

In the Supreme Court of the United States

SOUTH BAY UNITED PENTECOSTAL CHURCH AND BISHOP ARTHUR HODGES III,

Applicants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA, ET AL.,

Respondents.

HARVEST ROCK CHURCH, INC., ET AL.,

Applicants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPLICANTS BY THE BECKET FUND FOR RELIGIOUS LIBERTY

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The Becket Fund for Religious Liberty respectfully moves for leave to file a brief *amicus curiae* in support of Applicants' Emergency Applications for Writ of Injunction, without 10 days' advance notice to the parties of *Amicus's* intent to file as ordinarily required. In accordance with the Court's order of April 15, 2020, the proposed brief conforms to the formatting requirements of Rule 33.2.

In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice, but *Amicus* was nevertheless able to obtain a position on the motion from the parties. All parties have consented to the filing of the *amicus* brief.

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020).

Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am. v. Cuomo*, No. 20A90 (decided Nov. 25, 2020); *Roman Catholic Archbishop of Washington v. Bowser*, No. 1:20-cv-03625-TNM (D.D.C. filed Dec. 11,

2020) (challenge to 50-person cap on indoor worship); *Lebovits v. Cuomo*, 1:20-cv-01284-GLS-DJS (N.D.N.Y. filed Oct. 16, 2020) (challenge to restrictions on Jewish girls' school located in Far Rockaway, Queens).

Amicus seeks to file this brief to bring to the Court's attention the fact that California's complete ban on indoor worship is an extreme outlier nationally. Among other things, *Amicus* has conducted a comprehensive 50-state survey of relevant restrictions on indoor worship, which shows that California is one of only a few states that puts a numerical cap on worship attendance, and the only state to ban indoor worship altogether. The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1.

For the foregoing reasons, proposed *Amicus* respectfully requests that the Court grant this unopposed motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*¹

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020).

Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am. v. Cuomo*, No. 20A90 (decided Nov. 25, 2020); *Roman Catholic Archbishop of Washington v. Bowser*, No. 1:20-cv-03625-TNM (D.D.C. filed Dec. 11, 2020) (challenge to 50-person cap on indoor worship); *Lebovits v. Cuomo*, 1:20-cv-1284-GLS-DJS (N.D.N.Y. filed Oct. 16, 2020) (challenge to restrictions on Jewish girls' school located in Far Rockaway, Queens).

Amicus submits this brief to bring to the Court's attention the fact that California's complete ban on indoor worship is an extreme outlier nationally. Among other

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

things, *Amicus* has conducted a comprehensive 50-state survey of relevant restrictions on indoor worship, which shows that California is one of only a few states that puts any strict numerical cap on worship attendance, and is the only state to ban indoor worship altogether.² California’s extreme and anomalous worship ban must therefore fall.

SUMMARY OF ARGUMENT

The dispute before the Court is narrow. The lower courts agreed that California’s complete ban on indoor worship triggers strict scrutiny under the Free Exercise Clause. No one disagrees that California bears the burdens of proof and persuasion on its affirmative defense of strict scrutiny. And this Court has already held that combatting the spread of COVID-19 is a compelling governmental interest. The only remaining questions before the Court are thus whether California’s complete ban is “narrowly tailored,” as strict scrutiny requires, and what injunctive remedy ought to follow.

With respect to narrow tailoring, California’s ban fails the test in *Roman Catholic Diocese of Brooklyn v. Cuomo* at every turn. 141 S. Ct. 63, 67 (2020). California’s prohibition on indoor worship in Tier 1 counties (54 out of the 58 counties in California) is “far more restrictive” than any COVID regulations that have previously come before this Court, even than the 10- and 25- person caps enjoined in *Diocese of Brooklyn*. *Ibid.* California’s approach is also an extreme outlier nationally, with regulations that

² *Amicus* does not call into question CDC-approved guidance such as social distancing, hand sanitizing, masking, and other practices that are widely used for indoor worship in the rest of the nation. This brief addresses only numerical caps on worship attendance, like California’s ban.

are “much tighter” than those “adopted by many other jurisdictions hard-hit by the pandemic.” *Ibid.*

Amicus has compiled a comprehensive list of current COVID restrictions in all 50 states and the District of Columbia. This data confirms that no other state comes close to imposing the draconian restrictions California has mandated for houses of worship. And California’s restrictions are “far more severe,” 141 S. Ct. at 67, than necessary to prevent the spread of COVID among Applicants’ congregations, given numerous less restrictive alternatives and the admission by California that it has no evidence of spread in Applicants’ churches.

