No. 20-1579

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANTIETAM BATTLEFIELD KOA, et al.,

Plaintiffs-Appellants,

v.

LAWRENCE J. HOGAN, et al.,

Defendants-Appellees.

On Appeal from the Order of the United States District Court
for the District of Maryland
Case No. 1:20-cv-1130, Hon. Catherine C. Blake

BRIEF IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL BY *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; DISCIPLES JUSTICE ACTION NETWORK; INTERFAITH ALLIANCE FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; MEN OF REFORM JUDAISM; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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

No. 20-1579 Caption: Antietam Battlefield KOA v. Hogan

Pursuant to FRAP 26.1 and Local Rule 26.1,

See attachment for list of amici curiae making disclosures. The disclosures below apply to all amici
(name of party/amicus)

curiae on the attached list.

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

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

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

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

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

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

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

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

Signature: /s/ Alex J. Luchenitser Date: June 22, 2020

Counsel for: amici curiae on attached list

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Attachment to Disclosure Statement: List of *Amici Curiae*

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Disciples Justice Action Network.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to worship freely is precious, but that it should never be misused to cause harm.

Amici include religious organizations that are recommending not holding in-person worship at this time even if allowed under state law, as many of their constituent members (including congregations and faith leaders) believe that doing so under current conditions is dangerous. The religious organizations among *amici* recognize that in-person religious services inherently entail close and sustained human connections that risk COVID-19 infection not only of congregants but also of people in the wider community with whom they associate. Applying religion-neutral restrictions on large gatherings to religious services both protects the public health and respects the Constitution.

The *amici* are:

- Americans United for Separation of Church and State.

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

- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Disciples Justice Action Network.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are facing a pandemic. The United States has by far the most reported COVID-19 cases and deaths worldwide (*see COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited June 19, 2020), https://bit.ly/2xR2V99), and the total numbers of cases and deaths in Maryland continue to climb (*see* Rebecca Tan, et al., *Known coronavirus deaths and cases in D.C., Maryland and Virginia*, WASH. POST (updated June 19, 2020, 11:05 AM), https://wapo.st/2Sqc4wA).

This emergency has demanded decisive action from leaders at all levels of government. In Maryland, that response has included temporary restrictions on religious gatherings, which some of the Plaintiffs challenge here.[2] Reports from other regions suggest that measures like these have slowed the spread of the virus. *See, e.g.*, 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. And continued success depends in part on a cautious and controlled "reopening" of the many institutions that have been restricted as part of Maryland's life-saving public-health response.

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

The state public-health order currently in effect limits gatherings at religious facilities to 50 percent of the facilities' maximum capacity—the same restriction placed on numerous nonreligious institutions whose functions entail sustained close interactions in indoor spaces. *See* Order of the Governor of the State of Maryland No. 20-06-10-01 § III (2020) (Hogan) (E.O. 20-06-10-01), https://bit.ly/3db6zcN. This order does not come close to violating Plaintiffs' religious-exercise rights. As 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), neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause. Maryland's order complies with this principle. But even if heightened scrutiny were to apply here, the order would still be valid, because it is narrowly tailored to advance Maryland's compelling interest in protecting its residents from a deadly contagious disease.

What is more, the Establishment Clause forbids granting an exemption from the order for religious services. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985).

Exempting religious gatherings from Maryland's public-health order would do just that: A single contagious person at a religious service may infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not choose to attend the event.

For similar reasons, federal-court decisions—including rulings by the U.S. Supreme Court, this Court, and the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits—have overwhelmingly denied relief in religion-based challenges to COVID-19-related public-health measures that were much more restrictive of religious exercise than is Maryland's current order. This Court should likewise deny the motion for an injunction pending appeal.

ARGUMENT

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

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

The freedom to worship in accordance with one's spiritual needs is a right of the highest order. And it is natural that in difficult and perilous 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 in the face of general legal restrictions. *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 the temporary 50-percent-capacity limit ordered by Governor Hogan to combat a pandemic.[3] 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)). The Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they are

[3] To the extent that Plaintiffs challenge more onerous restrictions (Mot. for Inj. Pending Appeal 12, 14, 16–17, 22), they appear to be referring to prior orders and a guidance that are moot because they are no longer in effect. *See* E.O. 20-06-10-01 § I.a (superseding prior orders); Office of Legal Counsel of Governor Hogan, Interpretive Guidance No. COVID19-14 (May 13, 2020) (rescinding Interpretive Guidance COVID19-09, which applied to religious gatherings), https://bit.ly/3gwykPB. And while Plaintiffs briefly take issue with some orders by local governments (Mot. for Inj. Pending Appeal 20–21), these orders are beyond the scope of this case because they were not challenged in Plaintiffs' complaint and Plaintiffs have not named as defendants any local governmental entities or officials.

