No. 20A120

In the Supreme Court of the United States

WENDY GISH, PATRICK SCALES, JAMES DEAN MOFFATT, AND BRENDA WOOD,

Applicants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF CALIFORNIA; XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,

Respondents.

On Emergency Application for Writ of Injunction to the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

MOTION BY RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS, WITH ATTACHED PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, FOR LEAVE (1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
ALEXANDER GOUZOULES
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for Amici Curiae

MOTION FOR LEAVE (1) TO FILE *AMICUS CURIAE* BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, (2) TO DO SO IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES[1]

Movants, religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government, respectfully request leave of the Court to (1) file the attached *amicus curiae* brief in support of respondents and in opposition to applicants' emergency application for a writ of injunction, (2) file the brief in an unbound format on 8½-by-11-inch paper, and (3) file the brief without ten days' advance notice to the parties.

Positions of the Parties

Applicants do not object to this motion. Respondents consent to this motion.

Identities of *Amici*; Rule 29.6 Statement

All the proposed *amici* are nonprofit organizations that have no parent corporations and that are not owned, in whole or in part, by any publicly held corporation. The proposed *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.

[1] No counsel for a party authored this motion or the proposed *amicus* brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the motion's or brief's preparation or submission.

- General Synod of the United Church of Christ.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.

Interests of *Amici*; Summary of Brief

Applicants contend that application of California's COVID-19-related public-health restrictions to their religious gatherings violates the Free Exercise Clause of the First Amendment to the U.S. Constitution. The proposed brief would bring to the Court's attention the perspectives of *other* religious institutions and clergy on the matter.

The brief explains that the proposed *amici* believe that the right to worship enshrined in the Free Exercise Clause is precious, but that the Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety. The Clause was enacted not for that purpose, but to address a long history of governmental efforts to suppress particular religious groups based on disapproval of them or their beliefs. And the writings of leading Founders and early state constitutions and cases all demonstrate that the right to free exercise was not viewed during the Founding Era as overriding laws meant to ensure public safety. Extending this Court's decision in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam), to the far different facts at issue here would

be contrary to this original understanding and would improperly obstruct California's carefully tailored efforts to stanch a devastating pandemic surge that is overwhelming its healthcare system.

Format and Timing of Filing

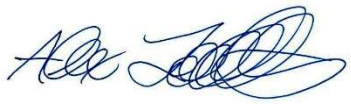
Applicants' emergency application was docketed on January 8, 2021. In light of the January 13, 2021 deadline that has been set for responding to the application, there was insufficient time for the proposed *amici* to prepare their brief for printing and filing in booklet form, as ordinarily required by Supreme Court Rule 33.1.

Amici provided notice of their intent to file the brief to the parties on December 28, 2020, after seeing a press release that applicants issued about the submission of their emergency application to the Court; and *amici* conveyed this notice again on January 8, 2021, promptly after learning that the application had been docketed. If the Court deems the first notice premature, *amici* respectfully ask that, given the January 13 response deadline, they be relieved of the ten-days' notice requirement of Rule 37.2(a).

* * * * *

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

Respectfully submitted.



RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
ALEXANDER GOUZOULES
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for Amici Curiae

JANUARY 2021

No. 20A120

In the Supreme Court of the United States

WENDY GISH, PATRICK SCALES, JAMES DEAN MOFFATT, AND BRENDA WOOD,
Applicants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF CALIFORNIA; XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondents.

On Emergency Application for Writ of Injunction to the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
ALEXANDER GOUZOULES
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONS AND STATUTES

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to worship freely is precious, but that it was never intended to override protections for people's safety and should not be misused to do so during the devastating pandemic that our nation now faces.

Amici include religious organizations that recommend against holding in-person worship at this time, even when allowed under state law, as many of their constituent members (including congregations and faith leaders) recognize that doing so under current conditions is dangerous. The religious organizations among *amici* know from long experience that in-person religious services inherently entail close and sustained human interactions. The gatherings thus present substantial risks of COVID-19 transmission—not only to congregants, but also to people in the wider community. Measures that help control the pandemic now will aid religious exercise by enabling safe resumption of regular worship services sooner. Applying to religious services religion-neutral restrictions that govern all large gatherings protects the public health and respects the Constitution.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their 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.

The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- General Synod of the United Church of Christ.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the midst of a surging pandemic, the application presents the question whether the Court should enjoin public-health restrictions that apply throughout our country's most populous state rather than—as was the case in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*—ones that temporarily applied in a few targeted neighborhoods. See 141 S. Ct. 63, 68 (2020) (per curiam). In adjudicating this weighty question, the Court should consider what history tells about the original intent and understanding of the Free Exercise Clause with respect to measures designed to protect public health and safety. The pertinent history was neither considered in the opinions in *Diocese of Brooklyn* nor addressed in the opinions in the first two cases presenting the Court with free-exercise objections to pandemic-related restrictions, *South Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613 (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603 (2020). And very little attention has been devoted to history in the party and *amicus* briefs submitted in any of the cases on this issue.

