IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

ANTIETAM BATTLEFIELD KOA, et al., *Plaintiffs,* v. LAWRENCE J. HOGAN, in his official capacity as Governor of the State of Maryland, et al., *Defendants.*	Case No. 1:20-cv-1130

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

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IDENTITY AND 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

We are facing a pandemic. 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 (Apr. 11, 2020), https://to.pbs.org/2z0hLup), and the number in Maryland continues to climb (*see* Rebecca Tan, et al., *Known coronavirus deaths and cases in D.C., Maryland and Virginia*, WASH. POST (updated Apr. 30, 2020, 2:14 PM), https:// wapo.st/2Sqc4wA). Governor Hogan has taken this threat seriously and acted decisively to save Marylanders' lives. As part of his statewide public-health response, the Governor has temporarily barred all in-person gatherings of more than ten people and ordered people to stay at home unless engaging in a narrow range of permitted activities. Reports from other regions suggest that orders of this type have been successful in limiting transmission of COVID-19. *See, e.g.*, *The State of Our State's Coronavirus Fight*, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq; Rong-Gong Lin II, et

al., *Social distancing may have helped California slow the virus and avoid New York's fate*, L.A TIMES (Mar. 31, 2020, 5:00 AM), https://lat.ms/2VSbYih.

Though the Governor's order does temporarily limit the plaintiff religious leaders' ability to host and attend large in-person religious gatherings, their religious-exercise rights have not been violated. The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505 U.S. 520 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. Governor Hogan's order complies with this principle: The virus is just as likely to spread at religious events as at nonreligious ones, so the order applies to all gatherings equally, regardless of motivation. But even if the Court were to conclude that heightened scrutiny should apply, the mass-gathering ban would still be valid because it is narrowly tailored to advance Maryland's compelling interest in protecting its residents from a deadly disease.

What is more, the Establishment Clause of the First Amendment forbids granting the religious exemption that 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 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 one of Plaintiffs' churches could infect scores of fellow congregants, who could then expose family, friends, and countless others 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. Plaintiffs' motion for a temporary restraining order should likewise be denied.

ARGUMENT

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

A. The Order 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 Plaintiffs argue here that the Free Exercise Clause entitles them to an exemption from temporary, emergency public-health measures enacted by Governor Hogan to combat a dangerous 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 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. Governor Hogan'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 more than ten people together are allowed for any purpose. Order of the Governor of the State of Maryland No. 20-05-06-01 (May 6, 2020) (Hogan) ¶ III, https://bit.ly/2WauHXz. The neutrality of that blanket prohibition is unchanged by the order's inclusion of religious gatherings in a non-exhaustive list of examples of prohibited gatherings (*id.* ¶ III(a)); religious gatherings would fall within the order's scope regardless. Moreover, while the stay-at-home component of the order bars people from leaving their homes for the vast majority of nonreligious activities (*id.* ¶ II), Maryland specifically allows its residents to leave their homes to attend in-person religious services involving less than eleven people, to attend drive-in religious services, and to provide remote religious services (Office of Legal Counsel of Governor Hogan, Interpretive Guidance No. COVID19-09 (Apr. 1, 2020 https://bit.ly/2WaM8HE)).

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. As explained, the Governor's order applies to all in-person gatherings and limits a wide range of out-of-home activities. It therefore does not pursue Maryland'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 stay-at-home component of the order contains some categorical exemptions for essential activities such as buying groceries and seeking medical care (E.O. 20-05-06-01 ¶ II.b) 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; *see also Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, United States Department of Justice (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls). The order challenged here restricts analogous nonreligious gatherings—including those at social clubs, lectures, parades, festivals, conventions, fundraisers, restaurants, senior centers, and theaters—no less than religious gatherings. *See* E.O. 20-05-06-01 ¶¶ III, V.

