No. 20A138

In The
Supreme Court of the United States

GATEWAY CITY CHURCH, ET AL., *Applicants*,
v.
GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.
Respondents.

ON EMERGENCY APPLICATION TO THE HON. ELENA KAGAN, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT, FOR WRIT OF INJUNCTION OR IN THE ALTERNATIVE FOR CERTIORARI BEFORE JUDGMENT OR SUMMARY REVERSAL

MOTION BY CHURCH-STATE SCHOLARS, WITH ATTACHED PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS, FOR LEAVE (1) TO FILE THE BRIEF, (2) IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

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FEBRUARY 24, 2021

MOTION BY CHURCH-STATE SCHOLARS, WITH ATTACHED PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, FOR LEAVE (1) TO FILE THE BRIEF, (2) IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES[1]

Movants, Church-State scholars with substantial expertise in the Religion Clauses, 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, (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

Counsel for Applicants and Respondents have indicated that neither party opposes this motion.

Identities of Amici

Amici are Church-State scholars with substantial expertise in the Religion Clauses. A full list of amici is attached as an appendix to this brief.

[1] No counsel for a party authored this motion or the proposed brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to its preparation or submission. The parties do not oppose the filing of this motion or brief.

Interest of Amici; Summary of Brief

Amici submit this brief to explain why Applicants' Free Exercise Clause claim lacks merit and why the injunction they seek would violate the Establishment Clause.

Format and Timing of Filing

Applicants filed their emergency application on February 17, 2021. In light of the February 24, 2021 deadline 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. Nor were the proposed amici able to provide the parties with ten days' notice of their intent to file the attached brief, as ordinarily required by Rule 37.2(a).

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For the above 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,

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BRIEF OF CHURCH-STATE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF CHURCH-STATE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS[1]

INTERESTS OF AMICI CURIAE

Amici are Church-State scholars with substantial expertise in the Religion Clauses. A full list of amici is attached as an appendix to this brief.

Amici submit this brief to explain why Applicants' Free Exercise Clause claim lacks merit and why the injunction they seek would violate the Establishment Clause.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission. The parties do not oppose the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Applicants ask for an injunction that this Court has held the Free Exercise Clause does not permit—one against enforcement of generally applicable municipal regulations "without regard to whether they ha[ve] the *object* of stifling or punishing free exercise." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (emphasis added). Without even mentioning this Court's controlling decisions in *City of Boerne* and *Employment Division v. Smith*, 494 U.S. 872 (1990), Applicants would have the Court effectively overrule them. The Court should reject that invitation.

This Court's precedent makes clear that the key question under the Free Exercise Clause is whether government action has the "object or purpose," and not just the "incidental" effect, of burdening religion. *City of Boerne*, 521 U.S. at 531. Far from targeting religion, Santa Clara County here regulated religious and secular entities with scrupulous evenhandedness, imposing an across-the-board prohibition on indoor gatherings and an across-the-board capacity limit for non-gathering indoor activities.

No provision of the Constitution prohibits disparate treatment between activities posing different levels of health risk. In an attempt to overcome that fatal problem and convince this Court to apply strict scrutiny, Applicants conflate (1) incidental burdens on religion flowing from *religiously neutral* regulatory distinctions among categories of activities, which will always have the effect of "favoring" some category, with (2) *religious targeting*. If the Court were to accept that reasoning, federal courts would be compelled to micromanage countless regulatory

decisions—many of them, like here, involving life-and-death issues—through application of the most demanding test known to constitutional law. The Court should not go down that dangerous road.

The application should be denied for another reason: It demands an unconstitutional injunction. Santa Clara County has prohibited all indoor gatherings, religious and secular. Applicants seek an injunction barring the county from enforcing that order only against places of worship. Other indoor gatherings—many of which also involve constitutionally protected activities—would remain prohibited.

