No. 20-1419

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES TOLLE,

Plaintiff-Appellant,

v.

GOVERNOR RALPH NORTHAM; COMMONWEALTH OF VIRGINIA,

Defendants-Appellees.

On Appeal from the Order of the United States District Court
for the Eastern District of Virginia
Case No. 1:20-cv-363, Hon. Leonie M. Brinkema

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

VICTOR M. GLASBERG
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
(703) 684-1100
vmg@robinhoodesq.com

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of record*
KENNETH D. UPTON, JR.
PATRICK GRUBEL
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1419 Caption: Tolle v. Northam

Pursuant to FRAP 26.1 and Local Rule 26.1,

Americans United for Separation of Church and State
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Alex J. Luchenitser Date: May 26, 2020

Counsel for: Americans United, amicus curiae

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IDENTITY AND INTEREST OF *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

We are facing a pandemic. The United States has by far the most reported COVID-19 cases and deaths worldwide (*see COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited May 25, 2020, 6:00 PM), https://bit.ly/2xR2V99), and the numbers in Virginia continue to climb (*see* Rebecca Tan, et al., *Known coronavirus deaths and cases in D.C., Maryland and Virginia*, WASH. POST (updated May 25, 2020, 11:35 AM), https://wapo.st/2Sqc4wA). As part of a statewide emergency public-health response, Governor Northam temporarily limited the size of

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

in-person gatherings and otherwise restricted the operations of many businesses to reduce the risks of contagion. These measures likely slowed transmission of the virus in Virginia (*see* Amended Executive Order Sixty-One, at 1 (2020) (Northam) (E.O. 61)), and reports from other regions show similar successes (*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, 5:00 AM), https://lat.ms/2VSbYih). Weakening the State's response now risks reversing that progress and accelerating the virus's spread.

Although the Governor's order has the effect of limiting the size of religious gatherings, Plaintiff'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. Governor Northam's order complies with this principle. But even if heightened scrutiny were to apply here, the order would still be valid, because it is narrowly tailored to advance the State's compelling interest in protecting Virginia residents from a deadly contagious disease.

What is more, the Establishment Clause forbids granting an exemption from the order for religious services. 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 Governor's public-health order 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 choose to attend the event.

For reasons similar to those set forth here, the overwhelming majority of decisions to consider religion-based challenges to COVID-19-related public-health measures—including orders by this Court and the Seventh and Ninth Circuits denying motions for injunctions pending appeal—have denied relief. The district court's decision should likewise be affirmed.[2]

[2] This brief addresses Plaintiff's claims only insofar as they relate to religious services.

ARGUMENT

I. THE ORDER DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

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

The freedom to worship in accordance with one's spiritual needs is a right of the highest order, and it is natural that, in difficult and scary times like these, people will seek the comfort and support that their faith communities provide. But 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). The Free Exercise Clause therefore does not entitle Plaintiff to an exemption from the temporary, emergency public-health measures enacted by the Governor to combat a pandemic. "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).

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)). Rather, the Court

has held that laws that burden religious conduct need satisfy mere rational-basis review when they are neutral toward religion and apply generally. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879. Governor Northam's order satisfies these requirements.

1. The order is neutral toward religion.

The neutrality requirement means that a law must not "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). That prohibition bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534; *see also Cent. Rabbinical Cong. v. Dep't of Health*, 763 F.3d 183, 194 (2d Cir. 2014) (law not neutral because it purposefully and exclusively regulated specific religious practice).

The order here was "designed [not] to suppress religious belief or practice" (*Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995)) but instead to suppress a "virulent and deadly disease" (E.O. 61 at 1). Nor has it "singled out religious practices for discriminatory treatment" (*Am. Life League*, 47 F.3d at 654): The order currently applicable to the relevant region of Virginia facially subjects all gatherings, regardless of purpose, to the same ten-person limit. *See* Amended Executive Order Sixty-Two (2020) (Northam) (E.O. 62) § 8. And while the order permits people to leave their homes for only a limited set of purposes, one of those is traveling to and from

places of worship. *Id.* § 7(f). The order thus does not subject religious activities to any special disfavor. *See Am. Life League*, 47 F.3d at 654 (law was religiously neutral because it "punish[ed] conduct for the harm it cause[d], not because the conduct [wa]s religiously motivated"); *see also Cent. Rabbinical Cong.*, 763 F.3d at 195 (law is neutral when it "encompass[es] *both* secular and religious conduct" and "extend[s] well beyond isolated groups of religious adherents").