Amici therefore present the pertinent history, which demonstrates that the Free Exercise Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety. The Clause was enacted not for that purpose, but to address a long history of governmental efforts to suppress particular religious groups based on disapproval of them or their beliefs. And the writings of leading Founders and early state constitutions and cases all demonstrate

that the right to free exercise was not viewed during the Founding Era as overriding laws meant to ensure public safety.

In view of that history, this Court should not extend *Diocese of Brooklyn* to the quite different situation here. For in that case, the Court concluded that official statements evinced animus toward a particular religious group, that New York treated places of worship especially harshly, that New York's rules effectively barred many congregants from attending services even though the plaintiff houses of worship had voluntarily been following particularly strict safety protocols, and that New York had not presented good reasons for the classifications it drew or demonstrated that the challenged restrictions were necessary to protect the public health. See 141 S. Ct. at 66–68. None of these things are true here. The application for an emergency injunction should be denied.

ARGUMENT

A. The Free Exercise Clause was neither intended nor originally understood to require exemptions from laws that protect the health and safety of the public.

1. The intent and writings of the Founders.

In its recent jurisprudence, this Court has looked to "history for guidance" when determining the meaning of provisions of the Bill of Rights. *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion); see also, *e.g.*, *Town of Greece* v. *Galloway*, 572 U.S. 565, 577 (2014); *McDonald* v. *City of Chicago*, 561 U.S. 742, 768 (2010). In *District of Columbia* v. *Heller*, 554 U.S. 570, 598 (2008), for example, the Court considered "the history that the founding generation knew" in concluding that the Second Amendment's preface is consistent with an individual

right to bear arms. The Court explained that "the way tyrants had eliminated a militia" in England informed "the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 598–599; see also *McDonald*, 561 U.S. at 768.

Similarly, both Religion Clauses of the First Amendment were informed by the history of European and colonial religious persecution. For the Founders of our Nation well knew that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 8–9 (1947); see also *Engel* v. *Vitale*, 370 U.S. 421, 432–433 (1962); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982). During the seventeenth and eighteenth centuries, Catholics and Puritans in England were subjected to laws enacted to "destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church." *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). Emigration to colonial America was spurred by these religious conflicts and persecutions. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 Geo. J.L. & Pub. Pol'y 51, 57 (2009). Yet some colonists then came to engage in similar practices themselves, using political authority to impose their own preferred beliefs and religious institutions at the expense of other denominations. See *Everson*, 330 U.S. at 9–10.

These "historical instances of religious persecution and intolerance * * * gave concern to those who drafted the Free Exercise Clause" (*Bowen* v. *Roy*, 476 U.S. 693, 703 (1986)), including, notably, James Madison, the primary architect of the First Amendment (*Everson*, 330 U.S. at 13). As Madison explained, "[t]orrents of blood ha[d] been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissent of Rutledge, J.). In contrast, posited Madison, the "relaxation of narrow and rigorous policy" with respect to religion had proved to be the "true remedy" in America. *Ibid.*

Accordingly, those who drafted the First Amendment sought to ensure (see *Everson*, 330 U.S. at 13) that government would, as Madison put it, be prevented from "proscribing all difference in Religious opinion" (*Memorial and Remonstrance*, *reprinted in Everson*, 330 U.S. at 69). Thus, this Court has recognized the Free Exercise Clause to forbid governmental actions that have "as their object the suppression of religion" (*Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993)), that evince "hostility toward * * * sincere religious beliefs" (*Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018)), or that "impose special disabilities on the basis of religious status" (*Trinity Lutheran Church of Columbia, Inc*. v. *Comer*, 137 S. Ct. 2012, 2021 (2017) (quoting *Lukumi*, 508 U.S. at 533) (alterations omitted)).

But while the Free Exercise Clause was intended to prohibit governmental disfavor or targeting of particular faiths, it was not originally understood to mandate exemptions from laws that protect public safety or health. For example, though Madison believed that the right to practice one's religion freely was of utmost importance, he cautioned that it should not be construed to "trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 1822), https://bit.ly/34wu2n5.

So too, it is "quite clear that Jefferson did not" endorse a "broad principle of affirmative accommodation" for religious objections against laws that secure public safety. See *City of Boerne* v. *Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in part). While Jefferson warned against the dangers of allowing government to "restrain the profession or propagation of [religious] principles," he believed that government might validly "interfere when [those] principles break out into overt acts against peace and good order." See Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), https://bit.ly/2JShvmT.

