No. 20A94

In the Supreme Court of the United States

HARVEST ROCK CHURCH, INC.; HARVEST INTERNATIONAL MINISTRY, INC., ITSELF AND ON BEHALF OF ITS MEMBER CHURCHES IN CALIFORNIA,

Applicants,

v.

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

Respondent.

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 RESPONDENT 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

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MOTION FOR LEAVE (1) TO FILE *AMICUS CURIAE* BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT 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 respondent 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 oppose this motion. Respondent 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.
- Bend the Arc: A Jewish Partnership for Justice.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.

[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.

- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- Reconstructionist Rabbinical Association.

Interests of *Amici*; Summary of Brief[2]

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 freely is precious and should never be misused to cause harm. And this Court has never mandated a religious exemption under the Free Exercise Clause when doing so would inflict substantial harm on people beyond the individual or entity invoking the Clause. Yet granting the injunction requested by applicants would do exactly that. The religious organizations among the proposed *amici* know from long experience that in-person religious services inherently entail close and sustained human interactions that present substantial risks of COVID-19 transmission—not only to congregants, but also to people in the wider community. Measures that help control

[2] The proposed brief is substantially similar to the briefs submitted by the same proposed *amici* in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87 (docketed Nov. 12, 2020), and *Agudath Israel of America* v. *Cuomo*, No. 20A90 (docketed Nov. 16, 2020). The primary differences are in the factual discussion in Part B.2.

the pandemic now will aid religious exercise by enabling safe resumption of regular worship services sooner.

The brief further explains that this Court has never concluded that there was discrimination against religion in violation of the Free Exercise Clause when government drew distinctions—without antireligious animus—based on objective, secular criteria. That is what California has done here, relying on epidemiological analysis tailored to the specific characteristics of activities and entities. Incorrectly treating California's conduct as discriminatory and granting the injunction that applicants request would harm religious institutions, their congregants, and religion in general by linking them with, and causing them to be blamed for, the avoidable suffering and death that would result from limiting California's efforts to thwart the pandemic.

Format and Timing of Filing

Applicants filed their emergency application on November 23, 2020. In light of the November 28, 2020 deadline that the proposed *amici* understand 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. Nor, for the same reason, 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). But the proposed *amici* did provide notice of their intent to file the brief to the parties on November 20 and 21, 2020, promptly after

seeing a press release that applicants issued about the submission of their emergency application to the Court.

* * * * *

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.

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NOVEMBER 2020

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

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT 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 and should never be misused to cause harm.

Amici include religious organizations that recommend against holding in-person worship at this time, even if 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 that 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 a motion for leave to file it.

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- Reconstructionist Rabbinical Association.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

The country is in the midst of a devastating pandemic. More than 259,000 Americans, including nearly 19,000 Californians, have died from COVID-19. See *COVID-19 Dashboard*, Ctr. for Sys. Sci. & Eng'g at Johns Hopkins Univ. (last visited Nov. 24, 2020), https://bit.ly/31VrTAa. There is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term damage to their health. See, *e.g.*, T.Y.M. Leung et al., *Short- and Potential Long-term Adverse Health Outcomes of COVID-19: A Rapid Review*, 9 Emerging Microbes & Infections 2190 (2020), https://bit.ly/3ikjBXJ. And across the country, the rates of infection are surging higher than ever. See, *e.g.*, Christina Maxouris & Dakin Andone, *US Coronavirus Hospitalizations, New Cases Break Record for Second Straight Day*, CNN (Nov. 20, 2020), https://cnn.it/3nJFT8v.

In response to this ongoing public-health emergency, California's governor issued a Guidance that restricts gatherings and business activities by establishing capacity limits based on the severity of the outbreak in different geographical areas. Similar restrictions have been successful in slowing the transmission of the virus. See, *e.g.*, Timothy Bella, *Places Without Social Distancing Have 35 Times More Potential Coronavirus Spread, Study Finds*, Wash. Post (May 15, 2020), https://wapo.st/2EKDjhd. And though California's Guidance restricts worship services, nonreligious gatherings are restricted to a greater or similar extent.

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[2] This brief is substantially similar to the briefs submitted by the same *amici* in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87 (docketed Nov. 12, 2020), and *Agudath Israel of America* v. *Cuomo*, No. 20A90 (docketed Nov. 16, 2020). The primary differences are in the factual discussion in Part B.2.