2. The order is generally applicable.

General applicability is closely related to neutrality. *Lukumi*, 508 U.S. at 531. It means that government cannot impose a "'burden[ ] *only* on conduct motivated by religious belief.'" *Liberty Univ. v. Lew*, 733 F.3d 72, 99 (4th Cir. 2013) (alteration and emphasis in original) (quoting *Lukumi*, 508 U.S. at 543). The Governor's order generally prohibits gatherings of more than ten people, and it specifically permits travel to places of worship while barring most other out-of-home activities. It therefore does not pursue the State's interests "only against conduct with a religious motivation." *See Lukumi*, 508 U.S. at 546.

That the order permits more than ten people to be present separately in essential businesses—such as hospitals and grocery stores (E.O. 62 §§ 3, 13)—does not negate its general applicability because it does not permit groups of more than ten people to congregate in such places (*see id.* § 8). In

all events, even if the order were to be construed as exempting essential businesses from the mass-gathering prohibition—which it does not—"[a]ll 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" do not by themselves trigger heightened scrutiny under the Free Exercise Clause. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009) ("That the . . . regulations recognize some exceptions cannot mean that the [state] has to grant all other requests for exemption to preserve the 'general applicability' of the regulations."). Rather, heightened scrutiny is triggered only when the scope of a law's coverage is so underinclusive that it demonstrates animus toward religious conduct. *See Lukumi*, 508 U.S. at 542–46 (explaining that city ordinances ostensibly aimed at protecting public health and preventing animal cruelty worked exclusively to bar Santeria religious animal sacrifice while leaving other animal slaughter unaffected); *see also Cent. Rabbinical Cong.*, 763 F.3d at 197 (regulation aimed at reducing infections was not generally applicable because it applied exclusively to a particular religious practice that accounted for only ten percent of cases).

Governor Northam's order exhibits no such animus. It equally limits the size of any gathering, including educational lectures, parties, social

clubs, parades, and political conferences. *See* E.O. 62 § 8. Indeed, by allowing people to travel to places of worship for purposes that do not involve gatherings of more than ten people (*id.* § 7(f)), the order treats religious gatherings and places of worship *more* favorably than both those similar nonreligious gatherings and many nonreligious places of assembly, including restaurant dining rooms, movie theaters, concert halls, and museums (*see* E.O. 62 §§ 1, 2). *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).

Religious services are not analogous to retail-store operations that are permitted by the Governor's order. *See* E.O. 62 §§ 3. It was reasonable for the Governor to conclude that briefly walking through a retail store poses a lesser public-health risk than sitting in a room with scores of people for an extended period. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (law is not "fatal[ly] underinclusiv[e]" when it targets only "conduct most likely to undermine" relevant governmental interest). Research demonstrates that "events where people spen[d] a length of time in each others' close company," such as parties, funerals, and religious gatherings, pose a notably higher risk of spreading the virus than fleeting interactions.

See Philip Oltermann, et al., *The cluster effect: how social gatherings were rocket fuel for coronavirus*, GUARDIAN (Apr. 9, 2020), https://bit.ly/369Sb2B; *see also What to do if you were potentially exposed to coronavirus disease*, VA. DEP'T OF HEALTH (updated May 14, 2020) (noting that being "[w]ithin 6 feet . . . of a person who has . . . COVID-19 . . . for at least 10 minutes" carries especially high risk of transmission), https://bit.ly/3bEjoeF.

What is more, exemptions that directly or indirectly further the governmental interest at issue do not undermine general applicability. *See Stormans*, 586 F.3d at 1134–35. Here, the retail activities designated as essential further Virginia's interest in safeguarding public health during the COVID-19 crisis. If in combating the virus the Governor were to close grocery stores, pharmacies, gas stations, banks, medical suppliers, laundromats, and similar services (*cf.* E.O. 62 § 3), the health crisis would be exacerbated. Medical professionals' ability to treat COVID-19 patients would be impaired without supplies and reliable transportation, and the entire medical system would suffer greater strain from additional illness and injury caused by the public's inability to eat, treat existing illnesses, and maintain sanitary living conditions.