Further, California’s bait-and-switch—telling the Ninth Circuit that severe restrictions were necessary and then lifting its most-restrictive order less than 72 hours after the *South Bay* panel ruled (not to mention withholding crucial ICU capacity data)—confirms that this Court should not simply defer to assertions of expertise by the State.

Finally, having shown a clear right to relief on the merits, Applicants are entitled to relief. The remaining *Winter* factors pose no obstacle to this Court’s issuance of a targeted order enjoining California’s indoor worship ban while leaving in place percentage of occupancy limitations equivalent to those that govern retail establishments in Tier 1 and houses of worship in Tiers 2, 3, and 4.

ARGUMENT

I. California’s ban on indoor worship cannot withstand strict scrutiny under *Diocese of Brooklyn*.

California’s ban on indoor worship fails strict scrutiny because it is not narrowly

tailored.

A. California’s worship ban is “far more restrictive” than the numerical caps enjoined in *Diocese of Brooklyn*.

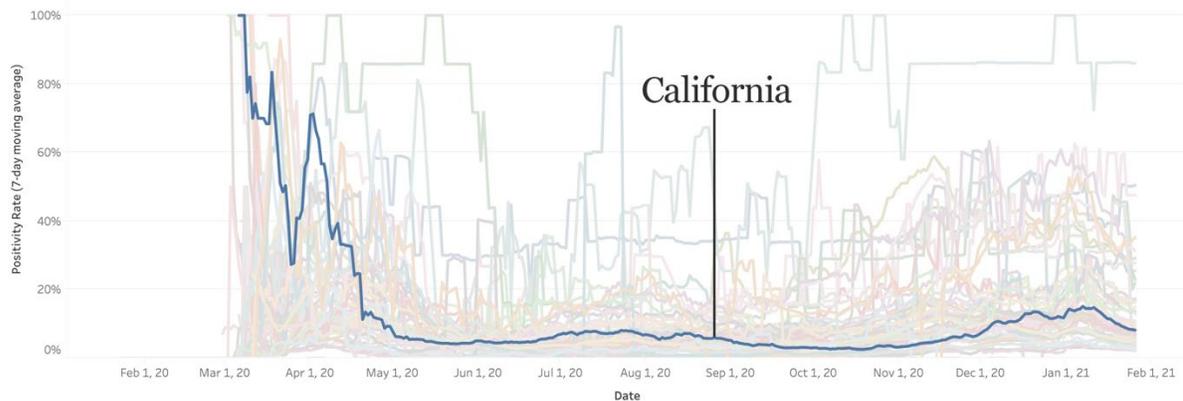
In *Diocese of Brooklyn*, New York’s 10- and 25-person caps on worship failed strict scrutiny in part because they were “far more restrictive than any COVID–related regulations that have previously come before the Court.” 141 S. Ct. at 67. California’s ban on indoor worship is even more restrictive than New York’s. *Diocese of Brooklyn* compared New York’s treatment of acupuncture facilities, campgrounds, garages, manufacturing plants, and transportation facilities to its treatment of houses of worship, finding that religious worship was treated worse. *Id.* at 66. And, key to the applications here, this Court included “non-essential” retail businesses in its list of comparators. *Ibid.* Indeed, this Court found it constitutionally “troubling” that “a large store in Brooklyn” could “literally have hundreds of people shopping there on any given day” while houses of worship remained shuttered. *Id.* at 66-67.

That is precisely the situation in California—only even more severe. Houses of worship across the State must remain closed entirely while a host of secular activities—from factories to non-essential retail—can operate indoors with modifications (like masking and distancing) that many houses of worship voluntarily adopted without a government mandate. As Judge O’Scannlain observed, “If fixed attendance caps of 25 or 50 people are too rigid and too extreme to withstand strict scrutiny, how can a complete ban not be?” *Harvest Rock Church, Inc. v. Newsom*, No. 20-56357, 2021 WL 235640, at *3 (9th Cir. 2021) (emphasis original).

