CAUSE NO. 2020-22609

STEVEN HOTZE, M.D.,	§	IN THE DISTRICT COURT
Hotze Health & Wellness Center,	§	
THOMAS DELAY,	§	
PASTOR JUAN BUSTAMANTE,	§	
City on a Hill Church,	§	
PASTOR GEORGE GARCIA,	§	
Power of Love Church,	§	
PASTOR DAVID VALDEZ,	§	
World Faith Center of Houston	§	
Church, and	§	281ST JUDICIAL DISTRICT
PASTOR JOHN GREINER,	§	
Glorious Way Church,	§	
Plaintiffs,	§	
v.	§	
	§	
LINA HIDALGO, in her official	§	
capacity as Harris County Judge, and	§	
HARRIS COUNTY,	§	
Defendants.	§	HARRIS COUNTY, TEXAS

Brief of Amicus Curiae
Americans United for Separation of Church and State
in Support of Defendants

PATRICK GRUBEL
Attorney in Charge
State Bar No. 24106034
grubel@au.org
KENNETH D. UPTON, JR.
State Bar No. 00797972
upton@au.org
Americans United for Separation
of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234 (phone)
(202) 466-3353 (fax)
Counsel for Amicus Curiae

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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. COVID-19 is both more contagious and far more lethal than the common flu; more than 13,000 Texans have been infected, and approximately one out of every fifty of them has died thus far. Megan Menchaca & Allyson Ortegon, *Here's how many coronavirus cases there are in Texas—and everything else you need to know*, TEX. TRIB. (updated Apr. 12, 2020), https://bit.ly/2X768fh. Leaders at all levels of government have therefore been asked to act decisively to protect their constituents' lives. Harris County leads Texas in the number of confirmed COVID-19 cases, having more than double the number of infections and nearly twice the number of deaths as the next highest county (Dallas). *Id.* As part of a county-wide emergency public-health response, and consistent with statewide orders and guidance, Harris County Judge Hidalgo has temporarily limited in-person gatherings and activities to reduce the risk of transmission.

Though County Judge Hidalgo's orders restrict some religious activities, they do not violate Plaintiffs' religious-exercise rights. 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 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. The stay-at-home order, as modified on April 3, 2020, treats religious gatherings no worse than nonreligious gatherings and allows faith leaders and houses of worship to continue operating under constraints similar to those imposed on other permitted activities.

Nor does a challenge to County Judge Hidalgo's order fare any better under the Texas Religious Freedom Restoration Act (or under heightened constitutional scrutiny if the Texas Constitution were to be construed to require it). The stay-at-home order is still lawful because it is narrowly tailored to advance the compelling governmental interest in protecting Harris County residents from a deadly disease.

What is more, the U.S Constitution's 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, as Plaintiffs request, that

religious gatherings must be completely exempted from the 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 family, friends, and strangers, including countless people who did not attend the service.

ARGUMENT AND AUTHORITIES

I. THE ORDER DOES NOT VIOLATE THE TEXAS CONSTITUTION'S GUARANTEE OF RELIGIOUS FREEDOM.

A. The Order Does Not Trigger Heightened Scrutiny Under the Texas Constitution.

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 provided, absolute license to engage in conduct consistent with one's religious beliefs. *E.g.*, *Tilton*, 925 S.W.2d at 677; *accord Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion). Yet Plaintiffs argue here that the religious-exercise guarantee of Article I, Section 6 of the Texas Constitution flatly prohibits temporary limitations on religious gatherings even 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); *accord In re Abbott*, No. 20-50264, __ F.3d __, 2020 WL 1685929, at *1 n.1, 6 (5th Cir. Apr. 7, 2020).

The Texas Supreme Court has not conclusively resolved whether the substantive rights granted by Article I, Section 6 exactly match 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 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. And it has used the same approach in interpreting other state constitutional provisions dealing with fundamental rights, treating them as consistent with their federal constitutional counterparts. *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).

Under the federal Free Exercise Clause, though government cannot forbid a religious practice *because it is religious*, religion-based disagreement with the law does not excuse noncompliance. As Justice Scalia explained for the U.S. Supreme Court in *Smith*, "[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." 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The U.S. Supreme Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy rational-basis review only—when they apply generally and are neutral toward religion. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879. "[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)). Similarly interpreting Article I, Section 6, "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).

County Judge Hidalgo's order easily satisfies the requirements of neutrality and general applicability.

