No. 21-15189

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GATEWAY CITY CHURCH, *et al.*,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, *et al.*,

Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the Northern District of California
Case No. 5:20-cv-08241-EJD, Hon. Edward J. Davila

BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; CENTRAL CONFERENCE OF AMERICAN RABBIS; COVENANT NETWORK OF PRESBYTERIANS; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; REV. DR. MARC IAN STEWART, CONFERENCE MINISTER, MONTANA-NORTHERN WYOMING CONFERENCE, UNITED CHURCH OF CHRIST; SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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RULE 26.1 DISCLOSURE STATEMENT

With the exception of Rev. Dr. Marc Ian Stewart, who is an individual, all the *amici* are nonprofit organizations that have no parent corporations and are not owned, in whole or in part, by any publicly held corporation.

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INTERESTS OF THE *AMICI CURIAE*[1]

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

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

[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 intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

sooner. Applying to religious services religion-neutral restrictions that govern all large gatherings protects the public health and respects the Constitution.

The *amici* are:

- Americans United for Separation of Church and State.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Rev. Dr. Marc Ian Stewart, Conference Minister, Montana-Northern Wyoming Conference, United Church of Christ.
- Southwest Conference of the United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici present four main points to supplement the powerful arguments that the State Defendants' brief makes in defense of the application to worship services of California's pandemic-related public-health restrictions. First, historical analysis shows that the Free Exercise Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety. Second, in a long line of cases, the Supreme Court has repeatedly recognized that the Clause must not override laws needed to safeguard the public health. Third, numerous COVID-19 outbreaks linked to houses of worship demonstrate that reasonable restrictions on worship services continue to be needed to control the pandemic. Fourth, identifying a single secular activity that allegedly is regulated less strictly than the religious activity at issue is insufficient to trigger heightened scrutiny under the Free Exercise Clause, yet that is all that Plaintiffs even purport to do here.

This Court should stay true to the original intent and long-held understanding of the Free Exercise Clause and protect the health and lives of Californians by upholding the State's application of its public-health restrictions to religious services.

ARGUMENT

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

In its recent jurisprudence, the Supreme Court has looked to "history for guidance" when determining the meaning of provisions of the Bill of Rights. *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2087 (2019) (plurality opinion); *see also, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014); *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010). In *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008), for example, the Court considered "the history that the founding generation knew" in concluding that the Second Amendment's preface is consistent with an individual right to bear arms. The Court explained that "the way tyrants had eliminated a militia" in England informed "the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 598–99.

The Free Exercise Clause's history demonstrates that the Clause was never intended or originally understood to supersede enactments that protect the public from serious harm. Rather, the Clause was enacted to address a long history of governmental efforts to suppress particular religious groups based on disapproval of the groups or their beliefs. And the writings of leading Founders, as well as early state constitutions and judicial decisions, demonstrate that the right to free exercise was not

viewed during the Founding Era as overriding laws meant to ensure public safety.

1. The intent and writings of the Founders.

Both Religion Clauses of the First Amendment were informed by the history of European and colonial religious persecution. For the Founders of our Nation well knew that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947); *see also Engel v. Vitale*, 370 U.S. 421, 432–33 (1962); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982). During the seventeenth and eighteenth centuries, Catholics and Puritans in England were subjected to laws enacted to "destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). Emigration to colonial America was spurred by these religious conflicts and persecutions. *See* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 Geo. J.L. & Pub. Pol'y 51, 57 (2009). Yet some colonists then came to engage in similar practices themselves, using political authority to impose their own

preferred beliefs and religious institutions at the expense of other denominations. *See Everson*, 330 U.S. at 9–10.

These "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause" (*Bowen v. Roy*, 476 U.S. 693, 703 (1986)), including, notably, James Madison, the primary architect of the First Amendment (*Everson*, 330 U.S. at 13). As Madison explained, "[t]orrents of blood ha[d] been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissent of Rutledge, J.). In contrast, noted Madison, "the forbearance of our laws to intermeddle with Religion" "has produced" "moderation and harmony" in America. *Id.*

Accordingly, those who drafted the First Amendment sought to ensure (*see Everson*, 330 U.S. at 13) that government would, as Madison put it, be prevented from "proscribing all difference in Religious opinion" (*Memorial and Remonstrance*, *reprinted in Everson*, 330 U.S. at 69). Thus, the Supreme Court has recognized the Free Exercise Clause to forbid governmental actions that have "as their object the suppression of religion" (*Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993)), that evince "hostility toward . . . sincere religious beliefs"

(*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1729 (2018)), or that "impose special disabilities on the basis of religious status" (*Trinity Lutheran Church of Columbia v. Comer*, 137 S.Ct. 2012, 2021 (2017) (quoting *Lukumi*, 508 U.S. at 533) (alterations omitted)).