Nor is there anything special about California’s COVID statistics as compared to

other states that would justify its harsher restrictions. Indeed, California’s epidemiological metrics have been in the middle of the pack over the course of the pandemic. For example, California’s running 7-day average of test positivity—one of the metrics it uses to determine a county’s tier under the Blueprint—has not tended to either extreme. If anything, over the last eight months (including at present) it has had much lower positivity rates than many other states:

COVID Positivity Rates Across the States



See The COVID Tracking Project, <https://covidtracking.com/data/download> (visualization created Jan. 28, 2021). See also Johns Hopkins University Coronavirus Resource Center, “Differences in Positivity Rates,” *available at* <https://coronavirus.jhu.edu/testing/differences-in-positivity-rates> (identifying The COVID Tracking Project as the database Johns Hopkins uses and describing “Approach 4” for comparing positivity rates across jurisdictions). If California’s epidemiological metrics are not unique, they can hardly justify a uniquely draconian ban on worship.

B. California’s worship ban is “much tighter” than the measures used by any other state.

1. California’s complete ban on indoor religious worship is the most restrictive in

the nation. *Amicus* has surveyed all 50 states and the District of Columbia and has compiled in the Appendix weblinks to the relevant state-level executive orders or guidance governing indoor worship. This research shows that as of January 27, 33 states do not restrict the size of indoor worship services at all. Eleven states impose percentage-of-occupancy caps ranging from 25% to 75% of normal occupancy limits. Only six states and the District of Columbia employ numerical caps without regard to a facility's maximum occupancy. And two of these six states (New York and Connecticut) cannot enforce their numerical caps as a result of this Court's ruling in *Diocese of Brooklyn* and the Second Circuit's decision on remand. *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020).

Of the remaining states with numerical caps, Maine limits in-person worship to 50 persons,³ New Jersey to 150,⁴ and Rhode Island to 125.⁵ The District of Columbia caps indoor religious gatherings at 250 persons.⁶ In the national context, California's ban—effectively a numerical cap of zero persons—thus stands alone as the most extreme restriction on worship in the country, and as one of the most extreme in the

³ Office of the Governor, Executive Order No. 16 FY20-21 (Nov. 4, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20to%20Revise%20Indoor%20Gathering%20Limits%2C%20Strengthen%20Face%20Covering%20Requirements%20and%20Delegate%20Certain%20Authority.pdf>.

⁴ Governor Philip D. Murphy, Executive Order No. 196 (Nov. 16, 2020), <https://nj.gov/in-fobank/eo/056murphy/pdf/EO-196.pdf> (as extended and modified by Executive Order 204).

⁵ Governor Gina M. Raimondo, Executive Order No. 20-108 (Dec. 17, 2020), <https://governor.ri.gov/documents/orders/Executive-Order-20-108.pdf> (as extended by Executive Order 21-05).

⁶ Mayor Muriel Bowser, Order 2020-126 (Dec. 16, 2020), https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Mayor%27s%20Order%202020-126%2012-16-2020.pdf.

As these data show, California’s restrictions are by any measure “much tighter” than those in any other state. *Diocese of Brooklyn*, 141 S. Ct. at 67. And on that basis alone, California’s ban fails strict scrutiny.⁷

2. California’s idiosyncratic worship ban also runs afoul of this Court’s ruling in *Holt v. Hobbs*, 574 U.S. 352 (2015). In *Holt*, the Court held that because 44 other state and federal prison systems would have allowed the plaintiff prisoner’s religious beard, Arkansas bore a special burden on strict scrutiny to explain “why the vast majority of States and the Federal Government permit inmates to grow ½-inch beards, either for any reason or for religious reasons, but it cannot.” *Id.* at 368 (citing *Procunier v. Martinez*, 416 U.S. 396, 414, n.14 (1974)).

