IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, Plaintiff, v. **MURIEL BOWSER**, et al., Defendants.	Civil Action No. 20-3625 (TNM) ELECTRONICALLY FILED RELIEF REQUESTED BY MARCH 25, 2021

REPLY IN SUPPORT OF PLAINTIFF'S SECOND APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants' brief confirms that their worship restrictions are entirely indefensible. They lack any plausible scientific basis, and they are more stringent than those of any state in the country. Every state has now abandoned hard caps on church attendance, and by next week fully 48 states will not impose a 25% capacity limit. A supermajority of 37 states, including Maryland and Virginia, will not impose *any* percentage-based limit at all, and another 11 will impose higher limits (almost all at 50%, which is double what the District allows). These other jurisdictions have acknowledged what the District stubbornly refuses to: Worship services can be conducted safely and responsibly without draconian capacity limits as long as they follow other safety protocols such as masking, social distancing, and careful cleaning practices. The Archdiocese does all of this and more, such as forgoing singing by the congregation at Mass. In light of all this, Defendants cannot bear their burden to prove why they need to restrict the fundamental right of religious worship so much more harshly than all of these other jurisdictions. Indeed, Defendants have not even *tried* to provide evidence that these less-restrictive alternatives are inadequate, or that the challenged rules here are in any way necessary to protect the public health.

Because Defendants' restrictions cannot survive scrutiny, they struggle to explain why they should not be scrutinized. But this is nothing more than wishful thinking. There is no question that strict scrutiny applies under RFRA when the government shuts down 75% of churches' capacity and bans them from opening their doors to the faithful on pain of massive fines. If this is not a substantial burden on religious exercise, nothing is. Even apart from RFRA, strict scrutiny also applies under the Free Exercise Clause of the First Amendment because the challenged rules are neither neutral nor generally applicable. Defendants' attempts to show otherwise are belied by the undisputed facts and foreclosed by Supreme Court precedent. The District's outlier restrictions thus cannot evade scrutiny and must be enjoined.

ARGUMENT

I. THE ARCHDIOCESE IS LIKELY TO SUCCEED ON THE MERITS.

A. Both RFRA and the Free Exercise Clause require strict scrutiny.

As the Archdiocese has explained, strict scrutiny applies under both RFRA and the First Amendment. As to RFRA, the District's rules undeniably impose a substantial burden on religious exercise by threatening churches with massive fines unless they turn away worshippers from Mass during Holy Week and beyond. And as to the First Amendment, the District's rules are not neutral or generally applicable: they were specifically designed to disfavor churches by subjecting them to a hard numerical cap that does not affect restaurants, and they treat worship services far more harshly than many secular gatherings. Defendants cannot rebut either point.

1. RFRA requires strict scrutiny because the Order substantially burdens religious exercise.

The substantial-burden inquiry is not a close question. Defendants cannot assail the well-established rule that a substantial burden exists whenever the government threatens to impose substantial penalties for engaging in religious exercise. And Defendants concede that the Archdiocese faces crushing fines for holding indoor worship services at more than 25% capacity—a core form of religious exercise that is safely occurring just across the border in Maryland and Virginia every day. Instead of engaging on either of these dispositive points, Defendants launch into a parade of irrelevancies. They claim that there is no substantial burden because they are not regulating the "content" of worship services, and because the Archdiocese could engage in *other* forms of religious exercise such as holding more Masses to accommodate more people (at considerable expense) under the 25% limit. But if those arguments were correct, then the government would have a free hand to impose similar limits on worship services at *any* time, and there would *never* be a substantial burden triggering RFRA scrutiny. That is not the law.

a. Defendants primarily argue that there is no substantial burden because there is no "minimum number of people required for a Mass," and thus complying with the capacity restrictions does not require the Archdiocese to violate "the requirements of its faith." Opp. Br. 8–9. But this argument misunderstands both the law and the Archdiocese's religious duty.

As a matter of law, a substantial burden exists whenever the government imposes a substantial penalty for engaging in a religious exercise. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014); *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972). It makes no difference whether the religious exercise is in some sense "required" by the plaintiff's religious beliefs, because RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The protected "exercise" of religion includes any "religiously motivated action." *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990); *see also Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (religious exercise is any "conduct prompted by religious principles"); *Hobby Lobby*, 573 U.S. at 696 (explaining that protected religious exercise under RFRA is even broader than under the First Amendment).

Accordingly, as this Court has held, "the burdened [religious] practice need not be strictly compelled by the religious tradition at issue to merit protection." *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710, 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020). Indeed, "[m]any cherished religious practices are performed devoutly by adherents who nonetheless do not or cannot insist that those practices are mandated." *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002). For example, it is not mandatory for Catholics to say the Rosary or attend Mass on typical weekdays, but it surely would be a substantial burden for the government to penalize them for doing so. That explains why "[n]either the Supreme Court nor [the D.C. Circuit] has ever adopted a rule limiting protection to practices that are compelled by a litigant's religion." *Id*.

