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SUPREME COURT OF TEXAS
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No. 20-0249

IN THE SUPREME COURT OF TEXAS

IN RE STEVEN HOTZE, M.D., HOTZE HEALTH & WELLNESS CENTER,
PASTOR JUAN BUSTAMANTE, CITY ON A HILL CHURCH,
PASTOR GEORGE GARCIA, POWER OF LOVE CHURCH, AND
PASTOR DAVID VALDEZ, WORLD FAITH CENTER OF HOUSTON CHURCH,

Relators.

Original Proceeding Pursuant to Texas Constitution art. V, § 3

BRIEF OF AMICUS CURIAE AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF RESPONDENT

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United has long fought to uphold the guarantees of the First Amendment's Religion Clauses that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, third parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Harris County, along with most of the rest of the world, is facing a pandemic. Reports indicate that COVID-19 is both more contagious and far more lethal than the common flu; and it is expected to spread exponentially across Texas. Megan Menchaca & Allyson Ortegon, *Here's how many coronavirus cases there are in Texas—and everything else you need to know*, TEX. TRIB. (updated Mar. 30, 2020), https://bit.ly/2X768fh. Leaders at all levels of government are therefore being asked to act decisively to slow transmission of the virus to protect their constituents' lives. As part of a county-wide emergency public-health response, Harris County Judge Hidalgo has issued a temporary order barring in-person

gatherings and limiting essential activities to reduce the risk of transmission.

Though this order will restrict some religious activities, it does not violate the Relators' constitutional religious-exercise rights. The U.S. Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505 U.S. 520 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. Like the virus, the order doesn't discriminate: It treats all gatherings equally regardless of motivation and allows faith leaders and houses of worship to continue operating under constraints similar to those imposed on other activities.

Because the religious-freedom guarantee of Article I, Section 6 of the Texas Constitution has historically been treated as coextensive with the federal Free Exercise Clause (*see, e.g.*, *Tilton v. Marshall*, 925 S.W.2d 672, 677 & n.6 (Tex. 1996)), the order is permissible under both constitutions. But even if this Court were to conclude that heightened scrutiny should apply, the order is still lawful because it is narrowly tailored to advance the government's compelling interest in protecting Harris County residents from a deadly disease.

What is more, the U.S Constitution's Establishment Clause forbids granting a religious exemption from the order. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of the nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding, as the Relators request, that religious gatherings must be exempted from a county public-health order would do just that. A single contagious person at a church can infect scores of fellow congregants, who may then expose countless family, friends, and strangers who did not attend the service. *See, e.g.*, *The Korean clusters: How coronavirus cases exploded in South Korean churches and hospitals*, REUTERS (Mar. 20, 2020), https://tmsnrt.rs/3amn5Wt (potentially hundreds of cases linked to a single person who attended church services while contagious).

ARGUMENT

I. THE ORDER DOES NOT IMPERMISSIBLY BURDEN RELIGIOUS EXERCISE.

It is natural that people, in difficult and scary times like these, will desire the comfort and support that their faith community provides. The freedom to worship in accordance with one's spiritual needs is a value of the highest order. But the legal guarantees of religious freedom do not provide (and never have) an absolute freedom to engage in conduct consistent with

one's religious beliefs. *E.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion); *Tilton*, 925 S.W.2d at 677. Yet the Relators argue here that the religious-exercise guarantees of both the federal Free Exercise Clause and Texas's Article I, Section 6 prohibit temporary limitations on religious gatherings in the face of a severe global pandemic. That claim is not supported by the law: "The right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

A. The order does not violate the Free Exercise Clause.

Though government cannot forbid a religious practice because it is religious, religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (Scalia, J., quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The U.S. Supreme Court has therefore explained that laws that burden religious conduct are constitutionally permissible—and need only satisfy rational-basis review—when they apply generally and are neutral toward religion. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879. County Judge Hidalgo's March 24 order easily satisfies these requirements.

1. The order is neutral toward religion.

The neutrality requirement means that a law must not "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). That prohibition bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534.

The order here evinces no hostility toward religion or houses of worship. First, it treats all gatherings the same regardless of whether they are religious in nature. Pet. Tab 2, at 3. No public or private gatherings are allowed anywhere for any purpose, including at activities designated as essential. Second, the order does not discriminate against religious institutions by designating them as "losers" compared to other businesses. *See* Pet. at 19. Both essential businesses and religious institutions are allowed to continue operating subject to universally applicable limitations that are designed to limit the spread of the virus. Just as liquor stores and box stores can continue selling their products, faith leaders can continue to minister and counsel individuals, and religious institutions can be staffed as necessary to conduct religious services virtually. Pet. Tab 2, at 4. But *all* must abide by social-distancing guidelines. Pet. Tab 2, at 4, 7.

That the order, by virtue of barring all gatherings, happens to impede religious gatherings does not amount to impermissible religious targeting.

Rather, the restrictions here merely result in precisely the sort of incidental burden on religion in service of legitimate governmental goals that does not offend the Free Exercise Clause under U.S. Supreme Court precedent.