Here, California’s position is even more isolated than Arkansas’s was in *Holt*—it is the *only* state to ban indoor worship. “That so many other [jurisdictions]” give houses of worship more leeway “while ensuring [health] safety * * * suggests that [California] could satisfy its [health] concerns through a means less restrictive” than an indoor worship ban. *Holt*, 574 U.S. at 368-369. California must therefore “at a minimum, offer persuasive reasons why it believes that it must take a different course” than every other state in the Union. *Id.* at 369. But California has not even

⁷ The highest courts in other Western nations have similarly struck down worship bans and numerical caps. See, e.g., Conseil d’État [CE Sect.] [French Council of State] Nos. 446930, 446941, 446968, 446975, Nov. 29, 2020, <https://www.conseil-etat.fr/Media/actualites/documents/2020/11-novembre/446930-446941-446968-446975.pdf> (striking down national 30-person numerical cap on worship); Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], 1 BvQ 44/20, Apr. 29, 2020, https://www.bundesverfassungsgericht.de/e/qk20200429_1bvq004420.html (gathering ban in Lower Saxony struck down because it did not allow for case-by-case exceptions for houses of worship).

attempted to justify the extreme step of banning core First Amendment activity. That failure scuppers its strict scrutiny defense.

C. California’s ban is “far more severe” than required to prevent the spread of COVID-19 at Applicants’ indoor worship services.

California has also failed to make the case that *these Applicants’* specific indoor worship services must be banned. Indeed, California’s evidence in support of its affirmative defense suffers from all of the defects of New York’s evidence in *Diocese of Brooklyn*. Like New York, California’s evidence consists primarily of declarations from public health officials involved in promulgating the challenged public health orders, married with rank speculation about the potential effects of allowing worship generally. Opposition to Emergency Motion at 21, *Harvest Rock Church v. Newsom*, No. 20-56357 (9th Cir. Dec. 28, 2020), ECF No. 7-2.⁸ There is no effort to analyze the effect of banning *these particular plaintiffs’* indoor worship. See *Diocese of Brooklyn*, 141 S. Ct. at 67 (lack of COVID-19 spread at plaintiffs’ worship services central to strict scrutiny analysis); *Holt*, 574 U.S. at 362-363 (court must look beyond a “broadly formulated interest” and “scrutinize the asserted harm of granting *specific* exemptions to *particular* religious claimants”) (emphasis added) (cleaned up).

Also like New York, California has presented no evidence that a worship ban is “required to prevent the spread of the virus at the applicants’ services.” *Diocese of Brooklyn*, 141 S. Ct. at 67. For example, Harvest Rock has been meeting for weekly worship services on four campuses for more than six months, adhering to a strict set

⁸ Although California refers to these declarations as “expert testimony” they were not admitted as such under Fed. R. Evid. 702. See also Fed. R. Evid. 701(c).

of guidelines that includes temperature checks, face masks, social distancing, sanitizing, and controlled entry and exit. Opening Brief at 21-22, *Harvest Rock Church v. Newsom*, No. 20-56357 (9th Cir. Jan. 19, 2021), ECF 40. South Bay held masked, socially-distanced services for months while maintaining a “perfect record” with no known COVID infections tied to its worship services. Emergency Application at 16, *South Bay United Pentecostal Church v. Newsom*, No. 20A136 (Jan. 25, 2021). These churches’ experience has been similar to the experience of the overwhelming majority of people in 49 other states who have attended masked, socially-distanced religious worship services during the pandemic: no outbreaks.⁹ And, like New York, California has not met its burden to put forward evidence that Applicants’ worship services have “contributed to the spread of COVID-19.” *Diocese of Brooklyn*, 141 S. Ct. at 67.

Yet instead of addressing the carefully controlled worship services at Harvest Rock and South Bay that follow public health recommendations regarding masks and social distancing, California’s witnesses reach back far in time and space to cherry-pick examples from before COVID safety protocols were widespread. Two of its three witnesses discuss the South Korean church service held in February 2020 “in a basement worship hall with no windows and attended by about 1,000 people seated on their knees on the floor, shoulder-to-shoulder” where “the church’s strict routine required repeatedly embracing others and wailing ‘amen.’” Watt Decl. at 16, *Harvest*

⁹ Scientific studies show that worship can be conducted safely. For example, three infectious disease experts reviewed more than one million Catholic masses nationwide, most in states without numerical caps. They concluded that where Church safety protocols were followed, there was not a single documented outbreak of COVID-19 linked to church attendance. See Dr. Thomas W. McGovern, Dr. Timothy Flanigan & Dr. Paul Cieslak, *Evidence-Based Guidelines to Celebrate Mass Safely Are Working*, Real Clear Science (Aug. 19, 2020), <https://perma.cc/SUN7-8SCX>.