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.

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 a closely related concept (*id.* at 531) that forbids government to impose a "'burden[ ] *only* on conduct motivated by religious belief'" (*Liberty Univ. v. Lew*, 733 F.3d 72, 99 (4th Cir. 2013) (alteration in original) (quoting *Lukumi*, 508 U.S. at 543)). The touchstone for both inquiries is whether government has purposefully discriminated against religious conduct. *See Lukumi*, 508 U.S. at 533–34, 542–43.

The order here evinces no hostility toward religion: It neither "single[s] out religious practices for discriminatory treatment" nor was "designed to suppress religious belief or practice." *See Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995). Rather, it restricts conduct "for the harm it causes, not because the conduct is religiously motivated." *See id.* The risk of COVID-19 transmission is heightened when people are in close proximity for prolonged periods. *See, e.g.*, Allison James, et al., *High*

COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020, MORBIDITY & MORTALITY WEEKLY REPORT (May 22, 2020), https://bit.ly/3f6MYM2. The order therefore restricts religious facilities in the same way—imposing a 50-percent-capacity limit—as many other institutions that entail sustained close interactions in indoor spaces, such as restaurants, salons, gyms, social clubs, and casinos. *See* E.O. 20-06-10-01 §§ III.a, III.d–h. And the order limits religious facilities *less than* some other comparable venues—indoor theaters and senior centers—which must remain closed entirely. *See* E.O. 20-06-10-01 § IV.

In similar circumstances, in *South Bay United Pentecostal Church v. Newsom*, __ S. Ct. __, No. 19A1044, 2020 WL 2813056 (May 29, 2020), the Supreme Court refused to issue an emergency injunction against a California public-health order that restricted in-person religious services to the smaller of 25 percent of building capacity or 100 people—substantially less than what Maryland permits. Concurring in the denial of injunctive relief, Chief Justice Roberts explained, "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment." *Id.* at *1. "Similar or more severe restrictions," emphasized the Chief Justice, "apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large

groups of people gather in close proximity for extended periods of time." *Id.* "And the Order exempts or treats more leniently only dissimilar activities," added the Chief Justice, "such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.*; *see also Attorney Gen. 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 and concert halls).

As Maryland's order restricts religious facilities and gatherings no more—and in some cases *less*—than comparable nonreligious institutions and gatherings, it does not work any unconstitutional discrimination against religion. Hence, heightened scrutiny does not apply.[4]

[4] Plaintiffs also cursorily argue that they should be entitled to heightened scrutiny because they couple their Free Exercise Clause claim with freedom of speech and assembly claims. Mot. for Inj. Pending Appeal 24–25. But this Court has never recognized this "hybrid-rights" theory. *See Workman v. Mingo Cty. Bd. of Educ.*, 419 Fed. App'x 348, 353 (4th Cir. 2011). In any event, Plaintiffs do not brief their freedom of speech and assembly claims, and even circuits that have been willing to entertain a hybrid-rights theory have made clear that a party relying on it must do more than "simply invoke" a second constitutional right. *See, e.g., Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

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

But even if a compelling-interest test did apply to Plaintiffs' religious-exercise claim, their challenge would still fail. More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand even compelling-interest scrutiny.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of the compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). But even those pre-*Smith* decisions repeatedly acknowledged that there is no right to religious exemptions from laws, like the order here, that shield the public from illness. For government has a compelling interest in protecting the health and safety of the public in general, and that interest is undeniable when it comes to preventing the spread of deadly communicable diseases. *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) (citing "the authority of a state to enact quarantine laws and 'health laws of every description'"). The Court straightforwardly rejected the idea that the Constitution 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)).

Following incorporation of the Free Exercise Clause against the states (*see Cantwell*, 310 U.S. at 303), the Supreme Court relied on *Jacobson* to reaffirm that reasonable public-health measures burdening religious exercise withstand a compelling-interest inquiry (*see Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that satisfies compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67). And this Court has likewise recognized that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011); *accord Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases).

There can be no doubt that Maryland has a compelling interest in battling the COVID-19 pandemic.

A compelling-interest test, if it applied, would also ask whether the challenged order is narrowly tailored to the governmental interest at stake. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982). 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). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *Jacobson*, 197 U.S. at 26–27)) and many other federal and state courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at 1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy a compelling-interest test.

Governor Hogan's order is far less restrictive than a blanket ban and easily satisfies the narrow-tailoring standard. No vaccine or accepted treatment for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* CHRISTI A. GRIMM, U.S. DEP'T OF HEALTH & HUMAN SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC 3 (Apr. 2020), https://bit.ly/2VTEMIm. Without the capacity to test comprehensively, temporarily restricting the size and density of in-person gatherings is the best way for Maryland to advance its compelling objective

of slowing community spread and saving lives. The order is no broader than necessary to ensure that the targeted activities—physical gatherings that create significant risks of contagion—occur more safely.