2. The order is generally applicable.

General applicability is closely related to neutrality. *Lukumi*, 508 U.S. at 531. It means that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. In other words, government cannot restrict religious conduct while allowing substantial "nonreligious conduct that endangers [the asserted governmental] interests in a similar or greater degree." *Id.*

COVID-19 spreads through person-to-person contact, so Judge Hidalgo has ordered people not to gather in person for any reason and to follow social-distancing protocols when they must go out. The order plainly does not pursue the County's interests "only against conduct with a religious motivation" (*see id.* at 546), and the Relators have not alleged otherwise.

Excluding from the order defined categories of essential activities does not negate the order's general applicability. "All laws are selective to some extent" and need not be universal to be generally applicable (*see id.* at 542); the fundamental question is whether the categorical selections amount to discrimination against religion or religious motivations (*see id.* at 542–43). As explained, the order explicitly permits certain religious activities and treats

religious gatherings and activities no worse than comparable nonreligious gatherings and activities. Moreover, the defined categories of essential activities draw no distinctions based on religious views or motivations—hospitals and homeless shelters, for example, may remain open whether or not they have a religious affiliation. Pet. Tab 2, at 5–6; *see Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that categorical exceptions to first-come, first-serve public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants).

"[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Thus, the Relators' federal Free Exercise Clause claim fails.

B. The order does not violate Article I, Section 6 of the Texas Constitution.

This Court has never decided whether the substantive rights granted by Article I, Section 6 match exactly those granted by the federal Free Exercise Clause. *Barr v. City of Sinton*, 295 S.W.3d 287, 296 n.37 (Tex. 2009). In practice, however, the Court has typically treated the two provisions as

coextensive. *See HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649 (Tex. 2007) (applying the *Smith* rule); *Tilton*, 925 S.W.2d at 677 & n.6. The Court has used the same approach in interpreting other parallel constitutional provisions dealing with fundamental rights. *See Fort Worth Osteopathic Hosp. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004) (equal protection); *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 106 (Tex. 2003) (commercial speech). Consistent with that method, lower courts have interpreted Article I, Section 6 to create a rule similar to that of *Smith*. For example, "Texas courts have routinely rejected the notion that a facially neutral, otherwise valid restrictive covenant violates constitutional religious freedom protections if applied against a church." *Voice of Cornerstone Church Corp. v. Pizza Property Partners*, 160 S.W.3d 657, 672 (Tex. App.–Austin 2005) (collecting cases).

Relators therefore meet no greater success under the Texas Constitution.

II. THE ORDER SATISFIES STRICT SCRUTINY.

Even if the Court were to conclude that the order is not neutral and generally applicable or that the Texas Constitution offers greater legal protections than the U.S. Constitution, the Relators' religious-exercise claim would still fail, because the order is narrowly tailored to achieving a compelling governmental interest. *See Lukumi*, 508 U.S. at 531. County

Judge Hidalgo's order does that: More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand strict judicial scrutiny.

a. Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of the strict-scrutiny standard whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *see also* 42 U.S.C. § 2000bb(b) (stating that the purpose of the federal Religious Freedom Restoration Act was "to restore the compelling interest test as set forth in" *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The Court's pre-*Smith* free-exercise decisions make clear that strict scrutiny, while an exacting standard, is not "fatal in fact" (*cf. Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (regarding race discrimination)). And they routinely denied religious exemptions from laws that, like the order here, were tailored to protect public health from serious threats.

b. A compelling interest is one "of the highest order." *Lukumi*, 508 U.S. at 546. The government has a compelling interest in protecting the health and safety of the public; and in particular, it has a compelling interest in preventing the spread of disease. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20; *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655–56 (4th Cir. 1995). Indeed, an extensive body of case law reflects the

overriding importance of the government's interest in combatting communicable diseases.

"[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, the Supreme Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox more than a century ago. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (citing "the authority of a State to enact quarantine laws and 'health laws of every description'"). The Court rejected the idea that the Constitution barred such compulsion, citing 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. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). That is because "[r]eal liberty for all could not exist" in a system that allows "each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *Id.*

Since then, the Supreme Court has reaffirmed that public-health measures like mandatory immunizations that burden religious exercise withstand strict scrutiny. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that is permissible under strict scrutiny); *Yoder*, 406 U.S. at 230. Lower federal courts have also routinely recognized that the governmental interest in preventing the spread

of communicable disease is compelling. *See, e.g.*, *Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353–54 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases showing compelling governmental interest in fighting the spread of contagious disease). The County's interest here in stanching the spread of COVID-19 is no less compelling. And it calls for limiting all gatherings, including religious ones, because all gatherings necessarily undermine the government's interest in reducing transmission.

c. "A [law] is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984)); *accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984). Even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby*, 487 U.S. at 487; *see Roberts*, 468 U.S. at 628–29 (ban on all gender discrimination is narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (*see Jacobson*, 197 U.S. at 26–27) and many other courts

(*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at 1089–90 (collecting cases)) have upheld against strict judicial review blanket prohibitions on refusing immunizations.

