IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

MARK ANTHONY SPELL, AND LIFE TABERNACLE CHURCH, *Plaintiffs,* v. JOHN BEL EDWARDS, in his individual capacity and his official capacity as Governor of the State of Louisiana, et al., *Defendants.*	Case No. 3:20-cv-282-BAJ-EWD

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTERESTS OF *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United has long fought to uphold the guarantees of the First Amendment's Religion Clauses that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, third parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Louisiana, along with most of the rest of the world, is facing a devastating pandemic. COVID-19 is both more contagious and far more lethal than the common flu (Dan Swenson, *Coronavirus vs. the flu*, NOLA.COM (Mar. 29, 2020 8:10 PM), https://bit.ly/3dSwF5Y), and the United States has by far the most reported COVID-19 cases and deaths worldwide (*COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited May 11, 2020, 11:00 AM), https://bit.ly/2xR2V99). The gravity of this challenge can hardly be questioned. *See In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020) (*Abbott II*).

Governor Edwards has taken this threat seriously and acted decisively to save Louisianans' lives. As part of a statewide public-health response, the Governor has temporarily ordered residents to stay at home, prohibited in-person gatherings that would put ten or more people in close proximity, and otherwise restricted the operations of businesses that are permitted to remain open. After being hit especially hard by the virus in March and April, Louisiana is beginning to see a recovery in the New Orleans area, likely as a result of adherence to the Governor's order. *Coronavirus in Louisiana*, NOLA.COM (updated May 10, 2020, 12:09 PM), https://bit.ly/2zqDpbi; *see also* ECF No. 1-2 at 1 (preamble to Governor Edwards's April 30 order). Reports from other regions of the country likewise show that orders of this type have successfully limited transmission

of the virus. *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. But the rates of new cases and deaths are still increasing in other parts of Louisiana (*Coronavirus in Louisiana*, *supra*; ECF No. 1-2 (preamble)), and weakening the State's response now risks reversing its success and fueling the virus's spread.

Though the Governor's order does have the effect of limiting some religious activities of Pastor Spell and his church, it does not violate their religious-exercise rights. The Fifth Circuit has repeatedly explained that public-health responses to the COVID-19 pandemic are constitutional if "the measures have at least some 'real or substantial relation' to the public health crisis and [are] not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Abbott II*, 954 F.3d at 784 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). The challenged order easily satisfies this test. The order's limitations on in-person interactions have a substantial relation to the public-health crisis because they limit person-to-person transmission of the virus. And as applied to religious gatherings, the order is not "beyond all question" unconstitutional; rather, it would satisfy the U.S. and Louisiana Constitutions and the Louisiana Preservation of Religious Freedom Act even if the "beyond all question" standard did not apply.

What is more, the U.S Constitution's Establishment Clause forbids granting the religious exemption that Plaintiffs seek. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of the nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding that religious gatherings must be exempted from the challenged order would do just that: A single contagious person at Life Tabernacle Church could infect scores of fellow congregants, who could then expose family, friends,

and countless others who did not attend the service. Indeed, many states have by now unfortunately identified virus clusters tied to in-person religious gatherings.

For reasons similar to those set forth here, the overwhelming majority of courts to consider challenges like this one to COVID-19-related orders have rejected them. Plaintiffs' motion for a temporary restraining order should likewise be denied.

ARGUMENT

I. THE ORDER DOES NOT VIOLATE PLAINTIFFS' RELIGIOUS-EXERCISE RIGHTS.

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 community provides. 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). Yet Pastor Spell and Life Tabernacle Church argue here that the religious-exercise guarantees of the U.S. and Louisiana constitutions and the Louisiana Preservation of Religious Freedom Act entitle them to an exemption from the temporary, emergency public-health measures enacted by the Governor to combat a pandemic. Those claims are wrong as a matter of law: "The right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