Applicants nevertheless seek a broader religious exemption from the Guidance under the Free Exercise Clause of the First Amendment. But this Court has never mandated a religious exemption when doing so would inflict substantial harm on people beyond the individual or entity invoking the Clause. Exempting religious gatherings from California's Guidance would do exactly that: A contagious person at a religious service could infect fellow congregants, who may then expose family, friends, and strangers, including numerous people who did not attend the event.

Nor has this Court ever concluded that there was discrimination against religion in violation of the Free Exercise Clause when government drew distinctions that were based not on hostility to religion but on legitimate, objective, secular criteria. California has not acted with antireligious animus here. On the contrary, the Guidance restricts religious gatherings less than or similarly to comparable nonreligious gatherings. And as the district court found, California has legitimate, science-based reasons for treating indoor gatherings such as indoor worship services, lectures, and concerts differently from activities such as food production, grocery shopping, and meeting outdoors.

The Court should not deviate from these settled principles of free-exercise law, particularly in the context of a request for an emergency injunction, when the Court does not have full merits briefing and the opportunity to give due consideration to the legal questions in the normal course. Not only would granting the injunction that applicants request inflict great harm on the many people who would become ill and die as a result, but this misuse of the precious right of religious freedom would also

harm religious institutions, their congregants, and religion in general by linking them with, and causing them to be blamed for, avoidable suffering and death.

ARGUMENT

A. The Free Exercise Clause does not require a religious exemption here because granting one would gravely harm numerous people.

1. This Court has never granted an exemption under the Free Exercise Clause when doing so would inflict substantial harm on people beyond the applicant.

The freedom to worship is a value of the highest order; and many people naturally seek the comfort and support provided by faith communities in these difficult times. But as this Court recently reaffirmed, the constitutional guarantee of religious freedom "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). For "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

The Court has thus repeatedly rejected free-exercise claims for religious exemptions that would impose significant harms on third parties. In *United States* v. *Lee*, for example, the Court denied an Amish employer's request for an exemption from paying Social Security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld* v. *Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–609

(1961) (plurality opinion). And in *Prince* v. *Massachusetts*, the Court denied a request for an exemption from child-labor laws to allow distribution of religious literature by minors, because while "[p]arents may be free to become martyrs themselves * * * it does not follow [that] they are free, in identical circumstances, to make martyrs of their children." 321 U.S. 158, 170 (1944). In short, as Justice Jackson separately explained in *Prince*, "the limits [on religious exercise] begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Id.* at 177 (Jackson, J., concurring in the judgment).

In keeping with this jurisprudence, the Court has repeatedly acknowledged that there is no right to religious exemptions from laws that, like California's Guidance, 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 personal liberty is subject to restraint "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 and conditioned 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 then applicable against the States, several of the Court's subsequent decisions have recognized that the principles of the case apply in the free-exercise context as in all others. In *Prince*, for example, the Court explained that one "cannot claim freedom from compulsory vaccination * * * on religious grounds." 321 U.S. at 166. 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 illustrated the principle 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," with citations to a case rejecting a free-exercise challenge to a mandatory-vaccination law (*Wright* v. *DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644 (Ark. 1965)), 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)), and *Jacobson*.

Except in one special context described in the next paragraph, the Court has ruled in favor of Free Exercise Clause claimants only after confirming that no substantial harm would be imposed on others. For instance, in holding that Amish parents were entitled to an exemption from a compulsory-school-attendance law in *Yoder*, the Court explained that "[t]he record strongly indicate[d] that accommodating the religious objections of the Amish * * * will not impair the physical or mental health of the child * * * or in any other way materially detract from the welfare of society." 406 U.S. at 234. Similarly, in holding that the Free Exercise Clause prohibited the state in *Sherbert* from denying unemployment benefits to a Seventh-Day Adventist because of her refusal to work on her Sabbath, the Court noted that its ruling would not "serve to abridge any other person's religious liberties" (374 U.S. at 409) or otherwise significantly harm anyone (see *id.* at 406–409).

Only in cases concerning the ministerial exception—which recognize that the Establishment and Free Exercise Clauses together prohibit employment-discrimination laws from being enforced in a manner that would interfere with a church's selection of ministerial employees—has the Court ever mandated a religious exemption that would inflict meaningful harm on nonbeneficiaries (there, the employees who lose their jobs). See *Our Lady of Guadalupe*, 140 S. Ct. at 2055; *Hosanna-Tabor Lutheran Evangelical Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012). Those cases concerned core decisions of religious institutions that affect only their internal structures and the people who voluntarily choose to join them. See *Hosanna-Tabor*, 565 U.S. at 188 ("[T]he Free Exercise Clause * * * protects a

religious group's right to shape its own faith and mission through its appointments."). This case presents a far different question: whether there is a constitutional right to put countless people *outside* the congregation at greater risk of exposure to deadly disease.