No government authority may extend a benefit or withdraw a burden from a class of people based solely on religious status when critically important rights are implicated for both groups. Decades of this Court's Establishment Clause jurisprudence make that clear. The state may extend such benefits or burdens to religious and nonreligious organizations alike. Or it may grant exclusive religious accommodations when nonreligious groups have no comparable rights at stake. What it cannot do is systematically privilege religious interests and disadvantage equally important nonreligious ones.

The Religion Clauses of the First Amendment are sometimes thought to be in tension with one another. But here there is no conflict, and the two clauses are mutually reinforcing. The Free Exercise Clause forbids discrimination against religion, and the Establishment Clause prohibits discrimination in favor of it. Because the county's order did not discriminate on the basis of religion, and because

the injunction Applicants seek would, both clauses support the same conclusion: The application should be denied.

ARGUMENT

I. THE COUNTY'S ORDER DOES NOT VIOLATE APPLICANTS' FREE EXERCISE RIGHTS

The county's restrictions are neutral rules of general applicability that do not target religious practice. They are thus a constitutionally permitted exercise of state and local governments' broad authority to protect public health.

A. The Question Under The Free Exercise Clause Is Whether Government Action Has The "Object" Of Burdening Religion

In *Smith*, this Court held that "if prohibiting the exercise of religion * * * is not the object" of a governmental action, "but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 494 U.S. at 878. Applying *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court invalidated a series of municipal ordinances because they *did* have "an impermissible object" and "were pursued only with respect to conduct motivated by religious beliefs." 508 U.S. 520, 524 (1993). The Court then reiterated in *City of Boerne* that the Free Exercise Clause reaches only laws that have the impermissible object of discriminating against religion. 521 U.S. at 531. The *Boerne* Court found that the Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation to enforce the Free Exercise Clause precisely because "Congress' concern" in passing RFRA was "*not* the object or purpose" of state legislation, but rather "the incidental burdens imposed" by that legislation. *Ibid.*

(emphasis added); *see id.* at 534 (explaining that the problem with RFRA was that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had *the object of stifling or punishing free exercise*") (emphasis added).

Here, Santa Clara County has acted with complete neutrality, classifying activities only by health risk. "The challenged ban on indoor 'gatherings' currently in effect for Santa Clara County applies equally to all indoor gatherings of any kind or type, whether public or private, religious or secular." Appl. Exh. A at 2. Likewise, Applicants' facilities may open for non-gathering activities to the exact same degree as secular venues. Appl. Exh. A at 2. The directive thus clearly "does not 'single out houses of worship' for worse treatment than secular activities." *Id.* (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020)).

Applicants nonetheless contend that worship gatherings are "disfavored" because they are not treated the same as lower-risk, non-gathering activities. App. 10. As the district court found, however, "gatherings of people from multiple households, particularly indoors, carry a high risk of transmission" not comparable to transitory, non-gathering exposures. Appl. Exh. D at 28; *see* Appl. Exh. D at 3.[2] In nonetheless insisting that differential treatment of gatherings and non-gatherings is

[2] Applicants' particular focus on the difference in treatment between indoor worship services and the Norman Y. Mineta San Jose International Airport is badly misplaced. As the district court found, airports "are immense facilities with efficient airflow and ventilation systems and are subject to a host of federal rules and regulations not applicable or feasible for places of worship, all of which greatly lower transmission risk"; "[u]nlike at worship services, people in airports typically do not interact with members of other households, carry on social conversations, sit in one place for an hour or more, or engage in singing, chanting, or other activities that increase viral exposure"; and the "social aspect of worship * * * distinguishes worship services from airport gates in a way that makes worship services substantially riskier activities." Appl. Exh. D at 20-21.

unconstitutional, Applicants rely on a strikingly aggressive version of the "most favored nation" theory of religious exemptions that academic critics of *Smith* have long championed.