As the Fifth Circuit explained in a case challenging a component of Texas's COVID-19 response, constitutional rights may "be reasonably restricted" during this crisis, and courts' authority to override public-health measures taken in response is very narrow. *Abbott II*, 954 F.3d at 784 (citing *Jacobson*, 197 U.S. at 29, 31); *accord In re Abbott*, __ F.3d __, No. 20-50296, 2020 WL 1911216, at *12 (5th Cir. Apr. 20, 2020) (*Abbott VI*). Thus, "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and [are] not

'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Abbott II*, 954 F.3d at 784 (quoting *Jacobson*, 197 U.S. at 31). Put another way, the measures must merely not be arbitrary or a pretext for oppression. *Id.* at 785 (citing *Jacobson*, 197 U.S. at 38). And "courts may not second-guess the wisdom or efficacy of the measures" adopted by other branches of government to protect the public health. *Id*. at 785 (citing *Jacobson*, 197 U.S. at 28, 30). This analysis applies to all individual rights, including religious exercise. *See Abbott II*, 954 F.3d at 778 n.1.

Governor Edwards's stay-at-home order easily clears this low bar. Limiting transmission of the virus by prohibiting certain activities and restricting the size of in-person gatherings plainly is related to the current public-health crisis. And as applied to Plaintiffs' religious activities, the order is not "beyond all question" a violation of their rights (*Abbott II*, 954 F.3d at 784), because it would satisfy even the regular standards for evaluating religious-exercise claims under the U.S. Constitution, Louisiana Constitution, and Louisiana Preservation of Religious Freedom Act.

A. The Order Does Not Trigger Heightened Scrutiny Under the Free Exercise Clause of the First Amendment to the U.S. Constitution.

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." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). Rather, the Supreme Court has held that laws that burden religious conduct are constitutionally permissible—and need satisfy rational-basis review only—when they are neutral toward religion and apply generally. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 879. Governor Edwards'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.

The order here evinces no hostility toward religion. It bans all mass gatherings, religious or not: No gatherings that would bring ten or more people together are allowed anywhere for any purpose. ECF No. 1-2, § 2.A. And while the order permits people to leave their homes for only a limited set of purposes, one of the permitted purposes is traveling to and from places of worship. ECF No. 1-2, § 2.A.6. Like all businesses that are not ordered closed, houses of worship may remain open as long as they comply with social-distancing requirements, including the ten-person limit on gatherings. ECF No. 1-2, § 2.C.

2. The order is generally applicable.

General applicability is closely related to neutrality. *Lukumi*, 508 U.S. at 531. It means that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. The Governor's order generally prohibits gatherings of ten or more people, and it specifically permits travel to places of worship while barring most other out-of-home activities. It therefore does not pursue Louisiana's interests "only against conduct with a religious motivation" (*see id.* at 546) or "single[ ] out religious practices for discriminatory treatment" (*see Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995)).

That the order distinguishes between "essential" and "nonessential" businesses does not negate its general applicability. Because "[a]ll laws are selective to some extent," they need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542–43. Copyright law, for example, contains several categorical exemptions (*see* 17 U.S.C. §§ 107–22), but no one understands those

carveouts to create a constitutional right to an exemption for religiously motivated violations of copyright. Rather, the fundamental question is whether the scope of a law's coverage demonstrates animus toward religious conduct by subjecting it to burdens not placed on a significant swath of analogous nonreligious 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).

Comparing similarly situated activities, therefore, is key to sniffing out impermissible religious discrimination. *See id.*; *cf. Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing* (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls). The challenged order equally limits the size of analogous nonreligious gatherings, such as educational lectures, social-club meetings, political conferences, and parades, to name a few. *See* ECF No. 1-2, § 2.A. And by allowing people to travel to places of worship for purposes that do not involve gatherings of ten or more people (ECF No. 1-2, § 2.A.6), the order treats religious gatherings and places of worship *better* than both those analogous nonreligious gatherings and many similar nonreligious places of assembly—for example, restaurant dining rooms, theaters, concert halls, and museums are closed entirely (ECF No. 1-2, §§ 2.B.1, 2.D).

