IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CALVARY CHAPEL OF BANGOR, ***Plaintiff,*** **v.** **JANET MILLS, in her official capacity as Governor of the State of Maine,** ***Defendant.***	**Case No. 1:20-cv-00156-NT**

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE SUPPORTING DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Braunfeld v. Brown,
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Cantwell v. Connecticut,
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Cassell v. Snyders,
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Church of the Lukumi Babalu Aye v. City of Hialeah,
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City Council v. Taxpayers for Vincent,
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Globe Newspaper Co. v. Superior Court,
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Legacy Church, Inc. v. Kunkel,
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Lighthouse Fellowship Church v. Northam,
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Constitutions and Statutes

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Other Authorities

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 6

Christopher Burns, *76 more coronavirus cases detected in Maine's biggest one-day increase*, BANGOR DAILY NEWS (May 7, 2020), https://bit.ly/3drotIA 1

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 17

Kathleen Foody, et al., *20,000: U.S. death toll overtakes Italy's as Midwest braces*, ASSOCIATED PRESS (updated Apr. 11, 2020, 3:09 PM), https://to.pbs.org/2z0hLup 1

John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565 (2010) 12

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 2

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 17

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 17

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 17, 18

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The State of Our State's Coronavirus Fight, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq 2

U.S. Covid-19 Cases Rise 2.4%, Deaths Top 75,000: Virus Update, BLOOMBERG NEWS (updated May 6, 2020), https://bloom.bg/2SM9mS9 1

U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, OEI-06-20-00300, *Hospital Experiences Responding to the COVID-19 Pandemic* (Apr. 2020), https://bit.ly/2VTEMIm 10

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 seeks 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

Maine, along with most of the rest of the world, continues to face a devastating pandemic. Indeed, one cannot seriously dispute the significant public importance of the challenges that lie before us. The United States now has the most reported COVID-19-related deaths worldwide. *See* Kathleen Foody, et al., *20,000: U.S. death toll overtakes Italy's as Midwest braces*, ASSOCIATED PRESS (updated Apr. 11, 2020), https://to.pbs.org/2z0hLup; *U.S. Covid-19 Cases Rise 2.4%, Deaths Top 75,000: Virus Update*, BLOOMBERG NEWS (updated May 6, 2020), https://bloom.bg/2SM9mS9. And the number of cases and the death toll in Maine are still climbing. *See* Christopher Burns, *76 more coronavirus cases detected in Maine's biggest one-day increase*, BANGOR DAILY NEWS (May 7, 2020), https://bit.ly/3drotIA.

Governor Mills has taken this threat seriously and acted decisively to save Mainers' lives. As part of Maine's public-health response, the Governor has temporarily ordered residents to stay at home, prohibited in-person gatherings that would put more than ten people in close proximity, and otherwise restricted the operations of businesses that are permitted to remain open. Reports from other regions suggest that orders of this type have been successful in limiting transmission

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[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 its preparation or submission. A motion for leave to file accompanies this brief.

of COVID-19. *See, e.g.*, *The State of Our State's Coronavirus Fight*, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq; Rong-Gong Lin II, et al., *Social distancing may have helped California slow the virus and avoid New York's fate*, L.A. TIMES (Mar. 31, 2020), https://lat.ms/2VSbYih.

The Governor's mass-gathering ban does temporarily limit Calvary Chapel's ability to conduct certain religious activities, and Calvary asks this Court for a temporary restraining order exempting it from the ban and allowing it to conduct in-person religious services. A temporary restraining order is an "extraordinary and drastic remedy that is never awarded as of right." *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 8–9 (1st Cir. 2012). To justify such drastic relief, Calvary must demonstrate, above all else, that its claims will likely succeed on their merits. *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). But Calvary cannot show a likelihood of success here, for the Constitution does not require—and in fact forbids—an exemption permitting Calvary to conduct in-person religious services.[2]

First, the mass-gathering ban does not violate Calvary's religious-exercise rights. The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505 U.S. 520 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. The restriction here complies with this principle: The virus is just as likely to spread at religious events as at nonreligious ones, so the ban applies to all such in-person gatherings equally, regardless of motivation. But even if heightened scrutiny were called for—

[2] This brief addresses only Calvary's likelihood of success on the merits under established constitutional principles. It does not address the remaining elements of the test for granting a temporary restraining order or preliminary injunction, all of which Calvary must satisfy to prevail here. *See Peoples Fed. Sav. Bank*, 672 F.3d at 9.

which it is not—the mass-gathering ban still should be upheld because it is narrowly tailored to advance Maine's compelling interest in protecting its residents from a deadly disease.

