

No. 20-56357

**In the United States Court of Appeals
for the Ninth Circuit**

HARVEST ROCK CHURCH, INC., *et al.*,
Plaintiffs-Appellants,

v.

GAVIN NEWSOM,
in his official capacity as Governor of the State of California,
Defendant-Appellee.

On appeal from the United States District Court for the
Central District of California, No. 2:20-cv-06414-JGB-KK
Hon. Jesus G. Bernal, District Judge

**BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR
RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFFS-
APPELLANTS AND INJUNCTION PENDING APPEAL**

Eric C. Rassbach
Nicholas R. Reaves
Kayla Toney
The Becket Fund for
Religious Liberty
1919 Pennsylvania Ave. NW,
Suite 400
Washington, DC 20036
(202) 955-0095
erassbach@becketlaw.org

Attorneys for Amicus Curiae

FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus* Becket Fund for Religious Liberty has no parent corporation. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICUS*¹

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the free exercise of all religious traditions. To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation, including multiple cases at the United States Supreme Court. *See, e.g., 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); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Becket has also appeared frequently before this Court. *See, e.g., California v. U.S. Dep't of Health & Hum. Servs.*, 977 F.3d 801 (9th Cir.), *vacated and remanded*, 141 S.Ct. 192 (2020); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), *rev'd and remanded*, 140 S.Ct. 2049 (2020); *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 657 F.3d 988 (9th Cir. 2011).

During the COVID-19 pandemic, Becket has represented synagogues, churches, and religious schools challenging unequal treatment under government regulations, including the successful plaintiffs in the Supreme Court's leading COVID-19 case. *See Agudath Israel v. Cuomo*,

¹ All parties consent to the filing of this *amicus* brief. No counsel for any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici*, contributed money to the preparation or submission of this brief.

No. 20A90, 2020 WL 6954120 (Nov. 25, 2020), *decided together with Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020); *see also Lebovits v. Cuomo*, No. 1:20-cv-01284 (N.D.N.Y filed Oct. 16, 2020) (Jewish girls' school); *Roman Catholic Archdiocese of Washington v. Bowser*, No. 1:20-cv-03625-TNM (D.D.C. filed Dec. 11, 2020).

Becket submits this brief to offer one narrow point: California's ban on indoor religious worship is an extreme outlier nationally and cannot be reconciled with *Diocese of Brooklyn*, particularly because California allows even *non-essential* retail to be open at 20% of occupancy.² Almost every other state has abandoned numerical caps on worship as a method of preventing the spread of COVID-19, and no other state bans indoor worship entirely. California's ban must therefore be enjoined.

ARGUMENT

I. California's ban on indoor worship is an extreme outlier that must be subject to strict scrutiny under *Diocese of Brooklyn*.

California is the only state in the nation to completely ban indoor worship, and one of only a handful to place *any* numerical cap on houses of worship. Most states impose no restrictions on indoor worship, and those that do typically apply percentage-of-occupancy caps. Under *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020),

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 like California's ban.

California's anomalous restrictions are subject to strict scrutiny because they treat religious gatherings worse than secular activity such as shopping at retail stores.

A. California's complete ban on indoor worship is the most extreme in the nation.

Numerical caps on religious worship are a national outlier. As of January 11, 33 states do not restrict the size of religious gatherings at all, while 11 states impose only percentage-of-occupancy caps. Only six states and the District of Columbia employ blunt numerical caps that apply regardless of a facility's size. And two of these six states (New York and Connecticut) cannot enforce their caps following the Second Circuit's recent precedential decision invalidating New York's 10- and 25-person caps. *Agudath Israel of Am. v. Cuomo*, No. 20-3572, 2020 WL 7691715, at *11 (2d Cir. Dec. 28, 2020).

Of the four remaining states with numerical caps, California's complete ban on indoor worship is the most severe. Maine limits in-person worship to 50 persons,³ New Jersey to 150,⁴ and Rhode Island to 125.⁵ Washington, D.C. caps indoor religious gatherings at 250 persons.⁶

³ Office of the Governor, Executive Order No. 16 FY20-21 (Nov. 4, 2020), <https://perma.cc/955N-D243>.

⁴ Governor Philip D. Murphy, Executive Order No. 204 (Nov. 30, 2020), <https://perma.cc/6QW2-Y778>.

⁵ Governor Gina M. Raimondo, Executive Order No. 20-108 (Dec. 17, 2020), <https://perma.cc/UA8T-MA4U>.

⁶ Mayor Muriel Bowser, Order 2020-126 (Dec. 16, 2020), <https://perma.cc/M9RS-SFWL>.