Finally, the Governor's order draws no distinctions based on religious views or motivations with respect to permitted activities and locations—hospitals, food banks, and other charities, for example, may continue to

operate whether or not they have a religious affiliation (*see* E.O. 62 § 7(b)). *See Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–11 (2d Cir. 2012) (law governing labeling of kosher products was generally applicable because it applied to all sellers and protected all customers regardless of religious belief or affiliation); *Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that categorical exceptions to public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants). The order's scope therefore does not work any unconstitutional discrimination against religious activity, and heightened scrutiny does not apply.

B. The Order Would Satisfy Even a Compelling Interest Test.

Even if the Court were to conclude that the Governor's order must satisfy heightened scrutiny, the order would do so. More than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand a compelling-interest test.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of the 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) (stating that 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 repeatedly acknowledged that there is no right to religious exemptions from laws, like the order here, that shield the public from serious disease.

1. The order serves a compelling governmental interest.

Government has a compelling interest in protecting the health and safety of the public in general and in preventing the spread of communicable diseases in particular. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20; *Am. Life League*, 47 F.3d at 655–56. "[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). The Court straightforwardly rejected the idea that the Constitution bars 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)). Because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," individual rights are subject to reasonable restrictions—especially during a public-health emergency like the one that we now face. *See Jacobson*, 197 U.S. at 27.

Following incorporation of the Free Exercise Clause against the states (*see Cantwell*, 310 U.S. at 303), the Supreme Court relied on *Jacobson* to reaffirm that state public-health measures burdening religious exercise withstand a compelling-interest inquiry (*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 this Court has likewise recognized that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353–54 (4th Cir. 2011); *see also McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th 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 recognizing compelling governmental interest in fighting spread of contagious disease).

There can be no doubt that Virginia has 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.

2. The order is narrowly tailored.

A compelling-interest test, if it applied, would also consider whether the challenged order is narrowly tailored to the governmental interest at stake. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982). Narrow tailoring does not, however, demand "perfect tailoring." *Williams-Yulee*, 575 U.S. at 454. And 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, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (ban on all gender discrimination narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *Jacobson*, 197 U.S. at 26–27)) and many other courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at 1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy a compelling-interest test.

Governor Northam's order 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* CHRISTI A. GRIMM, U.S. DEP'T OF HEALTH & HUMAN SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC 3 (Apr. 2020), https://bit.ly/2VTEMIm. Without the capacity to test comprehensively, temporarily restricting the size of in-person gatherings and enforcing social distancing and hygiene in permitted activities is the only way for Virginia to achieve its compelling objective of saving lives. The order is no broader than necessary to ensure that the targeted activities—physical gatherings that create a significant risk of transmission of the virus—are curtailed.

Any suggestion that the order is not narrowly tailored because in-person mass-gathering events could be carried out with social-distancing measures in place would ignore 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 state's goal. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). That is the case here. For example, churches in Texas and Georgia that had reopened recently had to close again after church leaders and members contracted the virus at church 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 this Court's earlier order in this case (ECF No. 14) and orders of the Seventh and Ninth Circuits—have rejected challenges like this one. For example, the Seventh Circuit recently explained in denying a motion for 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) (Easterbrook, Kanne, & Hamilton, JJ.) (per curiam) (citations 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, 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). And in another case in which the Ninth Circuit denied a motion for an injunction pending appeal, a California district court held that because the 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), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020).

Many other federal and state 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), *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); *Calvary Chapel of Bangor v. Mills*, __ F. Supp. 3d __, No. 1:20-cv-156, 2020 WL 2310913, at *6–10 (D. Me. May 9, 2020), *appeal docketed*, No. 20-1507 (1st Cir. May 11, 2020); *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), *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), *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), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 1905586, at *30–38 (D.N.M. Apr. 17, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *2–3 (E.D. Tenn. Apr. 17, 2020); *Nigen v. New York*, No. 1:20-cv-01576, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020); *see also Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-00674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 2020); *Elkhorn Baptist Church v. Brown*, No. S067736 (Ore. May 23, 2020); *Hughes v. Northam*, No. CL 20-