But while the Free Exercise Clause was intended to prohibit governmental disfavor toward or targeting of particular faiths, it was not originally understood to mandate exemptions from laws that protect public safety or health. For example, though Madison believed that the right to practice one's religion freely was of utmost importance, he cautioned that it should not be construed to "trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/34wu2n5.

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

Likewise, George Washington expressed the "wish and desire that the Laws may always be as extensively accommodated to [freedom of conscience], as a due regard for the Protection and essential Interests of the Nation may Justify, and permit." Letter from George Washington to the Society of Quakers (Oct. 13, 1789), https://bit.ly/3lQjkxG. In other words, Washington believed that religion should be accommodated willingly and enthusiastically, but not at the expense of public safety.

Prominent religious thinkers of the day also shared as a theological commitment this same understanding that religious objectors were not entitled to exemptions from public-safety laws, as the writings of Isaac Backus and John Leland demonstrate. *See* Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 630–32 (1990). They adopted and defended the views of Roger Williams, the Baptist theologian and founder of Rhode Island, who had likewise opposed the idea of an entitlement to religious exemptions from general laws protecting public safety. *See id.*

And it was broadly accepted in colonial and Founding Era America that public-health laws such as quarantine measures were essential to public safety. To fight diseases such as smallpox, yellow fever, plague, and cholera, colonies and states imposed quarantine measures—often very strict ones—during those times. Laura K. Donohue, *Biodefense and*

Constitutional Constraints, 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 82, 93–126 (2014). Thus "[q]uarantine was widely regarded as a central tenet of state police powers" then. *Id.* at 90; *see also Gibbons v. Ogden*, 22 U.S. 1, 203, 205 (1824). So our Constitution's Framers could not have thought that measures to safeguard the public health must be legally subordinated to religious practices.

2. Early state constitutions and court decisions.

Most Founding Era state constitutional analogues to the Free Exercise Clause contained caveats reflecting this basic understanding that the right to free exercise did not override public-safety concerns. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461–62 (1990). For example, the free-exercise guarantee of Delaware's Declaration of Rights of 1776 included the qualifier "unless, under Colour of Religion, any Man disturb the . . . Safety of Society." Del. Decl. of Rights of 1776, § 3. The free-exercise guarantee of the Maryland Constitution of 1776 contained the limitation "unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights." Md. Const., art. XXXIII (1776). The free-exercise clause of New York's 1777 Constitution provided that "the liberty of conscience, hereby granted, shall not be so

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

As Professor McConnell has explained, "[t]he wording of the state provisions . . . casts light on the meaning of the first amendment," "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, 103 Harv. L. Rev. at 1456. And that original meaning, according to Professor McConnell, was that "the free exercise right should prevail" "[w]here the rights of others are not involved" but does not override "peace and safety limitations" "necessary for the protection of others." *Id.* at 1462, 1464–66.

Early state-court decisions point in the same direction. Professor Vincent Phillip Muñoz has determined that "no antebellum state court

interpreted constitutional protections of religious free exercise to grant exemptions" from public-safety laws. Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083, 1099 (2008) (citing Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 276–95 (1991)).

Indeed, the few early court decisions to address the issue demonstrate precisely the opposite. For instance, the Pennsylvania Supreme Court held in 1831 that while "religious scruples of persons concerned with the administration of justice[ ] will receive all the indulgence that is compatible with the business of government," respect for religious obligations "must not be suffered to interfere with the operations of that organ of the government which has more immediately to do with the protection of person[s]." *Phillips v. Gratz*, 2 Pen. & W. 412, 416–17 (Pa. 1831). Similarly, in 1854, the Supreme Judicial Court of Maine noted that it "is not disputed" that "society['s] . . . right to interfere on the principle of self-preservation" prevails over the right to freely exercise religion. *Donahoe v. Richards*, 38 Me. 379, 412 (Me. 1854).

B. The Supreme Court has repeatedly recognized that the Free Exercise Clause does not override laws needed to protect the public health.

The Supreme Court's Free Exercise Clause jurisprudence has aligned with the Clause's original intent and understanding, by recognizing both that religious exercise is worthy of respect and accommodation and that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). Indeed, just last summer, the Court reaffirmed that the Free Exercise Clause "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). Thus, in a series of long-standing decisions, the Court repeatedly acknowledged that there is no right to religious exemptions from laws that shield the public from illness.