Smith explicitly acknowledged that its disavowal of strict scrutiny in incidental burden cases would "place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. But the most favored nation theory reflects a normative view that the Constitution *should* protect religious exercise from unintentional neglect. The Court could of course someday choose to revisit *Smith* and apply a form of heightened scrutiny to incidental burdens on religion. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (discussing "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech"); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (noting in an incidental-burden case that religious organizations do not "enjoy rights to communicate * * * superior to those of other organizations having social, political, or other ideological messages to proselytize"). But such a significant change in settled law should come only in a case where a challenge to *Smith* has been properly preserved, presented, and developed. It should not be accomplished through the backdoor of the most-favored-nation theory—and certainly not in an emergency order on the shadow docket, without the benefit of full briefing, wide amicus participation, and oral argument.

B. The "Most Favored Nation" Theory Of Religious Exemptions Is Inconsistent With *Smith*

Smith emphasized that "[t]he First Amendment's protection of religious liberty does not require" application of the compelling interest test to laws "of almost every conceivable kind." 494 U.S. at 888-89. Yet the most favored nation theory—which holds that mere presence of *some* secular regulatory exemptions triggers strict scrutiny—mandates precisely that. The theory's proponents have been candid about its dramatic consequences. *See* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 B.Y.U. L. Rev. 167, 173 (2019) ("[T]hink about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187, 195 (2001) ("[I]f the presence of just one secular exception means that a religious claim for exemption wins as well [absent a compelling interest], the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws.").

Given the incompatibility of the most favored nation theory of religious exemptions with *Smith*, it is not surprising that it has been rejected by several lower courts. *See*, *e.g.*, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) ("Consistent with the majority of our sister circuits, * * * we have already refused to interpret *Smith* as standing for the proposition that a secular

exemption automatically creates a claim for a religious exemption.").[3] The theory has also been subject to criticism by commentators, including those who support judicially administered religious exemptions. *See, e.g.,* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 664 (2003) (describing the most favored nation approach as "an unprincipled and bizarre manner of distributing constitutional exemptions").[4]

That criticism is warranted. This Court's jurisprudence has long accounted for the risk of *intentional discrimination* inherent in discretionary individualized-exemption schemes. *See Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)

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[3] *See also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality. Exceptions do not negate that [laws] are generally applicable."); *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield*, 853 F. Supp. 2d 214, 223 (D. Conn. 2012) ("The fact that a law contains particular exceptions does not cause the law not to be generally applicable, so long as the exceptions are broad, objective categories, and not based on religious animus.").

[4] *See also* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 199 (2002) (concluding that "the very foundation for the most favored nation framework is intellectually incoherent" and that "[t]here are too many conceptual and practical problems with [the theory] for it to be accepted"); Caroline Mala Corbin, *Religious Liberty in A Pandemic*, 70 Duke L.J. Online 1, 25 (2020) ("The rule that a single secular exemption automatically triggers strict scrutiny is an arguably untenable proposition that would make every religious objector 'a law unto himself.'") (citation omitted); James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 Wis. L. Rev. 689, 739 (2019) (concluding that the theory is "fundamentally inconsistent with the Court's current understanding of the Free Exercise Clause"); Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 Minn. L. Rev. 1341, 1396 (2020) ("Douglas Laycock and others have argued that a law is non-neutral with respect to religion if it contains even a single secular exception that undermines the purpose of the law. This is an almost insurmountable barrier to regulation."); Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party at 27, *Fulton v. City of Philadelphia*, No. 19-123 (S. Ct. argued Nov. 4, 2020) ("[I]f the presence of the exceptions were seen as making the statute no longer 'generally applicable' for *Employment Division v. Smith* purposes," it "would require more than just the application of strict scrutiny to religious exemption requests: It would also mean that the laws would often be seen as failing strict scrutiny, precisely because of their underinclusiveness.").