2. Requiring a religious exemption from California's Guidance would inflict severe harm on countless other people.

Exempting applicants from California's emergency public-health measures would subject not only their congregants but also everyone with whom they come into contact—indeed, their entire communities—to serious and sometimes-fatal health risks.

Indoor gatherings that bring together large groups of people for extended periods are responsible for a substantial proportion of the spread of COVID-19. See, *e.g.*, Christie Aschwanden, *How 'Superspreading' Events Drive Most COVID-19 Spread*, Sci. Am. (June 23, 2020), https://bit.ly/2Jkx71W. And religious gatherings, specifically, have led to numerous outbreaks and deaths. See, *e.g.*, Nakia McNabb, *At Least 18 West Virginia Covid-19 Outbreaks Linked to Church Services, Governor Says*, CNN (Oct. 19, 2020), https://cnn.it/31CLODY; Kaitlin McKinley Becker, *More Than 200 COVID-19 Cases Linked to Fitchburg Church*, NBC10 Boston (Nov. 7, 2020), https://bit.ly/2GK6Tox; Derek Dellinger, *Charlotte Church Connected to Nearly 200 Cases of COVID-19 Given Go-ahead to Open Some Locations*, FOX46 Charlotte (Oct. 30, 2020), https://bit.ly/3pMJx3f; Bill Bostock, *Nearly 100 People in Ohio Got Sick After One Man Infected with the Coronavirus Attended a Church Service*, Business Insider (Aug. 6, 2020), https://bit.ly/2Qi2eeF; Sara Cline, *Church Tied to*

Oregon's Largest Coronavirus Outbreak, AP (June 16, 2020), https://bit.ly/2YWFlT1; Hilda Flores, *One-Third of COVID-19 Cases in Sac County Tied to Church Gatherings, Officials Say*, KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu; Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69 Morbidity & Mortality Wkly. Rep. 632 (2020), https://bit.ly/3f6MYM2; Stephanie Becker, *At Least 70 People Infected with Coronavirus Linked to a Single Church in California, Health Officials Say*, CNN (Apr. 4, 2020), https://cnn.it/2NgYN6l; Lee Roop, *A Small Alabama Church Had a Revival and Now 40 People Have Coronavirus*, AL.com (July 27, 2020), https://bit.ly/2Ekzsav; Eric Grossarth, *Idaho Falls Church Revival Leads to 30 Confirmed or Probable Cases of Coronavirus*, Idaho Statesman (June 4, 2020), https://bit.ly/3hZQnyI; John Raby, *Virus Outbreak Grows to 28 Cases at West Virginia Church*, AP (June 15, 2020), https://bit.ly/30WTqBm; Rachel Needham, *Anatomy of an Outbreak: New Documents Reveal a Significant Number of the County's COVID-19 Cases Can Be Traced to Castleton Church*, Rappahannock News (Sept. 1, 2020), https://bit.ly/33hLAlG; Wyatt Massey, *Church of God Denomination Facing Significant COVID-19 Outbreak; Leaders Won't Say How Many Infected*, Chattanooga Times Free Press (July 7, 2020), https://bit.ly/3bTiWLl; Ryan Burns, *A Redding Megachurch Leader Came to Humboldt and Flouted Mask Rules; Her Ministry Is Now the Source of a Major COVID Outbreak*, Lost Coast Outpost (Oct. 13, 2020), https://bit.ly/3m86USh; Bailey Loosemore & Mandy McLaren, *How a Church Revival in a Small Kentucky Town Led to a Deadly Coronavirus Outbreak*, Louisville Courier-Journal (Apr. 3, 2020),

https://bit.ly/2V1Jjrs; Trudy Balcom, *COVID-19 Outbreak on the Navajo Nation Linked to Church Rally*, White Mountain Indep. (Mar. 24, 2020), https://bit.ly/2YSR6di; Joe Severino, *COVID-19 Tore Through a Black Baptist Church Community in WV; Nobody Said a Word About It*, Charleston Gazette-Mail (May 2, 2020), https://bit.ly/2SFVYyX.

