No. 20-55907

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEST ROCK CHURCH, INC., *et al.*,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM,

Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the Central District of California
Case No. 2:20-cv-06414, Hon. Jesus G. Bernal

BRIEF, IN SUPPORT OF APPELLEE AND IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL, OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; COVENANT NETWORK OF PRESBYTERIANS; INTERFAITH ALLIANCE FOUNDATION; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; REV. DR. MARC IAN STEWART, CONFERENCE MINISTER, MONTANA-NORTHERN WYOMING CONFERENCE, UNITED CHURCH OF CHRIST; AND SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST

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RULE 26.1 DISCLOSURE STATEMENT

With the exception of Rev. Dr. Marc Ian Stewart, who is an individual, all the *amici* are nonprofit organizations that have no parent corporations and that are not owned, in whole or in part, by any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

State Guidances

TABLE OF AUTHORITIES—continued

Other Authorities

TABLE OF AUTHORITIES—continued

INTERESTS OF THE *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 and should never be misused to cause harm.

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

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

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Covenant Network of Presbyterians.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- National Council of Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Rev. Dr. Marc Ian Stewart, Conference Minister, Montana-Northern Wyoming Conference, United Church of Christ.
- Southwest Conference of the United Church of Christ.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. The United States has suffered by far the most reported COVID-19-related deaths worldwide, more than 14,000 of which have occurred in California. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Sept. 14, 2020), https://bit.ly/2xR2V99. The virus continues to pose a dire threat to Californians, as cases have surged this summer. *See Tracking the coronavirus in California*, L.A. TIMES (updated Sept. 13, 2020), https://lat.ms/2YVy8SU.

As part of California's ongoing emergency response, Governor Newsom has issued a series of directives temporarily limiting in-person gatherings and other activities. California's currently operative Guidance restricts religious services less than or similarly to comparable nonreligious activities, tying the levels of restriction to metrics of COVID-19 transmission by county: only outdoor services are allowed in counties with widespread transmission of the virus; indoor services limited to the lesser of 25 percent of building capacity or 100 people are permitted in counties with substantial transmission; the limit is 50 percent of capacity or 200 people in counties with moderate transmission; and the only limit is 50 percent of capacity in counties with minimal transmission. *See Industry guidance to reduce risk*, COVID19.CA.GOV (updated Sept. 10, 2020),

https://bit.ly/3lI7KG7; *Blueprint for a Safer Economy*, COVID19.CA.GOV (updated Sept. 14, 2020), https://bit.ly/3jAoI7b. These kinds of restrictions on in-person gatherings have been successful in slowing the transmission of the virus. *See, e.g.*, Timothy Bella, *Places without social distancing have 35 times more potential coronavirus spread, study finds*, WASH. POST (May 15, 2020), https://wapo.st/2EKDjhd.

Plaintiffs nevertheless challenge California's Guidance under the Free Exercise Clause of the First Amendment. But the Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Clause. The Guidance complies with this legal standard because its limitations on religious services are no stricter than those imposed on analogous nonreligious activities. But even if heightened scrutiny were called for, the Guidance is constitutional because it is narrowly tailored to advance California's compelling interest in protecting its residents from a deadly disease.

What's more, the First Amendment's Establishment Clause forbids granting an exemption from the Guidance 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. Holding that religious gatherings must be exempted from the Guidance would do just that: A contagious person at a religious service could infect scores of fellow congregants, who may then expose many family members, friends, and strangers who did not attend the event.

For similar reasons, both the U.S. Supreme Court and this Court have rejected challenges to earlier versions of California's Guidance that are materially indistinguishable from current restrictions. The overwhelming majority of other court decisions—including rulings by the First, Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits—have likewise denied relief in religion-based challenges to COVID-19-related public-health measures. This Court should deny Plaintiffs' motion for an injunction pending appeal.