Pastor Spell and Life Tabernacle Church attempt to liken their church services to permitted retail-store operations. *E.g.*, Compl. ¶¶ 59. But it was reasonable for the Governor to conclude that briefly walking around a grocery store poses a lesser public-health risk than sitting in a room with scores of people for an extended period (*see Legacy Church, Inc. v. Kunkel*, __ F. Supp. 3d __, 2020 WL 1905586, at *34 (D.N.M. 2020)), and the judiciary has no "power to second-guess the [S]tate's policy choices in crafting emergency public health measures" (*Abbott II*, 954 F.3d at 784). What is more, most of the permitted out-of-home activities further Louisiana's interest in safeguarding public health during the COVID-19 crisis and are thus neither suitable comparators nor exceptions to the

general order. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134–35 (9th Cir. 2009) (exemptions that directly or indirectly further governmental interest at issue do not undermine general applicability). If in combating the virus the Governor were to forbid leaving home to obtain or provide groceries, medicine, healthcare, and similar goods and services (*see* ECF No. 1-2, §§ 2.A.1–2), the current health crisis would be exacerbated: The entire medical system would suffer greater strain from additional illness and injury caused by people's inability to eat, treat existing illnesses, and maintain sanitary living conditions. Likewise, barring travel needed to maintain federally designated critical infrastructure (*see* ECF No. 1-2, § 2.A.3 (incorporating by reference *Critical Infrastructure Sectors*, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, DEP'T OF HOMELAND SEC. (updated Mar 24, 2020), https://bit.ly/3cnEAqt)) would threaten national security, safety, and public health.

In addition, the Governor's order draws no distinctions based on religious views or motivations with respect to the limited categories of essential activities. Medical care, for example, is essential (*see* ECF No. 1-2, § 2.A.2) whether or not provided by a religiously affiliated person or entity. *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).

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)). The order challenged here "prescribe[s] and proscribe[s] the same conduct for all, regardless of motivation," and therefore satisfies the Free Exercise Clause. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015). Plaintiffs' religious beliefs do not afford them a constitutional right to defy the order.

B. The Louisiana Constitution affords no greater protections.

Article I, Section 8 of the Louisiana Constitution consists of the exact language of the Religion Clauses of the First Amendment to the U.S. Constitution. *See also* La. Rev. Stat. § 13:5232(2) (legislative findings underlying Louisiana's religious-freedom statute). Because the Louisiana provisions "embod[y] . . . in full" their federal analogs, the Louisiana Supreme Court has looked to federal case law on the federal versions for guidance in interpreting the state versions. *See Seegers v. Parker*, 241 So. 2d 213, 216–17 & n.4 (La. 1970); *accord Rodrigue v. Copeland*, 475 So. 2d 1071, 1080 (La. 1985); *LeBlanc v. Davis*, 432 So. 2d 239, 241 (La. 1983); *see also Gorman v. Swaggart*, 524 So. 2d 915, 922 (La. Ct. App. 1988). Hence, Plaintiffs' claim under Article I, Section 8 should fail for the same reasons as their federal free-exercise claim.

C. The Order Satisfies Even a Compelling-Interest Test.

Even if this Court were to analyze the Governor's order under heightened scrutiny—whether under the Louisiana Preservation of Religious Freedom Act (La. Rev. Stat. §§ 13:5232–33) or for some other reason—it would still survive.

Before its decision in *Smith* in 1990, the U.S. 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)). The Court's pre-*Smith* free-exercise decisions made clear that the test, while exacting, is not "fatal in fact" (*Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003)). And those decisions routinely acknowledged that there is no right to religious exemptions from laws, like the order here, that were reasonably tailored to 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; *cf. Abbott II*, 954 F.3d at 783–84 (describing Supreme Court precedent recognizing states' greater discretion to restrict rights when responding to epidemics and other serious public threats). "[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*, 197 U.S. at 25. 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; *accord Abbott II*, 954 F.3d at 783.

The Supreme Court has thus 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's interest in combating the spread of disease is a compelling one. *See, e.g.*, *Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353–54 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997) ("[T]he prison's

interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases).[1] Louisiana's interest here in stanching the spread of COVID-19 is no less compelling.

