IN THE CIRCUIT COURT OF RUSSELL COUNTY

LARRY HUGHES, *Plaintiff*, v. RALPH S. NORTHAM, *Defendant.*	)	Civil Case No. CL20-415

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

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

Virginia, along with most of the rest of the world, is facing a dangerous pandemic. The virus that causes COVID-19 is significantly more deadly than the seasonal flu, and there is no pre-existing immunity to it. *E.g.*, Katie Mettler, *How the coronavirus compares with the flu*, WASH. POST (Mar. 20, 2020, 3:30 PM), https://wapo.st/3b3xC9L. Leaders at all levels of government have therefore been asked to act decisively to slow transmission of the virus to protect their constituents' lives. As part of a state-wide emergency public-health response, Governor Northam has issued a temporary order barring all in-person gatherings that would put ten or more people in close proximity.

Though this order does have the effect of limiting some of the petitioner's religious activities, it does not violate his 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. And Virginia courts follow federal case law in interpreting the religious-freedom protections contained in the Virginia Constitution. *See, e.g.*, *In re Episcopal Church Property*, 76 Va. Cir. 884, at *8 (Fairfax Cnty. Cir. Ct. 2008) ("If a statute satisfies the Establishment and Free Exercise Clauses of the U.S.

[1] A motion for leave to file accompanies this brief.

Constitution, it is also consistent with the Virginia Constitution's corresponding religious freedom provisions."). Governor Northam's order complies with this case law. Like the virus, the order doesn't discriminate: The order 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.

But even if the order were to trigger heightened scrutiny, it is still lawful because it is narrowly tailored to serve the state's compelling interest in protecting all Virginians 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 petitioner requests, that religious motives justify violating the state 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.

ARGUMENT

I. THE ORDER DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT OF 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 right to engage in conduct consistent with one's religious beliefs. *E.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion); *Roberts v. Roberts*, 41 Va. App. 513, 523 (2003). Yet the petitioner argues here that the religious-exercise guarantee of

the Virginia Constitution entitles him to an exemption from the state's temporary limitations on gatherings in the face of a severe 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*, __ F.3d __, No. 20-50264, 2020 WL 1685929, at *1 n.1, 6 (5th Cir. Apr. 7, 2020).

As Governor Northam has explained, the protections for religious exercise in the Virginia Constitution are the same as those contained in the U.S. Constitution. (Def.'s Mem. in Opp. to Mot. for Temp. Injunction, at 11–12.) The U.S. Supreme Court's Free Exercise Clause doctrine makes clear that, 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 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Court has therefore held 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. The order here satisfies those requirements.

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), and the Governor's order here plainly has not. It evinces no hostility toward religion. It treats all gatherings the same regardless of whether they are religious in nature; no gatherings that would put ten or more people in close contact are allowed anywhere for any purpose. Executive Order Fifty-Five (2020) (Northam) (E.O. 55) ¶ 2. And while people may leave their homes only for a highly restricted set of purposes, one of the permitted purposes is traveling to and from places of worship. *Id.* ¶ 1(f).

The stay-at-home order's treatment of essential activities such as healthcare and food banks (*id.* ¶ 7) does not negate its 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, for example, may remain open whether or not they have a religious affiliation. *See Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (categorical exceptions to public-housing policy did not negate general applicability because they were equally available to religious and nonreligious applicants).

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)).

II. THE ORDER SATISFIES STRICT SCRUTINY.

Even if this Court were to conclude that strict scrutiny should apply under the state constitution, the petitioner's 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. More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand strict judicial scrutiny. Moreover, several courts have

rejected similar challenges to COVID-19-related orders in recent weeks. *See Nigen v. New York*, No. 1:20-cv-01576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction); *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).

a. Before its decision in *Smith* in 1990, the U.S. 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 recognized that there is no religious-exercise right to 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 U.S. 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)). 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 during a public health emergency. *In re Abbott*, __ F.3d __, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 27).

Since then, the U.S. Supreme Court has reaffirmed that public-health measures that burden religious exercise, such as mandatory immunizations, 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; *Prince*, 321 U.S. at 166–67. 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 state'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 U.S. 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.

The Governor'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 limiting in-person gatherings and enforcing social-distancing guidelines in permitted activities is how the state achieves that objective. And because the state 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 permit 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, *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. Granting the petitioner a religious exemption from the Governor's 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 with this principle, 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 *Corp. 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 petitioner and others who are determined to participate in large 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.

Virginia is facing an unprecedented public-health emergency. There much yet to learn about this new virus, but what we do know about it calls for a strong response: it has quickly spread across the nation; people can carry the virus for up to two weeks before showing symptoms and may be contagious in that timeframe; and the virus is hospitalizing and killing more people each day. Barring all in-person gatherings of a certain size and limiting permitted activities, as Governor Northam has done, will reduce contacts between people and with contaminated surfaces, slow the spread of the virus, and ultimately save lives.

If instead the petitioner—and all others who follow suit—are allowed to defy the Governor's order on religious grounds, 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, 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. 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 church 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 petitioner's request for a religious exemption from the Governor's order.

Respectfully submitted,

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[2] If necessary to be listed on this brief, attorneys Luchenitser and Grubel will file *pro hac vice* applications forthwith, and respectfully request temporary admission *pro hac vice* until they can do so, pursuant to Rule of Court 1A:4(3).

CERTIFICATE OF SERVICE

I certify that on April 9, 2020, a true and accurate copy of the foregoing brief was sent by mail and email to:

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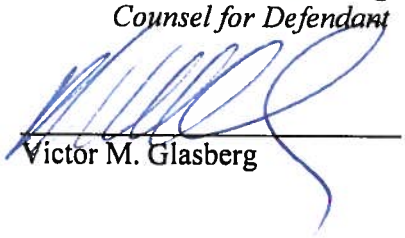

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