Judge Hidalgo's order operates in the same way. No vaccine for COVID-19 yet exists, so the only way to slow its spread is to limit the number of opportunities for person-to-person transmission. Temporarily barring all in-person gatherings and enforcing social-distancing guidelines in permitted activities is how the County achieves that objective. And because the County cannot know who is infected at any given time, the order is no broader than necessary to ensure that the targeted evils—physical gatherings that create opportunities for transmission of the virus—are curtailed.

III. THE ESTABLISHMENT CLAUSE FORBIDS THE REQUESTED EXEMPTION.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. The federal Religion Clauses "mandate[] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). That neutrality requirement forbids the government both to target religion for worse treatment (*see* Part I.A, *supra*) and to grant religious exemptions that would detrimentally affect nonbeneficiaries (see *Estate of Thornton*, 472 U.S. at 709–10). For when the government does so, it prefers the religion of the

benefited over the rights, beliefs, and interests of the nonbeneficiaries, in violation of the Establishment Clause. Accepting the Relators' argument that religious gatherings must be exempted from the order would contravene this settled constitutional rule.

a. In *Estate of Thornton*, for example, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications." 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent, demonstrating that even strict scrutiny cannot require religious exemptions that harm others. In *Lee*, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the

exemption would "operate[ ] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Braunfeld*, 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. at 608–09. And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow minors to distribute religious literature 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. at 170.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) and must not "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

b. In only one narrow set of circumstances (in two cases) has the U.S. Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. In *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), the Court held that the Americans with

Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339–40 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated "church autonomy," which is "enshrined in the constitutional fabric of this country." *Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017).

This case does not implicate the narrow church-autonomy doctrine because it does not present a question regarding internal matters such as hiring clergy or determining religious membership. Rather, it presents the opposite question: whether there is a constitutional right to put countless people *outside* the church at greater risk of exposure to a deadly virus.

c. Granting the exemption here would elevate the religious beliefs of some over the health of the entire community. For Relators and others who are determined to attend in-person religious gatherings do not put only themselves in danger—they also increase the risk of contagion for everyone with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness.

The County is facing an unprecedented public-health emergency, and health professionals around the globe are still working to understand this new virus. We do not have full testing capabilities, so we do not yet have a complete picture of who and how many among us are infected. But we do know that the virus has quickly spread across the nation; that people can carry the virus for up to two weeks before showing symptoms and may be contagious in that timeframe; and that the virus is hospitalizing and killing more people each day. In response to this grave public-health threat, County Judge Hidalgo has ordered the people of Harris County to stay home for the sake of their lives. Barring all gatherings and imposing safety limitations on permitted activities will reduce contacts between people and with contaminated surfaces, slow the spread of the virus, and ultimately save lives.

If Harris County is instead forced to exempt religious gatherings and religious institutions from the order, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely as any other gathering to spread COVID-19, and the examples are sadly piling up across the country. After a choir rehearsal at a church in Mount Vernon, Washington, 45 of the 60 attendees have fallen ill and two have died from the virus. 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/340CWbd. Of 40 early cases in Bartow County, Georgia, "a large number . . . [were] linked to one church event." Portia Bruner, *Bartow County reports coronavirus cases stemming from Cartersville church event*, FOX 5 N.Y. (updated Mar. 21, 2020), https://bit.ly/2w6DXls. In Washington, D.C., some of the earliest cases were linked to a church, where the rector, the organist, and at least one congregant tested positive, and hundreds of other congregants were asked to self-quarantine. Michelle Boorstein, *The Georgetown church quarantined by D.C.'s coronavirus outbreak*, WASH. POST (Mar. 9, 2020), https://wapo.st/2X4s2zo. And several cases in New Rochelle, New York, have been linked to attendance at a Jewish synagogue. Sheena Jones & Christina Maxouris, *New York Officials traced more than 50 coronavirus cases back to one attorney*, CNN (updated Mar. 11, 2020), https://cnn.it/2JtqAPb.

A single unwitting carrier in one of the Relators' churches could cause a ripple effect through the entire community: That one carrier might pass the virus to his neighbors in the pews, who might 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 to the grocery store for milk, they may potentially 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 due to lack of healthcare resources.

The Establishment Clause forbids the government to grant religious exemptions for conduct that threatens to harm so many.

CONCLUSION

For the foregoing reasons, this Court should reject the Relators' petition for mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND DISCLOSURE

1. I certify that this brief complies with the type-volume limitation of Texas Rules of Appellate Procedure 9.4(i)(2)(D) & 11(a) because it contains 3,921 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. I certify that no fee has been or will be paid for the preparation of this brief.

Date: March 31, 2020 /s/ *Kenneth D. Upton, Jr.*

CERTIFICATE OF SERVICE

I certify that on March 31, 2020, the foregoing brief was served via e-file to all parties and their counsel:

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