It is no rebuttal for Plaintiffs to suggest that Maryland has less restrictive alternatives in the form of laxer—and thus less effective—regulations. Under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). And as the Chief Justice explained in his opinion in *South Bay*, "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" __ S. Ct. __, 2020 WL 2813056, at *1 (quoting *Jacobson*, 197 U.S. at 38 (alteration in original)). Therefore, state officials' decisions on "when restrictions on particular social activities should be lifted during the pandemic . . . should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

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 explained above, the great majority of decisions around the country both before and after the Supreme Court's ruling in *South Bay*—including rulings from this Court and the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits—have denied injunctive relief in challenges to COVID-19-related orders that restricted religious gatherings. And all those public-health orders limited worship services substantially more than Governor Hogan's order does.

For example, the Seventh Circuit upheld an Illinois order that capped religious gatherings at ten people, explaining that religious services are "most like other congregate functions that occur in auditoriums, such as concerts and movies," which Illinois had banned completely. *Elim Romanian Pentecostal Church v. Pritzker*, __ F.3d __, No. 20-1811, 2020 WL 3249062, at *4–6 (7th Cir. June 16, 2020) (Easterbrook, J.). Likewise, the Ninth Circuit in its opinion in *South Bay* denied a motion for injunction pending appeal at a time when the challenged state and local orders prohibited *all* in-person gatherings,[5] explaining that "where state action does not 'infringe upon or restrict practices because of their religious

[5] California eased its restrictions between the Ninth Circuit's and Supreme Court's rulings.

motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." __ F.3d __, No. 20-55533, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020) (quoting *Lukumi*, 508 U.S. at 543). And, in a case in which this Court denied a motion for injunction pending appeal in a challenge to a ten-person limit on religious gatherings (Executive Order Fifty-Five (Mar. 30, 2020) (Northam), https://bit.ly/2M4U9rG), a Virginia district court held not only that the plaintiff was unlikely to succeed on the merits but also that the balance of equities favored the state because "it is no exaggeration to recognize that the stakes for residents . . . are life-or-death." *Tolle v. Northam*, No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020).

Many other federal courts have reached similar conclusions. *See, e.g.*, *Spell v. Edwards*, __ F.3d __, No. 20-30358, 2020 WL 3287239, at *3–4 (5th Cir. June 18, 2020), *denying as moot motion for injunction pending appeal, dismissing appeal as moot, and vacating* __ F. Supp. 3d __, No. 3:20-cv-282, 2020 WL 2509078, at *1, 2–4 (M.D. La. May 15, 2020) (ten-person limit); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, Doc. No. 117596871 (1st Cir. June 2, 2020), *denying motion for injunction pending appeal of* __ F.

Supp. 3d __, No. 1:20-cv-156, 2020 WL 2310913, at *3 (D. Me. May 9, 2020) (ten-person limit); *Bullock v. Carney*, __ F.3d __, No. 20-2096, 2020 WL 2819228 (3d Cir. May 30, 2020), *denying motion for injunction pending appeal of* __ F. Supp. 3d __, No. 1-20-cv-674, 2020 WL 2813316, at *1 (D. Del. May 29, 2020) (thirty-percent-capacity limit); *Hawse v. Page*, No. 20-1960 (8th Cir. May 19, 2020), *denying motion for injunction pending appeal of* No. 4:20-cv-588, 2020 WL 2322999, at *1, 3 (E.D. Mo. May 11, 2020) (standing-based dismissal of challenge to ten-person limit); *Gish v. Newsom*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020), *denying motion for injunction pending appeal of* No. 5:20-cv-755, 2020 WL 1979970, at *2, 5–6 (C.D. Cal. Apr. 23, 2020) (no gatherings of any size); *Calvary Chapel Lone Mountain v. Sisolak*, __ F. Supp. 3d __, No. 2:20-cv-907, 2020 WL 3108716, at *1 (D. Nev. June 11, 2020) (fifty-person limit), *appeal docketed*, No. 20-16169 (9th Cir. June 16, 2020); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111, at *1, 5–7 (E.D. Cal. May 5, 2020) (no gatherings of any size permitted), *appeal dismissed*, ECF No. 14, No. 20-15977 (9th Cir. May 29, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *3–8 (E.D. Va. May 4, 2020) (ten-person limit), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *2, 6–11 (N.D. Ill. May 3, 2020) (ten-person limit),