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. On the contrary, it treats religious services as "essential services." *Order Extending and Amending Order of County Judge Lina Hidalgo, Stay Home, Work Safe,* Apr. 3, 2020, § 2(b)(i), https://www.readyharris.org/stay-home (incorporating *GA-14 Essential Service Designation*, Texas Division of Emergency Management, http://tdem.texas.gov/essentialservices/ (last visited Apr. 12, 2020)).[1] And while the order generally prohibits public or private gatherings anywhere for any purpose, including at activities designated as essential, it permits worship services to be held

[1] *Amicus* cites the version of the amendment to Judge Hidalgo's order that is available on the Harris County website, because the version attached to the Petition is missing substantive text that is cut off on the right-hand margin.

in person if they cannot be held virtually. Pet. Ex. A, at 3; *Order Extending and Amending*, § 2.a.vi. Moreover, the order permits faith leaders to minister and counsel in individual settings, and it allows religious institutions to be staffed as necessary to conduct religious services virtually (or, when permitted, in person). Pet. Ex. A at 4; *Order Extending and Amending*, § 2.a.vi. Thus, just as it does with respect to other activities that it designates as essential, the order permits houses of worship to continue to provide their functions in a manner that minimizes risks to public health and complies with physical-distancing guidelines.

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 County Judge Hidalgo has generally prohibited public and private gatherings. Pet. Ex. A, at 3. The order plainly does not pursue the County's interests "only against conduct with a religious motivation." *See id.* at 546. Indeed, it permits in-person religious services when they cannot be conducted remotely. *Order Extending and Amending*, § 2.a.vi.

Because "[a]ll laws are selective to some extent," they need not be universal to be generally applicable; the fundamental question is whether the scope of a law's coverage amounts to discrimination against religion or religious motivations. *See id.*

at 542–43. As explained, Judge Hidalgo's order explicitly permits certain religious activities and treats religious gatherings and activities no worse (and in some respects better) than comparable nonreligious gatherings and activities. Moreover, in addition to designating religious activities themselves as essential, the order draws no distinctions based on religious views or motivations with respect to the other activities that it defines as essential—hospitals and homeless shelters, for example, may remain open whether or not they have a religious affiliation. Pet. Ex. A, at 5–6; *cf. Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that limited categorical exceptions to public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants).

* * *

Thus, as it is both neutral and generally applicable, Judge Hidalgo's order does not violate Article I, Section 6 of the Texas Constitution.

B. The Order Satisfies The Compelling Interest Test.

But even if the Court were to conclude that Judge Hidalgo's order requires heightened scrutiny under Article I, Section 6, the order would still be lawful because it is narrowly tailored to achieving a compelling governmental interest. *See Lukumi*, 508 U.S. at 531. More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand strict judicial scrutiny. Hence, many courts have rejected similar challenges to COVID-19-related orders in recent weeks. *See Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, ECF No. 9 (E.D. Va. Apr. 8, 2020) (copy

attached) (reaffirming and expounding upon denial of preliminary injunction); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020) (copy attached) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (copy attached) (denying preliminary injunction); City News Service, *Judge Denies Church's Attempt to Hold In-Person Easter Sunday Services*; Fox5SanDiego.com (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 In re Abbott*, __ F.3d __, 2020 WL 1685929, at *1–2 (vacating TRO that suspended restrictions on abortion); *Civil Rights Defense Firm v. Wolf*, No. 63 MM 2020, 2020 WL 1329008, at *1 (Pa. Mar. 22, 2020) (rejecting challenge brought by gun stores and others).

Before its decision in *Smith* in 1990, the Supreme Court interpreted the federal Free Exercise Clause to require application of the compelling interest test (i.e., strict scrutiny) 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 the test, while exacting, 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.

1. The order serves a compelling governmental interest.

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, more than a century ago, the U.S. Supreme Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. *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 straightforwardly rejected the idea that the Constitution barred such compulsory measures to protect health, 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)). Because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," individual rights are subject to reasonable restrictions—especially during a public-health emergency such as the one that we now face. *In re Abbott*, __ F.3d __, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 27).

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 mass gatherings, including religious ones, because all mass gatherings necessarily undermine the governmental interest in reducing transmission.

2. The order is narrowly tailored.

The compelling interest test requires that the challenged law be narrowly tailored to the interest at stake. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29

(1984) (ban on all gender discrimination is narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *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 concluded that blanket prohibitions on refusing immunizations satisfy strict judicial review.

County 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 restricting 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. Indeed, the Order's restrictions on religious activities are closely tailored to the circumstances of particular houses of worship: congregations that can conduct religious services remotely must do so, while those that cannot may hold in-person services that comply with physical-distancing guidelines. *Order Extending and Amending*, § 2.a.vi.

