No. 20A151

In the Supreme Court of the United States

RITESH TANDON, ET AL.,

Applicants,

v.

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

Respondents.

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

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

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The Becket Fund for Religious Liberty respectfully moves for leave to file a brief *amicus curiae* in support of Applicants' Emergency Application For Writ of Injunction, without 10 days' advance notice to the parties of *Amicus*'s intent to file as ordinarily required.

In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice, but *Amicus* was nevertheless able to obtain a position on the motion from the parties. Applicants and County Respondents consent to the filing of the *amicus* brief. State Respondents do not oppose the filing of the *amicus* brief.

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

Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am.* v. *Cuomo*, 141 S. Ct. 889 (2020); *Lebovits* v. *Cuomo*, 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020) (challenge to restrictions on Jewish girls' school

located in Far Rockaway, Queens); *Roman Catholic Archbishop of Washington* v. *Bowser*, No. 20-cv-03625, 2021 WL 1146399 (D.D.C. Mar. 25, 2021) (enjoining restrictions on worship attendance).

Amicus offers the proposed brief to situate the Application within the broader context of this Court's emergency docket. As we explain in the brief, far from being an unusual part of a federal court's activity, emergency proceedings are a standard judicial tool for vindicating core constitutional and civil rights. The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1.

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

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*[1]

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

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Amicus offers this brief to situate the Application within the broader context of this Court's emergency docket. Far from being an unusual part of a court's activity,

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

emergency proceedings are a standard judicial tool for vindicating core constitutional and civil rights like those presented by the Application.

SUMMARY OF ARGUMENT

To hear some people tell it, there is something shady about the Court's emergency docket. Indeed, they've even given it the moniker "shadow docket."[2] On this account, the Court's willingness to rule on emergency applications endangers "consistency" and "transparency," thus creating a "fog of uncertainty" about what its rulings mean.[3]

These are ivory tower objections that partake more of the "heaven of legal concepts" than the actual experience of litigation.[4] Every court in the country (except perhaps traffic court) provides for emergency proceedings, because courts have to resolve time-sensitive and important disputes including, among other things, persistent outrages to the Constitution.

For academics focused solely on the Supreme Court, emergency proceedings may be foreign or seem unsettling because they do not conform to the "ideal" procedure governing a typical merits case. But for practitioners who have to seek temporary restraining orders in district court, or an emergency injunction in a court of appeals, the Supreme Court's emergency procedures are unfamiliar only in their stringency. Indeed, if anything, this Court's emergency process is more transparent than many

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[2] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015).

[3] *Id.* at 9; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 157 (2019).

[4] Rudolf von Jhering, *Im juristischen Begriffshimmel. Ein Phantasiebild*, in *Scherz und Ernst in der Jurisprudenz* 245 (3d ed. 1885), 11th ed. (1912) cited in Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 809 (1935). The word "emergency" does not appear in Professor Baude's article.

other courts' procedures.

And the facts of this appeal show exactly why the Court's emergency procedures are needed. Eighteen months ago, it would have been unthinkable that a government could simply ban, on pain of criminal penalty, a small worship service in someone's home (or backyard). To be sure, during the uncertain days at the onset of the pandemic, it was understandable that governments moved quickly to restrict all social commerce. But now, in the pandemic's waning days, governments should also be quick to end their intrusions on First Amendment activities. Yet California and Santa Clara County, in the teeth of this Court's previous injunctions, have prolonged their suppression of worship and other religious activities, continuing to treat those activities worse than constitutionally-less-protected commercial activity at every turn. And the lower courts have again blessed this approach as "neutral" and "generally applicable," refusing to use their own emergency powers. But being banned from worship in one's own home *is* an emergency.[5] That some observers think suppressing worship is *not* an emergency says more about how much they value freedom to worship than it does about the scope of the Court's emergency powers.

Nor does Respondents' recent announcement that they plan to change their gatherings rules (at least temporarily) on April 15 change the necessity for this Court to act on the Application. Like Governor Cuomo's last-minute reclassification in *Diocese of Brooklyn*, and Santa Clara County's last-minute letter promising a change to its

[5] At the beginning of the pandemic, some worship limits may well have been justified, but even then, they unquestionably belonged on the emergency dockets of every court to consider them.

previous gatherings ban in *Gateway City Church*, Respondents' entirely tactical retreats come far too late. Indeed, there is *more* reason for this Court to intervene when a government defendant fights hard to keep a rule in the lower courts, creating negative precedent along the way, only to drop the rule like a hot potato when it faces this Court's scrutiny. Protecting the integrity of this Court's procedures thus counsels strongly in favor of enjoining Respondents.