Nor have Calvary's rights under the Free Speech or Assembly Clauses of the First Amendment been violated. The challenged ban regulates conduct rather than speech. To the extent that it burdens inherently expressive conduct, it triggers only intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), and it easily satisfies that standard because it is content neutral, advances an important governmental interest unrelated to the suppression of speech, and does not burden substantially more speech than necessary to advance that interest.

What is more, the Establishment Clause of the First Amendment forbids granting the religious exemption that Calvary seeks. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding that in-person religious gatherings must be exempted from the prohibition on gatherings would do just that: A single contagious person at a religious service can infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not attend the service.

For reasons similar to those set forth here, the overwhelming majority of courts to consider challenges like this one to COVID-19-related orders have rejected them. Calvary likewise has not shown that it is likely to prevail on the merits of its claims, and its motion for a temporary restraining order and preliminary injunction should be denied.

ARGUMENT

I. THE MASS-GATHERING BAN DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

A. The Ban Is Subject To Rational-Basis Review.

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 the constitutional guarantee of religious freedom has never provided absolute license to engage in conduct consistent with one's religious beliefs. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). Yet Calvary argues that the Free Exercise Clause entitles it to an exemption from Maine's temporary emergency public-health measures enacted to combat a pandemic. That claim is wrong as a matter of law: "The right to practice religion freely does not include liberty to expose the community . . . to a communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

The Supreme Court's Free Exercise jurisprudence makes clear that while government cannot forbid a religious practice *because* it is religious, religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). 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. *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). That prohibition bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534. 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. 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. *Lukumi*, 508 U.S. at 533–34, 542–43. Governor Mills plainly has not.

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

That the ban allows essential retail businesses—such as those providing grocery, pharmacy, medical, and other similar services (ECF No. 1-3, at 2)—to continue to operate and to remain open to the public 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 is thus key to sniffing out impermissible religious discrimination. *See id.* at 543. The ban restricts analogous nonreligious gatherings—including those at theaters and social clubs, for example—no less than religious gatherings. *Cf. Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, U.S. Dep't of Justice (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls).

What is more, the permitted retail activities further Maine's interest in safeguarding public health during the COVID-19 crisis. *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 government were to forbid leaving home to get groceries, medicine, healthcare, and similar goods and services, or, indeed, to close automotive and other transportation services that allow adequate staffing of such essential businesses, the current health crisis would be exacerbated: 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.

Nor is the general applicability of the ban undermined by the Governor's permitting nonessential businesses, like theaters, fitness centers, and salons, to continue to operate in a limited capacity. *See* ECF No. 1-3, at 3. Under the Governor's orders, nonessential businesses may continue to perform activities that "do not allow customer, vendor[,] or other visitor in-person contact," so long as they can do so without more than ten employees convening in a space where social distancing is not possible and so long as they make efforts to enable remote work. *Id.* In other words, nonessential businesses may remain open for employees to do things like take phone orders, maintain inventory, and process payroll. *Id.* Calvary's comparisons to the permitted

employment activities of nonessential businesses are inapt, for the mass-gathering ban expressly forbids nonessential businesses to open their doors to the public. It specifically disallows the very thing that Calvary seeks here: hosting mass public gatherings in person. And, of course, there's nothing to suggest that Calvary and other houses of worship are not themselves nonessential businesses within the meaning of the orders, entitling clergy and their staff to go to their houses of worship to carry out permitted functions—just not to open their doors to the public for mass gatherings.

Finally, the orders' defined categories of businesses draw no distinctions based on religious views or motivations. *Cf. Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that limited categorical exceptions to public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants). Hospitals, residential treatment facilities, and food banks, for example, may remain open (*see* ECF No. 1-3, at 2) regardless of whether they have a religious affiliation.

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 challenged ban "prescribe[s] and proscribe[s] the same conduct for all, regardless of motivation" and is therefore neutral and generally applicable. *Stormans*, 794 F.3d at 1077. Calvary's religious beliefs do not afford a constitutional excuse for noncompliance.

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

Even if this Court were to conclude that the prohibition on in-person gatherings must for some reason satisfy heightened scrutiny, Calvary's free-exercise claim would still fail. More than

a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand even the strictest judicial scrutiny.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *see also* 42 U.S.C. § 2000bb(b) (purpose of federal Religious Freedom Restoration Act was "to restore the compelling interest test as set forth in" *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). 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 orders challenged here, that were tailored to shield the public from serious disease.

1. The ban 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, Inc. v. Reno*, 47 F.3d 642, 655–56 (4th Cir. 1995). "[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 barred compulsory measures to protect health, citing the "fundamental principle" that personal liberty is subject to restraint "in order to secure the . . . health . . . of the state." *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). 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 such as the one that we now face. *See Jacobson*, 197 U.S. at 27.