Here, there is no question that holding Mass at more than 25% capacity is a protected religious exercise, and that the Archdiocese faces substantial penalties for doing so. Defendants cannot dispute that opening the church to more than 25% capacity is a protected religious exercise because it is "religiously motivated action." *Smith*, 494 U.S. at 881. Nor can they dispute that opening the Basilica to more than 250 worshippers (or about 8% of its seating capacity) is a protected religious exercise for the same reason. Defendants also cannot dispute that the penalties of $1,000 per violation are "substantial." Indeed, since the Archdiocese holds hundreds of Masses each week, it could quickly rack up hundreds of thousands of dollars in fines. And because those "sums are surely substantial," that is a "substantial burden." *Hobby Lobby*, 573 U.S. at 720–21. Contrary to what Defendants say (at 7–8), such fines are a classic form of "compulsion" that substantially burdens religious exercise. *Cf. Yoder*, 406 U.S. at 208 ($5 fine constituted substantial burden). And restricting worship services "strikes at the very heart" of religious freedom. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

b. Even if the substantial-burden inquiry did somehow require a showing of "mandatory" religious exercise, the Archdiocese would meet that test because it sincerely believes that it has a religious "duty" to open the church doors to the faithful at more than 25% capacity. As explained by the Archdiocese's Vicar General and Moderator of the Curia, the Archdiocese "sincerely believes that it has a religious duty to make the celebration of the Mass and the Eucharist available to its parishioners to the greatest extent possible when it believes it can safely do so." Carson Decl. ¶ 12. And here it is undisputed that the Archdiocese believes that it can safely hold Mass at more than 25% capacity (and with no hard numerical cap) because it is doing so every day in Maryland, and other Catholic dioceses are doing likewise in Virginia and virtually every other state in the country, with very few exceptions. *See* Dick Decl. Ex. B-17. Accordingly, there is no

doubt that Defendants' restrictions *do* require the Archdiocese to act contrary to its religious duty by closing the church doors to people it otherwise would welcome. Nor does it matter that to ensure safety in these times, Pope Francis, Catholic cardinals, and the Archdiocese itself have been "flexible" about adjusting worship in other ways. Opp. Br. 6–8. That is fully consistent with the core religious duty sincerely professed by the Archdiocese here. And it is far beyond the ken of judges or mayors to dictate to the Archdiocese which forms of "flexibility" are and are not consistent with Catholic sacramental theology. *See Capitol Hill Baptist*, 2020 WL 5995126, at *5 ("[I]t is 'not the role of a court to tell religious believers what is and isn't important to their religion, so long as their belief in the religious importance is sincere.'" (quoting *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020))).

Defendants do not dispute that the challenged rules have forced the Archdiocese to turn away some worshippers it would otherwise admit. Opp. Br. 10. Instead, they speculate that the Archdiocese possibly "could have accommodated those worship[p]ers without appreciable burden at another of its churches or by holding additional services at the same church." *Id*. But that misses the point, because the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether [the Church] is able to engage in other forms of religious exercise." *Holt v. Hobbs*, 574 U.S. 352, 361–62 (2015). In other words, because holding Mass in church at more than 25% capacity is a protected religious exercise, the only relevant question is whether that particular religious exercise is subject to a substantial penalty—not whether the Archdiocese could undertake some *other* religious exercise to make up for the one the government has banned. Otherwise, Defendants would be free to pick a church at random and ban worship services there, and then deny any substantial burden because people could always attend Mass elsewhere. That is not the way RFRA works.

Likewise, Defendants are wrong to suggest that the substantial burden turns on "how many worship[p]ers [are] affected" by the challenged rules. Opp. Br. 10. According to Defendants, the rules are not substantially burdensome because they exclude "an average of just 50 people per church." *Id*. This betrays an alarming view that cutting off "just 50 people" from religious worship is no big deal or, in Defendants' words, "non-foundational." *Id*. at 9–10. But Defendants may not substitute their views on the significance of religious exercise for the Archdiocese's view that it must minister to every soul in its flock. *See Hobby Lobby*, 573 U.S. at 724–25; *Capitol Hill Baptist*, 2020 WL 5995126, at *5. There is no magic number that makes a worship restriction immune from scrutiny. As the analysis above makes clear, the "substantial" part of the inquiry refers to the substantiality of the *penalty* threated by the government, not the number of people excluded from the church. Forcing a church to turn away even one person on pain of substantial penalty is a substantial burden.

c. In any event, there is no doubt that the challenged rules have forced the Archdiocese to turn away a substantial number of people who otherwise would attend Mass. As the Archdiocese has explained and Defendants have not contested, "[i]n December, January, and February, the District's restrictions on worship caused multiple Catholic churches in the District to reach the maximum limit" under the existing rules, and that is true not only for "Ash Wednesday" but also for regular "Sunday Masses." Carson Decl. ¶ 27. As a result, churches have been forced to resort to "reservation systems and other means to control the number of Mass attendees," which necessarily requires excluding many parishioners. *Id*. Churches likewise have "reached the maximum limit for funerals," forcing them to shut people out from Masses of Christian Burial, and denying a source of great religious solace at a time of acute grief (not to mention depriving the departed soul of the prayers of the faithful joined at Mass). *Id*.

If further evidence were needed, Masses just across the border in Virginia and Maryland regularly exceed 25% capacity, indicating that the same would occur in the District if allowed. Carson Decl. ¶ 26. And during Holy Week, when Mass attendance surges, parishes all throughout the District will be forced to turn away a substantial number of people who otherwise would attend. Indeed, the Archdiocese is informed that roughly half of its churches have already bumped up against the 25% limit even during ordinary Masses, and nearly *all* of the churches in the District will need more than 25% capacity during Holy Week and beyond. Carson Suppl. Decl. ¶¶ 7–8.

Finally, forcing the Archdiocese to hold more Masses to accommodate more people would itself be a substantial burden. Indeed, Defendants do not dispute that priests are religiously constrained to celebrate no more than three Masses per day even on Holy Days. Carson Decl. ¶ 50. The number of Masses is also constrained by the number of available support staff. *Id*. ¶ 51. And even if it were possible to add enough Masses to accommodate everyone who would otherwise attend, doing so "would also impose substantial costs on parishes, which would need to pay additional cleaning crews, staff, organists, and cantors, and acquire additional liturgical items—such as candles and incense—and cleaning supplies for each Mass." *Id*. ¶¶ 52–53.

d. Contrary to what Defendants say, imposing a 25% limit on church services is nothing like an ordinary "reasonable restriction[] on the time, place, or manner of protected speech." Opp. Br. 9. This is not a case about neutral speech regulations in public, but restrictions on the core religious exercise of worship in church. Nor is it somehow a *plus* that the District's Order, rather than altering the "content or substance of a Mass," *id.* at 5–6, shrinks the *congregation*, thus depriving some people of Mass altogether. To the contrary, as the Supreme Court has recognized, restricting a church's freedom to open its doors to the faithful implicates "the very heart of . . . religious liberty." *Diocese of Brooklyn*, 141 S. Ct. at 68.