appeal docketed, No. 20-1757 (7th Cir. May 6, 2020); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 1905586, at *1, 30–38 (D.N.M. Apr. 17, 2020) (five-person limit).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—has any injunctive relief been granted in religion-based challenges to COVID-19 orders; and all those cases, which were decided before the Supreme Court's decision in *South Bay*, considered restrictions far tighter than Maryland's. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (per curiam order granting motion for injunction pending appeal against Kentucky order prohibiting gatherings of any size); *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (purported restrictions on drive-in services); *Berean Baptist Church v. Cooper*, __ F. Supp. 3d __, No. 4:20-cv-81, 2020 WL 2514313, at *1, 11 (E.D.N.C. May 16, 2020) (ten-person limit on indoor religious services); *Tabernacle Baptist Church v. Beshear*, __ F. Supp. 3d __, No. 3:20-cv-33, 2020 WL 2305307, at *1–2, 5–6 (E.D. Ky. May 8, 2020) (Kentucky order prohibiting gatherings of any size); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021, at *1–2, 8–9 (D. Kan. Apr. 18, 2020) (ten-person limit); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249, at *1–2 (W.D. Ky. Apr. 18, 2020) (purported ban on drive-in services). Furthermore, contrary to the Chief

Justice's analysis in *South Bay*, __ S. Ct. __, 2020 WL 2813056, at *1, these decisions treated religious services as comparable to grocery shopping and office work, and they second-guessed state officials' judgments on what means were necessary to render religious services safe. *See, e.g.*, *Neace,* 958 F.3d at 414–15.

And while the Fifth Circuit granted a partial injunction pending appeal against a Mississippi city's complete ban on in-person religious services in *First Pentecostal Church of Holly Springs v. City of Holly Springs*, that injunction was limited to requiring the city to apply to religious services the rules applicable in that community to "similarly situated businesses and operations" (__ F.3d __, No. 20-60399, 2020 WL 2616687, at *1 (5th Cir. May 22, 2020))—something that Maryland already does. Moreover, that ruling did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the local measure that was challenged. *Compare id. with id.*, Doc. No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).

II. GRANTING A RELIGIOUS EXEMPTION WOULD VIOLATE THE ESTABLISHMENT CLAUSE.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of

one's beliefs on others. The Religion Clauses "mandate[ ] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This neutrality requirement forbids the state not just to target religion for worse treatment but also to grant religious exemptions that would detrimentally affect nonbeneficiaries. *See, e.g.*, *Estate of Thornton*, 472 U.S. at 709–10. Exempting religious services from Maryland's emergency public-health 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. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961). And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow a minor to distribute religious literature, because of the danger that the exemption would have posed to the child's welfare. 321 U.S. at 170. These holdings all embody the fundamental precept that "[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)) 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 Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), the Court held that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339–40 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to improper religious favoritism, and therefore were permissible under the Establishment Clause, because the applicable legal requirements would otherwise directly interfere with "church autonomy." *Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017).

This case does not implicate that special protection for ecclesiastical authority because it does not present questions regarding "religious

organizations[’] autonomy in matters of internal governance.” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Rather, it presents a far different question: whether there is a constitutional right to put countless people *outside* the church at greater risk of exposure to deadly disease.

c. Granting Plaintiffs an exemption from Maryland’s COVID-19 response here would elevate their religious preferences over the health of the entire community. If Plaintiffs were permitted to hold religious gatherings without restrictions, not only would their congregants face greater danger, but so would everyone with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness.

Maryland is facing an unprecedented public-health emergency. Though much about the virus remains unknown, what we do know demands a strong response. Limiting the numbers of people allowed to gather at religious facilities and comparable nonreligious venues will reduce contacts between people, slow the spread of the virus, and potentially save lives.

If Maryland is instead forced to exempt religious gatherings from its emergency public-health order, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely as other gatherings to lead to COVID-19 outbreaks, and the examples have sadly piled up across the country. *See, e.g.*, Stephanie Becker, *At least 70 people*

infected with coronavirus linked to a single church in California, health officials say, CNN (Apr. 4, 2020), https://cnn.it/2NgYN6l; Sara Cline, *Church tied to Oregon's largest coronavirus outbreak*, ABC NEWS (June 16, 2020), https://abcn.ws/2BhPtwC; 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; Bailey Loosemore & Mandy McLaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, LOUISVILLE COURIER JOURNAL (Apr. 3, 2020), https://bit.ly/2V1Jjrs; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; 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/2SFVYyX. Indeed, some of these outbreaks have occurred in spite of safety precautions taken by houses of worship. *See, e.g.*, Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; Chris Epp, *'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience*, CTV NEWS (May 11, 2020), https://bit.ly/3dLUv2l; 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.

As these examples show, continued adherence to public-health orders is critical to protecting the public from COVID-19. A single unwitting carrier at a worship service could cause a ripple effect throughout the entire community: That one carrier might pass the virus to his neighbors in the pews, who might then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members then go to the doctor's office, or to the grocery store for milk, they may potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources.

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

CONCLUSION

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

Respectfully submitted,

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