("If a state creates such a mechanism [for 'individualized exemptions'], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."); *see also Smith*, 494 U.S. at 884 (approving *Roy*). This concern mirrors one the Court has articulated in the free speech context, where it has warned that the delegation of "overly broad licensing discretion * * * 'has the potential for becoming a means for suppressing a particular point of view.'" *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). But the *Roy* plurality sharply distinguished cases involving individualized-exemption schemes from those where "there is nothing whatever suggesting antagonism by [government] towards religion generally or towards any particular religious beliefs." 476 U.S. at 708. Thus, the individualized-exemption rule provides no support for a broader most favored nation rule that sweeps beyond situations that are suggestive of discriminatory intent.

The most favored nation theory is also inconsistent with this Court's decision in *Lukumi*, which found a free exercise violation because of religious targeting. Proponents of the most favored nation theory nonetheless read that decision's analysis of whether a regulation is "generally applicable" as not turning on whether religion is targeted. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 6 (2016). This reading, however, cannot be reconciled with what this Court actually said in *Lukumi*. The first paragraph of the general applicability section in *Lukumi* states that "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only against conduct with a religious motivation*." 508

U.S. at 542-43 (emphasis added). The second paragraph reiterates that the government "cannot in a *selective manner* impose burdens *only on conduct motivated by religious belief*." *Id*. at 543 (emphasis added). The third paragraph highlights that the ordinances under review were "*drafted with care* to forbid few killings but those occasioned by religious sacrifice." *Ibid*. (emphasis added). The fourth paragraph concludes that the city had failed to explain "why *religion alone* must bear the burden of the ordinances." *Id*. at 544. The fifth paragraph notes that the city pursues its interest "*only* when it results from religious exercise." *Id*. at 545 (emphasis added). And the section concludes by finding that "each of [the] ordinances pursues the city's governmental interests *only* against conduct motivated by religious belief." *Ibid*. (emphasis added); *see id*. at 557 (Scalia, J., concurring) (explaining that "the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement *target* the practices of a particular religion for discriminatory treatment") (emphasis added).

Ignoring this pervasive focus on targeting in *Lukumi*'s general applicability section, proponents of the most favored nation theory place principal reliance on the second sentence in the following passage:

> The ordinances are underinclusive for those ends [of protecting public health and preventing cruelty to animals]. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.

Id. at 543. This passage lays out two steps for determining if a law is non-generally applicable, but proponents of the most favored nation approach typically conflate them. The first step is to determine if a law is underinclusive, which the Court does by examining whether it "fail[s] to prohibit nonreligious conduct that endangers" state interests "in a similar or greater degree" as a requested religious exemption. But underinclusion alone does not render a law non-generally applicable. The critical next step is determining whether the nature and degree of underinclusion is so "substantial" that it suggests the regulation was "drafted with care" to target religious practice. *Id*.; *see also Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 701-02 (9th Cir. 1999) ("Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister."), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134, 1137 (9th Cir. 2000).

This understanding of the meaning of Free Exercise Clause neutrality is confirmed by *City of Boerne*. There, RFRA was defended on the ground that "laws may discriminate against religion * * * without there having been conscious governmental hostility to religion." Brief of Respondent Flores at 9, 1997 WL 10293. The Court, however, rejected that view, holding that Congress cannot enforce the

Free Exercise Clause by requiring exemptions to state laws "without regard to whether they ha[ve] the object of stifling or punishing free exercise." 521 U.S. at 534.

Lastly, the Court's recent decision in *Brooklyn Diocese*, is consistent with the requirement that a law have a discriminatory object in order to run afoul of the Free Exercise Clause. The Court did not overrule *Smith* in *Brooklyn Diocese*; nor did it adopt the most favored nation theory discussed by some Justices in separate opinions. Instead, the majority rejected an order with a facial religious classification on the grounds that it "single[d] out houses of worship for especially harsh treatment." 141 S. Ct. at 66. As the court of appeals explained, that is not the case here. The County's rules "appl[y] equally to all indoor gatherings of any kind or type, whether public or private, religious or secular," and the Directive does not "affect whether appellants may continue to remain open for purposes that do not involve 'gatherings.'" Appl. Exh. A at 2.

