No. 20-1507

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Calvary Chapel of Bangor,

Plaintiff-Appellant,

v.

Janet Mills, in her official capacity as Governor of the State of Maine,

Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the District of Maine
Case No. 1:20-cv-00156-NT, Hon. Nancy Torresen

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

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae 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.

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Interest of the *Amicus 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 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

The motion for an injunction pending appeal is premature, as the district court has ruled only on Plaintiff Calvary Chapel of Bangor's motion for a temporary restraining order (*see* Order Deny'g TRO, ECF No. 27, at 23) and has not yet ruled on Calvary's motion for a preliminary injunction (*see id.*; Pl.'s TRO Mot., ECF No. 3, at 1). But if the Court considers the merits of Calvary's substantive arguments, it should reject them.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its 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.

Maine, along with most of the world, continues to face a devastating pandemic. The United States has suffered the most COVID-19-related deaths worldwide. See Christina Maxouris & Eric Levenson, *US coronavirus death toll passes 80,000 as states move to phased reopening*, CNN (May 11, 2020), https://cnn.it/2WOXvUz. And the number of cases and the death toll in Maine are still climbing. See Kevin Miller, *Three more deaths, 50 new COVID-19 cases reported in Maine*, PORTLAND PRESS HERALD (May 14, 2020), https://bit.ly/2LFrlG4.

This emergency demands decisive action from leaders at all levels of government. As part of Maine's emergency statewide public-health response, Governor Mills has temporarily prohibited in-person gatherings that would put more than ten people in close proximity, restricted the operations of businesses that are permitted to remain open, and ordered residents to stay at home. *See* Compl. Exs. B–D, ECF Nos. 1-2, 1-3, and 1-4. Reports from other regions suggest that orders of this type have been successful in limiting transmission of COVID-19. *See, e.g.*, *The State of Our State's Coronavirus Fight*, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq; 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.

Although the Governor's orders do temporarily limit Calvary's ability to conduct certain religious activities, Calvary's religious-exercise rights have not been 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*, 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 restrictions here comply with this principle: The virus is just as likely to spread at religious events as at nonreligious ones, so the orders apply to all these in-person gatherings equally, regardless of motivation. But even if heightened scrutiny were called for—which it is not—the orders still should be upheld because they are narrowly tailored to advance Maine's compelling interest in protecting its residents from a deadly disease.

What is more, the Establishment Clause of the First Amendment forbids granting the religious exemption that Calvary seeks. 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 in-person religious gatherings must be exempted from the 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.

For reasons similar to those set forth here, the overwhelming majority of decisions considering religion-based challenges to COVID-19-related public-health orders—including orders by the Fourth, Seventh, and Ninth Circuits denying injunctions pending appeal—have rejected them. Calvary's motion for an injunction pending appeal should likewise be denied.

Argument

I. The Mass-Gathering Ban Does Not Violate The Free Exercise Clause.

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

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 have never provided absolute license to engage in conduct consistent with one's religious beliefs. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). Yet Calvary argues

that the Free Exercise Clause entitles it to an exemption from Maine's temporary emergency public-health measures enacted to combat a 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." *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. "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 Supreme Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they are neutral toward religion and apply generally. *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). The touchstone in both inquiries is whether the government has discriminated against religious conduct. *Lukumi*, 508 U.S. at 533–34, 542–43. Governor Mills plainly has not.

Maine's orders evince no hostility toward religion. They ban all mass gatherings that would bring more than ten people together, whether for religious or secular activities. Compl. Ex. B, ECF No. 1-2, at 1. The Governor's orders thus bar "concerts, conventions, fundraisers, parades, fairs, and festivals" and "any similar event or activity in a venue such as an auditorium, stadium, arena, large conference room, meeting hall, theatre, gymnasium, fitness center[,] or private club." *Id.* The meaning of that facially neutral blanket prohibition is unchanged by the enumeration of religious gatherings in the non-exhaustive list of types of prohibited gatherings (*see id.*), for religious gatherings would fall within its scope regardless.