Rock Church v. Newsom, No. 2:20-cv-6414 (C.D. Cal. Dec. 14, 2020), ECF 66-1; see also *id.*, Rutherford Decl. at 35, *Harvest Rock Church v. Newsom*, No. 2:20-cv-6414 (C.D. Cal. Dec. 14, 2020), ECF 66-2 (same). And they also rely on a secular choir rehearsal (not a worship service) held in Skagit Valley, Washington in early March 2020, where choir members sat 6-10 inches apart and sang—without masks—for nearly two hours.¹⁰ Watt Decl. at 15; Rutherford Decl. at 34-35 (wrongly stating that event was evidence that COVID can spread “even where precautions were taken.”). These cherry-picked anecdotes—from far away, early in the pandemic, and about people who were not following today’s CDC guidance—do not help California shoulder its heavy burden.

D. California also cannot meet its burden on strict scrutiny because it withheld key facts from the lower courts.

The quality of California’s evidence is relevant in another way—California did not disclose to the Ninth Circuit that the court was relying on inaccurate facts. The *South Bay* panel found strict scrutiny satisfied because, in reliance on California’s assertions, it believed when it issued its opinion late on Friday, January 22, that it was then California’s “darkest hour,” “with case counts so high that intensive care unit capacity is at 0% in most of Southern California.” *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814, at *1 (9th Cir. Jan. 22, 2021). Yet less than 72 hours later, California rescinded its Regional Stay At Home Order statewide, immediately allowing retail to operate at higher percentage levels,

¹⁰ Kelsey Simpkins, “Singing unmasked, indoors spreads COVID-19 through aerosols, new study confirms,” CU Boulder Today (Sept. 17, 2020), <https://bit.ly/3crRqXT>.

permitting hair salons and other personal care services to reopen, lifting constraints on travel, and easing a number of other restrictions. At the same time, California acknowledged that it had been withholding key ICU data from the public—ostensibly because it would “mislead” Californians—and finally released the data. Don Thompson, “California reveals data used to lift stay-at-home order,” AP News (Jan. 25, 2021), <https://bit.ly/3t1QwHr>. That data showed that projected available ICU capacity statewide will soon be over 15% in all regions of the State; by mid-February the State projects Southern California will have the *most* ICU capacity, with 33.3% available. *Ibid.*

What’s more, California had this information *before* the *South Bay* panel made its decision. California officials told reporters by at least the morning of January 22—well before the Ninth Circuit panel issued its decision—that it had ICU data it was not sharing with the public, again because it would “mislead.” Don Thompson, “It’s a secret: California keeps key virus data from public,” ABC News (Jan. 22, 2021), *available at* <https://perma.cc/XYN5-3QRB>. After receiving sharp criticism from academic epidemiologists—including from Dr. George Rutherford, one of California’s own declarants in the *Harvest Rock* case—California officials decided over the weekend to release the data. *Ibid.* As it happened, that data showed a massive improvement in California’s ICU capacity, including in Southern California. Yet for some reason, California did not share this information with the *South Bay* panel, which had been led to believe that the ICU capacity metric was far worse than it actually was. By Monday, California wasn’t even taking ICU capacity into account in determining what

activities would or would not be allowed. See State of California, Blueprint for a Safer Economy, <https://perma.cc/DTL6-H79S> (“Every county in California is assigned to a tier based on its test positivity and adjusted case rate.”).

In situations of information asymmetry, courts can be tempted to defer completely to the assertions of government officials. But where core First Amendment rights are at stake—and where no other state in a similar situation has imposed the “draconian” measures California has—courts must be willing to look behind the curtain. *Harvest Rock Church*, 2021 WL 235640 at *1, *3 (O’Scannlain, J., concurring). Cf. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500–501 (1984) (appellate courts have duty of independent review in First Amendment cases). California’s deliberate withholding of information is another reason it cannot meet its burdens of proof and persuasion on strict scrutiny.