As these examples show, a single unwitting carrier at a large worship service can cause a ripple effect not just within the congregation, which alone would be tragic, but also throughout an entire community: The one infected person may pass the virus to his neighbors in the pews, who may then return home and pass it to their family members, including people at high risk of severe illness. Those infected family members may then expose others, who may do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die because of insufficient healthcare resources. The Free Exercise Clause has never been thought to require religious exemptions for conduct that threatens so much harm to so many.

It is no answer to argue that spread of the virus might be reduced to some extent through means short of restrictions on the size of gatherings, such as physical-distancing requirements and sanitation measures. Though such measures are certainly a good idea and can bolster the effectiveness of capacity restrictions, airborne transmission of COVID-19 can render even rigorous physical-distancing and cleaning measures inadequate. See*, e.g.*, Renyi Zhang et al., *Identifying Airborne Transmission as the Dominant Route for the Spread of COVID-19*, 117 PNAS 14,857

(2020), https://bit.ly/2HTGSnf. Outbreaks of the virus have thus been traced to religious gatherings that employed physical-distancing and other safety precautions. See, *e.g.*, Shelly Bradbury, *Fatal COVID-19 Outbreak Linked to Colorado Religious Group Suing State over Limits on Gatherings*, Denver Post (Oct. 6, 2020), https://dpo.st/3k5nHVl; Kate Conger et al., *Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases*, N.Y. Times (July 10, 2020), https://nyti.ms/30BOhgq; Lateshia Beachum, *Two Churches Reclose After Faith Leaders and Congregants Get Coronavirus*, Wash. Post (May 19, 2020), https://wapo.st/2WQgW0x; Alex Acquisto, *This Central Kentucky Church Reopened on May 10 and Became a COVID-19 Hot Spot*, Lexington Herald-Leader (June 6, 2020), https://bit.ly/3dDbQdq; Richard Read, *A Choir Decided to Go Ahead with Rehearsal; Now Dozens of Members Have COVID-19 and Two Are Dead*, L.A. Times (Mar. 29, 2020), https://lat.ms/2yiLbU6; Chris Epp, *'I Would Do Anything for a Do-Over': Calgary Church Hopes Others Learn from Their Tragic COVID-19 Experience*, CTV News (May 11, 2020), https://bit.ly/3dLUv2l.

Even when this Court subjects governmental conduct to a compelling-interest test, it does not require the state to accept "proposed alternatives" if they "will not be as effective" in achieving the state's goal. See *Ashcroft* v. *ACLU*, 542 U.S. 656, 665 (2004). And as the litany of examples of church-related outbreaks above reflects, permitting indoor mass gatherings with social-distancing and the like is simply not as effective at reducing the transmission of COVID-19 as is strictly limiting the size of those events. The Court should not second-guess the measures that California has

implemented, based on scientific data and public-health expertise, to protect its residents' health and lives.

B. California's Guidance does not discriminate against religion.

1. Distinctions based on objective scientific analysis rather than religious status or animus are not religious discrimination.

The Free Exercise Clause "'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017)). Thus, the Court has recognized religious discrimination when governmental action is based on religious status or is otherwise motivated by sectarian or antireligious animus. By contrast, this Court has never held that government discriminates against religion in violation of the Free Exercise Clause when it draws distinctions and acts based on objective, secular criteria, even if its actions incidentally burden religious practice along with other regulated conduct.

For example, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993), the Court struck down a set of local ordinances prohibiting animal sacrifice, because they "had as their object the suppression of religion," having been "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings." In *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018), the Court set aside a decision of a state commission that a baker had violated a civil-rights law by refusing for religious reasons to bake a cake for a wedding of a same-sex couple, because the commission's

statements and conduct had demonstrated "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." In *Espinoza* and *Trinity Lutheran*, the Court held that the Free Exercise Clause prohibited states from excluding religious institutions from eligibility for state funding programs "solely because of religious status." *Espinoza*, 140 S. Ct. at 2255; accord *Trinity Lutheran*, 137 S. Ct. at 2019–2021. And in *McDaniel* v. *Paty*, the Court ruled that prohibiting a minister from seeking public office solely because of his status as a member of the clergy violated the Free Exercise Clause. 435 U.S. 618, 629 (1978) (plurality opinion); accord *id.* at 629–630 (Brennan, J., concurring in the judgment).

