No. 20-55445

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY GISH, *et al.*,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, *et al.*,

Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the Central District of California
Case No. 5:20-cv-00755, Hon. Jesus G. Bernal

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
ALEXANDER GOUZOULES*
Americans United for
Separation of Church and
State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
katskee@au.org
luchenitser@au.org
gouzoules@au.org

*Admitted in New York only.
Supervised by Richard B.
Katskee, a member of the
D.C. Bar.

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus Americans United for Separation of Church and State is a nonprofit organization. It has no parent corporations, and no publicly held corporation owns any portion of it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Constitution and Statutes

TABLE OF AUTHORITIES—continued

Other Authorities

INTERESTS OF THE *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 religion and government. 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

Amicus agrees with Defendants that this appeal and the motion for an injunction pending appeal are premature, as the district court has not yet ruled on Plaintiffs' preliminary-injunction motion. But if the Court considers the merits of Plaintiffs' substantive arguments, it should reject them.

California, along with most of the world, continues to face a devastating pandemic. The United States has suffered the most COVID-19-

[*] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

related deaths worldwide (*see* Associated Press, *20,000: US Death Toll Overtakes Italy's as Midwest Braces* (Apr. 11, 2020), https://bit.ly/2YcRDXJ), and the death toll in California continues to climb (*see* Diya Chacko, *Coronavirus Today: The Threat of a Second Wave*, L.A. TIMES (Apr. 22, 2020), https://lat.ms/2RYYOPl). This emergency demands decisive action from leaders at all levels of government, and evidence suggests that the early response by California officials has saved lives. *See* Rong-Gong Lin II et al., *Social Distancing may have Helped California Slow the Virus and Avoid New York's Fate*, L.A. TIMES (Mar. 31, 2020), https://lat.ms/2VSbYih. That response includes the orders challenged by Plaintiffs: Executive Order N-33-20 issued by Governor Newsom on March 19 (Mot. for Injunction, Ex. B) and the April 7 order of the Public Health Officer of San Bernardino County (*id.*, Ex. C). Under these orders, residents are temporarily required to remain in their homes, gatherings are temporarily prohibited, and non-essential businesses are temporarily closed. *See* Mot. for Injunction, Ex. B, ¶ 1; Ex. C ¶ 3.

Although the challenged orders have the effect of temporarily limiting certain of Plaintiffs' religious activities, Plaintiffs' constitutional rights have not been violated. The district court correctly concluded that the orders are subject only to, and easily withstand, minimal judicial scrutiny because they are temporary executive actions taken in response to a national emergency.

See Mot. for Injunction, Ex. A at 5–6. But the state and county orders also satisfy traditional constitutional analysis.

The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. The challenged orders comply with this legal standard (which should also govern Plaintiffs' claims under the California Constitution's free-exercise guarantee). The virus is just as likely to spread at religious events as at nonreligious ones, so the orders apply to all gatherings equally. Indeed, the orders should be upheld 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 California residents from a deadly disease and are appropriately tailored to achieving that end.

What is more, far from invalidating the orders, the Establishment Clause forbids granting Plaintiffs' desired religious exemption. 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

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 orders' prohibition on gatherings would do just that: A single contagious person at a religious service can infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not attend the service.

The district court's decision below aligns with rulings by many courts in recent weeks rejecting similar challenges to COVID-19-related public-health orders. *See Cross Culture Christian Center v. Newsom*, No. 2:20-cv-832-JAM-CKD, ECF No. 23 (E.D. Cal. May 5, 2020) (denying TRO); *Roberts v. Neace*, No. 2:20-cv-054, ECF. No. 46 (E.D. Ky. May 4, 2020) (denying preliminary injunction with respect to religious services), *appeal docketed*, No. 20-5465 (6th Cir. May 5, 2020); *Cassell v. Snyders*, No. 3:20-cv-50153, ECF No. 39 (N.D. Ill. May 4, 2020) (denying TRO and preliminary injunction), *appeal filed*, ECF No. 46 (May 4, 2020); *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-2040-AWA-RJK, ECF No. 16 (E.D. Va. May 1, 2020) (same), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Legacy Church, Inc. v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327-JB-SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (denying TRO in 100-page opinion); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-00683-BAS-