II. Injunctive relief is warranted.

A. Where less restrictive means are available, the balance of harms tips towards Applicants.

Injunctive relief is called for here because all of the *Winter* factors are easily met. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The *South Bay* panel recognized that Applicants are suffering irreparable harm. *South Bay*, 2021 WL 222814, at *8. And as the *South Bay* panel also recognized, “[t]he third and fourth [*Winter*] factors, harm to the opposing party and the public interest, merge when the Government is the opposing party.” *Id.* at *16; *Nken v. Holder*, 556 U.S. 418, 435 (2009).

But the panel erred in finding that the balance of harms favored the government.

As this Court explained in *Diocese of Brooklyn*, “there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.” 141 S. Ct. at 67. “Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue.” *Ibid.* And, as Judge O’Scannlain noted, California has at its disposal a “variety of less severe measures,” which it uses to “allow all manner of secular activity to take place safely indoors.” *Harvest Rock Church*, 2021 WL 235640 at *2 (O’Scannlain, J., concurring). These include “occupancy limitations; facemask, physical-distancing, and disinfection protocols; installation of plexiglass barriers; regular COVID-19 testing practices; and penalties the State might enforce for failures to comply with such requirements.” *Ibid.*

These less restrictive alternatives confirm that the balance of harms tips toward Applicants. As the Second Circuit explained on remand from this Court, “no public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal.” *Agudath Israel*, 983 F.3d at 637. Just like New York’s restrictions, California’s indoor worship ban “specially and disproportionately burden[s] religious exercise, and thus ‘strike[s] at the very heart of the First Amendment’s guarantee of religious liberty.” *Ibid.* (quoting *Diocese of Brooklyn*, 141 S. Ct. at 68). This “direct and severe constitutional violation weighs heavily in favor of granting injunctive relief.” *Ibid.*

B. The Court has broad discretion to fashion an equitable remedy that enjoins the ban on indoor worship while allowing percentage-of-occupancy limits like those California now employs in four counties.

This Court, “in fashioning interim relief” and bringing to bear its own “equitable judgment,” may craft a “tailor[ed]” injunction “to meet the exigencies of the

particular case.” *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 2947 (3d ed. 2013)); see also 28 U.S.C. 1651(a) (“The Supreme Court * * * may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”). “The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward.” *Trump*, 137 S. Ct. at 2087 (internal citation omitted). See also *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 571 U.S. 1171 (2014) (crafting injunctive relief tailored to protect the constitutional rights of applicants as the case proceeded).

Targeted equitable relief is appropriate here to ensure that worship in California’s many churches, synagogues, mosques, temples, and gurdwaras is not treated worse than secular activities. California’s ban on in-person worship in all 54 Tier 1 counties was not affected by the Ninth Circuit’s limited injunctions. Houses of worship must therefore remain closed, while non-essential retail (and numerous other secular activities) can open at 25% of occupancy or greater.¹¹ Outside of Tier 1 counties, and following the Ninth Circuit’s injunctions against California’s numerical caps, houses of worship are now subject only to percentage-of-occupancy limits (25% in Tier 2, 50% in Tier 3, and 50% in Tier 4).¹² As of today, only four counties (Trinity, Sierra, Alpine,

¹¹ See State of California, *Blueprint for a Safer Economy: Activity and Business Tiers*, <https://perma.cc/D56E-3HW8>.

¹² See *ibid.*; *South Bay*, 2021 WL 222814, at *18 (“[W]e remand to the district court with the instruction to enjoin the State from imposing the 100- and 200- person caps under Tiers 2 and 3 of the Blueprint.”); *Harvest Rock*, 2021 WL 235640, at *1 (same).

and Mariposa) are in Tiers 2 or 3.¹³ Also unaffected by the Ninth Circuit injunctions are the required “modifications”—like distancing, masking, and sanitizing—that California imposes on all indoor activities. The Ninth Circuit also did not disturb California’s ban on indoor singing and chanting during worship.

Following this Court’s decision in *Diocese of Brooklyn*, appropriate equitable relief would thus likely entail requiring California to treat houses of worship in Tier 1 as equivalent to non-essential retail in Tier 1 (open at 25% capacity, with modifications) or equivalent to houses of worship in Tier 2 (open at 25% capacity, with modifications). Either approach would end California’s worst-in-the-nation treatment of houses of worship and its “troubling” privileging of retail, factories, and personal care businesses (to name just a few) over “churches and * * * synagogues,” many of which, like Applicants, “have admirable safety records.” *Diocese of Brooklyn*, 141 S. Ct. at 66-67.