On the other hand, the Court has never concluded that there was religious discrimination or animus in violation of the Free Exercise Clause just because a law has some exemptions, drawn on objective grounds unrelated to religion, but does not also contain an exemption for religious conduct or institutions. For example, in its cases upholding Sunday-closing laws, the Court concluded that Jewish shopkeepers who must close on Saturdays for observance of their Sabbath were not entitled to a religious exemption entitling them to stay open on Sundays, even though the laws contained many exemptions—delineated on nonreligious lines—for various kinds of businesses and institutions. See *Gallagher* v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 619–620, 631 (1961) (plurality opinion); *Braunfeld*, 366 U.S. at 600–601, 609 (plurality opinion); *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 585 (1961). And in *Hernandez* v. *Commissioner*, 490 U.S. 680, 700

(1989), the Court declined to require that payments made to a religious group for spiritual-training sessions be deductible under the Internal Revenue Code, despite provisions in the Code for numerous other kinds of deductions and exemptions.

As the Court explained in *Lukumi*, "[a]ll laws are selective to some extent." 508 U.S. at 542. Impermissible "inequality results" under the Free Exercise Clause "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation." *Id.* at 542–543 (emphasis added). In other words, "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens *only* on conduct motivated by religious belief." *Id.* at 543 (emphasis added). But it can, and inevitably does, impose some burdens that affect religious practices along with other activities without being guilty of invidious religious discrimination.

2. California's Guidance is not motivated by antireligious animus and does not discriminate against religious institutions based on status.

Here, the distinctions in California's Guidance are based on objective public-health criteria. The Guidance is not motivated by religious animus. Nor does it discriminate against religious institutions or individuals based on status.

Indeed, California's restrictions on gatherings limit religious services no more—and in important respects less—than comparable nonreligious activities. Cultural ceremonies, movie theaters, restaurants, universities, and political protests and rallies are covered by rules identical to those applicable to houses of worship.[3]

[3] See *Industry Guidance to Reduce Risk*, COVID19.CA.GOV (updated Nov. 16, 2020), https://bit.ly/3lI7KG7; *About COVID-19 Restrictions*, COVID19.CA.GOV (updated

And concert venues, live theatres, festivals, convention centers, bars, breweries, distilleries, wineries, nightclubs, family-entertainment centers, playgrounds, amusement parks, theme parks, gyms, fitness centers, yoga studios, bowling alleys, cardrooms, racetracks, sporting events with live audiences, and private gatherings are subject to stricter restrictions or—in many cases—are entirely closed or prohibited statewide.[4]

Applicants point out that certain businesses that produce, store, and sell food and other goods are not subject to the same restrictions as those that apply to houses of worship. But the State has articulated a "principled rationale for the difference in treatment" (*Masterpiece*, 138 S. Ct. at 1731)—namely, the different public-health risks posed by different categories of activities. And the district court, as factfinder, has credited the State's rationale. Applicants' Appendix C, at 3–4.

Take grocery and retail stores, for example. Public-health experts have concluded that stores pose much less risk of transmission of COVID-19 than do gatherings such as worship services, in part because customers' interactions with others at stores are generally transient, while attendees at large gatherings may sit near an infectious person for long periods and thus suffer exposure to a much greater amount of the virus. See Johns Hopkins Bloomberg Sch. of Pub. Health Ctr. for Health Sec., Public Health Principles for a Phased Reopening During COVID-19:

Nov. 23, 2020), https://bit.ly/2Bmgcb5 (section entitled "Can I engage in political rallies and protest gatherings?").

[4] See *Industry Guidance to Reduce Risk*, *supra*; *Blueprint for a Safer Economy*, COVID19.CA.GOV (updated Nov. 24, 2020), https://bit.ly/3jAoI7b (section entitled "Find the status of activities in your county"); *About COVID-19 Restrictions*, *supra* (section entitled "Are gatherings permitted?").

Guidance for Governors 12, 16 (Apr. 17, 2020), https://bit.ly/2CKc5qz. In addition, stores do not involve masses of individuals arriving and departing simultaneously.

Warehouses and food-production plants are not comparable to religious services either. Like retail operations, these institutions generally do not involve large groups arriving and departing together or congregating and intermingling *en masse* for long periods. And warehouses and plants are not open to members of the public generally but instead are typically occupied by the same set of employees from day to day. Employers thus have greater control over their employees' adherence to safety and health precautions; and contact tracing in the event of an outbreak is substantially easier among a closed group of known employees. Moreover, warehouses and plants cannot be operated remotely; and shutting them down would threaten the availability of food, medication, and other goods that are themselves crucial to maintaining the public health.

