UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

THEODORE JOSEPH ROBERTS, RANDALL DANIEL, and SALLY O'BOYLE, Plaintiffs, v. HON. ROBERT NEACE, HON. ANDREW BESHEAR, and ERIC FRIEDLANDER, Defendants.	Case No. 2:20-cv-00054-WOB-CJS

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER

RICHARD B. KATSKEE*
ALEX J. LUCHENITSER*
ALEXANDER GOUZOULES*†
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234
katskee@au.org
luchenitser@au.org
gouzoules@au.org

DAVID TACHAU
KATHERINE LACY CROSBY
Tachau Meek PLC
101 S. Fifth Street, Suite 3600
PNC Tower
Louisville, KY 40202-3120
(502) 238-9900
dtachau@tachaulaw.com
kcrosby@tachaulaw.com

Counsel for Amicus Curiae

**Pro hac vice* motions submitted herewith or forthcoming.
†Admitted in New York only. Supervised by Richard B. Katskee, a member of the D.C. Bar.

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IDENTITY AND INTEREST 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

This Court should deny Plaintiffs' motion for immediate injunctive relief, like Judge Hale of the U.S. District Court for the Western District of Kentucky did on April 18 in a case very similar to this one. *See Maryville Baptist Church v. Beshear*, No. 3:20-cv-00278-DJH, ECF No. 9 (W.D. Ky. Apr. 18, 2020). Kentucky, along with most of the world, is facing a pandemic. COVID-19 is both more contagious and far more lethal than the common flu; more than 2,500 confirmed cases have been identified in Kentucky so far, and more than one in twenty of those infected in the state have died so far. *See COVID-19 Hotline* (updated Apr. 19, 2020), https://govstatus.egov.com/kycovid19. In Jackson County, the number of confirmed cases jumped from zero to 305 per 100,000 residents in just four days, demonstrating how rapidly the virus can spread if left unchecked. *See* Joe Sonka, Jonathan Bullington, and David J. Kim, *Coronavirus Hot Spots Plague Kentucky, Indiana and Tennessee,* LOUISVILLE COURIER JOURNAL (updated Apr. 14, 2020),

https://bit.ly/3ei55Pr. Leaders at all levels of government have been asked to act decisively to protect their constituents' lives.

As part of a state-wide emergency public-health response (*see* Amend. Compl., ECF No. 6, ¶¶ 13-22), Kentucky's Cabinet for Health and Family Services issued an order temporarily prohibiting mass gatherings on March 19, 2020 (*see* Amend. Compl. Ex. D, ECF No. 6-4). To date, these measures have been successful. Kentucky has thus far avoided the rapid and exponential growth in cases experienced by the neighboring state of Tennessee, which had over 5,300 confirmed cases as of April 12. *See* Dan Vergano, *A Natural Coronavirus Experiment Is Playing Out In Kentucky And Tennessee*, BUZZFEED NEWS (updated Apr. 12, 2020), https://bit.ly/2XCNMTy. But continued success depends in part on compliance with public-health directives. And state officials are empowered to enforce their emergency public-health directives by a range of Kentucky statutes (*see* Amend. Compl. ¶¶ 24-25) and long-standing principles of Kentucky law (*e.g.*, *Hengehold v. City of Covington*, 108 Ky. 752, 57 S.W. 495, 496 (1900) ("The preservation of the public health has always been held a proper exercise of police power.")).

In accordance with that authority, Kentucky law enforcement has issued quarantine notices to those who have attended mass gatherings in defiance of the Cabinet's order, requesting that they quarantine in place so as not to risk further spreading of the virus. Though Plaintiffs received notices while attending religious activities, their religious-exercise rights were not violated. The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 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. The Cabinet's order prohibiting mass gatherings and law enforcement's efforts to enforce that order comply with this legal standard. Indeed, they would comply even if heightened review under the compelling-interest test were called for—which it is not—because the challenged public-health measures are narrowly tailored to advance the compelling governmental interest in protecting Kentucky residents from a deadly disease.

What is more, the Establishment Clause forbids granting Plaintiffs' desired 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 that religious gatherings must be exempted from the mass-gathering ban or that those who attend the gatherings despite the ban may disregard quarantine notices would do just that: A single contagious person at a church can infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not attend the service.