* * *

California faces a terrible problem. But every other state in the nation faces the same problem and has not found it necessary to forbid the core First Amendment activity of conducting worship. Most states have chosen cooperation instead of prohibition. And since cooperation is a proven option for combatting COVID, California must take it.

CONCLUSION

This Court should enjoin California’s ban on indoor worship.

¹³ See State of California, Blueprint for a Safer Economy (updated January 28, 2021 at 5:03 PM), <https://perma.cc/DTL6-H79S>.

Respectfully submitted.

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APPENDIX

State	Weblink for COVID-19 Restrictions on Indoor Worship as of January 27, 2021
Alabama	https://www.alabamapublichealth.gov/covid19/assets/cov-sah-worship.pdf (referred to in January 21, 2021 Order, available at https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-012121.pdf).
Alaska	https://covid19.alaska.gov/wp-content/uploads/2020/05/05222020-Phase-III-IV-016-Attachment-N-Revised-Social-Religious-and-Other-Gatherings.pdf
Arizona	https://azgovernor.gov/file/36633/download?token=WdLo2rxL
Arkansas	https://www.healthy.arkansas.gov/images/uploads/pdf/guidance_places_of_worship.pdf (referenced in Executive Order 20-53, available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-53.pdf)
California	https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf
Colorado	https://drive.google.com/file/d/1ZeHik4-YQxDJqIdgFvc5yqheqIZpdVTU/view
Connecticut	https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-9K.pdf
District of Columbia	https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Mayor%27s%20Order%202020-126%2012-16-2020.pdf
Delaware	https://governor.delaware.gov/health-soe/twenty-seventh-modification-state-of-emergency-declaration/
Florida	https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91-compressed.pdf (as extended and modified by Executive Orders 20-112, 120, 123, 139, 166, 213, 276, and 316)
Georgia	https://gov.georgia.gov/document/2020-proclamation/executive-order-04202001-handout/download
Hawaii	https://hawaiiicovid19.com/safe-gatherings/
Idaho	https://rebound.idaho.gov/wp-content/uploads/stage-2-modified-order_r.pdf
Illinois	https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2021-03.aspx
Indiana	https://www.in.gov/gov/files/Executive-Order-20-50-Continuation-of-Color-Coded-County-Assessments.pdf (as extended by

	Executive Order 21-01, available at https://www.in.gov/gov/files/Executive-Order-21-01-Second-extension-of-executive-order-20-50.pdf)
Iowa	https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202021.01.07.pdf
Kansas	https://covid.ks.gov/wp-content/uploads/2020/05/Reopen-Kansas-Framework-v7.pdf (Phase Three)
Kentucky	https://govsite-assets.s3.amazonaws.com/r00brFXTl2TJkofBUZUh_Healthy%20at%20Work%20Reqs%20-%20Places%20of%20Worship%20-%20Final%20Version%202.0%20Final.pdf (as referenced by Executive Order 2020-1034, available at http://web.sos.ky.gov/execjournalimages/2020-MISC-270558.pdf).
Louisiana	https://gov.louisiana.gov/assets/Proclamations/2021/6-JBE-2021-StateofEmergency-Renewing-COVID-19.pdf
Maine	https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/An%20Order%20to%20Revise%20Indoor%20Gathering%20Limits%2C%20Strengthen%20Face%20Covering%20Requirements%20and%20Delegate%20Certain%20Authority.pdf
Maryland	https://governor.maryland.gov/wp-content/uploads/2020/11/Scanned-from-a-Xerox-Multifunction-Printer-4-1.pdf
Massachusetts	https://www.mass.gov/doc/covid-19-order-59/download (as modified and extended by COVID-19 Order No. 62, available at https://www.mass.gov/doc/covid-19-order-62/download).
Michigan	https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-549437--,00.html
Minnesota	https://mn.gov/governor/assets/Executive%20Order%2021-01%20Signed%20and%20Filed_tcm1055-462272.pdf
Mississippi	https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1535.pdf (as extended and modified by Executive Order No. 1542, available at https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1542.pdf)
Missouri	https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/advisory-20201119.pdf
Montana	https://covid19.mt.gov/_docs/2020-11-17_Directive-on-Group-Size-and-Capacity-FINAL.pdf (as extended and modified by January 14, 2021 directive, available at https://covid19.mt.gov/_docs/Directive-on-2-2021-State-Law.pdf).