ARGUMENT

I. The Guidance does not violate the Free Exercise Clause of the First Amendment.

A. Rational-basis review applies to the Guidance.

The freedom to worship is a value of the highest order, and many people naturally seek the comfort and support provided by faith communities in these difficult times. But as the Supreme Court recently reaffirmed, the constitutional guarantee of religious freedom "does not

mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). Yet Plaintiffs argue here that the Free Exercise Clause entitles them to an exemption from California's emergency public-health measures. 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 Free Exercise Clause forbids intentional suppression of religious conduct, but it does not make "professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Supreme Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they are neutral toward religion and apply generally. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505 U.S. 520, 531, 543 (1993); *Smith*, 494 U.S. at 879.

California's Guidance complies with this principle. Protests, cultural ceremonies, movie theaters, and restaurants are covered by rules identical to those applicable to houses of worship. *See Industry guidance*; *Stay home*

Q&A, COVID19.CA.GOV (updated Sept. 14, 2020), https://bit.ly/2Bmgcb5 (section entitled "Can I engage in political protest gatherings?"). And concert venues, live theatres, festivals, convention centers, bars, breweries, distilleries, nightclubs, family entertainment centers, theme parks, gyms, fitness centers, pools, saunas, spas, steam rooms, cardrooms, racetracks, sporting events with live audiences, and various kinds of other gatherings are subject to stricter restrictions or—in many cases—are entirely closed or prohibited statewide. *See Industry guidance*; *Blueprint* (section entitled "Find the status of activities in your county"); *Stay home Q&A* (section entitled "Are gatherings permitted?"); *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH (Sept. 12, 2020), https://bit.ly/35HNRtf. California thus restricts religious services similarly to or less than comparable nonreligious gatherings.

Accordingly, both the Supreme Court and this Court have rejected requests for injunctions against California's limitations on houses of worship. In *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), the Supreme Court refused to issue an emergency injunction against the restrictions that are now applicable in counties with substantial transmission of the virus. Concurring in the denial of injunctive relief, Chief Justice Roberts explained that the restrictions

"appear[ed] consistent with the Free Exercise Clause" because "[s]imilar or more severe restrictions appl[ied] 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.* at 1613. And, earlier in the same litigation, this Court concluded that plaintiffs challenging restrictions that are now applicable in counties with widespread transmission of the virus "ha[d] not demonstrated a sufficient likelihood of success on appeal," for "where state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543); *see also 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) (order upholding same restrictions).

Plaintiffs take issue with California's decision not to impose on retail establishments the kinds of restrictions that are applicable to religious services. Mot. 14–15. But dissenters from both the Supreme Court's and this Court's decisions in *South Bay* made similar arguments, and they did

not prevail. *See* 140 S.Ct. at 1614 (Kavanaugh, J., dissenting); 959 F.3d at 945 (Collins, J., dissenting). As the Chief Justice's concurrence explained, California "exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." 140 S.Ct. at 1613.

Moreover, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542. "That . . . regulations recognize some exceptions cannot mean that the [state] has to grant all other requests for exemption to preserve the 'general applicability' of the regulations." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009). Rather, heightened scrutiny applies under the Free Exercise Clause only when the exempted conduct is "similar enough in all material respects" to nonexempted religious conduct to support a conclusion that the prohibition "was based on [the prohibited conduct's] religious nature" (*Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52–53 (10th Cir. 2013))—a showing that Plaintiffs do not and cannot make.

Plaintiffs additionally object (Mot. 4) to a prohibition on singing and chanting at indoor religious services (*see* COVID-19 INDUSTRY GUIDANCE: PLACES OF WORSHIP AND PROVIDERS OF RELIGIOUS SERVICES & CULTURAL CEREMONIES 3 (July 29, 2020), https://bit.ly/3fF534l). But California also

prohibits singing and chanting at indoor cultural ceremonies (*see id.* at 2–3), indoor protests (*Stay home Q&A* (section entitled "Can I engage in political protest gatherings?")), schools (*see* COVID-19 INDUSTRY GUIDANCE: SCHOOLS AND SCHOOL-BASED PROGRAMS 12 (Aug. 3, 2020), https://bit.ly/2FXK93C), and restaurants (*see* COVID-19 INDUSTRY GUIDANCE: RESTAURANTS, BARS, AND WINERIES 14 (July 29, 2020), https://bit.ly/3k7T69z). Other venues and events that commonly feature singing or chanting—including concert halls, live theatres, festivals, nightclubs, and sporting events with live audiences—are closed or barred entirely. *See Blueprint* (section entitled "Find the status of activities in your county"). And singing and chanting are still permitted at outdoor religious services. *See* INDUSTRY GUIDANCE: PLACES OF WORSHIP 3. Again, California is not discriminating against religion.