AHG, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020) (reaffirming and explaining legal basis for preliminary injunction), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020) (denying TRO); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction). And while the Sixth Circuit recently granted an injunction pending appeal allowing drive-in religious services, that court declined to extend the injunction to in-person services (*see Maryville Baptist Church, Inc. v. Beshear*, __ F.3d __, No. 20-5427, 2020 WL 2111316, at *5 (6th Cir. May 2, 2020)), and Plaintiffs acknowledge that drive-in services are not prohibited by the challenged orders here (*see* Mot. for Injunction at 5 n.6). The motion for an injunction pending appeal should be denied.

ARGUMENT

I. The Challenged Orders Do Not Violate The Free Exercise Clause of the First Amendment.

A. Rational-Basis Review Applies to the Challenged Orders.

The freedom to worship 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.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). Plaintiffs argue that the Free Exercise Clause entitles them to an exemption from California's emergency public-health measures in the face of a severe pandemic. That claim is wrong as a matter of law: "The right to practice religion freely does not include liberty to expose the community . . . to a communicable disease." *Id.*

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 Supreme 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). The Free Exercise Clause thus bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534. General applicability is the closely related concept (*id.* at 531) 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 orders have in no sense discriminated against religious conduct but instead apply to religious and secular activities equally. *See* Mot. for Injunction, Ex. B ¶ 1 (ordering "all individuals" to stay at home except as needed to maintain critical infrastructure or for essential activities); *id.* Ex. C ¶ 3 (ordering all non-

essential businesses to remain closed). Nor is their general applicability undermined by their exceptions for essential activities such as obtaining food at a grocery store. "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 shelters, for example, may remain open (Mot. for Injunction, Ex. L at 17, 27) 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).

Simply put, "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 "prescribe and proscribe the same conduct for all, regardless of motivation" and are therefore neutral and generally applicable. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015). Plaintiffs' religious beliefs do not afford a constitutional excuse from compliance.

B. The Orders Would Satisfy Even A Compelling-Interest Test.

Even if a compelling-interest test were to apply to Plaintiffs' religious-exercise claims, as it did in Free Exercise Clause cases before the *Smith* decision, Plaintiffs' challenge would still fail. More than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand even compelling-interest scrutiny.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest 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) (purpose of 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)). 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 do here. For 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.

"[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 more than a century ago 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 compulsory measures to protect health, 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)).

Following incorporation of the Free Exercise Clause against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court relied on *Jacobson* to reaffirm that state public-health measures burdening religious exercise 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 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 "state's wish to prevent the spread of communicable diseases clearly constitutes a compelling

interest." *Workman v. Mingo City Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011); *accord 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."); *see also 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).

There can be no doubt that California and its counties have a compelling interest in stanching the spread of COVID-19. And that interest calls for limiting all gatherings, including religious ones, so as not to undermine governmental efforts to reduce transmission of 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 Danny DeVito v. Wolf, __ A.3d __, No. 68 MM 2020, 2020 WL 1847100, at *13 (Pa. Apr. 13, 2020) (citations omitted). A more compelling governmental interest is difficult to imagine.

A compelling-interest test, if it applied, would also ask whether the challenged orders are narrowly tailored to address this governmental interest. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). That, too, is true here. 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, 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 combating evil of gender discrimination). Accordingly, the U.S. Supreme Court (*see Jacobson*, 197 U.S. at 26–27) and many other federal and state courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at 1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy a compelling-interest test.