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 governmental interest in preventing the spread of communicable disease is compelling. *See, e.g.*, *Workman v. Mingo Cty. 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."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases); *see also Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (noting, in case involving statutory exemptions from vaccination law, that "[c]onstitutionally, [plaintiff] has no right to an exemption"). Maine's interest here in stanching the spread of COVID-19 is no less compelling.

2. The ban is narrowly tailored.

The compelling-interest test, if it applied, would also call for determining whether the challenged order is narrowly tailored to the interest at stake. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (ban on all gender discrimination is 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.

The mass-gathering ban operates in the same way. No vaccine for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, OEI-06-20-00300, *Hospital Experiences Responding to the COVID-19 Pandemic* (Apr. 2020), https://bit.ly/2VTEMIm. Without the capacity to test comprehensively for the virus, the only way to slow its spread is to temporarily restrict the number and size of in-person gatherings and enforce social-distancing guidelines in permitted activities and operations. And the ban is no broader than necessary to ensure that the targeted activities—physical gatherings that create opportunities for transmission of the virus—are curtailed.[3]

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 courts around the country have rejected challenges like this one to in-person-gathering restrictions and stay-at-home orders. *See Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832-JAM-CKD, 2020 WL 2121111 (E.D. Cal. May 5, 2020) (denying TRO); *Roberts v. Neace*, __ F. Supp. 3d __, 2:20-cv-054, 2020 WL 2115358 (E.D. Ky. May 4, 2020) (denying preliminary injunction with respect to religious services), *appeal docketed*, No. 20-5465 (6th Cir. May 5, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (denying TRO

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[3] Calvary asserts a claim under the Equal Protection Clause of the Fourteenth Amendment in its Complaint. *See* ECF No. 1 ¶¶ 149–161. Although it does not assert this claim in its motion for a TRO and preliminary injunction, *amicus* notes that it would fail for the same reasons that Calvary's free-exercise claim fails: The mass-gathering ban is neutral and generally applicable and does not treat religious gatherings any differently from analogous nonreligious gatherings. *Cf. Lukumi*, 508 U.S. at 540 (looking to equal-protection case law in evaluating neutrality under Free Exercise Clause).

and preliminary injunction), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040-AWA-RJK, 2020 WL 2110416 (E.D. Va. May 1, 2020) (denying TRO and preliminary injunction), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *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); *Legacy Church, Inc. v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327-JB-SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (denying TRO in 100-page opinion); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683-BAS-AHG, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020) (reaffirming and explaining 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-01576-EK-PK, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020) (denying TRO); *Hotze v. Hidalgo,* No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

Ignoring this overwhelming body of authority to the contrary, Calvary directs the Court to the only three instances of which *amicus* is aware in which courts have issued injunctive relief in religion-based challenges to COVID-19-related orders. *See Maryville Baptist Church, Inc. v. Beshear*, __ F.3d __, No. 20-5427, 2020 WL 2111316, at *5 (6th Cir. May 2, 2020) (granting injunction pending appeal against any restriction on drive-in religious gatherings, but denying injunction with respect to in-person services); *On Fire Christian Ctr., Inc. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249, at *1 (W.D. Ky. Apr. 11, 2020) (granting TRO to

permit drive-in religious services); *see also First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021, at *9 (D. Kan. Apr. 18, 2020) (granting TRO, based on reasoning rejected by weight of authority). And in two of those three cases, the relief was limited to drive-in religious services. Here, by contrast, Calvary asks this Court to permit it to open its doors and conduct in-person religious services.

II. THE BAN DOES NOT VIOLATE THE FREE SPEECH OR ASSEMBLY CLAUSES.

Calvary's claims that the ban violates its First Amendment rights of speech and assembly fare no better than its free-exercise claim. The First Amendment freedoms of speech and assembly are "cognate rights" subject to the same protections. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Accordingly, the right to assemble has been subsumed under free-speech doctrine regarding expressive association. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565, 609–11 (2010).

The First Amendment's protections for free expression do not prohibit government from regulating conduct in a way that incidentally burdens expressive activity. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Thus, it "has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). By temporarily limiting the size of all in-person gatherings, the challenged ban plainly regulates conduct rather than speech. All mass gatherings—social, civic, recreational, religious, and otherwise—are subject to the same conduct-based limitation without regard to their purpose or the content of any expression that might be involved. *See* Part I.A, *supra*.

Calvary argues that the mass-gathering ban is an illicit content-based speech regulation because certain businesses, like pharmacies and grocery stores, are exempted. (ECF No. 3, at 11–

12.) But selling groceries, medicine, or hammers is not speech, and regulating businesses based on the types of goods that they sell therefore is not a content-based speech regulation.