2. The order is narrowly tailored.

The compelling-interest test requires that the challenged law be narrowly tailored to the interest at stake. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Narrow tailoring does not demand "perfect tailoring," and a state need not target all forms of an evil for a law to be narrowly tailored. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015). What is more, 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 is narrowly tailored to combating 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 Edwards'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. Because Louisiana cannot know who is infected at any given time, the only way to slow the virus's spread is to temporarily restrict the size of in-person gatherings and enforce social-distancing

[1] The Louisiana Preservation of Religious Freedom Act similarly recognizes that "'[c]ompelling state interest' includes the interest of the state to protect the best interest of a child and the health, safety, and welfare of a child" (La. Stat. Ann. § 13:5234(3)) and provides that "[n]othing in this [Act] shall be construed to allow any person to cause physical injury to another person" (La. Stat. Ann. § 13:5235).

guidelines in permitted activities. The order is thus no broader than necessary to ensure that the targeted activities—physical gatherings that create a significant risk of transmission of the virus—are curtailed. At the same time, the order is carefully written to restrict religious activities as little as necessary: Just as Louisianans may leave their homes to buy food or obtain medical care, so too may they go to in-person religious services involving fewer than ten people. *See* ECF No. 1-2, § 2.A.6. And just as businesses not ordered to close may continue minimal operations subject to social-distancing and gathering-size regulations, places of worship may remain open to provide remote religious services or in-person services with less than ten people. *See* ECF No. 1-2, § 2.C.

Allowing Plaintiffs to hold in-person gatherings of ten or more people, even with social-distancing measures (*cf.* Mot. for TRO & Prelim. Injunction, ECF No. 4-1, at 3), is not a better-tailored alternative because it would be less effective at slowing the virus than is barring large gatherings outright. *See 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); *cf. Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009) (under RLUIPA, showing that alternative is "unfeasible" or "less effective" rebuts challenge to regulation's tailoring). In all events, the deferential *Jacobson* standard adopted by the Fifth Circuit tightly constrains the Court's ability to "second-guess" the State's policy decisions regarding how best to respond to the pandemic. *See Abbott II*, 954 F.3d at 784.

D. 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 courts around the country have rejected challenges like this one to in-person-gathering restrictions and stay-at-home orders. *See Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (denying TRO in 100-page opinion); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-156, 2020 WL 2310913 (D. Me. May 9, 2020) (denying TRO), *appeal docketed*, No. 20-1507 (1st Cir.

May 11, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020) (denying TRO); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111 (E.D. Cal. May 5, 2020) (denying TRO); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374 (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-204, 2020 WL 2110416 (E.D. Va. May 1, 2020) (denying TRO and preliminary injunction), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *First Pentecostal Church v. City of Holly Springs*, __ F. Supp. 3d __, No. 3:20-cv-119, 2020 WL 1978381 (N.D. Miss. Apr. 24, 2020) (denying TRO); *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (denying TRO), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Tolle v. Northam*, No. 1:20-cv-363, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020) (reaffirming and explaining denial of preliminary injunction), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020) (denying TRO); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

In only two jurisdictions—the Sixth Circuit and the District of Kansas—have courts issued injunctive relief in religion-based challenges to COVID-19-related 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) (*Maryville II*); *Maryville Baptist Church v. Beshear*, No. 3:20-cv-278, ECF No. 35 (W.D. Ky. May 8, 2020) (*Maryville III*); *Tabernacle Baptist Church v.*

Beshear, No. 3:20-cv-33, ECF No. 24 (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); *see also First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). But these courts did not apply the deferential *Jacobson* standard adopted by the Fifth Circuit in *Abbott II*; they instead applied (incorrectly) standard doctrine. *See Neace*, __ F.3d __, 2020 WL 2316679, at *2–4; *Maryville II*, __ F.3d __, 2020 WL 2111316, at *2–4; *see also First Baptist*, __ F. Supp. 3d __, 2020 WL 1910021, at *8–9, 12 (rejecting standard used in *Abbott II*). As a result, these courts' decisions showed no deference to the state's policy judgments about the relative public-health risks posed by different categories of activities. *See, e.g.*, *Neace*, __ F.3d __, 2020 WL 2111316, at *4 (asserting that in-person religious gatherings pose no greater risk of transmission of the virus than office environments of businesses). Indeed, these cases' analysis of whether the means used by government were narrowly tailored ignored the obvious policy rationale: Barring large gatherings entirely is more likely to reduce transmission of COVID-19 than allowing large gatherings with attempts at social distancing. *Cf., e.g.*, *id.* ("Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that . . . ?").