The public-health measures here 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://bit.ly/3fjvLjt, at 3. Without the capacity to test comprehensively for the virus, Plaintiffs' assertions that their congregants are "healthy" (*e.g.*, Mot. for Injunction at 6) are of no moment, as California and its counties cannot safely limit restrictions to those who have actually

been able to be tested and have received a positive diagnosis. Temporarily limiting in-person gatherings is the only way for California and the counties to achieve their compelling objective of saving lives. And the orders are no broader than necessary to ensure that the targeted activities—physical gatherings that create opportunities for transmission of the virus—are curtailed. At the same time, the orders are carefully tailored to restrict religious activities only as necessary to achieve that goal: Places of worship can remain open and people can seek spiritual fulfillment there, including through "drive-in" religious services.

II. The Challenged Orders Do Not Violate Plaintiffs' Religious-Exercise Rights Under the California Constitution.

Plaintiffs' arguments fare no better when repackaged as claims under the California Constitution's free-exercise guarantee (CAL. CONST. art. I § 4). As an initial matter, a federal court may not enjoin state officials to comply with state law, so Plaintiffs are barred from seeking injunctive relief against the State Defendants on claims that Executive Order N-33-20 violates the California Constitution. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Vasquez v. Rackauckas*, 734 F.3d 1025, 1041 (9th Cir. 2013). What is more, even if the San Bernardino Defendants are not considered to be state officials (*but see Vasquez*, 734 F.3d at 1041 (county district attorney considered state rather than local official when taking certain actions)), Plaintiffs have advanced no argument as to how an

injunction could be cabined so as to apply to county officials and the county order only and yet still provide the relief that Plaintiffs seek. *Cf.* Mot. for Injunction at ix (referring to the state and San Bernardino orders collectively and seeking an injunction against both).

In all events, Plaintiffs' claims under the California Constitution would fail even if this Court could consider them. Although the California Supreme Court has not formally decided whether the *Smith* standard governs free-exercise claims under the California Constitution (*see N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008)), it has historically "applied the federal and state free exercise clauses interchangeably, without ascribing any independent meaning to the state clause" (*Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 90–91 (Cal. 2004))—strongly suggesting that *Smith*'s rational-basis analysis governs. The challenged public-health orders easily meet that standard. *See* Section I.A, *supra*.

But as already explained (*see* Section I.B, *supra*), the emergency public-health measures here would withstand challenge even under a compelling-interest test, were that the applicable standard. Indeed, the California Court of Appeals, assuming without deciding that the compelling-interest test applied, has held that the free-exercise guarantee of the California Constitution did not mandate a religious exemption from

a mandatory-vaccination law. *See Brown v. Smith*, 235 Cal. Rptr. 3d 218, 224–25 (Cal. Ct. App. 2018); *see also Love v. State Dep't of Educ.*, 240 Cal. Rptr. 3d 861, 873 (Cal. Ct. App. 2018). The California Constitution provides Plaintiffs with no right to an exemption here.

III. The Establishment Clause Neither Requires Nor Allows the Requested Exemption.

The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Because the challenged orders treat religious gatherings the same way as analogous nonreligious gatherings, Plaintiffs are wrong in arguing that the orders violate the Establishment Clause. Rather, it is *granting* the religious exemption that Plaintiffs seek that would violate the Establishment Clause. For the neutrality requirement of the First Amendment's Religion Clauses forbids the government not just to target religion for worse treatment (*see* Section I.A, *supra*) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton*, 472 U.S. at 709–10).

A. The Challenged Orders Do Not Violate the Establishment Clause.

The district court correctly concluded that the challenged orders do not violate the Establishment Clause. By treating religious and

nonreligious activities equally (*see* Section I.A, *supra*), the orders straightforwardly comply with the Establishment Clause's mandate of governmental neutrality toward religion. *See McCreary*, 545 U.S. at 860. Nor can Plaintiffs legitimately argue that California and the Counties lack a predominantly secular purpose in combating the pandemic or that they have improperly endorsed or entangled themselves with religion by issuing public-health orders. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011).

