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

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INTRODUCTION

The Government seeks to evade judicial review by hiding behind a fictional narrative and touting futile litigation strategies. This appeal does not seek to raise new issues unreviewed by the district court—this appeal seeks to vacate and reverse the respective judgment and orders of the district court and remand the matter back to the district court with directions to preliminarily enjoin the Government's unconstitutional activity. The appeal should be decided before any amended complaints or new lawsuits are filed in the district court so that—as confirmed by recent Supreme Court precedent—this Court may reaffirm that there is no pandemic exception to the Constitution, and that the Government must satisfy strict scrutiny when trammeling fundamental freedoms.

The Government's incorrect application of longstanding constitutional standards afford the Government no excuse. The Government's actions and arguments before this Court demonstrate its belief that it may operate outside the confines of the Constitution during an emergency. The Government is mistaken, and this Court should take decisive action to enjoin the Government from dictating if and how citizens can worship in accordance with their faith.

ARGUMENT

I. THE CHURCH MEMBERS CONTINUE TO SUFFER ACTUAL AND THREATENED INJURY BY THE GOVERNMENT'S ULTRA VIRES RESTRICTION OF FIRST AMENDMENT RIGHTS.

A. Executive Order N-33-20 Continues to Provide the California Department of Public Health Unfettered Power to Suppress Religious Worship.

The Church Members assert claims for injunctive and declaratory relief against the Government's Executive Order N-33-20, and the enforcement thereof, by State and county officials. Church Members' claims are not moot for the simple reason that EO N-33-20 remains in effect, and it continues to provide the California Department of Public Health ("CDPH") *carte blanche* power to craft, modify, and reenact restrictions on religious worship, power the CDPH continues to exercise. *See, e.g.*, Appellants' Request for Judicial Notice ("RJN") Exs. 2A-6B. EO-N-33-20 elevates CDPH directives to the status of criminal law enacted through executive fiat, rendering the Church Members' pursuit of injunctive and declaratory relief both understandable and proper. Because courts can provide meaningful relief in connection with the Church Members' claims, *see, e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), this action is not moot, and the district court's orders and Judgment dismissing the Church Members' claims with prejudice must be reversed and vacated. As in *Chafin*, "[t]his dispute is very much alive." *Id.* at 173.

The Government argues that the continued application of EO N-33-20 is "not relevant" to the Church Members' claims because the State Public Health Officer has "separate and independent authority to take measures that prevent the spread of COVID-19 . . . ." State Ans. Br. P. 27 (citing Cal. Health & Saf. Code § 120140). The Government's reasoning is both flawed and irrelevant.

First, California's statutory law does not grant CDPH authority to unilaterally enact broadly applicable criminal laws. *Cf.* 6-ER-1094 (EO N-33-20 cites Cal. Gov't Code § 8665, imposing criminal penalties on violators of orders issued under the California Emergency Services Act); Cal. Gov't Code § 8595 ("The Governor may *assign* to a state agency any activity concerned with the mitigation of the effects of an emergency . . . .") (emphasis added). The solitary statute cited by the Government on this point, California Health & Safety Code Section 120140, does not provide otherwise. 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." Nothing in Section 120140 confers upon the CDPH the authority to enact criminal laws, the violation of which may result in a misdemeanor conviction or fine; EO N-33-20, however, does—which is, presumably, why the Governor of California issued the order in the first place.

Second, even if the CDHP has this independent authority to criminalize church services (it does not), the mere fact that *multiple* laws may facially or as-applied violate the constitutional rights of the Church Members does not remove the Church Members' EO N-33-20 claims from the district court's jurisdiction.[1] Nor should it. California Health & Safety Code Section 120140, for example, comes with its own set of requirements, including that the CDPH's measures be "necessary" to prevent the spread of the disease. Cal. Health & Saf. Code § 120140. Because, unlike here, the CDPH would need to satisfy its showing of necessity *before* it could exercise its authority under that statute, a claim challenging Section 120140 would necessarily be distinct from the Church Members' claims here.

San Bernardino and Riverside County Appellees similarly argue that EO N-33-20 is not relevant to the Church Members' claims against the counties. However, the Counties ignore their prior promises to *enforce* the State's COVID-19 orders as written, which they have never recanted publicly. 3-ER-366; Appellants' RJN Ex. 7; County of Riverside Request for Judicial Notice Ex. 1 ("[b]y rescinding these orders, the County of Riverside now aligns itself with the State's Orders as they now exist or may be issued or amended in the future"); San

[1] If anything, it would make this Court's clarification of Church Members' constitutional rights here all the more necessary.