Accordingly, this case is nothing like other cases involving reasonable time-place-and-manner rules as applied to religious expression in public spaces. The two most prominent examples are *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), and *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011); *see also id*. at 1122 (Kavanaugh, J., concurring). In *Henderson*, the plaintiffs were prohibited from selling t-shirts on the National Mall, and in *Mahoney* from chalking on the street in front of the White House. But in both cases they were free to engage in the same religious expression by spreading the gospel through an "infinite" variety of alternative means that would serve their purposes equally well. *Capitol Hill Baptist*, 2020 WL 5995126, at *6.

Here, by contrast, there is no adequate substitute for holding Mass in person in the unique setting of a church, which is "a sacred building designated for divine worship to which the faithful have the right of entry for the exercise, especially the public exercise, of divine worship." Code of Canon Law c.1214. As dedicated sacred spaces, individual churches are not fungible; each one is tied to a parish community and has unique religious significance based on its own physical and spiritual characteristics. Carson Decl. ¶¶ 56–57. In addition, remote worship is no fair substitute for Catholics because it is not possible to receive the Eucharist by Zoom. *Id*. ¶ 10; *see also Diocese of Brooklyn*, 141 S. Ct. at 68. And the Catechism places special emphasis on in-person gatherings at Mass, in accordance with the Biblical injunction "not to neglect to meet together." Carson Decl. ¶¶ 10–11 (quoting *Hebrews* 10:25). Accordingly, while RFRA may not give religious adherents the right to express themselves on government property in disregard of reasonable time-place-and-manner rules, it also does not give the *government* a blank check to reach into *church* property and impose caps on the number of people who can worship there. In short, barring churches from opening their doors to worshippers is an obvious substantial burden.

2. The Free Exercise Clause requires strict scrutiny because the Order is not neutral or generally applicable.

Even if RFRA did not require strict scrutiny, the Free Exercise Clause would. Defendants do not respond to the Archdiocese's argument that the Free Exercise Clause requires strict scrutiny of interference with religious worship, Mem. 21–23, and therefore the argument is conceded. *See* Standing Order ¶ 12(B), ECF No. 7 (citing *Phrasavang v. Deutsche Bank*, 656 F. Supp. 2d 196, 201 (D.D.C. 2009)). Moreover, Defendants effectively concede that their restrictions on worship services are not neutral and generally applicable because they do not apply across the board to all public gatherings. The 25% limit and 250-person cap on their face do not apply to train stations, big-box retail stores, and many other establishments. *See* Mem. 11, 19–20. Defendants argue that this disparate treatment can be justified because worship services supposedly pose special risks of COVID-19 transmission. But that goes only to whether the Defendants can *survive* strict scrutiny—not whether strict scrutiny applies in the first place. Under the Free Exercise Clause, restrictions on religious exercise can avoid strict scrutiny only if they are neutral and generally applicable in the sense that they do not disfavor religious exercise either by design or in effect. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). But the rules here have both the purpose *and* effect of targeting religious services for special restrictions that do not apply elsewhere. Strict scrutiny thus applies.

a. Defendants ignore the point that the 250-person cap is an arbitrary religious gerrymander that was deliberately designed to limit attendance at the largest church without affecting the largest restaurant. Mem. 20–21. Defendants continue to insist (at 11–12) that churches and restaurants are subject to "the same" 250-person cap. But they never address how the cap can be neutral when it was expressly calculated to ensure that not a single restaurant would be affected, but only churches. Mem. 20. Indeed, Defendants even concede (at 17 n.11) that setting

the cap at 250 people leaves restaurants effectively without any hard numerical cap, allowing them to operate subject only to a capacity-based restriction—a liberty that is denied to churches. Thus, because not just the effect but also the "object" of the cap is to restrict only religious worship, it "is not neutral." *Lukumi*, 508 U.S. at 533.

b. Defendants also have no answer to the point that the Supreme Court has already held that strict scrutiny applies when officials impose harsher capacity restrictions on churches than on other establishments such as big-box retail stores and train stations. *See* Mem. 19–20; *Diocese of Brooklyn*, 141 S. Ct. at 66–67 (harsher restrictions for a church than for "transportation facilities" or "a large store" triggered strict scrutiny); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (*S. Bay II*) (statement of Gorsuch, J.) (more favorable treatment of "retail operations" triggered strict scrutiny).