Nor do Maryland's stay-at-home requirements discriminate against religious purposes or activities. Just as Marylanders may leave their homes to buy food or obtain medical care (*id.* ¶ II), so too may they go to in-person religious services involving less than eleven people or to drive-in services (Interpretive Guidance No. COVID19-09 ¶¶ 1–2). Just as employees of businesses that are allowed to remain open may go to their workplaces to maintain permitted operations (E.O. 20-05-06-01 ¶ II), clergy and their staff may go to their houses of worship to provide remote or other allowed religious services (Interpretive Guidance No. COVID19-09 ¶ 3). And just as in-person religious services are limited to ten people (*id.* ¶ 2.a), nothing in the order permits groups of more than ten to congregate in hospitals, grocery stores, or other businesses that may remain open (E.O. 20-05-06-01 ¶ III); and many businesses are closed entirely or prohibited from having any customers stay inside them (*id.* ¶ V).

What is more, the permitted out-of-home activities further Maryland'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 Governor were to forbid leaving home to obtain groceries, medicine, healthcare, cleaning supplies, and similar goods and services (*cf.* E.O. 20-05-06-01 ¶ II.b), 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.

In addition, the Governor's order draws no distinctions based on religious views or motivations with respect to permitted out-of-home activities. Hospitals, media organizations, homeless shelters, food banks, and soup kitchens are permitted to operate whether or not they have a religious affiliation. *See* E.O. 20-05-06-01 ¶¶ II.b.ii, VI; *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).

Nor does the order set up a suspect system of individualized exemptions that disfavors religion. *Cf.* Compl. ¶ 124. To be sure, the Free Exercise Clause guards against governmental practices that routinely grant individualized exemptions based on subjective determinations that favor nonreligious over religious justifications. *See Smith*, 494 U.S. at 884; *accord, e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). But the order here creates no scheme of case-by-case determinations

that would enable discriminatory application; rather, it contains limited categorical exemptions that, as explained above, do not discriminate against religion.

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 Order Would Satisfy Even A Compelling-Interest Test.

Even if the Governor's order were for some reason subject to heightened scrutiny, which it isn't, Plaintiffs' free-exercise claim would still fail. For more than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand even the strictest judicial review.

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 order here, that were 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. "[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, the Supreme Court more than a century ago upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The Court straightforwardly rejected the idea that the Constitution bars compulsory measures to protect health, citing the "fundamental principle" that personal liberty is subject to restraint "in order to secure the . . . health . . . of the state." *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). Because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," individual rights are subject to reasonable restrictions—especially during a public-health emergency 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. The Fourth Circuit has also consistently recognized that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353–54 (4th Cir. 2011); *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 holding that government's interest in fighting spread of contagious disease is compelling). Maryland's interest here in stanching the spread of COVID-19 is no less compelling.

2. The order 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 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 Hogan'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 Maryland cannot know who is infected at any given time, the only way to slow the virus's spread is to restrict the number and size of in-person gatherings temporarily. And the order is no broader than necessary to ensure that the targeted activities—physical gatherings that create opportunities for transmission of the virus—are curtailed.

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; among these are two district courts within the Fourth Circuit and a Fourth Circuit panel that summarily rejected a motion for an injunction pending appeal. *See 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); *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); *see also Legacy Church, Inc. 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); *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); *Roberts v. Neace*, __ F. Supp. 3d __, No. 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 and preliminary injunction), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 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); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *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).

Amicus is aware of only three instances in which courts have issued injunctive relief in religion-based challenges to COVID-19-related orders, and in two of those the relief was limited to drive-in religious services. *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 to allow drive-in religious services but denying injunction with respect to in-person religious gatherings); *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, where challenged orders had substantially broader exemptions for nonreligious activities than here). Governor Hogan has expressly permitted drive-in services (Interpretive Guidance No. COVID19-09 ¶ 1), so determinations concerning orders restricting those services are irrelevant here.[1]

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.

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[1] Plaintiffs also raise a religious-exercise claim under the Maryland Constitution in support of their request for a TRO. *See* Compl. ¶¶ 192–208; Mot. for TRO ¶ 2 (incorporating all pleadings in Complaint). That claim 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).

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 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 *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. 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.

Simply put, Maryland is facing an unprecedented public-health emergency. In response to this grave threat, Governor Hogan has prohibited large gatherings and ordered Marylanders 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.

For religious gatherings are just as likely as other gatherings to spread COVID-19, and the examples are sadly piling up across the country. Officials in Sacramento County, California, for example, traced roughly a third of the county's

first several hundred cases back to church gatherings. Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020, 2:55 PM), https://bit.ly/2XlCpPu. After a church-choir practice—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 one of Plaintiffs' 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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