Bernardino Appellees' Ans. Br. p. 11; Riverside County Appellees' Ans. Br. pp. 5-7. As such, an injunction barring the Counties' enforcement of EO N-33-20 is not only proper, but necessary for the Church Members to obtain any meaningful relief.

The Government argues that, even if the Church Members' claims are "not moot strictly in the Article III sense," the district court would have nevertheless been justified in dismissing the complaint because the claims asserted are too attenuated from the present reality. State Ans. Br. p. 27. The district court's mootness analysis, however, cannot be stripped away so easily from the context of this litigation. The CDPH has revised its policies at least *seven times* since the Church Members filed their complaint less than one year ago, in April 2020. *See* AOB pp. 7-16. In light of those revisions, it makes perfect sense that the district court would desire updated allegations; the Church Members ultimately share in this desire. But, the district court's attempt to bring about that amendment by dismissing the Church Members' claims on jurisdictional grounds is so fundamentally flawed as to compel the Church Members' filing of this appeal.

The district court's mootness ruling set up the parties to engage in a never-ending game of cat and mouse, with the Church Members repeatedly forced to have to return to square one in response to the CDPH's steady stream of revisions. Any failure of the Church Members to amend would, under the district court's

flawed analysis, render the entire action moot and deny this Court any opportunity to review the district court's orders—including its order denying temporary injunctive relief. *See Silvas v. G.E. Money Bank*, 449 F. App'x 641, 645 (9th Cir. 2011) ("Because the operative complaint has been dismissed, we dismiss the interlocutory appeal [for preliminary injunctive relief] as moot."); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992), as amended (May 22, 1992) ("an amended pleading supersedes the original pleading"). Sooner or later, the Church Members would necessarily have to confront the district court's mootness analysis in order to seek review of the district court's flawed constitutional analysis. They choose to do so now.

B. The "Voluntary Cessation" Exception Applies to the Facts of this Case, As Made Clear by the Government's Readoption of Similar Restrictions on Religious Worship.

The Government's reliance on cases involving *legislatively* ceased government action is misplaced. State Ans. Br., p.29. Executive action and legislative action are not same, nor are they treated the same under this Court's precedent. *Rosebrock v. Mathis*, 745 F.3d 963, 972-74 (9th Cir. 2014); *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) ("*legislative act* creates a presumption that the action is moot.") (emphasis added). As such, the Church Members need not overcome a "presumption" of mootness that might otherwise be applied in cases where the

statute challenged by the plaintiff was later repealed by the legislature. *Bd. of Glazing Health*, 941 F.3d at 1199 ("In other cases, . . . we have suggested there must be a 'virtual certainty' that a government will not reenact legislation in order to overcome the presumption of mootness.").

Instead, the Church Members must establish only that there is a reasonable expectation that challenged executive policy, or similar policy, may be adopted once more. *Id.*; s*ee also Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662-63 (1993) (city's replacement of the challenged ordinance with one that continued to disadvantage plaintiffs "to a lesser degree" did not moot the appeal). If this expectation exists, the "voluntary cessation" exception applies, and the action is not moot.

Here, there is a reasonable expectation that CDPH will reissue its ban on worship services, or at least issue an "amended" policy that continues to harm the Church Members in the same manner as alleged, if only "to a lesser degree." *See Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am.*, 508 U.S. at 662-63. There is no doubt of this because the CDPH has already done so, and the Church Members are currently prohibited from attending services at their churches.

In an attempt to circumvent this undeniable fact, the Government argues the Church Members' only sought to worship *outdoors* in their complaint, and that, because they can do so under the current CDPH directives, their claims are moot.

State Ans. Br. p. 30. The Government's narrow reading of the Church Members' claims is not supported by the complaint or the Church Members' other filings and actions; at no point in the complaint do the Church Members' allege that they only seek the right to worship outside. 6-ER-1065 ("this list prohibits all religious leaders from conducting *in-person and out-of-home religious services* . . .") (emphasis added); 6-ER-1067 ("Plaintiff Scales recognizes that most of his congregants will stay at home but he wants to be available for those who are healthy and feel that *in-person church service* can be safely attended) (emphasis added); 6-ER-1070 ("As a result of not being able to conduct an *in-person church service*, Plaintiff Moffatt has been deprived of the opportunity for important . . . religious activities . . . ."). Rather, the Church Members allege that the Government's disfavored treatment of worship activities violates their fundamental rights—regardless of the precise boundary of those restrictions. 6-ER-1073 ("relegating all faith activities to a second-class status (at best)"). The Government's attempt to rewrite the scope of this action falls flat.