II. THE INJUNCTION APPLICANTS SEEK WOULD VIOLATE THE ESTABLISHMENT CLAUSE

Even if Applicants were entitled to some form of relief from the county's order, the remedy they demand would be unconstitutional. The county's directive prohibits indoor "gatherings," "regardless of whether the event has a religious or secular purpose, such as a wedding, conference, religious service, festival, performance, political event, protest, or sporting event." Appl. Exh. D at 8. Yet Applicants seek an injunction barring enforcement of the directive only as to indoor worship services, App. 1, leaving other constitutionally-protected indoor gatherings barred. That remedy is itself unconstitutional. Whether legislative, executive, or judicial, no

government authority may systematically privilege religious groups over their non-religious counterparts when comparable vital interests are at stake.

While religious accommodations are permissible in many situations, this is not one of them. At some point, exemptions confer a sufficiently large benefit on religion as to violate a principle of neutrality under the Establishment Clause. And here, much of the activity that would be systematically disadvantaged by Applicants' injunction—including political gatherings, lectures, and academic conferences—is itself constitutionally protected. If the Establishment Clause means anything, it must prohibit a simple and direct favoring of religious interests over equally vital secular interests.

The Establishment Clause prohibits the government from making any law "respecting an establishment of religion." U.S. Const. amend. I. "The core notion animating" that prohibition "is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion). Indeed, "[t]he general principle that civil power must be exercised in a manner neutral to religion * * * is well grounded in [this Court's] case law." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

In *Texas Monthly*, this Court invalidated a sales tax exemption for religious periodicals that did not extend to comparable secular publications. 489 U.S. at 14. While no opinion gained majority support, the plurality and concurring Justices

agreed that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." *Id.* at 28 (Blackmun, J., concurring in the judgment); *accord id.* at 17 (plurality op.) ("Because Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief, the exemption manifestly" violates the Establishment Clause.).

To be sure, Texas could have "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life" if the incentives it offered were "available to an extended range of associations whose publications were substantially devoted to such matters," and not only those dealing with religious matters or promoting religious faith. *Id.* at 16; *see id.* at 27-28 (Blackmun, J., concurring in the judgment) (noting that a state could permissibly "exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong."). But Texas could not benefit religious publications without benefitting directly comparable secular publications.

Similarly, in *Kiryas Joel*, the Court held that New York "crosse[d] the line from permissible accommodation to impermissible establishment" when it created a special separate school district for the Satmar Hasidic community. 512 U.S. at 710.

This type of accommodation was constitutionally defective because it conflicted with "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion." *Id.* at 703. Because neutrality is an animating principle in Establishment Clause cases, the Court explained that "the general availability of any benefit provided religious groups or individuals" is a crucial factor in the analysis. *Id.* at 704.

And in *Welsh v. United States*, the Court held that a statute exempting only religious pacifists from compulsory military service must be read to include nonreligious pacifists. 398 U.S. 333, 357-58 (1970). While the plurality opinion relied primarily on statutory interpretation, Justice Harlan's concurrence recognized that the Establishment Clause compelled the same result. *Id.* at 343-44, 357-61. As Justice Harlan explained, the government cannot, consistent with Establishment principles, privilege one set of sincerely held pacifist beliefs over another by "draw[ing] the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other." *Id.* at 356. Indeed, egregious disparate treatment on the basis of religious status is precisely the "kind of classification that this Court has condemned." *Id.* at 357-58; *see* Nelson Tebbe, *Religious Freedom in an Egalitarian Age* 71-79 (2017).

As this Court has interpreted the Establishment Clause, the principle of religious neutrality thus runs both ways. In *Everson v. Board of Education of Ewing*, the Court explained that a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the

members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 330 U.S. 1, 16 (1947). The same reasoning informed this Court's more recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, which held that the Free Exercise Clause prohibited Missouri from categorically denying playground resurfacing grants to religiously affiliated applicants. 137 S. Ct. 2012, 2019-20 (2017) (quoting *Everson*, 330 U.S. at 67). And as this Court has explained, "incur[ing] a cost or be[ing] denied a benefit on account of * * * religion" is one of the central ways in which Establishment Clause plaintiffs may demonstrate injury for purposes of standing. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011); *see Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2102-03 (2019) (Gorsuch, J., concurring in the judgment).