II. THE TEXAS RELIGIOUS FREEDOM RESTORATION ACT DOES NOT REQUIRE AN EXEMPTION.

The Texas Religious Freedom Restoration Act imposes the compelling-interest test when the government substantially burdens religious exercise. Tex. Civ. Prac. & Rem. Code § 110.003. The test set forth in the Act is the same as in the analogous federal statute (*compare id.* § 110.003(b) *with* 42 U.S.C. § 2000bb-1), which in turn incorporates pre-*Smith* federal free-exercise case law on the

application of the compelling interest test (42 U.S.C. § 2000bb). Indeed, the Act specifically directs courts to consider federal free-exercise case law when determining whether there is a compelling governmental interest. *Id.* § 110.001(b).

Assuming for the sake of argument that Judge Hidalgo's order substantially burdens Plaintiffs' religious exercise under the Act and triggers the compelling-interest test, the order satisfies the test for the reasons already explained. Accordingly, Plaintiffs meet no greater success under the Act than they do under the Texas Constitution.

Plaintiffs dedicate many pages to questioning whether Texas and the County have taken the "right" steps to address this pandemic. (Pet. at 11–17.) But as the U.S. Court of Appeals for the Fifth Circuit recently explained, *Jacobson* unambiguously left that determination to the other branches of government. *In re Abbott*, __ F.3d __, 2020 WL 1685929, at *6. "[C]ourts may not second-guess the wisdom or efficacy of the [emergency public-health] measures." *Id.* at *7. And while Plaintiffs suggest that the severity of the order's penalties makes the order not narrowly tailored (*see* Pet. at 18), the Act forecloses that conclusion: Government "is not required to separately prove that the . . . penalty provision[ ] of the law . . . [is] the least restrictive means to ensure compliance or to punish the failure to comply." Tex. Civ. Prac. & Rem. Code § 110.003(c).

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 not just to target religion for worse treatment (*see* Part I, *supra*) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton*, 472 U.S. at 709–10). For when the government purports to accommodate the religious exercise of some by shifting costs or other burdens to others, it prefers the religion of the benefited over the rights, beliefs, and interests of the nonbeneficiaries, in violation of the Establishment Clause. Accepting Plaintiffs' argument that religious gatherings must be fully 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 making them pay "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 religious exemptions that harm others cannot be required even under the compelling-interest test. In *Lee*, 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." 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. For "[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." *Jacobson*, 197 U.S. at 26.

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 special protections for ecclesiastical authority because it does not present questions 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 deadly disease.

c. Granting the exemption here would elevate the religious beliefs of some over the health of the entire community. For Plaintiffs and others who are determined to host or attend in-person religious gatherings do not put only

themselves in danger; they also increase the risk of contagion for everyone with whom they, their parishioners, and their families 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 without even knowing that they are sick; 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 everyone's protection. Limiting 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 completely 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. Officials in Sacramento County, California, for example, have 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, 2:55 PM), 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 4:13 PM), https://bit.ly/3bZV0F5. A church event in Kentucky 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 9:24 AM), https://bit.ly/2XkKCnd. And several cases in New Rochelle, New York, have been linked to attendance at a 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 Plaintiffs' 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.[2]

[2] Based on the controlling legal principles explained above, *amicus*'s position is that Judge Hidalgo's order in fact exempts too much, violating the Establishment Clause to the extent that it permits houses of worship to hold in-person services if they

CONCLUSION

For the foregoing reasons, this Court should reject Plaintiffs' request for a complete religious exemption from the County's order.

Respectfully submitted,

/s/ *Patrick Grubel*

PATRICK GRUBEL
State Bar No. 24106034
grubel@au.org
KENNETH D. UPTON, JR.*
State Bar No. 797972
upton@au.org
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234 (phone)
(202) 466-3323 (fax)

Of Counsel:

RICHARD B. KATSKEE
Legal Director
ALEX J. LUCHENITSER
Associate Legal Director
Americans United for Separation of Church and State

Date: April 13, 2020

* Admitted in Texas and Oklahoma only. Supervised in the District of Columbia by Richard B. Katskee, a member of the D.C. Bar.

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cannot do so remotely. This case does not, however, challenge the exemption as overly broad.

CERTIFICATE OF SERVICE

I certify that on April 13, 2020, the foregoing brief was served via e-file to all parties and their counsel:

Jared R. Woodfill
State Bar No. 00788715
WOODFILL LAW FIRM, P.C.
3 Riverway, Suite 750
Houston, Texas 77056
(713) 751-3080 (phone)
(713) 751-3058 (fax)
woodfillservice@gmail.com
Counsel for Plaintiffs

Seth Hopkins
State Bar No. 24032435
HARRIS COUNTY ATTORNEY'S OFFICE
1019 Congress, 15th Floor
Houston, TX 77002
(713) 274-5141
seth.hopkins@cao.hctx.net
Counsel for Defendants

/s/ *Patrick Grubel*