Defendants comparison of *Rosebrock v. Mathis* with the facts of this case overlooks significant details. *Compare* Answering Br. p.31 *with Rosebrock*, 745 F.3d 963, 973-74. In *Rosebrock*, this Court held that the government overcame the heavy burden of mootness because the email that altered the offensive policy addressed all objectionable measures that the government officials took against the

plaintiff in the case, and, by the time of the appeal, the altered policy had been in effect for three years. *Rosebrock,* 745 F.3d at 974. By contrast, here the Church Members were only permitted to return to indoor in person religious worship for approximately forty-five days before new health directives reimposed restrictions that were substantially similar to the initial health directives in place at the time the Church Members filed suit. The Government continues to restrict worship services even now. Because the Government has not satisfied its "heavy burden of proving that the challenged conduct cannot reasonably be expected to recur," *Rosebrock,* 745 F.3d at 972, the Church Members' claims are not moot.

C. This Case is "Capable of Repetition, Yet Evading Review" Because the Government Revises Its Policies on a Nearly Continuous Basis

The Government asserts, incorrectly, that the Church Members' claims have not evaded review, and that, to the extent the action will evade review, "it is due to Plaintiffs' own decisions not to amend." State Ans. Br. pp. 32-33. If, as the Government argues, a mere policy change by the CDPH—which has occurred no less than seven times over the past nine months—is enough to moot this action, then the district court's interlocutory orders will likely never be reviewed by this Court. *See* AOB at pp. 7-15 (describing evolution of Government policies). Any attempt to seek appellate review of such orders would perpetually fail for lack of jurisdiction, for precisely the reasons the Government argues here.

Amending the complaint would also not prevent the district court from reapplying its unprecedented "minimal scrutiny" standard to any renewed motion for preliminary injunction. 1-ER-70. As a result, the Church Members would likely continue to be prejudiced by the district court's rulings, repeatedly, without hope of obtaining timely and meaningful review by this Court or the Supreme Court on issues of law fundamental to their claims. *See Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63, 68 (2020) ("At most Catholic churches, Mass is celebrated daily . . . [w]hile we could presumably act more swiftly in the future, there is no guarantee that we could provide relief before another weekend passes.").

The Government's argument that all levels of the federal court system have, at least in some capacity, reviewed religious liberty motions or cases in the COVID-19 context is a peculiar one. State Ans. Br. pp. 33-34. In effect, the Government argues that this Court lacks jurisdiction over the Church Members' claims because this and other courts have jurisdiction over several similar disputes. But therein lies the point: review in those cases was possible in part because the claims were *not* mooted merely through unilateral policy change adopted by the defendant. *Diocese of Brooklyn v. Cuomo,* 141 S.Ct. at 68 (rejecting mootness challenge). Moreover, the district court's ruling directly contradicts that binding precedent. *Id.* The Government's arguments would leave Church Members without

relief when the Supreme Court has already deemed the Church Members' claims worthy of the highest constitutional protections worthy of immediate protective action. *Id.*

II. THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER DENYING INTERIM INJUNCTIVE RELIEF.

The Government misconstrues the nature of the merger doctrine and, as a result, concludes incorrectly that this Court lacks jurisdiction to review the district court's interlocutory order denying the Church Members' request for a temporary restraining order and preliminary injunction. State Ans. Br. p. 35 (citing *SEC v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982)). While it is true that an otherwise independently appealable interlocutory order "merges" with a final judgment, that does not diminish this Court's ability to review that interlocutory order in an appeal from final judgment. *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 730–731 (9th Cir. 2017); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1301 & n.4 (9th Cir. 2013). If it did, the merger doctrine and final judgment rule would be rendered null. *Am. Ironworks & Erectors, Inc. v. North Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) ("A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment.").