Defendants suggest (at 13) that churches should be compared only to theaters, not big-box stores or other businesses with no capacity restrictions. But the Supreme Court has already rejected that argument twice. *See Diocese of Brooklyn*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) ("The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed," but "once a State creates a favored class of businesses" by exempting them from any capacity restrictions, "the State must justify why houses of worship are excluded from that favored class."); *S. Bay II*, 141 S. Ct. at 719 n.1 (statement of Gorsuch, J.) (referring to "disparate occupancy caps"); *id*. at 717 (Barrett, J., in the partial grant of application for injunctive relief) (agreeing on this point). Thus, if Defendants believe that worship poses special risks that justify special restrictions, it must bear the burden of proving its case under strict scrutiny.

c. Defendants do not dispute that if the Basilica stopped holding worship services and instead converted itself into a big-box retail store, then neither the 250-person cap nor the 25% capacity limit would apply. Defendants say (at 13–15) that *other* limits would still apply, but that is irrelevant. The point is that the onerous rules actually being challenged here, the 250-person cap and the 25% limit, would not apply if the Basilica stopped holding worship services. This proves that churches are being targeted *because of their worship activity*. Indeed, the other limits that would apply are far less restrictive than the 250-person cap and the 25% limit that currently apply to worship services. For example, Defendants point out (at 13) that big-box stores must allow 60 square feet per person. But since Defendants define big-box stores as those that exceed 50,000 square feet, even the smallest big-box store is allowed more than 800 occupants. *See* Second Nesbitt Decl. ¶ 30. And larger stores such as Costco can apparently host more than 2,500 people. *See* Office of the Deputy Mayor for Planning and Economic Development (Nov. 29, 2012), https://tinyurl.com/yjz7qyjq (Costco's interior is 154,000 square feet). If the same rule applied to the Basilica, it would be allowed to host more than 2,000 people. *See* Carson Decl. ¶ 28 ("The interior" of the Basilica "spans 129,912 square feet."). Likewise, the 50-square-foot limit that applies to fitness centers (where people surely exhale and talk) would allow the Basilica to hold more than 2,500. Nor can Defendants rely on the fact that they "reserve[]" discretion to impose additional restrictions on retail stores (Opp. Br. 13), as they haven't *exercised* that discretion to restrict stores as they have churches. Finally, Defendants suggest (at 12) that big-box stores might not exceed the limits that apply to churches, but if so there would have been no need for the Defendants' bait-and-switch in December, when they briefly restricted big-box stores to create the appearance of equal treatment for litigation purposes, but then exempted them two days later. *See* Dick Decl. Ex. B-14 at 3.

B. The Order Cannot Survive Strict Scrutiny.

Defendants have not even begun to show that the District's uniquely harsh restrictions on worship advance a "compelling" state interest, *Lukumi*, 508 U.S. at 546, much less that they are "the least restrictive means of furthering" such an interest. 42 U.S.C. § 2000bb-1(b). On both prongs of strict scrutiny, the burden of proof is "placed squarely on the Government by RFRA" and "the First Amendment." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Even at this preliminary stage, no less than at trial, Defendants bear "the burden[] of going forward with the evidence." *Id.* at 428–29 (quoting 42 U.S.C. § 2000bb-2(3)).

Defendants seem blissfully unaware of that burden. Over and over, they fail to cite any actual evidence to support their restrictions and instead point only to the *possibility* that some evidence might someday turn up. Thus, though the District's worship restrictions are more stringent than those of all 50 States, Defendants protest that it is still "unclear how much [the practice of other States] has protected public health" anyway. Opp. Br. 20. Indeed, Defendants aver that "no one even knows if these states' decisions regarding the proper restrictions of places of worship are *a*—let alone *the*—determining factor." *Id.* But this is a tacit admission that there is *no evidence at all* that the District's uniquely harsh worship limits are actually necessary, because they might well achieve nothing. Pressed on the fact that less than 5% of infected D.C. residents interviewed have reported attending "faith event[s]," Defendants urge this Court not to trust the data—collected by the District itself—since it *might* (like anything) be misleading. *Id.* at 21.

Maybe. But against mounting evidence—*actual* evidence—from every State and the District itself, Defendants' response that "well, you never know" is not enough to carry its burden to justify its worship restrictions and survive strict scrutiny. *See Gonzales*, 564 U.S. at 429. The District cannot "simply presume . . . that only the harshest restriction can work." *Dunn v. Smith*, 141 S. Ct. 725, 726 (2021) (Kagan, J., concurring).

1. The District has no compelling need for its strict worship limits.

a. As the Supreme Court has explained, other jurisdictions provide a crucial benchmark for applying strict scrutiny. *See Holt*, 574 U.S. at 369. After all, if "many" states manage to protect the public health without a 25% capacity limit or a 250-person cap on worship, then Defendants "must, at a minimum, offer persuasive reasons why [they] believe[] that [they] must take a different course." *Id.* Under that doctrine, the District's worship restrictions cannot survive because all 50 States have now scrapped rigid numerical limits, and 48 (including neighboring Maryland and Virginia) do not impose any 25% capacity limit. Indeed, 37 states do not impose *any percentage-based limit at all*, and instead rely on the more targeted means of social-distancing, masking, and sanitization rules, which have proven highly effective at preventing the spread of COVID-19 in churches. "That so many other" governments have found less restrictive ways to guard public health shows that the District too "could satisfy its [public health] concerns through a means less restrictive" than it has imposed. *Id.* at 368–69.

Defendants do not even try to prove that they need to impose harsher worship restrictions than any state in the country. They retort (at 16 n.10) that one State—Maine—does use hard numerical caps, but the point backfires. For one thing, Maine has announced that it will move to a 50% limit on March 26. Dick Decl. Ex. B-17 at 2 n.2. But even before then, Maine's current rules impose a 50-person *floor*, not a cap. Churches in Maine may admit *at least* 50 worshippers, even if they would otherwise be limited to a smaller number under the State's square-footage-based rule. They are allowed to admit *more* than 50 people if they have the square footage. *Id*. at 2.