The County Defendants did not improperly favor some religions over others by allowing drive-in church services on Easter. (*Cf.* Mot. for Injunction at 13 & n.12.) After initially allowing drive-in services for that occasion (*see* Mot. for Injunction, Ex. E at 14), the Counties—as well as California—made clear that services conducted in that way will be allowed permanently (*see id.* at 5 n.6). Thus, California and the Counties are treating all religions equally. And Plaintiffs acknowledge that there is now no issue relating to drive-in services in this case. *Id.* at 5–6 & n.6.

B. The Establishment Clause Forbids Government To Grant The Exemption That Plaintiffs Seek.

Far from requiring the religious exemption that Plaintiffs seek, the Establishment Clause forbids it. 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. For when government purports

to accommodate the religious exercise of some by shifting costs or burdens to others, it prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. *See, e.g.*, *Estate of Thornton*, 472 U.S. at 709–10. Exempting Plaintiffs from the challenged orders 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, demonstrating that even under a compelling-interest standard, the First Amendment 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 have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Braunfeld v. Brown*, 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. 599, 608–09 (1961) (plurality opinion). 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 reaching that conclusion, the Court in *Prince* cited *Jacobson* and noted that case's rejection of an exemption from vaccination laws. *Id.* at 166 & n.12.

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 detrimentally affected, 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 government from involving itself in the 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 that narrow ecclesiastical-authority doctrine because Plaintiffs' challenge to the state and county public-health measures does not present any 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 Plaintiffs' churches at greater risk of exposure to a deadly virus.

Granting an exemption here would elevate Plaintiffs' religious beliefs over the health of the entire community. For the exemption that Plaintiffs seek would not put only themselves in danger. It would also increase the risk of contagion for everyone with whom the members of Plaintiffs' churches come into contact, including, most especially, the elderly, the immunocompromised, and all others at elevated risk of severe illness.

California 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 may carry the virus for up to two weeks before showing symptoms; and the infected may be contagious without even knowing that they are sick. Temporarily limiting permitted activities will reduce contacts among people and between people and contaminated surfaces, slow the spread of the virus, and save lives.

If Plaintiffs are instead allowed because of their religious beliefs to ignore the critical public-health orders at issue, 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. Officials in Sacramento County, for example, traced

roughly a third of that County's first several hundred 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. Seventy-one cases were tied to one Sacramento church alone. Tony Bizjak, et al., *71 infected with coronavirus at Sacramento church. Congregation tells county 'leave us alone,'* SACRAMENTO BEE (Apr. 2, 2020), https://bit.ly/2yOL4jk. A church service in West Virginia led to a cluster of infections that devastated a small community. Joe Severino, *COVID-19 tore through a black Baptist church community in WV. Nobody said a word about it.*, CHARLESTON GAZETTE-MAIL, https://bit.ly/2SFVYyX. And after a church-choir practice—at which members attempted to observe social-distancing and hygiene guidance—45 out of 60 attendees fell ill, and two tragically died. Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6.

The short of it is that a single unwitting carrier in one church could cause a ripple effect throughout an entire community: They might pass the virus to neighbors in the pews, who might then return home and pass it to family members, including people at high risk of severe illness. If they then go to the hospital or the grocery store, they may potentially expose healthcare providers or other essential workers, 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 a lack of healthcare resources.

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

CONCLUSION

For the foregoing reasons, the motion for an injunction pending appeal should be denied.

Respectfully submitted,

s/ *Alex J. Luchenitser*
RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
ALEXANDER GOUZOULES*
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
katskee@au.org
luchenitser@au.org
gouzoules@au.org

*Admitted in New York only. Supervised by Richard B. Katskee, a member of the D.C. Bar.

Counsel for Amicus Curiae

Date: May 5, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s): 20-55445

I am the attorney or self-represented party.

This brief contains 4,733 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Alex J. Luchenitser **Date** May 5, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*