In the national context, California’s ban is the exception, not the rule. This graphic shows the current status of restrictions nationwide:

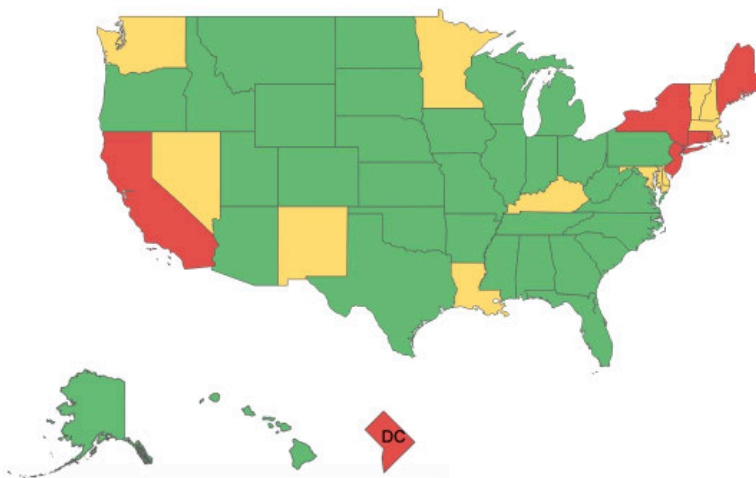
COVID-19 and Restrictions on In-Person Indoor Worship

- Restrictions**
- Numerical Cap
 - Percentage Limit
 - No Restrictions

The map and graphics below track state government restrictions on in-person indoor worship in reaction to the COVID-19 pandemic. Hover over a state to see its specific restrictions.

Last updated: January 11, 2021

- * States colored red may have both a numerical cap **AND** a percentage limit.
- ** Numerical caps in NY and CT are unenforceable under *Agudath Israel of America v. Cuomo*, 2020 WL 7691715 (2d Cir. 2020).



Available at: <https://www.becketlaw.org/covid-19-religious-worship/>.

B. California’s extraordinary ban violates *Diocese of Brooklyn* because it forbids all indoor worship while allowing non-essential retail to remain open at 20% of occupancy.

The Supreme Court decision in *Diocese* is dispositive here. In *Diocese*, the Court compared New York’s treatment of acupuncture facilities, campgrounds, garages, manufacturing plants, and transportation facilities to its treatment of houses of worship. 141 S.Ct. at 66. And, key to this appeal, the Court included “non-essential” retail businesses in its

list of comparators. *Id.* Indeed, the 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. Given this disparate treatment, the Court had little difficulty concluding that New York’s restrictions were not neutral and generally applicable, and thus were subject to strict scrutiny. *Id.*

That is precisely the situation in California. Since December 7, large, non-essential retailers have been permitted to open at 20% occupancy, while houses of worship must remain closed. *See* Cal. Dep’t of Health, Regional Stay At Home Order (Dec. 3, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf> at 2c (“Worship and political expression are permitted outdoors.”) and 2.f. (“In order to reduce congestion . . . all retailers may operate indoors at no more than 20% capacity.”). For example, under the Regional Stay At Home Order, Macy’s department store at the Stanford Shopping Center in Palo Alto has had a permitted occupancy of 740 since December 7:



But during that same time period, all worship services in Santa Clara County have been banned.⁷ This facially disparate treatment triggers strict scrutiny.

C. Upholding California’s ban on indoor worship would create a circuit split with the Second and Sixth Circuits.

The Second Circuit, the Sixth Circuit, and a panel of this Court have all interpreted *Diocese* to require strict scrutiny when governments treat houses of worship worse than non-essential retailers or other *Diocese* comparators. *See Agudath Israel*, 2020 WL 7691715, at *7 (“[A] policy

⁷ Indeed, Macy’s has lobbied to elide the difference between essential and non-essential retail. *See* Nathaniel Meyersohn, *As Black Friday approaches, retailers lobby states to stay open*, CNN Business (Nov. 21, 2020, 2:43 PM), <https://perma.cc/W457-3E2W>.

that expressly singles out religion for less favored treatment, as here, is subject to strict scrutiny.”); *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep’t*, No. 20-4300, 2020 WL 7778170 at *2 (6th Cir. 2020) (“[T]he Free Exercise Clause . . . ‘prohibits government officials from treating religious exercises worse than comparable secular activities.’” (quoting *Diocese*, 141 S.Ct. at 69)); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020) (“Under the Court’s reasoning, the New York order was not neutral because it ‘single[d] out houses of worship for especially harsh treatment.’” (quoting *Diocese*, 141 S.Ct. at 66)).