Defendants also plead that "[t]he District's cap at 25% of capacity is not an outlier," by which they apparently mean that, at the time their brief was filed, three out of 50 States imposed one. Opp. Br. 28. But one of those three (Washington) is moving to 50% on Monday, March 22. *See* WA Governor's Office, *Inslee announces statewide move to Phase 3 of recovery plan, return*

to spectator events and Phase 1B, Tier 2 vaccine eligibility (Mar. 11, 2021), https://tinyurl.com/yzdjderc. Meanwhile, a supermajority of states (37) have dissolved *all* occupancy limits on houses of worship, and another 11 are more relaxed than the District (almost all of them are at 50%). *See* Dick Decl. Ex. B-17; Md. Order 21-03-09-01 (Mar. 9, 2021), https://tinyurl.com/3yjn635j; Minn. Exec. Order 21-11 (Mar. 15, 2021), https://tinyurl.com/352en656. This lopsided split shows that even if a 25% limit is *one* way to fight COVID-19, it is far from the *least restrictive* way, as RFRA requires. In response, Defendants do not even try offer any "persuasive reasons why" they must "take a different course" than 48 States. *Holt*, 574 U.S. at 369.

Tellingly, Defendants say nothing at all about Maryland and Virginia—which are not only protecting public health *without* any 250-person cap or 25% limits, but are doing so in densely populated areas that are part of the very same metro area as the District. These examples are devastating because they make it virtually impossible for Defendants to prove that a 250-person cap or 25% limit is truly necessary. To make that showing, Defendants would need to provide evidence that the lack of equally harsh worship limits in Arlington, Alexandria, Bethesda, and Baltimore has caused serious problems that the District's rules have managed to avoid. But as the District concedes, it cannot provide any such comparative evidence at all. Indeed, the problem for Defendants is even worse, because the existence of uniquely stringent limits in the District actually *creates* a public-health hazard by encouraging parishioners who are shut out of less crowded churches in D.C. to instead attend Mass in *more crowded* churches just across the border in Maryland and Virginia. This perverse incentive achieves exactly the opposite of controlling the spread of COVID-19, because it encourages more mixing of populations. Thus, on Defendants' premises, the challenged rules not only fail to promote public health, but actually undermine it.

Defendants all but admit that they cannot carry their burden of proof, stating that "[a]lthough many states have *tried* less restrictive means, *it remains unclear* how much this has protected public health." Opp. Br. 20 (second emphasis added). They try to cherry-pick the data by zeroing in on the single hardest-hit state in the Union, North Dakota (which imposes no percentage-based limit). *Id.* But the very source cited by Defendants also reveals seven jurisdictions with lower infection rates than the District's, most of which are much *less* restrictive of free exercise. *See* Statista, *Rate of coronavirus (COVID-19) cases in the United States as of March 11, 2021, by state* (March 2021), https://tinyurl.com/3e7jnmuu. The source also shows two of the three 25%-cap States (California and New Mexico) have higher infection rates than some 18 other States with looser restrictions. Overall, the evidence provides no support for the notion that the District's restrictions are more effective than the less-restrictive means employed by the vast majority of states.

b. The lack of a compelling interest in the 25% occupancy limit is especially clear because the Archdiocese is already following separate rules about masking, cleaning, and social distancing, which functionally limit churches under 50% capacity anyway. Carson Decl. ¶ 30. To prevail, Defendants would need to show that a 25% limit would advance a compelling public-health interest *compared to the realistic baseline of masked and socially distanced worship*, not compared to a caricature of overcrowded churches. But here again, the District provides no evidence that a 25% limit has any significant benefit over masking and distancing rules. In other words, the District has conceded that there is no proof of *any* marginal benefit from its compulsory exclusion of worshippers, much less a *compelling* benefit. This is precisely the type of gratuitous, unscientific, evidence-free restriction on religious exercise that RFRA is designed to prevent.

c. Defendants also cannot establish a compelling interest in restricting worship services because they do not apply the same restrictions to other entities that host large numbers of people, such as big-box stores and train stations. *See supra* pp. 10–11. When the government restricts First Amendment activity and "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546–47. In other words, Defendants fail to demonstrate a compelling interest because they have elsewhere "le[ft] appreciable damage to that supposedly vital interest unprohibited." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Lukumi*, 508 U.S. at 547).

d. The District's own data show that worship services pose no heightened health risk that would justify special capacity restrictions compared to these other activities. *See* Mem. 26–28. In an attempt to establish "outbreaks tied specifically to worship services," Defendants point to two isolated instances (in nine months) in which a few people who had been at Mass tested positive. Opp. Br. 21. But Defendants point to nothing beyond the "potential" that these infections occurred or spread in church. *Id.* In any event, there have been 43,000 cases in the District this year, including in big-box stores and elsewhere, and it would be unrealistic to expect that *nobody* who attended church ever tested positive. Defendants ominously add that "[t]he Archdiocese was sufficiently concerned that it cancelled all public Masses at" the affected church. *Id.* But this only confirms that the Archdiocese acted responsibly—not that its worship services pose a unique threat of infection. Indeed, there are far more reported outbreaks associated with other activities. Of the 172 recorded outbreaks between July 31, 2020, and March 3, 2021, only three—or roughly 1.7%—came from places of worship of any kind, whereas more than ten times that came from restaurants and bars. *See* DC Health, *Outbreak Data*, https://coronavirus.dc.gov/page/outbreak-data.

e. Defendants also have no response to the point that the need to restrict worship is waning as infection rates are dropping and vaccine rates are soaring (especially among vulnerable populations). Defendants quibble about exactly how steep the drop has been (Opp. Br. 18–19), but there is no doubt as to the trend. They point to the 7-day average of 266 new daily cases on December 25 (*id*. at 19), but the 7-day average is now 115. *See* CDC, *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://tinyurl.com/ynzc2ady. In addition, the priority vaccination of vulnerable populations means that new infections are far less harmful (much less lethal) than they were before. Indeed, on one of the most critical points—that hospitalizations are falling and everyone in high-risk categories in D.C. will have had a chance to be vaccinated by Holy Week—Defendants say nothing, presumably because there is no answer.