That the orders allow essential retail businesses—such as those providing grocery, pharmacy, medical, and other similar services (Compl. Ex. C, ECF No. 1-3, at 2)—to remain open to the public does not negate their general applicability. "All laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542–43. "[E]xpress exceptions for objectively defined categories of persons" thus do not trigger heightened scrutiny under the Free Exercise Clause. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *accord Ill. Bible Coll. Ass'n v. Anderson*, 870 F.3d 631, 640–41 (7th Cir. 2017); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134–35 (9th Cir. 2009); *see also Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) (recognizing difference between free-exercise challenges to "general prohibition[s]," which are subject to rational-basis review, and challenges to "system[s] of individual exemptions," which are subject to heightened scrutiny (citing *Smith*, 494 U.S. at 883–85)). Rather, heightened scrutiny applies under the Free Exercise Clause only when the scope of a law's coverage demonstrates animus toward religious conduct. *See Lukumi*, 508 U.S. at 542–46.

The orders here exhibit no such animus. They restrict analogous nonreligious gatherings—including those at theaters and social clubs, for

example—no less than religious gatherings. *Cf. Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, U.S. Dep't of Justice (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls). Moreover, the permitted retail activities further Maine's interest in safeguarding public health by ensuring that people can obtain items essential to health and survival. *See Stormans,* 586 F.3d at 1134–35 (exemptions that directly or indirectly further governmental interest at issue do not undermine general applicability).

Nor is the general applicability of the orders undermined by permitting nonessential businesses, like theaters, fitness centers, and salons, to continue to operate in a limited capacity. *See* Compl. Ex. 3, ECF No. 1-3, at 3. Under the Governor's orders, nonessential businesses may continue to perform activities that "do not allow customer, vendor[,] or other visitor in-person contact," as long as their employees are able to do so while adhering to social-distancing measures. *Id.* In other words, nonessential businesses may remain open for employees to do things like take phone orders, maintain inventory, and process payroll. *Id.* Calvary's comparisons to the permitted employment activities of nonessential businesses are inapt, for the orders expressly forbid nonessential

businesses to open their doors to the public or host mass public gatherings in person—the very things that Calvary wants to do. And, of course, there's nothing to suggest that Calvary and other houses of worship fail to qualify as nonessential businesses within the meaning of the orders, so clergy and their staff may go to their houses of worship to carry out permitted functions. They just cannot hold mass gatherings.

In addition, the orders' defined categories of businesses draw no distinctions based on religious views or motivations. *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). Hospitals, residential treatment facilities, and food banks, for example, may remain open (*see* Compl. Ex. 3, ECF No. 1-3, at 2) regardless of whether they have a religious affiliation. The scope of the orders therefore does not work any unconstitutional discrimination against religious activity, and heightened scrutiny does not apply.

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

Even if this Court were to conclude that the prohibition on in-person gatherings must satisfy heightened scrutiny, Calvary's free-exercise claim 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 test 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 restraint "in order to secure the . . . health . . . of the state." *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

The Supreme Court has repeatedly reaffirmed that public-health regulations that burden religious exercise withstand heightened judicial scrutiny. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that satisfies compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that the government has a compelling interest in preventing the spread of communicable disease. *See, e.g.*, *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); *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").

Indeed, as this Court has recognized, "few interests are more central to a state government than protecting the safety and well-being of its citizens." *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018). There can be no doubt that Maine has a compelling interest here in stanching the spread of COVID-19. And that interest calls for limiting all mass gatherings, including religious ones, so as not to undermine governmental efforts to reduce transmission of the virus.

The compelling-interest test, if it applied, would also call for determining whether the challenged order is 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); *accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (ban on all gender discrimination was narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (*see Jacobson*, 197 U.S. at 26–27) and many other courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at

1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy a compelling-interest test.

The mass-gathering ban operates 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/2VTEMIm, at 3. Without the capacity to test comprehensively for the virus, Maine cannot tailor its restrictions solely to those residents who have received a positive diagnosis. So temporarily banning in-person mass gatherings is the only way for the State to achieve its compelling interest in safeguarding the lives and health of its residents.