415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. 281st Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—has any injunctive relief been granted 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); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). But those decisions incorrectly held that the compelling-interest test was applicable, on the grounds that the challenged orders contained categorical exemptions for nonreligious activities—such as office work or walking down a store aisle (*see Neace,* __ F.3d __, 2020 WL 2316679, at *4)—that are not analogous to religious services and pose less danger of spreading the virus. *See supra* Section I.A.2. And in concluding that restrictions on large religious gatherings were not

narrowly tailored to preventing transmission of the virus (*see, e.g.*, *Neace*, __ F.3d __, 2020 WL 2316679, at *4), those cases incorrectly ignored the fact that social-distancing measures are less effective at preventing transmission than outright bans of large gatherings. *See supra* Section I.B.2. Separately, a recent Fifth Circuit order granting a partial injunction pending appeal did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption of the local order at issue by a state order. *Compare First Pentecostal Church v. City of Holly Springs*, No. 20-60399, Doc. No. 515426773, at 2 (5th Cir. May 22, 2020) (per curiam order), *with id.*, Doc. No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).

II. GRANTING AN EXEMPTION FOR RELIGIOUS SERVICES WOULD VIOLATE THE ESTABLISHMENT CLAUSE.

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 County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This neutrality requirement forbids 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 religious services from the challenged order would contravene this settled constitutional rule.

a. In *Estate of Thornton*, for example, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries" by making them pay "to offset the benefit bestowed on subscribers to religious publications." 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent, demonstrating that religious exemptions that harm others cannot be required even under 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. 252, 261 (1982). 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). And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow a minor to distribute religious literature, because of the danger that the exemption would have posed to the child's welfare. 321 U.S. at 170. That is because "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) and must not "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When

nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

b. In only one narrow set of circumstances (in two cases) has the 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 Evangelical Lutheran 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 impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated "church autonomy." *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 that special protection for ecclesiastical authority because it does not present questions regarding "religious organizations['] autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). 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.

c. Granting an exemption here would elevate Plaintiff's religious preferences over the health of the entire community. By holding religious gatherings, Plaintiff's church would not only put its members in danger but 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. As the Northern District of Illinois recognized, COVID-19 has already killed more Americans "than the number of people who perished during the 9/11 terrorist attacks, Pearl Harbor, and the Battle of Gettysburg combined." *Cassell*, __ F. Supp. 3d __, 2020 WL 2112374, at *1. Though much about the virus remains unknown, what we do know demands a strong response. Limiting permitted gatherings and activities will reduce contacts between people, slow the spread of the virus, and save lives.

If Virginia is instead forced to exempt religious gatherings, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely as any other gathering to spread COVID-19, and the examples are sadly piling up across the country. Officials in Sacramento County, California, for example, 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, 2:55 PM), https://bit.ly/2XlCpPu. After a church-choir practice in Washington State—at which members attempted to observe 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. A church event in Louisville was "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, https://bit.ly/2SFVYyX. *See also supra* pp. 14–15 (describing additional COVID-19 outbreaks stemming from religious services).

As these examples demonstrate, a single unwitting carrier at a worship service could cause a ripple effect throughout the entire community: That one carrier might pass the virus to his neighbors in the pews, who might then return home and pass it to their family members,

including people at high risk of severe illness. If those infected family members then go to the 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 so much harm to so many.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

/s/ *Alex J. Luchenitser*

VICTOR M. GLASBERG
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
(703) 684-1100
vmg@robinhoodesq.com

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
KENNETH D. UPTON, JR.
PATRICK GRUBEL
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
(202) 466-3353 (fax)
katskee@au.org
luchenitser@au.org
upton@au.org
grubel@au.org

Counsel for Amicus Curiae

Date: May 26, 2020

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 5,536 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.

/s/ *Alex J. Luchenitser*

CERTIFICATE OF SERVICE

I certify that on May 26, 2020, the foregoing document was filed using the Court's CM/ECF system; that I emailed a copy of the document to Plaintiff-Appellant—who agreed to accept service by email—at jtmail0000@yahoo.com; and that I emailed a copy of the document to the Solicitor General of Virginia—who represents Defendants-Appellees in similar cases and who also agreed to accept service by email—at solicitorgeneral@oag.state.va.us.

/s/ *Alex J. Luchenitser*