No. 20-55533

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTH BAY UNITED PENTECOSTAL CHURCH, *et al.*,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, *et al.*,

Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the Southern District of California
Case No. 3:20-cv-865, Hon. Cynthia A. Bashant

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

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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.

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INTERESTS OF THE *AMICUS CURIAE*[*]

Americans United for Separation of Church and State is a national, nonsectarian and nonpartisan 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

This motion for an injunction pending appeal is premature, as the district court has not yet ruled on South Bay United Pentecostal Church's motion for an injunction pending appeal. But if the Court considers the merits of South Bay's 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-related deaths worldwide (*see* Christina Maxouris & Eric Levenson, *US*

[*] 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.

coronavirus death toll passes 80,000 as states move to phased reopening, CNN (May 11, 2020), https://cnn.it/2WOXvUz), and the virus continues to pose a dire threat to California and its people (*see* Luke Money, et al., *'Second Wave' of coronavirus could be far worse for California than the first, officials warn*, L.A. Times (Apr. 22, 2020), https://lat.ms/2YTwzpv).

This emergency demands decisive action from leaders at all levels of government. In California, that response includes the orders challenged by South Bay, which restrict group gatherings. Evidence suggests that the measures taken by California officials have saved many 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. But continued success depends in part on continued compliance, and South Bay's desire to host gatherings cannot be safely accommodated during this time of emergency.

Though South Bay is temporarily required to host church gatherings remotely or as drive-in services rather than in person, its religious-exercise rights have not been violated. 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. Indeed, the orders would be valid 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.

What is more, the Establishment Clause forbids granting South Bay's desired religious exemption from them. 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 challenged orders would do just that: A single contagious person at such a gathering can infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not attend the event.

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 rulings by this Court, the Fourth Circuit, and the Seventh Circuit denying injunctions pending appeal—have rejected them. South Bay's motion for an injunction pending appeal should likewise 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 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). Yet South Bay argues that the Free Exercise Clause entitles it to an exemption from California's and San Diego'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. Nor is their general applicability undermined by their exceptions for essential activities such as obtaining medical care at a

hospital or 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. And the exempted activities further California's interest in protecting public health by ensuring that people can obtain items essential to health and survival. *See Stormans, Inc. v. Selecky (Stormans I)*, 586 F.3d 1109, 1134–35 (9th Cir. 2009) (exemptions that directly or indirectly further governmental interest at issue do not undermine general applicability). Moreover, the defined categories of essential activities draw no distinctions based on religious views or motivations: Hospitals and shelters, for example, may remain open 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 (Stormans II)*, 794 F.3d

1064, 1077 (9th Cir. 2015). South Bay's 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 South Bay's religious-exercise claims, as it did in Free Exercise Clause cases before the *Smith* decision, South Bay's 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 a compelling-interest test.

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). Here, South Bay concedes, as it must, that "the government has a compelling interest in curbing the novel coronavirus." Mot. for Inj. at 16–17.

The only remaining component of a compelling-interest test (were such a test to apply) would ask whether the challenged orders are narrowly tailored to address the applicable governmental interest. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 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, 485 (1988); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (holding that a complete 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, 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 San Diego 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 may remain open and people may seek spiritual fulfillment there, including through "drive-in" religious services.

C. The Vast Majority of Courts to Consider Similar Challenges to COVID-19 Orders Have Rejected Them.

For reasons similar to those set forth above, numerous decisions around the country—including orders of this Court, the Fourth Circuit, and the Seventh Circuit denying injunctions pending appeal—have rejected challenges like this one to in-person-gathering restrictions and stay-at-home orders. For example, on May 16, 2020, the Seventh Circuit denied a motion for an injunction pending appeal in a case much like this one, explaining:

> [W]e find that plaintiffs have not shown a sufficient likelihood of success on the merits to warrant the extraordinary relief of an injunction pending appeal. The Governor's Executive Order 2020-32 responds to an extraordinary public health emergency. *See generally Jacobson v. Massachusetts*, 197 U.S. 11 (1905). 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, as in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Executive Order's 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, ECF No. 16, at 2 (7th Cir. May 16, 2020), *denying motion for injunction pending appeal*

of __ F. Supp. 3d __, No. 1:20-cv-2782, 2020 WL 2468194, at *2–4 (N.D. Ill. May 13, 2020).