Applicants additionally object to a prohibition on singing and chanting at indoor religious services. But California also prohibits singing and chanting at indoor cultural ceremonies,[5] indoor political protests and rallies,[6] schools,[7] restaurants,[8] and indoor private gatherings.[9] Other venues and events that commonly feature singing

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[5] Cal. Dep't of Pub. Health, Covid-19 Industry Guidance: Places of Worship and Providers of Religious Services & Cultural Ceremonies 2–3 (July 29, 2020), https://bit.ly/3fF534l.

[6] *About COVID-19 Restrictions*, *supra* (section entitled "Can I engage in political rallies and protest gatherings?").

[7] Cal. Dep't of Pub. Health, Covid-19 Industry Guidance: Schools and School-Based Programs 12 (Aug. 3, 2020), https://bit.ly/2FXK93C.

[8] Cal. Dep't of Pub. Health, Covid-19 Industry Guidance: Restaurants, Bars, and Wineries 14 (July 29, 2020), https://bit.ly/3k7T69z.

[9] *About COVID-19 Restrictions*, *supra* (section entitled "Are gatherings permitted?").

or chanting—including concert halls, live theatres, festivals, and nightclubs—are closed or barred entirely.[10] And singing and chanting are still permitted at outdoor religious services.[11] Again, California is not discriminating against religion.

Nor are California's restrictions discriminatory because they apply to applicants' worship services but not to social-welfare programs that applicants may wish to provide, such as operating a food bank. The sustained congregation of worshippers is different from the fleeting, sequential exchanges between a volunteer at a food bank and a person picking up pantry staples. And the rules concerning social-welfare programs govern religious and nonreligious institutions equally,[12] underscoring the nondiscriminatory nature of California's restrictions.

Finally, applicants argue that California's restrictions on *indoor* religious services should be enjoined because California allows *outdoor* protests. But the rules that California imposes on protests are *identical* to the rules applicable to religious services: *outdoor* protests and religious services are permitted statewide, while *indoor* protests and religious services are barred in some counties and governed by uniform limitations in others.[13] Furthermore, outdoor gatherings are not comparable to indoor gatherings because there is far less risk of transmission of the virus outdoors; indeed, one study concluded that the odds of infection are nearly twenty times higher at indoor gatherings than at outdoor ones. See, *e.g.*, Tara Parker-Pope,

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[10] See *Blueprint*, *supra* (section entitled "Find the status of activities in your county").

[11] See Industry Guidance: Places of Worship, *supra*, at 3.

[12] See *Essential Workforce*, COVID19.CA.GOV (updated Sept. 22, 2020), https://bit.ly/35kQalC (section entitled "Food and Agriculture," ¶ 12).

[13] See *About COVID-19 Restrictions*, *supra* (section entitled "Can I engage in political rallies and protest gatherings?").

How Safe Are Outdoor Gatherings?, N.Y. Times (July 3, 2020), https://nyti.ms/3j4fH6g. That California restricts outdoor religious and political gatherings less than indoor gatherings (including religious ones) shows absolutely no disfavor toward religion but instead demonstrates that the State draws appropriate distinctions based on epidemiological considerations related to the physical features of the setting.

As Judge Easterbrook explained in upholding restrictions in Illinois that were similar to California's, "worship services * * * seem most like other congregate functions that occur in auditoriums, such as concerts and movies," all of which "put[ ] members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air." *Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020), *petition for cert. docketed*, No. 20-569 (Oct. 30, 2020). Because California's Guidance restricts religious worship similarly to or less than these kinds of comparable activities, it cannot be said to discriminate against religion.

CONCLUSION

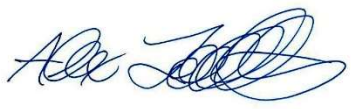
If there is one belief widely held among the diverse faiths that Americans hold, it is the great value that they place on human life. *E.g.*, *Deuteronomy* 30:19–20. The precious right to worship freely should not be misapplied in a manner that contributes to the spread of disease, suffering, and death. For to do so would defeat the very purpose of that right: "The dead cannot praise the Lord." *Psalms* 115:17.

California has carefully drawn distinctions based on objective public-health-based considerations, while at the same time showing special solicitude—not

disfavor—for religious institutions and their worship services. In doing so, the State is ensuring that after the pandemic is brought under control many more Californians will be alive, healthy, and able to engage in activity that gives their lives meaning, be that worship or other pursuits. Especially in the context of an emergency proceeding such as this one, this Court should not second-guess California's scientifically grounded distinctions and the factual findings of the district court.

The application for an emergency injunction should be denied.

Respectfully submitted.



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