Nor are California's restrictions discriminatory (*cf.* Mot. 10–11) because they apply to Plaintiffs' worship services but not to social-welfare programs—such as operating a food bank—that Plaintiffs may wish to provide (*see Essential workforce*, COVID19.CA.GOV (updated Sept. 8, 2020), https://bit.ly/35kQalC). The sustained congregation of worshippers speaking, singing, and interacting is different from the fleeting, sequential exchanges between a volunteer at a food bank and a person picking up pantry staples. And the rules concerning gatherings and social-welfare

programs that apply to Plaintiffs govern nonreligious institutions equally. That California treats the delivery of social-welfare programs by religious and nonreligious institutions the same way only underscores that California's restrictions are neutral and generally applicable. *Cf. Ungar v. N.Y.C. Hous. Auth.*, 363 F.App'x 53, 56 (2d Cir. 2010) (limited categorical exemptions from public-housing policy did not negate general applicability because exemptions were equally available to religious and nonreligious applicants).

Finally, Plaintiffs spill much ink arguing that California's restrictions on *indoor* religious services should be enjoined because California allows *outdoor* protests. Mot. 6–10. But, as noted above, the rules California imposes on protests are *identical* to the rules applicable to religious services: *outdoor* protests and religious services are permitted statewide, while *indoor* protests and religious services are barred in some counties and governed by uniform limits in others. *See Stay home Q&A* (section entitled "Can I engage in political protest gatherings?"). In any event, outdoor activities are not comparable to indoor gatherings because there is far less risk of transmission of the virus outdoors. *See, e.g.*, Tara Parker-Pope, *How Safe Are Outdoor Gatherings?*, N.Y. TIMES (July 3, 2020), https://nyti.ms/3j4fH6g. Indeed, one study concluded that the odds

of infection are nearly twenty times higher at indoor gatherings than outdoor ones. *See id.*

Plaintiffs thus fall back on an argument that California selectively enforces its Guidance against houses of worship but not protests. Mot. 15. Enforcement decisions are "particularly ill-suited to judicial review," however, and courts defer to them unless they are "'deliberately based upon an unjustifiable standard such as . . . religion.'" *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Plaintiffs cannot come close to making such a showing here because they have presented no evidence that any official who reports to the only defendant in this case—Governor Newsom—has taken any enforcement action against them or any other house of worship. *See* Mot. 4–5.

For similar reasons, federal courts have repeatedly rejected arguments that allowing large outdoor protests invalidates limits on indoor religious activities. In *Calvary Chapel Dayton Valley v. Sisolak*, __ S.Ct. __, No. 19A1070, 2020 WL 4251360, at *4 (July 24, 2020), Justice Alito made such an argument in dissent from a Supreme Court denial of injunctive relief against Nevada restrictions on religious services, but it did not carry the day. At least five federal district courts have rejected such arguments as well. *See Legacy Church v. Kunkel*, __ F.Supp.3d __,

No. 1:20-cv-327, 2020 WL 3963764, at *15, 84–87 (D.N.M. July 13, 2020), *appeal docketed*, No. 20-2117 (10th Cir. Aug. 12, 2020); *High Plains Harvest Church v. Polis*, No. 1:20-cv-1480, 2020 WL 4582720, at *2 (D. Colo. Aug. 10, 2020), *appeal docketed*, No. 20-1280 (10th Cir. Aug. 11, 2020); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-687, 2020 WL 3766496, at *14–16 (N.D.N.Y. July 6, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, __ F.Supp.3d __, No. 2:20-cv-907, 2020 WL 3108716, at *4 (D. Nev. June 11, 2020), *appeal docketed*, No. 20-16274 (9th Cir. June 30, 2020); *Solid Rock Baptist Church v. Murphy*, No. 1:20-cv-6805, 2020 WL 4882604, at *10, 13 (D.N.J. Aug. 20, 2020). And even *Soos v. Cuomo*, on which Plaintiffs lean heavily (Mot. 8–9), did not require *indoor* religious services to be treated the same as *outdoor* protests; it merely required *indoor* religious services to be treated similarly to certain nonreligious *indoor* gatherings, and *outdoor* religious services to be treated similarly to *outdoor* protests. *See* __ F.Supp.3d __, No. 1:20-cv-651, 2020 WL 3488742, at *11–13 (N.D.N.Y. June 26, 2020), *appeals docketed*, Nos. 20-2414, 20-2418 (2d Cir. July 30, 2020).