Here, the Church Members seek this Court's review of the district court's interlocutory order denying temporary injunctive relief. AOB pp. 28-47. The Church Members' earlier-filed appeal from that order may indeed be dismissed as moot; the Church Members have moved as such.[2] That dismissal, however, does not detract from this Court's jurisdiction to review that order in the context of the Church Members' appeal from final Judgment. *See Nationwide Biweekly Admin.*, 873 F.3d at 730–731.

The Government's remaining jurisdictional arguments revolve around whether the district court's order denying injunctive relief should be properly construed as an order denying a preliminary injunction or denying a temporary restraining order. State Ans. Br. pp. 36-37 (citing *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (holding that an order denying temporary restraining order may be subject to an interlocutory appeal pursuant to 28 U.S.C. § 1291 if it is tantamount to the denial of a preliminary injunction)). The distinction, however, is of no difference here—the Church Members' appeal is no longer of an interlocutory nature. Whatever the characterization, the district court's order denying interim injunctive relief has merged with the Judgment and may be reviewed by this Court.

[2] On January 5, 2021, the Church Members filed a motion to voluntarily dismiss their interlocutory appeal, No. 20-55445. Dkt. 117.

III. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER DENYING INJUNCTIVE RELIEF

A. The Church Members Seek This Court's Review of Matters Already Considered by the District Court.

The Government misinterprets the issues presented by the Church Members in this appeal. The Church Members challenge—as they always have—the constitutionality of EO N-33-20, which allows the CDPH unfettered authority to infringe on fundamental constitutional rights. To the extent that the Government has altered the underlying health directives, the Church Members reference these changes to highlight why their case remains ripe for review and why the exceptions to the mootness doctrine must apply in this case. This Court has authority to take judicial notice of indisputable facts that directly relate to the issues on appeal. Fed. Rules Evid. Rule 201.

The mere fact that the CDPH modified its policies does not render improper the injunctive relief sought by the Church Members. A party seeking preliminary injunctive relief "must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994); *see also 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.").

Here, that relationship is clear: the Church Members seek injunctive relief of the same nature and character as requested in their original complaint and which may be finally granted following trial. The Church Members' claims arise from the Government's restriction of their ability to worship freely, and they seek permanent injunctive relief prohibiting the Government from enforcing its orders restricting those activities. *See, e.g.*, 6-ER-1088 (Church Members seek injunctive relief enjoining and prohibiting enforcement of EO N-33-20). Accordingly, this Court may properly reverse the district court's order and direct the district court to enter a preliminary injunction pending a trial on the merits.

This Court also has the authority to reverse, or alternatively to vacate, the district court's order denying injunctive relief, even if this Court does not take the additional step of enjoining the Government or directing the district court to do so. As discussed in Appellants' Opening Brief, AOB p. 30, the district court abused its discretion by applying the incorrect legal standard to the Church Members' claims. 1-ER-61-69 (district court created and then misapplied its own "minimal scrutiny" standard when denying the Church Members' request for injunctive relief). Thus, at a minimum, this Court should reverse the district court's ruling, clarifying that strict scrutiny applies to the Church Members' claims, and remand to the district for further proceedings. *See Diocese of Brooklyn*, 141 S.Ct. 63; *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020).

In sharp contrast to its protestations, the Government also urges that this Court consider a defense it *failed to raise* in the district court when opposing the Church Members' motion for injunctive relief; the Government argues on appeal that the Eleventh Amendment immunizes the State from liability in federal court for violations of the state constitution. *Compare* Ans. Br. p. 44 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-125 (1984)) *with* Dist. Ct. Doc. 13. Despite this failure to raise, the Church Members acknowledge the Government's immunity assertion and withdraw their request for relief from the Government's violations of state law. The Church Members continue to seek relief with respect to the Government's violations of U.S. constitutional law, only.

B. The Government's Attempt to Incorporate by Reference Its Arguments Relating to the Court's Free Exercise Analysis Fails.

With respect to the Church Members' Free Exercise claim, the Government fails to identify its arguments with any particularity. Instead, the Government seeks to incorporate by reference the arguments it raises in *South Bay United Pentecostal Church v. Newsom*, 9th Cir. No. 20-56358. AOB p. 39. This Court's rules, however, do not permit incorporation by reference, and any arguments the Government raised in its briefing in *South Bay* should not be deemed raised for the purposes of this appeal. *See* Ninth Circuit Rule 28–1(b) ("Parties must not . . . incorporate by reference briefs submitted to . . . this Court in a prior appeal, or refer this Court to such briefs for the arguments on the merits of the appeal."); *cf.*

United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992) (noting court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief") (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)). By failing to give express notice of the arguments raised in this appeal, as they relate to the Church Members' claims, the Government has denied the Church Members and their counsel an adequate opportunity to respond.