ARGUMENT

I. The Court's emergency docket is well-suited to vindicate core constitutional and civil rights like those at issue in the Application.

The Application presents a time-sensitive issue of great constitutional import. Because California and Santa Clara County have refused to conform their behavior to this Court's previous rulings, and the Northern District of California and the Ninth Circuit have refused to intervene, this Court should act. This is exactly what emergency relief is designed to do.

1. There is nothing untoward or nefarious happening when courts employ their equitable powers to grant emergency relief. Congress recognized that emergency relief is sometimes necessary, and explicitly provided a mechanism to obtain such relief before this Court. First enacted as part of the Judiciary Act of 1789, the All Writs Act authorizes an individual Justice or the full Court to issue an injunction pending appeal. 28 U.S.C. 1651.

Similarly, federal courts at the trial and appellate levels have also long had procedures in place to provide emergency relief. See Fed. R. Civ. P. 62(d) (district court); Fed. R. App. P. 8 (courts of appeals); 28 U.S.C. 1292(a)(1) (appellate jurisdiction over

appeals). So do state courts. See, *e.g.*, N.Y. C.P.L.R. § 5518 (injunctions pending appeal); Cal. Rules of Court 8.112, 8.116 (writ of supersedeas); Tex. R. App. P. 29.3 (injunctions pending appeal). Cf. The Federalist No. 83, at 569 (Alexander Hamilton) (J. Cooke ed. 1961) ("[t]he great and primary use of a court of equity is to give relief *in extraordinary cases*") (emphasis original).

In short, courts across the country—both state and federal—uniformly issue emergency relief because sometimes litigants need immediate relief. As this Court has explained, "'[n]o court can make time stand still' while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review." *Nken* v. *Holder*, 556 U.S. 418, 421 (2009) (quoting *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 9 (1942)). Emergency proceedings, by providing for extraordinary equitable relief, are an entirely normal judicial function.

Objections to this Court's emergency docket are thus founded on a decontextualized misunderstanding of the purpose of emergency proceedings. All courts sitting in equity sometimes have to make decisions in a hurry, and this Court is no exception. That may mean that opinions are not as long or as detailed as academic observers might prefer, but brevity is not a legitimate reason to deny relief to parties who need it urgently. Nor is there any indication that the Court's merits decisions are uniformly rated as clearer or providing better guidance than its decisions on emergency applications.[6]

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[6] See, *e.g.*, Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Security L. & Pol'y 251 (2011) (merits opinion not "a model of clarity"; "enigmatic as it is intriguing"); *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1315 (2016) (*Klein* merits opinion

As it happens, this Court's emergency process is in fact more transparent than many other courts' procedures. The Court's docket is freely searchable online, filings are downloadable, and the Court typically provides ample time for litigants to respond and for interested *amici* to appear.[7] By contrast, many district court TRO rulings are issued from the bench without a transcript and many state court emergency proceedings are difficult, if not impossible, to access online. And those decisions that are published are often one- or two-line decisions. In short, in comparison to the thousands of other emergency dockets around the country, there's nothing shadowy at all about the Court's emergency docket.

2. Protecting the basic religious exercise at issue in this case *is* an emergency, easily falling within the range of irreparable injuries found to support emergency relief. As an initial matter, it is well-established that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality)). And this Court has accordingly granted emergency relief to protect religious practice in many contexts outside

"enigmatic[]"); *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring) ("Nearly half a century after *Lemon*, * * * the truth is, no one has any idea" how to apply it.). And dissenting Justices frequently criticize the lack of clarity in majority merits opinions. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 129 (2008) (Scalia, J., dissenting) (describing majority's opinion as "painfully opaque").

[7] *Pace* Professor Vladeck, filing *amicus* briefs on emergency dockets is not "all-but impossible in most cases." Compare *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Comm. on the Judiciary,* 117th Cong., 1st Sess. 14 (2021) (testimony of Stephen I. Vladeck) with the docket in *Danville Christian Acad.* v. *Beshear*, No. 20A96 (7 amicus briefs filed in 6 days, both in support of and in opposition to application, on behalf of law professors, American Medical Association, religious groups, and others).

of COVID, including to death-row prisoners raising constitutional and statutory rights to comfort of clergy. See, *e.g.*, *Gutierrez* v. *Saenz*, 141 S. Ct. 127, 127-128 (2020) (stay of execution); *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019) (enjoining state from proceeding with execution "unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend" in death chamber); see also, *e.g.*, *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 571 U.S. 1171 (2014) (conditional injunction against enforcement of Affordable Care Act contraceptive mandate).