B. California's Guidance would satisfy even a compelling-interest test.

Even if a compelling-interest test did apply, more than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand it.

Before its decision in *Smith*, 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.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Those pre-*Smith* decisions repeatedly acknowledged that there is no right to religious exemptions from laws that shield the public from illness. For government has an undeniably compelling interest in protecting the public from the spread of deadly communicable diseases. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20.

"[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, more than a century ago in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Supreme Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. 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)).

The Supreme Court later 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; *Yoder*, 406 U.S. at 230 & n.20; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that the state has a compelling interest in preventing the spread of communicable disease. *See, e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F.App'x 348, 353–54 (4th Cir. 2011); *Whitlow v. California*, 203 F.Supp.3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases). There can thus be no doubt that California has a compelling interest in stanching the spread of COVID-19. As this Court stated in its opinion in *South Bay*, 959 F.3d at 939, "We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure."

A compelling-interest test, if it applied, would also ask whether California's Guidance 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.

No accepted cure or vaccine for COVID-19 yet exists, and asymptomatic carriers may unwittingly infect people in close proximity. *See, e.g.*, *S. Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring). So temporarily restricting gatherings is the best way for California to advance its compelling objective of slowing community spread and saving lives. At the same time, the Guidance is no broader than necessary to ensure that the targeted activities—indoor gatherings that create significant risks of contagion—occur more safely.

To suggest, as Plaintiffs do, that the Guidance is not narrowly tailored because California could impose laxer restrictions on religious services—such as physical distancing and sanitation requirements (Mot. 20)—ignores the obvious: prohibiting or imposing a ceiling on the size of gatherings is more likely to reduce transmission of COVID-19 than is

permitting the gatherings to proceed under looser rules. 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).

That is the case here. Airborne transmission of COVID-19 can overcome physical-distancing and cleaning measures. *See, e.g.*, Dyani Lewis, *Mounting evidence suggests coronavirus is airborne—but health advice has not caught up*, NATURE (updated July 23, 2020), https://go.nature.com/3k68T8L. Outbreaks of the virus have thus resulted from religious gatherings in spite of physical-distancing and other safety precautions taken by houses of worship. *See, e.g.*, Kate Conger, et al., *Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 10, 2020), https://nyti.ms/30BOhgq; Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; Alex Acquisto, *This Central Kentucky church reopened on May 10 and became a COVID-19 hot spot*, LEXINGTON HERALD-LEADER (June 6, 2020), https://bit.ly/3dDbQdq.

Moreover, as the Chief Justice explained in his concurrence 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.'" 140 S.Ct. at 1613 (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 challenges to COVID-19-related orders have rejected them.

In addition to the cases cited above, numerous other decisions—including rulings by the First, Third, Fourth, Fifth, Seventh, and Eighth Circuits—have rejected challenges like this one by religious organizations to in-person-gathering restrictions. For example, in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342, 347 (7th Cir. 2020) (Easterbrook, J.), 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.

Many other federal courts have reached similar conclusions. *See, e.g.*, *Bullock v. Carney*, 806 F.App'x 157 (3d Cir. 2020), *denying motion for injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-674, 2020 WL