To suggest, as Calvary does, that the ban is not narrowly tailored because in-person mass-gathering events could be carried out with social-distancing measures in place ignores the obvious: Barring large gatherings entirely is more likely to reduce transmission of COVID-19 than permitting large gatherings with attempts at social distancing. Under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal.

Ashcroft v. ACLU, 542 U.S. 656, 665 (2004); *accord Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002). That is the case here. For example, a Texas church and a Georgia church that had reopened recently had to close again after church leaders and members contracted the virus despite social-distancing measures. Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x. Similarly, a church service in Canada that complied with social-distancing guidelines nonetheless led to an outbreak that infected half of those present. Chris Epp, *'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience*, CTV NEWS (updated May 11, 2020), https://bit.ly/3dLUv2l.

C. The Vast Majority Of Courts To Consider Similar Free-Exercise Challenges To COVID-19-Related Orders Have Rejected Them.

For reasons similar to those set forth above, numerous decisions around the country—including orders of the Fourth, Seventh, and Ninth Circuits denying injunctions pending appeal—have rejected challenges like this one to in-person-gathering restrictions and stay-at-home orders. For example, the Seventh Circuit recently explained in an order denying a motion for an injunction pending appeal:

> Executive Order 2020-32 responds to an extraordinary public health emergency. The Executive Order does not discriminate against religious activities, nor does it show hostility toward religion. It appears instead to impose neutral and generally applicable rules . . . . [Its] temporary numerical restrictions on public gatherings apply not only to worship services but also to the most comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus. Worship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods.

Elim Romanian Pentecostal Church v. Pritzker, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020) (unpublished) (per curiam) (Easterbrook, Kanne, & Hamilton, JJ.) (citation omitted), *denying motion for injunction pending appeal of* __ F. Supp. 3d __, No. 1:20-cv-2782, 2020 WL 2468194 (N.D. Ill. May 13, 2020).

Likewise, in denying a motion for injunction pending appeal in an order designated for publication, the Ninth Circuit noted that "where state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." *S. Bay United Pentecostal Church v. Newsom*, __ F.3d __, No. 20-55533, ECF No. 29, at 3 (9th Cir. May 22, 2020) (quoting *Lukumi*,

508 U.S. at 543). In another case in which the Ninth Circuit denied a motion for an injunction pending appeal, a California district court held that because challenged state and local "orders apply to both religious and secular gatherings, they do not discriminate, and are therefore facially neutral." *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970, at *5–6 (C.D. Cal. Apr. 23, 2020) (unpublished), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020) (unpublished). And in a case in which the Fourth Circuit denied a motion for injunction pending appeal, a Virginia district court held not only that the plaintiff was unlikely to succeed on the merits but also that the balance of equities favored the state because "it is no exaggeration to recognize that the stakes for residents . . . are life-or-death." *Tolle v. Northam*, No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (unpublished), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020) (unpublished), *petition for cert. docketed*, No. 20-1419 (U.S. May 12, 2020).

Many other federal courts have reached similar conclusions when evaluating challenges like this one. *See, e.g.*, *Antietam Battlefield KOA v. Hogan*, __ F. Supp. 3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *7–10, 12–14 (D. Md. May 20, 2020) (denying preliminary injunction), *appeal*

docketed, No. 20-1579 (May 22, 2020); *Spell v. Edwards*, __ F. Supp. 3d __, No. 3:20-cv-282, 2020 WL 2509078, at *2–4 (M.D. La. May 15, 2020) (denying TRO and preliminary injunction); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111, at *5–7 (E.D. Cal. May 5, 2020) (denying TRO), *appeal docketed*, No. 20-15977 (9th Cir. May 19, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *6–11 (N.D. Ill. May 3, 2020) (denying TRO and preliminary injunction), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *4–8 (E.D. Va. May 1, 2020) (denying preliminary injunction), *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, at *30–38 (D.N.M. Apr. 17, 2020) (denying TRO in 100-page opinion); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *2–3 (E.D. Tenn. Apr. 17, 2020) (unpublished) (denying TRO); *Nigen v. New York*, No. 1:20-cv-01576, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020) (unpublished) (denying TRO).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—have courts issued injunctive relief in religion-based challenges to COVID-19 orders. *See Roberts v. Neace*, __ F.3d __, No. 20-