Defendants speculate that "there may well be variants as yet undetected" that could defeat immunity. Opp. Br. 19. But if rights could be restricted based on speculation that they "may well" result in harm, then there would be no rights at all. Defendants provide no *actual evidence* to suggest that people who have been vaccinated or recovered from prior infection face any serious risk of hospitalization or death. They do attempt to support the possibility of "reinfection[]" by citing a scientific study (*id*. at 22–23), but it shows just the opposite of what they claim. *See* Jennifer M. Dan et al., *Immunological memory to SARS-CoV-2 assessed for up to 8 months after infection,* SCIENCE (Feb. 5, 2021), https://tinyurl.com/tmkb6sna (finding "substantial" immunity for those previously infected, and concluding that "95% of subjects retained immune memory at ~6 months after infection"). Indeed, the evidence overwhelmingly shows that the rapidly increasing number of people who have recovered or been vaccinated are not at serious risk. *See* Norman E. Sharpless, *SARS-CoV-2 Antibodies Can Protect from Reinfection, NCI Study Suggests*, NAT'L CANCER INST. (Dec. 21, 2020), https://tinyurl.com/dnufmhhn.

2. The District has failed to prove that its worship limits are the least restrictive way to protect public health.

Defendants argue that while "the Archdiocese may be able to convince the Court that some alternative restriction would be more narrowly tailored, it has not done so here." Opp. Br. 23. This gets the burden of proof exactly backwards. Under strict scrutiny, the Archdiocese does not bear the "burden of disproving the asserted compelling interests at the hearing on the preliminary injunction." *Gonzales*, 546 U.S. at 429. Rather, the Archdiocese "must be deemed likely to prevail unless the *Government*" can prove that "less restrictive alternatives are less effective." *Id.* (emphasis added). Defendants have not carried that burden here. Again, they have not even tried.

The District's own regulations prove that the less-restrictive means of masking and social distancing can prevent transmission in places like big-box stores, food sellers, and bus, train, or metro stations. *See* Mem. 28. The Supreme Court compared worship to these same activities in *Diocese of Brooklyn*. *See* 141 S. Ct. at 66–67. And just as in *Diocese of Brooklyn*, Defendants here have failed to prove that the same less-restrictive means are not acceptable for churches.

Defendants' primary answer seems to be that the Supreme Court decided *Diocese of Brooklyn* without the benefit of "evidence to the contrary," which they claim to have now "provided." Opp. Br. 24. Defendants rely on Dr. Nesbitt, *see id.* at 25 (citing Second Nesbitt Decl. ¶¶ 6, 29), who cites her own previous declaration asserting that worship requires harsher restrictions because congregants "greet each other," First Nesbitt Decl. ¶ 12, "sit[] in one place," *id.* ¶ 14, engage in "communion[] and other rituals," *id.* ¶ 8, "chant[,]" and "sing in unison," *id.* ¶ 15. But the State pressed the very same arguments in *Diocese of Brooklyn*, and the Supreme Court rejected them. *Roman Cath. Diocese of Brooklyn v. Cuomo*, No. 20-cv-4844, 2020 WL 6120167, at *6 (E.D.N.Y. Oct. 16, 2020) ("[C]ongregants . . . physically greet one another, sit or stand close together, share or pass objects, and sing or chant in a way that allows for airborne

transmission of the virus."), *rev'd and remanded sub nom. Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020). As the Supreme Court's ruling makes clear, worship services can be conducted just as safely as shopping and other activities as long as congregants refrain from sitting closely together and follow other safety precautions such as masking, social distancing, and sanitizing—all of which is provided for in the Archdiocese's voluntary guidelines. *See* Carson Suppl. Decl. ¶¶ 4–5 (noting that the Archdiocese's guidelines also prohibit singing by the congregation). The same points are dispositive here. Defendants' recycling of the same arguments that the Supreme Court rejected in *Diocese of Brooklyn* does not count as "new evidence."

Dr. Nesbitt's pronouncements are especially lacking in credibility because her previous prophecies of doom have not come to pass: She previously testified that "people are going to get sick and die if the Court permits faith-based organizations to conduct worship services outdoors in unlimited size." Decl. of Dr. Laquandra Nesbitt ¶ 7, *Capitol Hill Baptist Church v. Bowser*, No. 20-2710 (D.D.C. Oct. 9, 2020), ECF No. 40-1. But after this Court enjoined the restrictions on outdoor worship, there is no evidence that anybody got sick or died as a result. Then, in the run-up to Christmas, Dr. Nesbitt argued that "a 50-person limit was the correct approach" to indoor worship. Decl. of Dr. Nesbitt ¶¶ 16–17, *Roman Cath. Archbishop of Wash. v. Bowser*, No. 20-3625 (D.D.C. Dec. 17, 2020), ECF No. 17-1. But once again, after the District was forced to abandon the 50-person limit as a result of this litigation, the sky did not fall.

Defendants also protest that unlike in *Diocese of Brooklyn*, "there is no allegation here 'that the [Mayor] specifically targeted' the Catholic community." Opp. Br. 25. But this argument falls flat because the Court expressly *declined* to rely on targeting in *Diocese of Brooklyn*, 141 S. Ct. at 66. In any event, the Archdiocese here *has* shown that the District's 250-person cap is targeted at worship because it is a "religious gerrymander." Mem. 20. Nor is this a mere "allegation"; it is

plain on the face of the Mayor's order, which explains that the District deliberately designed the 250-person cap to have an adverse impact on worship but not dining. Rather than retract that confession, Defendants pretend it never happened and drop a footnote asking this Court not to "consider plaintiff's arguments about the reasons for the 250-person cap." Opp. Br. 17 n.11. But the Court can and should find that the gerrymandered cap is not a "science-based restriction[]" of any kind, *id.* at 15, much less the *narrowest* means of advancing a *compelling* public health interest.