Similarly, George Washington expressed the "wish and desire that the Laws may always be as extensively accommodated to [freedom of conscience], as a due regard for the Protection and essential Interests of the Nation may Justify, and permit." Letter from George Washington to the Society of Quakers (Oct. 1789), https://bit.ly/3lQjkxG. In other words, Washington believed that religion should be accommodated willingly and enthusiastically, but not at the expense of public safety.

Prominent religious thinkers of the day also shared as a theological commitment this same understanding that religious objectors were not entitled to exemptions from public-safety laws, as the writings of Isaac Backus and John Leland demonstrate. See Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 630–632 (1990). They adopted and defended the views of Roger Williams, the Baptist theologian and founder of Rhode Island, who had likewise opposed the idea of an entitlement to religious exemptions from general laws protecting the peace. See *ibid.*

2. Early state constitutions and court decisions.

Most Founding Era state constitutional analogues to the Free Exercise Clause contained caveats reflecting this basic understanding of the Framers that the right to free exercise did not override public-safety concerns. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461–1462 (1990). For example, the free-exercise guarantee of Delaware's Declaration of Rights of 1776 included the qualifier "unless, under Colour of Religion, any Man disturb the * * * Safety of Society." Del. Decl. of Rights of 1776, § 3. The free-exercise guarantee of the Maryland Constitution of 1776 contained the limitation "unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights." Md. Const., art. XXXIII (1776). The free-exercise clause of New York's 1777 Constitution provided that "the liberty of conscience, hereby granted, shall not be so construed as to * * * justify practices inconsistent with the peace or safety of this State." N.Y. Const., art. XXXVIII (1777). The Georgia

Constitution of 1777 recognized that all "persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." Ga. Const., art. LVI (1777). And the New Hampshire Constitution of 1784 stated that although everyone has "a natural and unalienable right to worship God according to the dictates of his own conscience," none have the right to "disturb the public peace or disturb others in their religious worship." N.H. Const., part I, art. 5 (1784); accord Mass. Const., art. II (1780); R.I. Charter (1663); S.C. Const., art. VIII, § 1 (1790).

As Professor McConnell has explained, "[t]he wording of the state provisions * * * casts light on the meaning of the first amendment," "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, 103 Harv. L. Rev. at 1456. And that original meaning, according to Professor McConnell, was that "the free exercise right should prevail" "[w]here the rights of others are not involved" but should not override "peace and safety limitations" "necessary for the protection of others." *Id.* at 1462, 1464–1466.

Early state-court decisions point in the same direction. Professor Vincent Phillip Muñoz has determined that "no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions" from public-safety laws. Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083, 1099 (2008)

(citing Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 276–295 (1991)).

Indeed, the few early court decisions to address the issue demonstrate precisely the opposite. For instance, the Pennsylvania Supreme Court held in 1831 that while "religious scruples of persons concerned with the administration of justice[ ] will receive all the indulgence that is compatible with the business of government," respect for religious obligations "must not be suffered to interfere with the operations of that organ of the government which has more immediately to do with the protection of person[s]." *Phillips* v. *Gratz*, 2 Pen. & W. 412, 416–417 (Pa. 1831). Similarly, in 1854, the Supreme Judicial Court of Maine noted that it "is not disputed" that "society['s] * * * right to interfere on the principle of self-preservation" prevails over the right to free exercise of religion. *Donahoe* v. *Richards*, 38 Me. 379, 412 (Me. 1854).

B. The Free Exercise Clause does not mandate a religious exemption from California's restrictions on gatherings.

This Court's traditional Free Exercise Clause jurisprudence has aligned with the Clause's original intent and understanding, by recognizing both that religious exercise is worthy of respect and accommodation and that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). Indeed, earlier this year, the Court reaffirmed that the Free Exercise Clause "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Thus, in a series of

long-standing decisions, the Court repeatedly acknowledged that there is no right to religious exemptions from laws that shield the public from illness.

More than a century ago, in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court explained that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] * * * regardless of the injury that may be done to others." See *id.* at 26. The Court straightforwardly rejected the view that the Constitution bars compulsory measures to protect health, recognizing instead the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the * * * health * * * of the state.'" *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co.* v. *Husen*, 95 U.S. 465, 471 (1877)). Because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," individual rights are defined so as to ensure that government may implement reasonable restrictions to protect the public health. *Id.* at 27.