Likewise, in a case in which this Court denied a motion for an injunction pending appeal, the Central District of California 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), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020). The Eastern District of California held that challenged state and local orders "are permissible exercises of emergency police powers especially given the extraordinary public health emergency facing the State." *See Cross Culture Christian Center v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832-JAM-CKD, 2020 WL 2121111, at *5–7 (E.D. Cal. May 5, 2020). The Northern District of Illinois rejected the attempt to equate prohibited religious gatherings, which "seek to promote conversation and fellowship," to exempted essential retail activities, explaining that there "are many examples where religious services have accelerated the pathogen's spread." *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). The Eastern District of Virginia held that a plaintiff church had "not shown that it is being

disparately targeted as compared to more similar gatherings [than essential retail stores] such as birthday parties, book clubs, group fitness classes, secular marriage celebrations, and other similar gatherings." *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040-AWA-RJK, 2020 WL 2110416, at *4–8 (E.D. Va. May 1, 2020), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020). In another case, in which the Fourth Circuit denied a motion for injunction pending appeal, the same District 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-00363-LMB-MSN, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *petition for cert. docketed*, No. 20-1419 (U.S. May 12, 2020).

Many other federal and state courts have reached similar conclusions when evaluating challenges like this one. *See, e.g.*, *Spell v. Edwards*, No. 3:20-cv-282, 2020 WL 2509078, at *2–4 (M.D. La. May 15, 2020) (denying TRO and preliminary injunction); *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) (denying TRO), *appeal docketed*, No. 20-1507 (1st Cir. May 11, 2020); *First Pentecostal Church v. City of Holly Springs*, __ F. Supp. 3d __, No. 3:20-

cv-119, 2020 WL 1978381, at *1–3 (N.D. Miss. Apr. 24, 2020) (denying TRO); *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) (denying TRO); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 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).

In only three jurisdictions—the Sixth Circuit, the District of Kansas, and the Eastern District of North Carolina—have courts deviated from the principles in those cases and 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*, __ F.3d __, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (same); *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); *Berean Baptist Church v. Cooper*, No. 4:20-cv-81, ECF No. 18 (May 16, 2020). But these decisions are inconsistent with the law of this Circuit: They incorrectly held that the compelling-interest test was applicable, because they erroneously analogized in-person religious services to quite different nonreligious activities that pose lesser risks of transmission of the virus, such as office work or walking down a store aisle. *Compare, e.g.*, *Neace*, __ F.3d __, 2020 WL 2316679, at *4, *with Stormans II*, 794 F.3d at 1079–82 (rejecting arguments that secular exemptions that were not comparable to desired religious exemption could trigger strict scrutiny). Moreover, in concluding that restrictions on large religious gatherings were not narrowly tailored to preventing transmission of the virus, these cases ignored the obvious—that barring large gatherings entirely is more likely to reduce transmission of COVID-19 than is allowing large gatherings with attempts at social distancing. *Compare Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (under compelling-interest test, law is narrowly tailored if "proposed alternatives will not be as effective" in achieving government's goal), *with Neace*, __ F.3d __, 2020 WL 2316679, at

*4 ("Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that . . . ?").

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

South Bay's 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 South Bay is barred from seeking injunctive relief against the State Defendants on claims that a state official's order 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 Diego 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)), South Bay has 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 it seeks.

In all events, South Bay's 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 South Bay with no right to an exemption here.

III. The Establishment Clause Prohibits the Requested Exemption.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. The federal Religion Clauses "mandate[ ] governmental neutrality between religion and religion, and between

religion and nonreligion." *McCreary 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* 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). 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 South Bay 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 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 with this principle, demonstrating that even under a heightened compelling-interest standard, the First Amendment cannot require religious exceptions that harm others. In *Lee*, the Court rejected an Amish employer's request for an exemption from paying Social Security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Braunfeld*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. at 608–09. And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow minors to distribute religious literature because, while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free, in identical circumstances, to make martyrs of their children." 321 U.S. at 170. In doing so, the Court 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 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 the Establishment and Free Exercise Clauses together prohibited the government from involving itself in the ecclesiastical 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 South Bay's challenge to California's and San Diego's

public-health measures does not present a 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 of a religious gathering at greater risk of exposure to a deadly virus.

c. Granting an exemption here would elevate South Bay's religious beliefs over the health of the entire community. For South Bay and other houses of worship that are determined to ignore the challenged public-health measures do not put only their members in danger. They also increase the risk of contagion for everyone with whom their members come into contact, including the elderly, the immunocompromised, and all others at elevated risk of severe illness.

California faces 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: "asymptomatic individuals may carry and spread the virus, and there is currently no known vaccine or effective treatment." *Id.* Limiting permitted

gatherings and activities will reduce contacts between people and contaminated surfaces, slow the spread of the virus, and save lives.

If South Bay is instead permitted to ignore the challenged orders and host in-person gatherings, 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. For example, officials in Sacramento County 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. After a church-choir practice in Seattle—at which members attempted to observe social-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 church service in West Virginia led to 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 in Canada, a church service 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.

As these examples demonstrate, a single unwitting carrier at one gathering could cause a ripple effect throughout the entire community: That one carrier might pass the virus to his neighbors at the gathering, 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 grocery store or the hospital, they may potentially expose essential retail workers or healthcare providers, who may then do the same to their families—and so on. And as more people get sick, 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 lack of healthcare resources.

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

CONCLUSION

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

Respectfully submitted,

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Date: May 17, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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