To the extent that the Government's briefing attempts to distinguish *Diocese of Brooklyn*, the Government does so unsuccessfully. The Government claims that the Church Members challenge regulatory framework that "has since been replaced by an entirely new regulatory framework." State Ans. Br. p.32. But this is inaccurate. As stated in the complaint, the Church Members challenge the constitutionality of EO N-33-20 and the then existing health directives that had legal effect only because of EO N-33-20. EO N-33-20 remains in effect today and continues to power the current health directives. Therefore, the regulatory framework has not been altered materially, and the injunctive relief requested by the Church Members remains tethered to their claims.

To the extent the regulatory framework has changed because of the new Blueprint, the current framework is now *more* similar to the one rejected by the Supreme Court in *Diocese of Brooklyn*. In *Diocese of Brooklyn*, the executive order restricted religious activities more stringently than functionally

indistinguishable secular activities. 141 S.Ct. at 66. The Government's Blueprint does this in no uncertain terms. Appellants' RJN Ex. 4 ("Shopping Centers" are "Open Indoors with modifications," while "Places of Worship" may operate "Outdoor Only with modifications") Accordingly, this Court should not hesitate to apply the traditional scrutiny standards to the Church Members' claims.

C. EO N-33-20 and the Associated Health Directives Are Not Narrowly Tailored and Therefore Violate the Free Exercise, Free Speech, and Free Assembly Clauses.

The Government does not argue—because there is no credible argument in support—that EO N-33-20 is narrowly tailored. EO N-33-20 is broadly worded such that "all residents are directed to immediately heed the current State public health directives." 6-ER-1092-93. It grants the CDPH *carte blanche* authority to criminalize the exercise of fundamental rights across California, indefinitely. The order makes no exceptions for religious worship, free speech, or assembly; nor does it give law enforcement guidance on how to enforce EO N-33-20 when confronted by those Constitutionally protected activities. 6-ER-1090-95. The order's all-encompassing language is the antithesis of narrow. *See, e.g., Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (ordinance granting officials overly broad licensing discretion fails narrow tailoring requirement).

The CDPH's current Blueprint plan brings this into sharp focus. The Blueprint allows indoor retail, but prohibits indoor religious activities meeting with

the exact same protections in place. State Ans. Br. p. 16 ("Retail and shopping malls . . . are allowed to operate indoors . . . in Tier 1"). The CDPH adopted this policy without empirical evidence demonstrating that COVID-19 transmission is more rampant amongst indoor religious activity than, for example, indoor retail shopping. Instead, the CDPH surmises this to be true based on its assumption of what must occur during religious worship. Specifically, the Government claims that religious worship is uniquely dangerous because "[w]orship services are relatively lengthy, generally lasting forty-five minutes to an hour and sometimes up to two hours," "[p]articipants tend to know and speak with one another, bring them into even closer contact," and "many houses of worship have limited ventilation . . .." State Ans. Br. p. 7.

But, the Government's sweeping reduction of what constitutes religious worship to a few narrow characterizations serves to undermine the Government's claim of narrow tailoring. Not all forms of worship take the form described by the Government. The simple act of communal prayer, for example, need not last forty-five minutes, require close contact between participants, or take place in a poorly ventilated structure. Yet, the Government has criminalized communal, indoor prayer across much of the state.

Equally illuminating is the fact that the Government's description of worship is no more or less applicable to the many secular activities that may currently be

enjoyed. For example, shoppers may spend unlimited amounts of time indoors at poorly ventilated shopping malls, remaining only six feet apart from their friends or family, all while remaining compliant with the Government's orders. This internal inconsistency is apparent on the face of the Blueprint, and yet a violation of the policies set forth in the Blueprint still amounts to a violation of criminal law as a result of EO N-33-20.

Neither EO N-33-20, nor the Blueprint, are narrowly tailored to further a compelling state interest. The Government therefore violates the Church Members' First Amendment right to free exercise of religion, free speech, and to peaceably assemble.