Moreover, these decisions erred in holding that the compelling-interest test was applicable in the first place, because they erroneously analogized in-person religious services to nonreligious activities that pose lesser risks of transmission of the virus. The Sixth Circuit treated walking down a grocery-store aisle or accepting a package from a deliverywoman as activities analogous to religious services. *See id.*; *see also First Baptist*, __ F. Supp. 3d __, 2020 WL 1910021, at *14 (comparing religious services to, among other things, hotel rooms and retail stores). But religious gatherings typically involve more people being in close proximity for a longer time and engaging in more interactions. "Risks of contagion turn on social interaction in close quarters" (*Neace*, __ F.3d __, 2020 WL 2111316, at *4), and it is both reasonable and constitutionally permissible to treat activities differently based on those factors.

II. THE ORDER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, BUT GRANTING A RELIGIOUS EXEMPTION WOULD.

The Establishment Clause of the First Amendment "mandates 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)). Because the Governor's order treats religious gatherings like analogous nonreligious gatherings, Plaintiffs are wrong in arguing that the order violates the Establishment Clause. Rather, *granting* Plaintiffs the religious exemption that they seek would violate the Establishment Clause. For the neutrality requirement of the First Amendment's Religion Clauses forbids the government not just to target religion for worse treatment (*see* Part I.A, *supra*) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton*, 472 U.S. at 709–10).

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. For when government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. Exempting Plaintiffs from the Governor's order would contravene this settled constitutional rule.

a. In *Estate of Thornton*, for example, the 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 *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 to protect the child's welfare. 321 U.S. at 170. As the Court explained in *Jacobson*, "[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." 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)) or "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

b. In only one narrow set of circumstances (in two cases) has the U.S. Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. In *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 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 of the Church of Jesus Christ of Latter-day Saints 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 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 concern 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.

c. Granting an exemption here would elevate Plaintiffs' religious preferences over the health of the entire community. Simply put, Louisiana is facing an unprecedented public-health emergency. In response to this grave threat, Governor Edwards has prohibited large gatherings and ordered Louisianans to stay home. The Governor has determined that these steps will slow the spread of the virus and ultimately save lives. If the State is instead forced to exempt religious gatherings, everyone will be in greater danger of contracting the virus: By holding in-person religious gatherings, Plaintiffs would not only put their congregations 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.

Reports showing that religious gatherings are just as likely as other gatherings to spread COVID-19 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—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 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.

A single unwitting carrier at a worship services 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, increasing the likelihood that people will die due to lack of healthcare resources. The Establishment Clause forbids government to grant religious exemptions for conduct that threatens such great harm to so many.

CONCLUSION

For the foregoing reasons, Plaintiffs' request for a temporary restraining order should be denied.

Respectfully submitted,

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Date: May 12, 2020

CERTIFICATE OF SERVICE

I certify that on May 12, 2020, the foregoing brief was filed using the Court's CM/ECF system. Counsel for all parties who have made appearances in this case are registered CM/ECF users and will be served electronically via that system. I further caused this document to be served upon the following parties who have not yet appeared in this case by causing it to be emailed to the attorneys who are listed as counsel for them or their municipalities on their governmental websites:

- John Bel Edwards, Governor of the State of Louisiana;
- David Barrow, Mayor of Central City, Louisiana;
- Roger Corcoran, Chief of Police of Central City, Louisiana;
- Sharon Weston, Mayor of Baton Rouge, Louisiana;
- Sid Gautreaux, Sheriff of East Baton Rouge Parish, Louisiana.

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