For reasons similar to those set forth here, as Judge Hale did in *Maryville Baptist Church*, many courts have rejected challenges like this case to COVID-19-related orders in recent weeks. *E.g., Legacy Church v. Kunkel*, No. 1:20-cv-327, ECF No. 29 (D.N.M. Apr. 17, 2020) (denying TRO motion in 100-page opinion); *Hotze v. Hidalgo,* No. 2020-22609 (Tex. Dist. Ct. Harris Cty. Apr. 13, 2020) (denying TRO); *Tolle v. Northam,* No. 1:20-cv-00363-LMB-MSN, ECF No. 9 (E.D. Va. Apr. 8, 2020)

(reaffirming denial of preliminary injunction); *Nigen v. New York*, No. 1:20-cv-1576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction); City News Service, *Judge Denies Church's Attempt to Hold In-Person Easter Sunday Services*, FOX 5 SAN DIEGO (Apr. 10, 2020), https://bit.ly/3ccPvTG (San Diego, California, federal judge denied TRO); Matthew Barakat, *Judge rejects lawsuit over order; no religious exemption*, WASH. POST (Apr. 9, 2020), https://wapo.st/2xiqeIE (Russell County, Virginia, state judge denied TRO); *see also Friends of Danny DeVito v. Wolf*, No. 68 MM 2020, __ A.3d __, 2020 WL 1847100, at *1 (Pa. Apr. 13, 2020) (rejecting First Amendment and other constitutional challenges by non-life-sustaining businesses); *Civil Rights Defense Firm v. Wolf*, No. 63 MM 2020, __ A.3d __, 2020 WL 1329008, at *1 (Pa. Mar. 22, 2020) (rejecting challenge brought by gun stores and others); *Brandy v. Villanueva*, No. 2:20-cv-2874, ECF No. 29 (C.D. Cal. Apr. 9, 2020) (rejecting Second Amendment challenge brought by gun stores).[1] This Court should do the same.

[1] *But see On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249, at *1 (W.D. Ky. Apr. 11, 2020) (granting ex parte TRO based on plaintiff's allegation that defendant intended to prohibit drive-in church service). Plaintiffs here briefly allege that Defendants intend to prohibit drive-in church services (*see* Amend. Compl. ¶ 62), but each Plaintiff received the challenged quarantine notices after attending a mass gathering in person (*see id.* ¶ 29), and no provision in the state orders attached to the Amended Complaint addresses drive-in services. What is more, a recent filing from Governor Beshear in *On Fire* clarified that drive-in services are *not* prohibited by the state order. *See id.*, ECF No. 27 at 1-2. Thus, there is no legal question before this Court about limitations on drive-in services.

ARGUMENT

I. THE ORDERS DO NOT VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHT OF RELIGIOUS EXERCISE.

The freedom to worship in accordance with one's spiritual needs 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 the legal guarantees of religious freedom do not provide (and never have provided) an absolute right to engage in conduct consistent with one's religious beliefs. *E.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Plaintiffs argue here that the Free Exercise Clause entitles them to an exemption from Kentucky's emergency public-health measures in the face of a severe pandemic. Mot. at 13-19. That claim is not supported by law: "The right to practice religion freely does not include liberty to expose the community . . . to a communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

The Supreme Court's Free Exercise jurisprudence makes clear that while government cannot forbid a religious practice *because* it is religious, religion-based disagreement with the law does not excuse noncompliance. As Justice Scalia wrote for the Court, "[t]o 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 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Court has therefore held that laws that place burdens on religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they apply generally and are neutral toward religion. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879.

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. General applicability is a closely related concept (*id.* at 531) that 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.* The touchstone in both inquiries is whether the government has discriminated against religious conduct. *See id.* at 533-34, 542-43.

The challenged public-health measures plainly have not. As Judge Hale explained in *Maryville Baptist Church*, the Cabinet's March 19 order "temporarily prohibits '*[a]ll* mass gatherings,' not merely religious gatherings." No. 3:20-cv-00278-DJH, ECF No. 9, at 5 (quoting Amend. Compl. Ex. D ¶ 2). It thus includes, without limitation, "sporting events; parades; concerts; festivals; conventions; fundraisers" and other types of secular gatherings. (*See* Amend. Compl. Ex. D. ¶ 2.)