2813316 (D. Del. May 29, 2020); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, ECF 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 (D. Me. May 9, 2020); *Tolle v. Northam*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-363, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020), *and petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020); *Hawse v. Page*, No. 20-1960, ECF No. 4914708 (8th Cir. May 19, 2020), *denying motion for injunction pending appeal of* No. 4:20-cv-588, 2020 WL 2322999 (E.D. Mo. May 11, 2020) (standing-based dismissal); *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 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 (M.D. La. May 15, 2020); *Cassell v. Snyders*, __ F.Supp.3d __, No. 3:20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F.Supp.3d 758 (E.D. Cal. 2020), *appeal dismissed*, No. 20-15977, ECF No. 14 (9th Cir. May 29, 2020); *Antietam Battlefield KOA v. Hogan*, __ F.Supp.3d __, No. 1:20-cv-1130, 2020 WL 2556496 (D. Md. May 20, 2020), *appeal dismissed*, No. 20-1579, ECF No. 35 (4th Cir. July 2, 2020); *Lighthouse Fellowship Church v. Northam*, __ F.Supp.3d __, No. 2:20-cv-2040, 2020 WL 2110416 (E.D. Va. May 1,

2020), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *see also DiMartile v. Cuomo*, __ F.App'x __, No. 20-2683, 2020 WL 5406781 (2d Cir. Sept. 8, 2020), *staying injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-859, 2020 WL 4558711 (N.D.N.Y. Aug. 7, 2020) (fifty-person limit on weddings).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—have courts granted injunctive relief in challenges to the application to worship services of COVID-19-related health orders. Other than *Soos*, 2020 WL 3488742, which is addressed above (as well as a couple decisions that were promptly stayed on appeal[2]), *all* of those cases were decided before the Supreme Court's decision in *South Bay*. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020); *Berean Baptist Church v. Cooper*, __ F.Supp.3d __, No. 4:20-cv-81, 2020 WL 2514313 (E.D.N.C. May 16, 2020); *Tabernacle Baptist Church v. Beshear*, __ F.Supp.3d __, No. 3:20-cv-33, 2020 WL 2305307 (E.D. Ky. May 8, 2020); *First Baptist Church v. Kelly*, __ F.Supp.3d __, No. 6:20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020); *On Fire Christian Ctr. v. Fischer*,

[2] *See DiMartile*, 2020 WL 5406781; *County of Los Angeles v. Superior Court*, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020).

__ F.Supp.3d __, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). Contrary to the Chief Justice's analysis in *South Bay*, most of 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. (The exception is *Holly Springs*, which did not set forth its reasoning or even explain whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the city ban that was at issue there. *Compare* 959 F.3d at 670 *with id.*, No. 20-60399, ECF No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).)

II. Granting a religious exemption would violate the Establishment Clause.

The Establishment Clause "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)). Granting Plaintiffs the religious exemption that they seek would violate this principle. For the neutrality requirement of the First Amendment's Religion Clauses forbids government not just to target religion for worse treatment but also to grant religious exemptions that would detrimentally affect

nonbeneficiaries. When government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it improperly prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries.

In *Estate of Thornton v. Caldor, Inc.*, for example, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. 703, 709–10 (1985). 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*, for instance, 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) (plurality opinion). And in *Prince*, the Court denied a request for an exemption from child-labor laws barring distribution of religious literature by minors, because of the danger that the exemption would have posed to children'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.

To be sure, the Supreme Court held in *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), and *Our Lady of Guadalupe*, 140 S.Ct. at 2055, that employment-discrimination laws cannot be enforced in a way that would interfere with a church's selection of its ministers. But those cases concerned core decisions of houses of worship that affect only their own members and internal structures. This case 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.

Granting Plaintiffs an exemption here would elevate their religious preferences over the health of the entire community. Not only would Plaintiffs' congregants face greater danger, but so would everyone with whom they come into contact, including the elderly and others at the highest risk of severe illness.

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.*, Bill Bostock, *Nearly 100 people in Ohio got sick after one man infected with the coronavirus attended a church service*, BUSINESS INSIDER (Aug. 6, 2020), https://bit.ly/2Qi2eeF; 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; Sara Cline, *Church tied to*

Oregon's largest coronavirus outbreak, ABC NEWS (June 16, 2020), https://abcn.ws/2BhPtwC; 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; 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; *see also supra* p. 17.

As these examples show, a single unwitting carrier at a large worship service could cause a ripple effect throughout an entire community: That one infected person 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 the grocery store, they may 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, the motion for an injunction pending appeal should be denied.

Respectfully submitted,

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Date: September 15, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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