D. EO N-33-20 and the Incorporated Health Directives Are Vague.

The Government provides no response or explanation with respect to how a person of "common intelligence" is supposed to know how EO N-33-20 is applied if the health directives are constantly changing, and if local officials announce that local law enforcement need not consistently impose citations to all violators. *See* AOB p.40. To add more confusion, the Government's health directives literally can change without any notice to a person if a hospital occupancy rate suddenly lowers before that person googles websites listing the color status—and therefore Tier status—of the person's county. Appellants RJN Exs. 2A-6B. Such complex systems can hardly constitute unambiguous laws that provide persons with notice

of the meaning and application of any given law. Thus, EO N-33-20 and its accompanying directives are void for vagueness.

E. The Government's Targeting of Religious Worship for Disfavored Treatment Violates the Equal Protection Clause.

The Government cannot violate fundamental rights by disguising its actions under atypical labels of "essential" and "nonessential" workers and touting a hollow claim that such divisions are based on an assessment of risk of transmission of COVID-19. *See* State Ans. Br. 43. The Government provides no empirical evidence that indoor retail shopping poses less risk of transmission of COVID-19 than indoor religious worship. *See* AOB p.43, fn. 6. (discussing the Government's seven-factor risk assessment); State Ans. Br. p. 7 (basing its risk assessment on a flawed generalization of what worship entails). Nor can the Government reasonably claim that the restrictions on worship are narrowly tailored to justify the risk of criminal repercussions if one unknowingly violates a restriction.

The Government also erroneously contends that its actions are subject only to rational basis review, not strict scrutiny. The Court applies the same standard to classifications that infringe on fundamental rights as those that target suspect classes. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 621 (1996) ("The Court has stated that it will uphold a law that neither burdens a fundamental right *nor* targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end.") (emphasis added). Here, the

Government's Orders burden fundamental rights—free exercise of religion, speech, and assembly—and it does so by targeting the act of religious worship. *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (targeting of group based on religion may give rise to Equal Protection claim). As such, strict scrutiny applies, not rational basis, and, as discussed above, the Government has not met its burden of proving that its restrictions on indoor worship are narrowly tailored to further a compelling state interest.

F. Infringement of Fundamental Rights Constitutes Irreparable Harm.

The fact that the Church Members suffer irreparable harm when prevented from worshiping in accordance with their faith cannot be credibly disputed. *See, e.g.*, 5-ER-994-1001 (Church Member declarations); No. 20-56324, Doc. 2 p. 96-110 (same). 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)). The State *conceded* this in its opposition to the Church Members' emergency motion for an injunction pending appeal: "The State agrees that Plaintiffs have a constitutionally protected interest in participating in indoor worship services and that they suffer some irreparable injury when prevented from attending indoor services in person at their chosen place of worship." No. 20-56324, Doc. 7-1 p. 19 (citing *Diocese of Brooklyn*, 2020 WL 6948354, at *3.) The

Government's attempt to unwind this concession fails to persuade. State Ans. Br. pp. 45-46.

The Government cannot dictate *if* and *how* citizens practice their religion, and then impose criminal repercussions of those who practice their religion in a manner contrary to what the Government proscribes. It is the epitome of condescension for the Government to assume it can ascertain on behalf of religious adherents what constitutes an acceptable form of worship. The Government has no place deciding whether religious worship is unaltered and acceptable if forced to occur outside of a house of worship. To be clear, the Church Members do not seek to silence or even ignore the recommendations of the CDPH or the Government. The Church Members simply seek to be held to the same public health standards as secular, or "essential," institutions.

IV. IF THE COURT DISMISSES THIS APPEAL AS MOOT, IT SHOULD ALSO VACATE THE DISTRICT COURT'S UNREVIEWED ORDER DENYING INTERIM INJUNCTIVE RELIEF.

This action is not moot for the reasons discussed above. However, if this Court disagrees, the Church Members respectfully request that the Court also vacate the district court's unreviewed order denying injunctive relief. The Government does not oppose this request in its Answering Briefs.

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 mootness determination, Plaintiffs-Appellants respectfully request that this Court vacate the district court's unreviewed order denying interim injunctive relief.

January 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Reply Brief complies with the requirements of Ninth Circuit Rule 32-1. The brief was prepared in 14-point font and, other than the portions exempted by Federal Rule of Appellate Procedure 32(f), contains 5,173 words, as counted by Microsoft Word.

January 11, 2021

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, I filed the foregoing Appellants' Reply 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.

January 11, 2021

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