C. The Supreme Court Did Not Uphold a 25% Capacity Limit in *South Bay II*

Defendants claim that the Supreme Court "upheld California's 25% capacity restriction" in *South Bay II*, but their argument rests on a clear misreading of that decision. Opp. Br. 18. As this Court has recognized, "the Supreme Court's denial[s] of emergency relief . . . are not 'decision[s] on the merits of the underlying legal issues.'" *Capitol Hill Baptist*, 2020 WL 5995126, at *7 n.9 (quoting *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009)). That is especially clear here because the Supreme Court in *South Bay II* did not even consider the merits of California's 25% limit, since the plaintiffs there were not subject to that limit and had not challenged it in the Ninth Circuit. If anything, a majority of Justices indicated that the limit would be struck down if it were properly challenged. *South Bay II* thus does not support Defendants' argument here but rather undermines it. And that is especially true because the 25% limit has become even more of an outlier as more states have abandoned it since *South Bay II* was decided.

1. At the time of *South Bay II*, California had a four-tier system of worship restrictions that applied to different parts of the state depending on local conditions. Under "Tier 1," no indoor worship was permitted. *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1153 (9th Cir. 2021). Under "Tier 2," indoor worship was limited to 25%, whereas retail was limited to 50% and grocery stores faced no limit. *Id*. Under Tiers 3 and 4, worship was limited to 50%. *Id*.

The plaintiff church fell under Tier 1. *Id*. at 1131–32. Thus, in the Ninth Circuit, it challenged the total ban on indoor worship under Tier 1, *id*. at 1140–51, along with the statewide ban on singing in worship, *id*. at 1152, but did not challenge the 25% capacity limit on worship in Tier 2 (or any of the restrictions in the other tiers), *id.* at 1151 n.38. That explains why, when the case reached the Supreme Court, all three opinions of the six-Justice majority addressed the validity of the Tier 1 prohibitions and the singing ban, but did not address the merits of the 25% limit or the other restrictions in Tiers 2–4. Indeed, as Justice Gorsuch explained, "today's case concerns the total ban on indoor worship found in 'Tier 1,' [but] nothing in our order precludes future challenges to the other disparate occupancy caps applicable to places of worship, particularly in 'Tiers' 2 through 4." *See S. Bay II*, 141 S. Ct. at 719 n.1 (statement of Gorsuch, J.). A majority of the Court agreed on this point: Justices Thomas and Alito joined Justice Gorsuch's opinion, and Justice Barrett wrote separately (joined by Justice Kavanaugh) to say that she "agree[d] with Justice Gorsuch's statement" except as to the singing ban. *Id*. at 717 (Barrett, J., concurring). That makes five Justices. And by referring to the 25% limit as a form of "disparate" treatment, the same five-Justice majority indicated that the limit likely would not survive if it were properly challenged. *Id*. at 719 n.1 (statement of Gorsuch, J.). That is the relevant lesson here.

2. The Archdiocese is especially likely to succeed here because RFRA applies to the District of Columbia, whereas the plaintiffs in *South Bay II* and the Supreme Court's other recent cases challenged state laws, and could invoke only the First Amendment. As explained above, RFRA is far more protective of religious exercise because it requires strict scrutiny of *any* substantial burden, regardless of whether the challenged law is neutral and generally applicable. *See supra* p. 3. That makes it much easier for a plaintiff to prevail under RFRA. Indeed, even the dissenting Justices who have voted to uphold worship restrictions have not attempted to argue that

the restrictions are not substantially burdensome, or that they can survive strict scrutiny. Instead, they have relied on the argument that strict scrutiny should not apply because, in their view, the worship restrictions are neutral and generally applicable. *See, e.g.*, *S. Bay II*, 141 S. Ct. at 721 (Kagan, J., dissenting) (arguing that California "satisfie[d] that neutrality rule by regulating worship services the same as other activities"); *Diocese of Brooklyn*, 141 S. Ct. at 81 (Sotomayor, J., dissenting) (arguing that New York's rules did "not discriminate against religious institutions"). Because RFRA applies here, however, that key argument is not available to the defenders of the District's worship restrictions, which trigger strict scrutiny even if they are non-discriminatory.

3. The Archdiocese is even more likely to succeed because a much lower standard applies here than it did in *South Bay II* and the other recent Supreme Court decisions. When plaintiffs seek injunctive relief from the Supreme Court under the All Writs Act (as opposed to a stay of a lower court decision), they must show that their asserted "legal rights" are "indisputably clear." Mem. 24, 32. Defendants claim that this applies only in cases involving a single justice "reviewing an in-chambers petition." Opp. Br. 30. That is flatly mistaken. The reason that the Supreme Court's "issuance of an injunction . . . 'demands a significantly higher justification' than that required for a stay" is that "an injunction 'does not simply suspend judicial alteration of the status quo [as a stay does] but grants judicial intervention that has been withheld by lower courts.'" *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). That is true whether the injunctive relief is granted by a single Justice or the whole Court. Indeed, the Court has said as much—and thus applied the stricter standard—in orders issuing from the whole Court. *See Respect Me. PAC v. McKee*, 562 U.S. 996 (2010). So the plaintiffs who have recently succeeded in the Supreme Court did clear a higher hurdle than that faced by the Archdiocese. If their right to relief was "indisputably clear," there can be no doubt that the Archdiocese is entitled to relief here.