However, core free exercise rights (under the First Amendment or civil rights statutes like RFRA or RLUIPA) do not represent the outer bounds of the Court's emergency docket. Rather, this Court has stepped in to remedy even those injuries that implicate no fundamental freedoms, where important issues are nevertheless at stake. Multiple Justices, for example, have concluded that a government "suffers a form of irreparable injury" when "enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (allowing state DNA collection from arrested persons to continue). Extending this rule to regulations, this Court has intervened to protect various policies enjoined by the lower courts while an appeal proceeds, including a sex offender registry statute, executive action to limit transgender persons' military enlistment, regulations limiting asylum eligibility, and agency action to build a border wall with transferred funds. See *United States* v. *Comstock*, No. 08A863 (U.S. Apr. 3, 2009); *Trump* v. *Karnoski*, 139 S. Ct. 950 (2019); *Barr* v.

East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019). *Trump* v. *Sierra Club*, 140 S. Ct. 1 (2019). On the other side of the ledger, the Court has also intervened to enjoin government deportations and executions that may be contrary to law, as well as agency rules alternatively argued to harm state sovereignty or impose significant compliance costs. See, *e.g.*, *Nken* v. *Mukasey,* 555 U.S. 1042 (2008) (staying deportation); *Christeson* v. *Roper*, 135 S. Ct. 433 (2014) (staying execution); *Haynes* v. *Thaler*, 568 U.S. 970 (2012) (same); *West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016) (staying EPA rule). In important policy cases, the Court has even intervened in more in-the-weeds matters, such as preventing significant discovery burdens on the federal government, or ensuring that a state government will hold funds in escrow for restitution should a tax be deemed unconstitutional. See *In re Department of Commerce*, 139 S. Ct. 16, 16-17 (2018) (staying deposition); *In re United States*, 138 S. Ct. 371 (2017) (staying discovery in challenge to recission of Deferred Action for Childhood Arrivals program); *American Trucking Ass'ns, Inc.* v. *Gray*, 483 U.S. 1306, 1309-1310 (1987) (Blackmun, J., in chambers) (enjoining Arkansas respondents to escrow collected taxes). Whatever the merits of the above interventions, it cannot be the case that the government's desire to proceed faster with the discretionary construction of a border wall (a years-long project) or to avoid an intrusive deposition poses a *greater* emergency than the irreparable harm of severely constricting worship and Bible study in a private home.

The Court said as much in *Gateway City Church*. There, the Court granted injunctive relief against a total ban on indoor worship in Santa Clara County, finding "[t]he

Ninth Circuit's failure to grant relief was erroneous," since the "outcome [wa]s clearly dictated by th[e] Court's [prior] decision" to enjoin California's total ban on indoor worship. *Gateway City Church* v. *Newsom*, No. 20A138, 2021 WL 753575 at *1 (Feb. 26, 2021) (citing *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021)). Here, the same lower court again blessed strict limits on religious worship in California not applicable to various other activities, where (far) more than three households may freely gather in numerous indoor and outdoor spaces.

If there are edge cases in the Court's grants of emergency relief, this case is not among them. Scholars and judges may debate, for example, whether every injunction of a government policy works an irreparable injury on the state. But whatever the merits of that debate, this Court's emergency powers are, at a minimum, properly invoked where the irreparable loss of First Amendment rights is at issue.

3. Respondents' recently announced intention to lift some of their most stringent restrictions in the coming weeks doesn't change the above calculus. Injunctive relief remains appropriate here because Respondents may, at any time, extend or reinstate these restrictions on in-home Bible studies and religious worship. Under *Diocese of Brooklyn*, this "constant threat" of renewed restraints on Applicants' constitutional rights confirms that an injunction is the appropriate remedy. 141 S. Ct. at 68.

As this Court explained in *Diocese of Brooklyn*, Governor Cuomo could have, at any time, amended New York's COVID restrictions on religious worship "without prior notice." 141 S. Ct. at 68. Any changes to the State's restrictions would thus "almost certainly bar [religious worship] services before judicial relief can be

obtained." *Ibid*. This "risk of suffering further irreparable harm" confirmed that an injunction forbidding enforcement of the Governor's already-lifted restrictions was the appropriate remedy. *Id.* at 68-69. ("[I]njunctive relief is still called for because the applicants remain under a constant threat that the area in question will be re-classified."). Cf. *Cassell* v. *Snyders*, 990 F.3d 539, 546 (7th Cir. 2021) (rejecting claim of mootness "given the uncertainty about the future course of the pandemic").