Contrary to Plaintiffs' contentions (Mot. at 15-17), Kentucky's treatment of essential activities such as "life-sustaining retail" and hospitals (*see* Amend. Compl. Ex. D ¶ 3 (exempting certain essential activities); Ex. E, ECF No. 6-5 (classifying certain retail sectors such as pharmacies and grocery stores as "life-sustaining")) 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 Lukumi*, 508 U.S. at 542.

The defined categories of essential activities draw no distinctions based on religious views or motivations—hospitals and food banks, for example, may remain open regardless of whether they have a religious affiliation. *See Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (exceptions to public-housing policy did not negate general applicability because they were equally available to religious and nonreligious applicants); Amend. Compl. Ex. G, ECF No. 6-7 ¶ 1(d) (providing that "religious and secular nonprofit organizations, including food banks" may remain open to provide necessities to needy populations). The public-health measures here evince no hostility toward religion.

Nor have Defendants discriminated against religion by targeting enforcement only at religious activities. The anecdotal observations in the affidavits submitted by Plaintiffs (*e.g.*, Cox Decl., ECF No. 7-6 ¶¶ 5-6) fail to establish that nonreligious gatherings have been ignored by Kentucky authorities. On the contrary, officials in Pike County, for example, issued closure orders to a massage therapist and a cosmetologist who refused to comply with social-distancing measures. *See* Will Wright, *Closure Order Issued for KY Massage Therapist, Cosmetologist Flouting COVID-19 Rules*, LEXINGTON HERALD (Apr. 9, 2020), https://bit.ly/2VsM8B9. Basketball rims and playground swings were removed from Louisville parks to prevent people from gathering for "sporting events," a nonreligious category of mass gatherings prohibited by the Cabinet's order. *See* Darcy Costello, *A Basketball Town Without Hoops? Louisville Removes Rims At Parks to Slow Coronavirus*, LOUISVILLE COURIER JOURNAL (Mar. 26, 2020), https://bit.ly/2VvB2vd. An employee at a Kentucky senior-living center who tested positive for COVID-19 was identified by law

enforcement and ordered to stay home after she did not comply with initial requests by public-health authorities. *See* Deborah Yetter, *Court Orders Kentucky Senior Living Community Worker to Stay Home With Monitor*, LOUISVILLE COURIER JOURNAL (updated Apr. 14, 2020), https://bit.ly/2VccEzX. And in an affidavit submitted in a pending case, Louisville public-health authorities documented numerous investigations into and orders issued against secular businesses for failing to follow social-distancing requirements, including, among other businesses, a furniture store, a UPS store, and a communications company. *See On Fire Christian Center*, No. 3:20-cv-264-JRW, ECF No. 10-3 at 3-52. There is thus a comprehensive statewide effort to enforce emergency public-health directives neutrally, without regard to religion.

In sum, "the 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)). Here, the orders require Kentuckians to avoid mass-gathering events, and law enforcement is responsible for enforcing those orders against those who fail to comply for whatever reason, be it religious or secular. The governmental actions at issue are neutral and generally applicable, and Plaintiffs' religious beliefs do not excuse them from compliance.

II. THE CHALLENGED PUBLIC-HEALTH MEASURES WOULD WITHSTAND EVEN A COMPELLING-INTEREST TEST.

As explained above, Defendants' actions easily withstand the rational-basis review that applies here as a matter of law under the Free Exercise Clause. But even if a compelling-interest test applied, as it did in Free Exercise Clause cases before the

Smith decision, Plaintiffs' challenge would still fail. For more than a century of constitutional jurisprudence confirms that restrictions on religious exercise tailored to containing contagious diseases withstand strict judicial scrutiny under *any* standard.

Before the *Smith* decision, the Supreme Court interpreted the Free Exercise Clause to require application of the compelling-interest standard whenever religious exercise was substantially burdened by government action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). But even the Court's pre-*Smith* free-exercise decisions routinely denied religious exemptions from laws that protected public health from serious threats, as the challenged public-health measures were.