More than a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court explained that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *See id.* at 26. The Court thus straightforwardly rejected the view that the Constitution bars compulsory

measures to protect the public health, recognizing instead the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the . . . health . . . of the state.'" *Id.* (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). For "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

Although *Jacobson* did not specifically consider a Free Exercise Clause argument, perhaps because the Clause had not yet been held applicable to 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 v. Massachusetts,* 321 U.S. 158, 166 (1944), for example, the Court explained that one "cannot claim freedom from compulsory vaccination . . . on religious grounds." For the "right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Id.* at 166–67.

In *Sherbert v. Verner*, 374 U.S. 398, 402–03 (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." In *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972), the Court

underscored that free-exercise claims are denied when "harm to the physical or mental health . . . or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." In explaining that foundational principle, the Court specifically pointed (*id.* at 230 & n.20) to *Jacobson*, as well as a case expressly rejecting a free-exercise challenge to a mandatory-vaccination law (*Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644 (Ark. 1965)), and a case spurning an attempt to use the Free Exercise Clause to block a lifesaving blood transfusion (*In re President & Dirs. of Georgetown Coll.*, 331 F.2d 1000, 1007–10 (D.C. Cir. 1964) (Wright, J., in chambers)). And in *Employment Division v. Smith*, 494 U.S. 872, 888–89 (1990), the Court rejected a view of the Free Exercise Clause that would have "required religious exemptions from . . . health and safety regulation such as manslaughter and child neglect laws" and "compulsory vaccination laws."

The Supreme Court has also repeatedly denied in other contexts free-exercise claims for religious exemptions that would have imposed harms on third parties. For example, in *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court rejected 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." In *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (plurality opinion), 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." And in *Prince*, 321 U.S. at 170, the Court denied a request for an exemption from child-labor laws barring 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."

C. California's restrictions on religious gatherings are needed to protect the public health.

Similarly, California's restrictions on religious gatherings are needed to protect Californians from harm, just as the State's restrictions on nonreligious gatherings are. 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.[2]

[2] *See, e.g.*, Joshua Bote, *Priest Dies from COVID After San Francisco Catholic Church Closes Due to Outbreak*, SFGate (Feb. 17, 2021), http://bit.ly/3qx1Edr; Pat Ferrier, *Fort Collins Church, Nursing Home Report Larger COVID-19 Outbreaks*, Coloradoan (Feb. 6, 2021),

http://bit.ly/3pfktka; 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; Nakia McNabb, *At Least 18 West Virginia Covid-19 Outbreaks Linked to Church Services, Governor Says*, CNN (Oct. 19, 2020), https://cnn.it/31CLODY; Krystle Holleman, *One Death Reported After COVID-19 Outbreak at Grand Ledge Church*, WILX10 (Nov. 11, 2020), https://bit.ly/3k1KGBD; 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*

Moreover, means short of restrictions on the size of gatherings—such as physical-distancing requirements and sanitation measures—are not sufficient to control spread of the virus. 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. Many outbreaks of the virus have thus been traced to religious gatherings that employed physical-distancing and other safety precautions.[3]

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.

[3] *See, e.g.*, Caroline Enos, *Dozens of COVID-19 Cases Linked to Christmas Eve Gatherings at Woburn Church*, Boston Globe (Jan. 2, 2021), http://bit.ly/2ZaeAdt; John S. McCright, *Eighty COVID Cases Traced Back to Vergennes Christmas Services*, Addison Cty. Indep. (Jan. 11, 2021), http://bit.ly/3jIftmI; Brendan Kirby, *Mobile County Church Rocked by COVID-19*, Fox10 News (Jan. 6, 2021), http://bit.ly/2OAkNx9; 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

As these examples demonstrate, a single unwitting carrier at a large worship service can cause a ripple effect throughout an entire community: One infected person may pass the virus to neighbors in the pews, who may then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members then go to the doctor's office or the grocery store, they may expose others, who may then 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 inadequate healthcare resources.

D. California's restrictions are carefully tailored to protect the public health without unduly restricting worship.

The Supreme Court's decisions to enjoin restrictions on worship services in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), and *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021), appear to rest on conclusions that those restrictions were not necessary to protect the public health. It seems that the Court viewed

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(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.

those limitations—occupancy caps of ten or twenty-five people imposed by New York and a flat ban on indoor worship imposed by California—as too harsh. *See Diocese of Brooklyn*, 141 S.Ct. at 68; *S. Bay*, 141 S.Ct. at 717 (Roberts, C.J., concurring in partial grant of injunctive relief); *id.* at 718 (statement of Gorsuch, J.). And the Court or its members pointed to many nonreligious activities that New York and California restricted less than worship services. *See Diocese of Brooklyn*, 141 S.Ct. at 66–67; *S. Bay*, 141 S.Ct. at 718–19 (statement of Gorsuch, J.).