The same is true here. Respondents have repeatedly modified and extended their restrictions on religious worship and in-home gatherings, and could do so again at any time. See Application 11 (noting changes to guidance on "gatherings" from March 16, 2020; September 2020; October 9, 2020; and November 13, 2020). Indeed, California's COVID restrictions are at least as dynamic as New York's: the "Blueprint for a Safer Economy" permits California to reclassify any county's COVID "risk level" (tier) with little or no notice. *See* Blueprint for a Safer Economy, California.gov, https://perma.cc/42AL-MCYG ("New Blueprint tier assignments were announced on April 6, 2021, with an effective date of April 7, 2021."). Restrictions on gatherings and religious worship can also vary significantly depending upon a county's classification. Application 12. Cf. *Diocese of Brooklyn*, 141 S. Ct. at 65-66 (describing Governing Cuomo's division of New York City into "'red' or 'orange' zones").

Santa Clara County's restrictions fare no better. After fighting to ban indoor worship all the way up to the Supreme Court in *Gateway City Church* v. *Newsom* (without any hint that they might shortly change their position), the County announced,

on the day petitioner's reply brief was due, that *the next day* it would lift certain restrictions, and within a week might "allow all indoor gatherings, including indoor worship gatherings, to resume up to the same capacity as all other indoor facilities." Letter to the Court (Feb. 25, 2021), *Gateway City Church* v. *Newsom*, No. 20A138. It is no surprise that this abrupt change of heart provided Gateway City Church with not a scintilla more than the bare minimum relief they sought in court. Cf. Joseph C. Davis, Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325, 332 (2019) (explaining how governments use "mid-litigation change[s]" in laws or regulations "to moot a concerning case").

And, just as in *Diocese of Brooklyn*, there is no assurance that Respondents won't reimpose the same or similar discriminatory restrictions if COVID cases tick up again. Rather than suggesting that California's upcoming reprieve will be made permanent, Governor Newsom's actions to date confirm that if cases begin to rise, Applicants can expect to find themselves subject to renewed restrictions.[8] Cf. *Calvary Chapel Dayton Valley* v. *Sisolak*, 982 F.3d 1228, 1230 n.1 (9th Cir. 2020) ("Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions.").

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[8] Compare Michelle Wiley, *California Tightens Coronavirus Restrictions, Most Counties Must Close Nonessential Indoor Businesses*, KQED (Nov. 16, 2020), https://perma.cc/5TBH-Y86K ("A staggering 94% of California's population will move back to the most restrictive COVID-19 guidelines due to a rapid uptick in cases, Gov. Gavin Newsom announced Monday.") with Alix Martichoux, *Gov. Gavin Newsom says California may be 'days, not weeks' from further reopening*, ABC 7 News (May 1, 2020), https://perma.cc/JLG6-BUEF ("Newsom said he believed 'we're getting very, very close' to lifting restrictions on more businesses, including the retail, hospitality and restaurant sectors.").

California, like New York, has also shown a penchant for crafting COVID restrictions that treat religious worship not as a protected constitutional right, but as a discretionary hobby that the state can shut down while it prioritizes reopening more economically valuable activities. See Application 5 ("[E]ven restaurants, wineries, breweries, cardrooms, distilleries, and bowling alleys can host gatherings indoors."). But a pandemic is not an excuse to push religious exercise to the back of the line, only begrudgingly permitting citizens to exercise their constitutional rights on threat of court order. "There is no reason why [Applicants] should bear the risk of suffering further irreparable harm" if California or Santa Clara County decide to change their mind and reimpose restrictions on in-home religious gatherings. *Diocese of Brooklyn*, 141 S. Ct. at 68-69.

* * *

Some academics have looked at the Court's interventions on COVID worship restrictions and complained that the Court is doing too much to protect core constitutional and civil rights. But that gets things exactly backward. The blame for an active emergency docket lies instead squarely with the governments that have repeatedly attempted to suppress worship and the lower courts that have blessed those actions as "neutral." Until they start following this Court's lead—like the vast majority of governments and lower courts already have—the Court should not hesitate to issue emergency relief.

CONCLUSION

This Court should issue the requested injunction.

Respectfully submitted.

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