Nebraska	http://dhhs.ne.gov/Documents/DHM-Measure-Table-ENGLISH.pdf
Nevada	https://nvhealthresponse.nv.gov/wp-content/uploads/2020/12/Places-of-Worship.UPDATED-12-15.pdf
New Hampshire	https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/inline-documents/2020-05/guidance-worship.pdf
New Jersey	https://nj.gov/infobank/eo/056murphy/pdf/EO-196.pdf (as extended and modified by Executive Order 204, available at https://nj.gov/infobank/eo/056murphy/pdf/EO-204.pdf).
New Mexico	https://cv.nmhealth.org/wp-content/uploads/2020/12/123020-PHO.pdf
New York	https://forward.ny.gov/cluster-action-initiative
North Carolina	https://files.nc.gov/governor/documents/files/EO181-Modified-Stay-at-Home-Early-Closure-Order.pdf (as extended by Executive Order 189, available at https://files.nc.gov/governor/documents/files/EO189-Further-Extension-of-Stay-at-Home-Order.pdf)
North Dakota	https://www.governor.nd.gov/sites/www/files/documents/Executive%20Order%202020-43.4-%20-%20Restaurant%20and%20bar%20capacity%20limits.pdf (as modified by Executive Order 2020-43.5, available at https://www.governor.nd.gov/sites/www/files/documents/Executive%20Order%202020-43.5.pdf).
Ohio	https://coronavirus.ohio.gov/static/publicorders/limit-prohibit-mass-gatherings-ohio-rev-order-reader.pdf
Oklahoma	https://www.sos.ok.gov/documents/executive/1977.pdf
Oregon	https://sharesystems.dhsoha.state.or.us/DHSForms/Served/le3461.pdf (incorporated by Executive Order 66, available at https://www.oregon.gov/gov/Documents/executive_orders/eo_20-66.pdf , and extended by Executive Order 67, available at https://www.oregon.gov/gov/Documents/executive_orders/eo_20-67.pdf).
Pennsylvania	https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-TWW-mitigation-enforcement-immunity-order.pdf (reinstated after expiration of December 10, 2020 Order, available at https://www.governor.pa.gov/wp-content/uploads/2020/12/20201210-TWW-Limited-Time-Mitigation-Order.pdf).
Rhode Island	https://governor.ri.gov/documents/orders/Executive-Order-20-108.pdf (extended by Executive Order 21-05, available at https://governor.ri.gov/documents/orders/Executive-Order-21-05.pdf).

South Carolina	https://governor.sc.gov/sites/default/files/Documents/2020-11-25%20FILED%20Executive%20Order%20No.%202020-73%20-%20Modifying%20%20Amending%20Emergency%20Measures.pdf (as extended by Executive Orders 2020-75, 77; 2021-03, 07).
South Dakota	https://doh.sd.gov/documents/COVID19/ChurchesandOtherReligiousGatherings.pdf
Tennessee	https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee70.pdf (as modified and extended by Executive Order 74, available at https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee74.pdf).
Texas	https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf
Utah	https://coronavirus-download.utah.gov/Health/UPHO-2021-3-Updated-Statewide-COVID-19-Restrictions.pdf
Vermont	https://accd.vermont.gov/news/update-new-work-safe-additions-be-smart-stay-safe-order#religious-facilities-and-places-of-worship
Virginia	https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf
Washington	https://www.governor.wa.gov/sites/default/files/COVID19%20Religious%20and%20Faith%20Based%20Organization%20Guidance.pdf
West Virginia	https://coronavirus-wvgovstatus-cdn.azureedge.net/STAY_AT_HOME_ORDER.pdf
Wisconsin	https://www.dhs.wisconsin.gov/covid-19/community.htm (under Faith-Based Organizations)
Wyoming	https://health.wyo.gov/wp-content/uploads/2021/01/Order2_TwentiethContinuation_Jan212021.pdf