Although *Jacobson* did not specifically consider a Free Exercise Clause argument, perhaps because the Clause was not yet at that time applicable against the States, several of this Court's subsequent decisions have recognized that the principles of the case apply in the free-exercise context as in all others. In *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944), for example, the Court explained that one "cannot claim freedom from compulsory vaccination * * * on religious grounds." For

the "right to practice religion freely does not include liberty to expose the community * * * to communicable disease." *Id.* at 166–167. In *Sherbert* v. *Verner*, 374 U.S. 398, 402–403 (1963), the Court, citing *Jacobson* and *Prince*, noted that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." And in *Wisconsin* v. *Yoder*, 406 U.S. 205, 230 & n.20 (1972), the Court underscored that free-exercise claims are denied when "harm to the physical or mental health * * * or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred"; in explaining that foundational principle, the Court specifically pointed to *Jacobson*, as well as a case expressly rejecting a free-exercise challenge to a mandatory-vaccination law (*Wright* v. *DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644 (Ark. 1965)), and a case rejecting an attempt to use the Free Exercise Clause to block a lifesaving blood transfusion (*Application of President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000, 1007–1010 (D.C. Cir. 1964) (Wright, J., in chambers)).

Expanding the reach of *Diocese of Brooklyn* to strike down the restrictions at issue here would be not only contrary to these precedents but also irreconcilable with the original understanding and intent of the Free Exercise Clause, which the cases reflect. And the special factual circumstances that the Court emphasized in *Diocese of Brooklyn* are not present here:

- Whereas the Court concluded in *Diocese of Brooklyn* that official "statements made in connection with the challenged rules can be viewed as targeting" ultra-Orthodox Jews (141 S. Ct. at 66), the record here contains no evidence whatever of antireligious animus.

- Whereas in *Diocese of Brooklyn* "[t]he restrictions at issue * * * effectively barr[ed] many from attending religious services" (*id.* at 68), California specially accommodates religion by allowing outdoor worship services of unlimited size (see Applicants' Appendix 121; Cal. Dep't of Pub. Health, COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services & Cultural Ceremonies 3 (July 29, 2020), https://bit.ly/3fF534l).

- Whereas in *Diocese of Brooklyn* the Court determined that "the regulations * * * single out houses of worship for especially harsh treatment" (141 S. Ct. at 66), California restricts numerous nonreligious activities to the same extent as indoor religious services and limits much more strictly than New York did other nonreligious activities that the Court referenced in its analysis (compare *id.* at 66–67 with *About COVID-19 Restrictions*, COVID19.CA.GOV (updated Jan. 8, 2021), https://bit.ly/2Bmgcb5).

- Whereas, in *Diocese of Brooklyn* New York's "Governor himself admitted [that] the [challenged] executive order [was] 'not a policy being written by a scalpel,' but rather [was] 'a policy being cut by a hatchet'" (*Agudath Israel of Am.* v. *Cuomo*, 980 F.3d 222, 230 (2d Cir. 2020) (Park, J., dissenting)), California has

carefully tailored its restrictions to the particular characteristics of specific activities based on a religion-neutral, seven-factor risk analysis performed by public-health experts (see *S. Bay United Pentecostal Church* v. *Newsom*, __ F. Supp. 3d __, No. 20-cv-865, 2020 WL 7488974, at *8–11 (S.D. Cal. Dec. 21, 2020), appeal docketed, No. 20-56358 (9th Cir. Dec. 22, 2020)).

- Whereas in *Diocese of Brooklyn* the plaintiff houses of worship voluntarily followed strict social-distancing and other safety protocols that were even more protective than what the state had required (141 S. Ct. at 67), at least some of the applicants here wish not just to hold indoor services but apparently to engage at those indoor events in baptisms, laying hands on the sick, or anointing the sick with oil (see Applicants' Verified Compl. ¶¶ 7–8 (Apr. 13, 2020)).

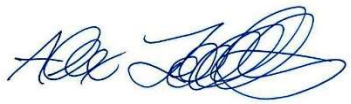
- Whereas in *Diocese of Brooklyn* New York "ha[d] not shown that public health would be imperiled if less restrictive measures were imposed" (141 S. Ct. at 68), California's restrictions are necessary because of the dire public-health emergency that the State now faces—intensive care units are at capacity in most of the State; oxygen supplies are low and are reserved for the most seriously ill patients; ambulance operators have been told not to take patients to hospitals if they are unlikely to survive; those patients who do get taken to hospitals must often wait in ambulances for many hours before they are admitted; and some emergency rooms are turning critically ill patients away because they are full (see Alexandra Meeks et al., *'Human Disaster' Unfolding in LA Will Get Worse,*

Experts Say, CNN (Jan. 5, 2021), https://cnn.it/2Lj8K5U; Matt Gutman et al., *With LA Hospitals Overwhelmed by COVID-19, EMS Told Not to Transport Certain Patients*, ABC News (Jan. 5, 2021), https://abcn.ws/39dKhqS; *About COVID-19 Restrictions*, *supra* (section entitled "Click map to see current ICU bed availability"), https://bit.ly/2Xrfd17).

CONCLUSION

The Court should stay true to the original intent and understanding of the precious right of religious free exercise—and to the Court's long-standing, consistent precedents—by denying the application.

Respectfully submitted.



RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
ALEXANDER GOUZOULES
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for Amici Curiae

JANUARY 2021