Government has a compelling interest in protecting the health and safety of the public, and that interest is undeniable when it comes to preventing the spread of an infectious disease that puts lives at risk. *See Sherbert*, 374 U.S. at 402-03; *accord Yoder*, 406 U.S. at 230 & n.20. An extensive body of case law reflects the overriding importance of the state 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); *see also Allison v. Cash*, 137 S.W. 245, 249 (Ky. 1911) (upholding Kentucky's exercise of its quarantine powers for suppression of smallpox outbreak). 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'"). In doing so, the Court rejected the idea that the Constitution barred such compulsion, citing the "fundamental principle" that personal liberty is subject to some 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)).

Plaintiffs question the authority of *Jacobson* by noting that it predated incorporation of the First Amendment against the States. (Mot. 12.) But after incorporation of the Free Exercise Clause in 1940 (*Cantwell v. Connecticut*, 310 U.S. 296 (1940)), the Supreme Court reaffirmed that public-health measures that burden religious exercise, such as mandatory vaccinations, withstand a compelling-interest test. *See Sherbert*, 374 U.S. at 402-03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that is permissible under a compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166-67. And lower federal courts have routinely recognized that the governmental interest in preventing the spread of communicable disease is compelling. *See, e.g.*, *Workman v. Mingo City 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 holding that government's interest in fighting spread of contagious disease is compelling); *see also Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (noting, in

case involving statutory exemptions from vaccination law, that "[c]onstitutionally, [plaintiff] has no right to an exemption").

There can be no doubt that Kentucky has a compelling interest in stanching the spread of COVID-19. And that interest calls for limiting all gatherings, including religious ones, because they necessarily undermine Kentucky's interest in reducing transmission. It also calls for requiring those who have placed themselves (and therefore others) at higher risk of infection by gathering outside their homes to self-quarantine rather than expose others to the virus. As the Supreme Court of Pennsylvania recently explained:

> The enforcement of social distancing to suppress transmission of the disease is currently the only mitigation tool. Recent models for the COVID-19 pandemic predict that about 60,000 Americans will die. Although a staggering death toll, it is lower than earlier predictions that between 100,000 and 240,000 Americans would die—even if the nation abided by social distancing. The reason for the drop in the death toll projection is *the enforcement of social distancing mechanisms and citizen[s'] compliance with them*.

Friends of DeVito, 2020 WL 1847100, at *13 (emphasis added, citations omitted). A more compelling governmental interest is difficult to imagine.

The compelling-interest test also requires that the challenged law be narrowly tailored to address the governmental interest at stake. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). But even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby*, 487 U.S. 474, 485 (1988); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628-29 (1984) (holding that a ban on gender discrimination is narrowly tailored to combatting evil of gender discrimination). Accordingly, the U.S. Supreme Court (*see Jacobson*, 197 U.S. at 26-27), the highest court of Kentucky (*see Mosier v. Barren Cty.*

Bd. of Health, 215 S.W.2d 967, 969 (Ky. 1948)), and many other federal and state courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at 1089-90 (collecting cases)) have upheld under even strict judicial review blanket prohibitions on refusing immunizations.

The challenged public-health measures operate in the same way. No vaccine for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, OEI-06-20-00300, *Hospital Experiences Responding to the COVID-19 Pandemic* (Apr. 2020), https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf, at 3. Without the capacity to test comprehensively for the virus, Plaintiffs' assertion that they have not been diagnosed with it (Mot. at 5-6) is meaningless, and therefore irrelevant here, as Kentucky cannot possibly tailor its measures toward only those who have obtained a test and received a positive diagnosis. Temporarily limiting in-person gatherings, and enforcing quarantines against those who disregard these limitations, is the only way for Kentucky to achieve its compelling objective. As Judge Hale explained in *Maryville Baptist Church*, "COVID-19 is widely understood to be transmitted through person-to-person contact, including persons with and without symptoms of illness" (No. 3:20-cv-00278-DJH, ECF No. 9, at 6), so the measures that Kentucky has taken are no broader than necessary to ensure that the targeted evils—physical gatherings creating an opportunity for the virus to spread—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 permit imposing the costs or 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)). This neutrality requirement forbids government both to target religion for worse treatment (*see* Part I, *supra*) and to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton*, 472 U.S. at 709-10). For when government does either of those, it prefers the religion of the benefited over the rights, beliefs, and interests of the nonbeneficiaries, in violation of the Establishment Clause. Granting Plaintiffs a religious exemption from the Cabinet's order or from quarantine notices would contravene this settled constitutional rule.