This principle of religious neutrality permits the government to accommodate religious groups when equivalent benefits are extended to non-religious groups as well. In *Walz v. Tax Commission,* for example, the Court upheld a tax exemption for religious properties in part because New York had "not singled out one particular church or religious group or even churches as such," but rather had exempted "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." 397 U.S. 664, 673 (1970); *see Bowen v. Kendrick,* 487 U.S. 589, 608 (1988) (upholding a statute enlisting a "wide spectrum of organizations" in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution").

To be sure, Establishment Clause neutrality does not mean that religious accommodations are impermissible whenever they do not include nonreligious actors. As this Court has often said, "there is room for play in the joints" between the Religion Clauses, leaving space for some state action that is neither compelled by the Free Exercise Clause nor forbidden by the Establishment Clause. *Walz*, 397 U.S. at 669. For example, in *Cutter v. Wilkinson,* the Court rejected an Establishment Clause challenge to heightened protections for prisoners under the Religious Land Use and Institutionalized Persons Act, noting that "[r]eligious accommodations * * * need not 'come packaged with benefits to secular entities.'" 544 U.S. 709, 724 (2005) (citation omitted). While "[a]n accommodation must be measured so that it does not override other significant interests," there often is no comparable nonreligious interest at stake in religious accommodations. *Id*. at 710, 724 (giving the example of "Congressional permission for members of the military to wear religious apparel while in uniform"). And even where a comparable nonreligious interest does exist and is not accommodated, the Establishment Clause is not necessarily implicated.

Even so, there comes a point at which disparate treatment of religious and nonreligious actors becomes fundamentally incompatible with Establishment Clause principles. That may be when exclusion from an accommodation implicates some other significant right, such as freedom of speech (*Texas Monthly*), education (*Kiryas Joel*), or conscience (*Welsh*). Wherever that line is, the injunction Applicants seek here would cross it.

As in *Texas Monthly*, *Kiryas Joel*, and *Welsh*, Applicants' requested injunction would provide a constitutionally significant benefit only to religious actors, while depriving nonreligious ones of an equivalent benefit. All citizens, not just members of religious institutions, have a constitutional interest in assembling in person. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."). They may wish to organize political campaigns, hear book readings, or attend in-person meetings of "groups that contribute[] to the community's cultural, intellectual, and moral betterment," *Tex. Monthly*, 489 U.S. at 15 (plurality opinion); *see Heffron*, 452 U.S. at 652-53 (religious organizations do not "enjoy rights to communicate * * * superior to those of other organizations having social, political, or other ideological messages to proselytize").

Here, the county's interest in saving lives and stopping the spread of disease justifies its choice to prohibit all such activities because of the grave risk they pose. Appl. Exh. D at 28 ("[G]atherings of people from multiple households, particularly indoors, carry a high risk of transmission. Preventing people from gathering indoors and limiting the number of people permitted to gather outdoors rationally furthers the legitimate goal of slowing transmission of the virus."). Yet Applicants seek an injunction that would exempt only worship services from the prohibition, while keeping it in place for all secular activities. Doing so would impermissibly bar citizens, "'*because of their faith, or lack of it*, from receiving the benefits of public

welfare.'" *Trinity Lutheran*, 137 S. Ct. at 2020 (emphasis in original) (citation omitted).

Here the Establishment Clause dilemma reinforces the lack of a free exercise problem: Santa Clara County treats all indoor gatherings, whether religious or not, the same. Applicants' preferred remedy would transform a policy of religious neutrality into one of religious favoritism. Correct application of settled Free Exercise law avoids that perverse—and Establishment Clause-violating—result.

CONCLUSION

The application should be denied.

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