U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 19, 2020

The Honorable Gavin Newsom
Governor of California
1303 10th Street, Suite 1173
Sacramento, CA 95814

Dear Governor Newsom:

We are writing to you to raise several civil rights concerns with the treatment of places of worship in Executive Orders N-33-20 and N-60-20 and documents relating to the California Reopening Plan.

Of course, we recognize the duty that you have to protect the health and safety of Californians in the face of a pandemic that is unprecedented in our lifetimes. You and other leaders around the country are called on to balance multiple competing interests and evaluate the constantly changing information available to you about COVID-19, and make your best judgment on courses of action.

Attorney General William P. Barr recently issued a statement on *Religious Practice and Social Distancing*, in conjunction with a Mississippi case in which the Department of Justice participated regarding restrictions on worship. In the statement, the Attorney General emphasized the need to practice social distancing to control the spread of COVID-19. He also noted that temporary restrictions that would be unacceptable in normal circumstances may be justified. But, "even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers. Thus, government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity." Simply put, there is no pandemic exception to the U.S. Constitution and its Bill of Rights.

Laws that do not treat religious activities equally with comparable nonreligious activities are subject to heightened scrutiny under the Free Exercise Clause of the First Amendment. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Laws that are not both neutral toward religion and generally applicable are invalid unless the government can prove that they further a compelling interest and are pursued through the least restrictive means possible. Religious gatherings may not be singled out for unequal treatment compared to other nonreligious gatherings that have the same effect on the government's public health interest, absent the most compelling reasons.

Executive Order N-33-20 (March 19, 2020) ordered Californians to remain at home except to engage in authorized necessary activities as laid out by the Public Health Officer at the time and as modified going forward. The Public Health Officer's April 28 "essential workforce" list does not appear to treat religious activities and comparable nonreligious activities the same.

The list includes "faith-based services" but only if "provided through streaming or other technologies." In-person religious services are thus apparently prohibited even if they adhere to social distancing standards.

The list of nonreligious workers who are not so restricted by the Executive Order and essential workforce list when telework "is not practical" is expansive. For example, the list includes "Workers supporting the entertainment industries, studios, and other related establishments, provided they follow covid-19 public health guidance around social distancing." Likewise, "workers supporting ecommerce" are included as essential, regardless of whether the product they are selling and shipping are life-preserving products or not. This facially discriminates against religious exercise. California has not shown why interactions in offices and studios of the entertainment industry, and in-person operations to facilitate nonessential ecommerce, are included on the list as being allowed with social distancing where telework is not practical, while gatherings with social distancing for purposes of religious worship are forbidden, regardless of whether remote worship is practical or not.

Even more pronounced unequal treatment of faith communities is evident in California's Reopening Plan, as set forth in Executive Order N-60-20 (May 4, 2020), and in the documents the California Department of Public Health produced pursuant to it, including the "Resilience Roadmap" (https://covid19.ca.gov/roadmap/) and "County Variance Attestations" (https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Local-Variance-Attestations.aspx). Places of worship are not permitted to hold religious worship services until Stage 3. However, in Stage 2, schools, restaurants, factories, offices, shopping malls, swap meets, and others are permitted to operate with social distancing. And as noted, ecommerce and entertainment industry activities are already permitted with social distancing. This constitutes precisely the kind of differential treatment the Supreme Court identified in the *Lukumi* decision in which the government is not willing to impose on certain activities the same restrictions it is willing to impose on constitutionally protected religious worship. While it is true that social distancing requirements applied to places of worship may inevitably result in much smaller congregations than some faith groups would like, in our experience with other controversies around the country, many places of worship are quite content to operate at 15-25% of capacity in a way that allows for social distancing between family groups.

The Department of Justice does not seek to dictate how States such as California determine what degree of activity and personal interaction should be allowed to protect the safety of their citizens. However, we are charged with upholding the Constitution and federal statutory protections for civil rights. Whichever level of restrictions you adopt, these civil rights protections mandate equal treatment of persons and activities of a secular and religious nature.

We recognize that three U.S. District Courts have denied Temporary Restraining Orders (TRO's) sought by plaintiffs against Executive Order N-33-20, *Abiding Place Ministries v. Wooten,* No. 3:20-cv-00683 (S.D. Cal. April 10, 2020) (no written opinion); *Gish v. Newsom*, No. 5:20-CV-755 (C.D. Cal. Apr. 23, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-CV-00832 (E.D. Cal. May 5, 2020), and one denied a TRO against the Reopening Plan, which is

now on appeal to the Ninth Circuit. *South Bay United Pentecostal Church v. Newsom*, No. 3:20-cv-865 (S.D. Cal. May 15, 2020) (oral transcript ruling). These TRO decisions do not justify California's actions. The *Abiding Place, Gish,* and *Cross Culture* TRO decisions do not address the Stage 2 reopening, and *South Bay United Pentecostal* does not describe why worship services can be distinguished from schools, restaurants, factories or other places Stage 2 permits people to come together. Other decisions around the country have followed *Lukumi* to make clear that reopening plans cannot unfairly burden religious services as California has done. *See, e.g.*, *Robert v. Neace*, No. 20-5465 (6th Cir. May 11, 2020).

Religion and religious worship continue to be central to the lives of millions of Americans. This is true now more than ever. Religious communities have rallied to protect their communities from the spread of this disease by making services available online, in parking lots, or outdoors, by indoor services with a majority of pews empty, and in numerous other creative ways that otherwise comply with social distancing and sanitation guidelines. We believe, for the reasons outlined above, that the Constitution calls for California to do more to accommodate religious worship, including in Stage 2 of the Reopening Plan.

Thank you for your prompt attention to this matter. Should you wish to discuss further, please contact United States Attorney for the Eastern District of California McGregor Scott at (916) [redacted] or [redacted]@usdoj.gov.

Sincerely,

Eric S. Dreiband
05/19/2020

Eric S. Dreiband
Assistant Attorney General
Civil Rights Division

McGregor W. Scott
United States Attorney
Eastern District of California

Nicola T. Hanna
United States Attorney
Central District of California

David L. Anderson
United States Attorney
Northern District of California

Robert S. Brewer
United States Attorney
Southern District of California

cc: The Honorable Xavier Becerra
Attorney General of California