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 making them bear costs "to offset the benefit bestowed on subscribers to religious publications." 498 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent with this principle, demonstrating that even under a heightened compelling-interest standard, the First Amendment cannot require religious

exceptions 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 doing so, the Court cited *Jacobson* and noted that case's rejection of an exemption from vaccination laws. *Id.* at 166 & n.12; *see also Mosier*, 215 S.W.2d at 833 ("There may be no interference with appellant's . . . religious belief against vaccination, but he may not endanger the health of the community by refusing to have his daughter vaccinated.").

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.

In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when the Establishment and Free Exercise Clauses together prohibited the

government from involving itself in the ecclesiastical structuring of religious institutions. 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 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 improper religious favoritism, and therefore were permissible under the Establishment Clause, because both Religion Clauses limit governmental intrusion into the internal organizational structure of churches.

This case does not implicate the narrow ecclesiastical-authority doctrine because Plaintiffs' challenge to Kentucky's public-health enforcement does not present a question regarding "religious organizations[']autonomy in matters of internal governance" (*Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring)). 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.

Granting an exemption here would elevate the religious beliefs of Plaintiffs over the health of the entire community. For Plaintiffs and others who are determined to ignore the temporary mass-gathering bans and flout quarantine notices do not put only themselves in danger. They also increase the risk of contagion for everyone with whom they come into contact, including the elderly, the immunocompromised, and all others at elevated risk of severe illness.

Kentucky faces an unprecedented public-health emergency. Though much about the virus remains unknown, what we do know demands a strong response: The virus has spread quickly across the nation; people can carry the virus for up to two weeks before showing symptoms and may be contagious without even knowing that they are sick; and the virus is hospitalizing and killing more people each day. Limiting permitted activities and issuing quarantine notices to those who do not comply will reduce contacts between people and contaminated surfaces, slow the spread of the virus, and save lives.

If Plaintiffs are instead allowed to defy the Cabinet's order and ignore law enforcement because of their religious beliefs, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely to spread COVID-19 as any other mass gatherings, and the examples are tragically numerous. For example, a church event in Louisville last month has been "linked to at least 28 cases . . . and two deaths." Bailey Loosemore & Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020), https://bit.ly/2XkKCnd. Officials in Sacramento County, California, traced roughly a third of the county's more than 300 confirmed cases back to church gatherings. 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. Similarly, about a quarter of all cases in the state of Kansas are "tied to religious gatherings." Anna Christianson & Tiffany Littler, *Gov. Kelly issues executive order to limit church gatherings, funerals*, KSNT (updated Apr. 7, 2020), https://bit.ly/3bZV0F5.

A single unwitting carrier in one church could cause a ripple effect throughout 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 grocery store or the hospital, they may potentially expose essential retail workers or healthcare providers, 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, putting healthcare workers at particular risk because of shortages of personal protective equipment (*see* OEI-06-20-00300) and increasing the chances that people will 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

Plaintiffs' emergency motion for a temporary restraining order or for preliminary injunctive relief should be denied.

Respectfully submitted,

/s/ *David Tachau*

RICHARD B. KATSKEE*
ALEX J. LUCHENITSER*
ALEXANDER GOUZOULES*†
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, D.C. 20005
(202) 466-3234
katskee@au.org
luchenitser@au.org
gouzoules@au.org

DAVID TACHAU
KATHERINE LACY CROSBY
Tachau Meek PLC
101 S. Fifth Street, Suite 3600
PNC Tower
Louisville, KY 40202-3120
(502) 238-9900
dtachau@tachaulaw.com
kcrosby@tachaulaw.com

Counsel for Amicus Curiae

Date: April 19, 2020

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* *Pro hac vice* motions filed herewith or forthcoming.
† Admitted to practice in New York only. Supervised by Richard B. Katskee, a member of the D.C. Bar.