant View Baptist Church v. Beshear*, 2020 WL 7658397 (6th Cir. 2020).

It has hard to imagine that the Court did not intend for its ruling in *Diocese of Brooklyn* to be a binding expression of the extent to which the First Amendment protects the free exercise of religion, and that this decision would have a salutary effect on these pending various matters. The records, unfortunately, indicate otherwise, which requires the Court again to address cases with similar, if not nearly identical, facts.

III. Conclusion

California treats houses of worship with a harsher hand than secular businesses. With most of California under the strictest of lockdowns, many

businesses are permitted to operate at reduced capacity and some without any limitations at all. Houses of worship, though, must remain closed for in-person services. Even if the State were to relax some of the standards for secular businesses, moving down a tier, for example, houses of worship would still be subject to greater restrictions than secular businesses. This is unconstitutional.

At the same time, the State has attempted to avoid judicial determinations regarding its orders disproportionally impacting houses of worship by modifying directives in apparent attempts to moot the issues before the District and Circuit Courts, though Applicants challenge the Executive Order from which State health officials derive their authority rather than the directives themselves.

The lower courts, including the District Court and Court of Appeals have failed to grant injunctions pending appeal, despite Applicants' likelihood of success on appeal.

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.

For all the reasons stated in this brief, therefore, 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 6th Day of January, 2021.

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