5465, 2020 WL 2316679 (6th Cir. May 9, 2020) (per curiam order on motion for injunction pending appeal); *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (same); *Berean Baptist Church v. Cooper*, __ F. Supp. 3d __, No. 4:20-cv-81, 2020 WL 2514313 (E.D.N.C. May 16, 2020); *Tabernacle Baptist Church v. Beshear*, __ F. Supp. 3d __, No. 3:20-cv-33, 2020 WL 2305307 (E.D. Ky. May 8, 2020); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). But this set of decisions incorrectly concluded that the compelling-interest test applied to the orders at issue because of categorical exemptions for nonreligious activities—such as office work or walking down a store aisle (*see, e.g.*, *Neace*, __ F.3d __, 2020 WL 2316679, at *4)—that are quite different from religious gatherings and pose lesser risks of transmission of the virus. *See supra* Section I.A. Moreover, in determining that the restrictions were not narrowly tailored (*see, e.g.*, *Neace*, __ F.3d __, 2020 WL 2316679, at *4), these cases incorrectly ignored the fact that social-distancing measures are less effective than outright bans. *See supra* Section I.B. And a recent Fifth Circuit order partially granting an injunction pending appeal did not make clear

whether it was based on constitutional grounds or on preemption of the local order at issue by a state order. *See First Pentecostal Church v. City of Holly Springs*, No. 20-60399, ECF No. 515426773, at 2 (5th Cir. May 22, 2020) (per curiam) (unpublished).

II. The Establishment Clause Forbids Government To Grant The Exemption That Calvary Seeks.

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 First Amendment's Religion Clauses "mandate[ ] 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)). This neutrality requirement forbids the government not just to target religion for worse treatment (*see supra* Section I.A) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton*, 472 U.S. at 709–10). 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.*, *id.* Exempting Calvary from the challenged order 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 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 a compelling-interest test. In *United States v. 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 a minor to distribute religious literature because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free . . . to make martyrs of their children." 321 U.S. at 170. "Real 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.

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 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*, 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. 565 U.S. 171, 194–95 (2012). And in *Corporation of the Presiding Bishop v. Amos*, the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. 483 U.S. 327, 339–40 (1987). These exemptions did not amount to impermissible 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 special protection for ecclesiastical authority because it does not present questions regarding internal matters such as hiring clergy or determining religious membership. Rather, it presents a far different question: whether there is a constitutional right to put countless people *outside* the church at greater risk of exposure to deadly disease.

Granting an exemption here would elevate Calvary's religious preferences over the health of the entire community. By holding in-person religious gatherings, Calvary would not only put its members in danger but also increase the risk of contagion for everyone outside the congregation with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness.

Maine is facing an unprecedented public-health emergency. Though much about the virus remains unknown, what we do know—that "asymptomatic individuals may carry and spread the virus, and there is currently no known vaccine or effective treatment" (*Cassell*, __ F. Supp. 3d __, 2020 WL 2112374, at *1)—demands a strong response. Restricting in-person gatherings will reduce contacts between people and contaminated surfaces, slow the spread of the virus, and save lives.

If Maine is instead forced to exempt Calvary—and therefore also all other houses of worship that want exemptions—everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely to spread COVID-19 as are other mass gatherings, and the examples are tragically numerous. Officials in Sacramento County, California, for example, traced roughly a third of the 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. After a church-choir practice—at which members attempted to observe distancing and hygiene guidance—45 out of 60 attendees fell ill, and two 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. A single church event in Louisville 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. And 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 (May 2, 2020), https://bit.ly/2WxQyae. *See also supra* p. 14 (describing additional COVID-19 outbreaks stemming from religious services).

A single unwitting carrier at one of Calvary's worship services could cause a ripple effect throughout the entire community: That one infected but asymptomatic individual 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 any of 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 government to grant religious exemptions for conduct that threatens so much harm to so many.

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 5,178 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font measuring no less than 14 points.

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