California's current limitations on religious services—twenty-five percent of building capacity in some counties and fifty percent of building capacity in others—are much less restrictive than those enjoined in *Diocese of Brooklyn* and *South Bay*. Moreover, California's current limitations are *less* restrictive than the rules applicable to nonreligious activities that the Court or individual Justices viewed as comparable in those two cases. As the State Defendants' brief explains, because building capacities for houses of worship are calculated differently from ones for institutions such as stores, factories, offices, and warehouses, a twenty-five-percent capacity restriction for houses of worship allows *more* people to be present per square foot than are allowed in these nonreligious institutions even at full capacity. *See* State Br. 45 n.19 and citations therein. Similarly, the limitations on singing and chanting about which

Plaintiffs complain are *less* strict for worship services than for other activities. *See id.* at 41–42. Further, California has carefully tailored the restrictions that it imposes on each type of activity to the particular characteristics of the activity, based on a religion-neutral, eight-factor risk analysis performed by public-health experts. *See id.* at 13–15, 32–35.

In arguing that California's percentage-capacity restrictions discriminate against religious services, Plaintiffs point to just one allegedly comparable activity—waiting for flights at airport gates. Appellants' Br. 13–16. But identifying a single activity that is allegedly restricted less than religious services, when numerous other activities are restricted equally or more, is insufficient to trigger heightened scrutiny under the Free Exercise Clause. "The mere existence of" a single "'secular exemption'" does not "'automatically create[ ] a claim for a religious exemption.'" *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1082 (9th Cir. 2015) (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006)). "A law is not generally applicable," and triggers strict scrutiny under the Clause, only "if its prohibitions *substantially* underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *See id.* at 1079 (emphasis added); *accord Parents for Priv. v. Barr*,

949 F.3d 1210, 1235 (9th Cir.), *cert. denied*, 141 S.Ct. 894 (2020); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009).

For example, in concluding in *Diocese of Brooklyn* that New York was discriminating against worship services, the Supreme Court pointed to many less-restricted activities that it viewed as comparable, including "acupuncture facilities, camp grounds, garages," "plants manufacturing chemicals and microelectronics," "factories[,] and schools." 141 S.Ct. at 66–67. Similarly, one of the opinions in *South Bay* concluded that California's then-existing flat ban on indoor religious services was discriminatory because no similar prohibition was imposed on "shopping malls," "hairstylists," "manicurists," "movie studios," and "other businesses." *See* 141 S.Ct. at 717–20 (statement of Gorsuch, J.). And in *Lukumi*, the Court held that a law purportedly barring cruelty to animals discriminated against religion because it banned religious sacrifice while failing to prohibit fishing, "[e]xtermination of mice and rats within a home," poisoning unwanted animals in one's yard, euthanasia of stray or abandoned animals, harming animals during medical experiments, and the use of live animals as bait during hunting. *See* 508 U.S. at 543–44.

In these cases, examining broad ranges of activities, the Court identified governmental patterns of exempting various secular activities

but prohibiting religious activities that the Court viewed as analogous. A single exemption does not constitute a pattern.

Plaintiffs nevertheless point to a statement by Justice Kavanaugh in a dissenting opinion in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2613 (2020), suggesting that restricting a single secular activity less than religious activity could trigger heightened scrutiny even when numerous secular activities are restricted equally to or more than the religious conduct at issue. But no other Justice joined that dissent or took a similar position in any of the Court's other pandemic-related cases.

In any event, airport waiting areas are not analogous to houses of worship, for the reasons given by the State Defendants (*see* State Br. 36–43) and because federal guidance subjects air travel to a host of restrictions that are not applicable to religious services (*see* U.S. Dep't of Transp. et al., *Runway to Recovery* (Dec. 2020), https://bit.ly/3ftAEJh). Moreover, the Supreme Court declined to enjoin in *South Bay*, 141 S.Ct. at 716, and *Harvest Rock Church v. Newsom*, __ S.Ct. __, No. 20A137, 2021 WL 406257 (Feb. 5, 2021), California's percentage restrictions on religious services even though the plaintiffs in those cases presented the Court with the same argument concerning airports that Plaintiffs here make. *See* App. for Emergency Injunction, *South Bay*, at 34, https://bit.ly/31yzV1b;

App. for Emergency Injunction, *Harvest Rock*, at 15, 17, https://bit.ly/2O6huhc.

CONCLUSION

If there is one belief widely held among the diverse faiths that Americans have, 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. This Court should therefore affirm the denial of injunctive relief against California's application of its public-health restrictions to religious services.

Respectfully submitted,

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Date: April 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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