California’s ban on indoor worship under both the Regional Stay At Home Order and the Blueprint would immediately be thrown out in both the Second and Sixth Circuits as it violates “the minimum requirement of neutrality’ to religion.” *Diocese*, 141 S.Ct. at 66 (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)). Upholding California’s ban would thus create a circuit split over the interpretation of *Diocese*.

II. California cannot meet strict scrutiny with respect to the ban on indoor worship.

California bears the burden of proof on its strict scrutiny affirmative defense. *Lukumi*, 508 U.S. at 546. And under *Holt v. Hobbs*, that burden is even heavier where the “the vast majority of States” place no

restrictions at all on indoor worship, much less numerical caps. 574 U.S. 352, 368 (2015). California has not come close to meeting this burden.

A. California’s ban on plaintiffs’ indoor worship does not further its interest in preventing the spread of COVID-19.

Although preventing COVID-19 spread is obviously a compelling governmental interest, California has not met its burden to show that restricting these plaintiffs’ worship furthers that interest. Indeed, California’s evidence in support of its affirmative defense suffers from all of the defects of New York’s evidence in *Diocese*. Like New York, California’s evidence consists primarily of declarations from public health officials involved in promulgating the challenged public health orders, married with speculation about the potential effects of allowing worship more generally.⁸ There is no analysis of the effect of banning *these particular plaintiffs’* indoor worship. *See Diocese*, 141 S.Ct. at 67 (lack of COVID-19 spread at plaintiffs’ worship services central to strict scrutiny analysis).

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*, 141 S.Ct. at 67. And, like New York’s,

⁸ Since California did not seek to qualify this testimony as expert opinion and—to the extent it is admissible *at all* under Fed. R. Evid. 701(c)—it is at best lay witness opinion testimony and not entitled to any special deference. *See, e.g., Rodriguez v. Gen. Dynamics Armament & Tech. Prod.*, 510 F. App’x 675, 676 (9th Cir. 2013) (error to hold “[a]ny witness can talk about his job”).

California's orders are "more restrictive than any COVID-related regulations that have previously come before the Court" and "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic[.]" *Id.* Indeed, California does not contest that there is "no evidence that the applicants have contributed to the spread of COVID-19." *Id.*; Dkt. 7-2 at 29. That alone is enough to doom California's strict scrutiny defense.⁹

B. California's ban on indoor worship is not the least restrictive means available.

California's ban also fails at the least-restrictive-means step. As 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." *Id.* Several other states utilize percentage-of-occupancy limits rather than numerical caps, with no documented harm to their interests.

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>.

Of course, most states employ a cooperative approach, with no evidence of harm to their interests. California’s prohibitive approach runs counter to CDC guidance, which is framed cooperatively and advises houses of worship to “consider holding services and gatherings in a large, well-ventilated area or outdoors, as circumstances and faith traditions allow.” CDC, *Communities of Faith*, (Dec. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/faith-based.html>. California does not explain why these states are wrong and it is right.¹⁰

Strict scrutiny requires more. If “many” other states and cities have advanced an interest by less restrictive means, a defendant government “must, at a minimum, offer persuasive reasons why it believes that it must take a different course.” *Holt*, 574 U.S. at 369. “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. *Id.* at 368-69. California has not even attempted to offer reasons for its extreme position, much less persuasive ones.

¹⁰ Governor Newsom is cooperative elsewhere. See Eric Ting, *Gavin Newsom says he won’t compel schools to reopen if teachers unions refuse to go back*, San Francisco Chronicle (Jan. 8, 2021), <https://www.sfgate.com/politics/article/Gavin-Newsom-schools-reopen-teachers-union-vaccine-15856522.php> (“Our approach is not to do it top down and mandate It’s to have a collaborative framework”).

* * *

Adjudicating the intersection of COVID-19 and religious worship is not easy. But where First Amendment rights are at stake, courts must not shy from their task. California offers no justification for its anomalous and extreme ban on indoor worship while allowing non-essential retail to open at 20%. That violates the First Amendment.

CONCLUSION

The Court should enjoin California's indoor worship ban pending appeal.

January 11, 2021

Respectfully submitted,

/s/ Eric C. Rassbach

Eric C. Rassbach
Nicholas R. Reaves
Kayla Toney
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave NW,
Suite 400
Washington, D.C. 20036
(202) 995-0095
erassbach@becketlaw.org

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with Fed. R. App. P. 29(a)(5), Cir. R. 32-3(2), and the length limits in this Court's January 5, 2021 supplemental briefing order (Dkt. 25) as it contains 2,098 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: January 11, 2021

/s/ Eric C. Rassbach

Eric C. Rassbach

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2021, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

Dated: January 11, 2021

/s/ Eric C. Rassbach

Eric C. Rassbach
Attorney for Amicus Curiae