Only if the ban were interpreted to regulate "inherently expressive" conduct (*Rumsfeld*, 547 U.S. at 66) could it trigger intermediate scrutiny (*see Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010); *O'Brien*, 391 U.S. at 377). Gathering with more than ten people is not, however, inherently expressive. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (holding that there is no generalized First Amendment right to associate with others); *Roberts*, 468 U.S. at 618 (association is expressive if done "for the purpose of engaging in those activities protected by the First Amendment").

But even if the mass-gathering ban were construed as regulating inherently expressive conduct, it would nonetheless pass constitutional muster. Under the applicable intermediate-scrutiny test, burdens on expressive conduct are upheld if they (1) are content-neutral, (2) advance important governmental interests unrelated to the suppression of speech, and (3) do not burden "substantially more speech than necessary" to further those interests. *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 189 (1997). All three requirements are satisfied here.

First, the justification for the restriction on the size of gatherings—to fight a deadly virus by reducing person-to-person transmission—"ha[s] nothing to do with content." *See Boos v. Barry*, 485 U.S. 312, 320 (1988). The ban applies to all mass gatherings regardless of their purpose; religious gatherings are covered not because they are religious (or because they include speech) but because they entail bringing people together in person. *See* Part I.A, *supra*.

Second, there can be no question that combating a deadly outbreak of a global pandemic is an important interest unrelated to the suppression of expression. Indeed, the Supreme Court has held that much less important interests satisfy intermediate scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (ensuring that bandshell events are both loud enough

and not too loud); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (keeping public park clean and accessible); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984) (avoiding aesthetic visual clutter from signs and billboards).

Third, the ban does not burden substantially more expressive conduct than necessary to advance Maine's interest in slowing the spread of COVID-19. It restricts large in-person gatherings precisely because they are most conducive to spreading the virus. *See* Part I.B.2, *supra*.[4]

III. The Ban 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 orders treat religious gatherings similarly to analogous nonreligious gatherings, Calvary is wrong in arguing that the mass-gathering ban violates the Establishment Clause. Rather, *granting* Calvary the religious exemption that it seeks 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

[4] Calvary also asserts religious-exercise and free-speech claims under the Maine Constitution. *See* ECF No. 1 ¶¶ 170–201. It does not address them in its motion for a TRO and preliminary injunction. In all events, those claims cannot support injunctive relief from this Court because the Eleventh Amendment bars federal courts from enjoining state officials to comply with state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. Exempting Calvary from the Governor's orders 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. at 261. In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow a minor to distribute religious literature because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free . . . to make martyrs of their children." 321 U.S. at 170. 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 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 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 protection for ecclesiastical authority because it does not present questions regarding internal matters such as hiring clergy or determining religious membership. Rather, it presents a far different question: whether there is a constitutional right to put countless people *outside* the church at greater risk of exposure to deadly disease.

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

Maine is facing an unprecedented public-health emergency, and in response to this grave threat, Governor Mills has restricted residents' ability to gather in person with others. The Governor has determined that these steps will slow the spread of the virus and ultimately save lives.

If Maine is instead forced to exempt Calvary—and therefore also all other houses of worship that want exemptions—everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely 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), https://bit.ly/2XlCpPu. After a church-choir practice—at which members attempted to observe distancing and hygiene guidance—45 out of 60 attendees fell ill, and two died. Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6. A single church event in Louisville has been "linked to at least 28 cases . . . and two deaths." Bailey Loosemore & Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020), https://bit.ly/2XkKCnd. And a church service in West Virginia led to a cluster of infections that devastated a small community. Joe Severino, *COVID-19 tore through a black Baptist church*

community in WV; Nobody said a word about it, CHARLESTON GAZETTE-MAIL (May 2, 2020), https://bit.ly/2WxQyae.

A single unwitting carrier at one of Calvary's worship services could cause a ripple effect throughout the entire community: That one infected but asymptomatic individual might pass the virus to his neighbors in the pews, who might then return home and pass it to their family members, including people at high risk of severe illness. If any of those infected family members then go to the doctor's office, or to the grocery store for milk, they may potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources. The Establishment Clause forbids the government to grant religious exemptions for conduct that threatens to harm so many.

CONCLUSION

For the foregoing reasons, Calvary's motion for a temporary restraining order and preliminary injunction should be denied.

Respectfully submitted,

/s/ David A. Soley

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, I electronically filed the foregoing with the Clerk of the Court through the CM/ECF system, causing service to be effected on counsel for all parties.

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