Defendants also attempt to render the Supreme Court's recent decisions irrelevant on the ground that they were issued as part of the Court's "Shadow Docket." For example, they say that *South Bay II* is nothing more than an "order of 170 words, attributed to no group of justices." Opp. Br. 31. But that does not mean, as Defendants contend, that "the law is unsettled" on the matter addressed in this type of order. *Id.* For one thing, precedential weight does not vary with word count. More to the point, while the decision was not expressly *attributed* to a particular group of Justices, there can be no doubt that it was *decided* by a majority. And when a majority of the Supreme Court embraces an outcome, that outcome becomes binding precedent. That is confirmed by no less an authority than the Supreme Court itself. Its recent order in *Gateway City Church v. Newsom* declared that "[t]he Ninth Circuit's failure to grant relief was erroneous"—not ill-advised, but wrong—because the issuance of injunctive relief was "clearly dictated by this Court's decision in *South Bay*." No. 20A138, 2021 WL 753575, at *1 (U.S. Feb. 26, 2021). So too here.

II. ABSENT RELIEF, THE ARCHDIOCESE WILL BE IRREPARABLY HARMED.

Irreparable harm is undeniably present here. Defendants do not dispute that the loss of freedoms protected by RFRA or the First Amendment, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67; *see Capitol Hill Baptist*, 2020 WL 5995126, at *10; Mem. 31. That settles the issue. Defendants' only response is that the Archdiocese is wrong on the merits and has not shown that it would conduct services at capacities above the current restrictions if those restrictions were removed, Opp. Br. 34, but that is incorrect for the reasons the Archdiocese has discussed, *see supra* pp. 4–7.

III. THE EQUITIES AND THE PUBLIC INTEREST FAVOR RELIEF.

The balance of equities and the public interest—which Defendants agree "merge" in this case—continue to favor relief. *See* Opp. Br. 34. Defendants do not dispute that there is "[n]o public interest" in maintaining an unlawful government policy. Mem. 32–33 (quoting *Agudath Israel*,

983 F.3d at 637). Nor do Defendants dispute that "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (internal quotation marks omitted); *see also Capitol Hill Baptist*, 2020 WL 5995126, at *12 ("[T]here is undoubtedly also a public interest in ensuring that the rights secured under the First Amendment and, by extension, the RFRA, are protected."). Accordingly, so long as the Archdiocese "is likely to succeed in proving that the District has violated its rights under RFRA [or the First Amendment], the equities and public interest weigh in its favor." *Capitol Hill Baptist*, 2020 WL 5995126, at *12. Indeed, injunctive relief is "heavily" favored where, as here, a restriction "'strike[s] at the very heart of the First Amendment's guarantee of religious liberty.'" *Agudath Israel*, 983 F.3d at 637 (quoting *Diocese of Brooklyn*, 141 S. Ct. at 68).

Instead of engaging these authorities, Defendants quote inapposite passages discussing the showing of irreparable harm that a State must make when it seeks an injunction. *See* Opp. Br. 35. Those passages do not address the public-interest showing that a private party must make in order to obtain an injunction against the government. And they certainly do not license Defendants to maintain an unlawful policy by claiming that an injunction necessarily harms them. If that were the law, a preliminary injunction would never issue against the government.

Defendants also emphasize (at 34–36) the danger posed by COVID-19, but that does not justify the restrictions they have imposed on the Archdiocese's Masses. The Supreme Court has declined to find "harm [to] the public" where the government fails to show that the application of "less restrictive measures" would "imperil[]" public health. *Diocese of Brooklyn*, 141 S. Ct. at 68. Defendants have failed to make that showing here, as the Archdiocese has explained. *See supra* pp. 13–20. In addition, Defendants obliquely suggest that "attendance at the applicants' services has resulted in the spread of the disease." Opp. Br. 34 (quoting *Diocese of Brooklyn*, 141 S. Ct. at

68). But Defendants' only example involves an Episcopal church, which is not connected to the Archdiocese, and Defendants do not claim that people who tested positive after attending Catholic churches "le[d] to spread of COVID-19." *Id.* at 34–35. Moreover, the risk of spreading COVID-19 is ubiquitous in society, and if the government truly required the complete elimination of that risk before any activity could continue, then every gathering, public and private, would be banned.

IV. THE ARCHDIOCESE IS ENTITLED TO ALL THE RELIEF IT SEEKS.

Tacitly acknowledging that their rules are indefensible, Defendants argue (at 36–38) that only a limited injunction is appropriate here.

First, Defendants ask that the injunction apply only to the Archdiocese and Catholic churches. The Archdiocese does not object to this; the ordinary rule is that an injunction applies to the parties who seek relief, although the precedent may benefit others who are similarly situated.

Second, Defendants ask (at 38) that the 250-person cap need not be enjoined because they have now (but only under threat of litigation) unilaterally waived the restriction for the Basilica during Holy Week. But by its terms, the waiver does not appear to cover Palm Sunday (March 28), the first day of Holy Week. Opp. Br. Ex. H. And it expires right after Easter, thus unlawfully forcing the Basilica to turn away worshippers "even on ordinary Sundays." Carson Decl. ¶ 30. Even if Defendants were to extend the waiver of the cap unilaterally, "injunctive relief is still called for" under the voluntary-cessation doctrine, "because the [Archdiocese] remain[s] under a constant threat" of renewed enforcement. *Diocese of Brooklyn*, 141 S. Ct. at 68. In addition, the separate 25% capacity limit still requires the Basilica and other churches to turn away worshippers.

CONCLUSION

For the foregoing reasons, the Court should grant a temporary restraining order and a preliminary injunction against the enforcement of the 250-person limit and the 25% capacity limit on the Archdiocese's indoor worship services.

Respectfully submitted, this the 19th day of March, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 19, 2021, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which will send notification of such filing to all counsel of record.

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