**No. 20-1377**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

DENVER BIBLE CHURCH, *et al.*,
*Plaintiffs-Appellees*,
v.
GOVERNOR JARED POLIS, *et al.*,
*Defendants-Appellants*,
ALEX M. AZAR II, *et al.*,
*Defendants*.

On Appeal from the Order of the United States District Court
for the District of Colorado
Case No. 1:20-cv-2362, Hon. Daniel D. Domenico

# BRIEF, IN SUPPORT OF STATE DEFENDANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL, OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; COVENANT NETWORK OF PRESBYTERIANS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; INTERFAITH ALLIANCE FOUNDATION; KANSAS-OKLAHOMA CONFERENCE, UNITED CHURCH OF CHRIST; MEN OF REFORM JUDAISM; NATIONAL COUNCIL OF THE 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; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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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.

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## 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 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 infection not only of congregants but also of 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.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.
- Kansas-Oklahoma Conference, United Church of Christ.
- Men of Reform Judaism.
- National Council of the 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.
- Union for Reform Judaism.
- Women of Reform Judaism.

## 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 2,200 of which have occurred in Colorado. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Oct. 26, 2020), https://bit.ly/2xR2V99. And there is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term health damage. *See, e.g.*, TYM Leung, et al., *Short- and Potential Long-term Adverse Health Outcomes of COVID-19: A Rapid Review*, EMERGING MICROBES & INFECTIONS (Sept. 17, 2020), https://bit.ly/3ikjBXJ.

As part of Colorado's ongoing emergency response, Governor Polis and Director Ryan have issued a series of orders temporarily limiting business activities and in-person gatherings. In the counties where Plaintiffs are located, the currently operative Public Health Order limits indoor religious services to the lower of fifty attendees or fifty-percent capacity per room. *See* Third Amended Public Health Order 20-35 Safer at Home Dial, COLO. DEP'T OF PUB. HEALTH & ENV'T, § II.C.2.j (Oct. 23, 2020), https://bit.ly/3mf1u87; Mot. Ex. 1 ¶ 1; *Covid-19 dial dashboard*, COLO. DEP'T OF PUB. HEALTH & ENV'T (last visited Oct. 26, 2020), https://bit.ly/3okdpTW. And a Colorado Executive Order requires

individuals to wear masks in indoor places that are accessible to members of the public; while people who are officiating a religious service are exempt from this requirement, attendees are not. *See* Health Order 20-35 § I.B; Colo. Exec. Order D 2020 138, §§ II.2.G, II.2.M.7, II.2.R (July 16, 2020), https://bit.ly/2Tfsisf. These kinds of restrictions have been successful in slowing the transmission of COVID-19. *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; Lynne Peeples, *Face masks: what the data say*, NATURE (Oct. 6, 2020), https://go.nature.com/2HoHFw4.

The district court nevertheless concluded that application of Colorado's Orders to the plaintiff churches likely violates 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. Colorado's Orders comply with this legal standard because Colorado's limitations on religious services are lesser than or similar to those on comparable nonreligious activities. Even if heightened scrutiny were called for, however, the Orders are constitutional because they are narrowly tailored to advance Colorado's compelling interest in protecting its residents from a deadly disease.

What is more, the First Amendment's Establishment Clause forbids granting a complete exemption from the Orders 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 no size limitation or mask requirement may be placed on religious gatherings would do just that: A contagious person at a religious service could infect scores of fellow congregants, who may then expose family, friends, and strangers, including numerous people who did not attend the event.

For similar reasons, federal-court decisions—including rulings by the U.S. Supreme Court, this Court, and the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have overwhelmingly rejected religion-based challenges to COVID-19-related public-health measures, most of which were much more restrictive of religious gatherings than are Colorado's Orders. This Court should do the same and grant the motion for a stay pending appeal.

## ARGUMENT

### I. Colorado's Orders do not violate the Free Exercise Clause.

#### A. Rational-basis review applies.

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 Colorado'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*, 508 U.S. 520, 531, 543 (1993); *Smith*, 494 U.S. at 879.

Colorado's restrictions on the size of gatherings comply with this principle, because they limit religious services similarly to or less than comparable nonreligious gatherings. In the counties where Plaintiffs are located, many kinds of indoor venues and events—including theatres, concerts, restaurants, receptions, markets, malls, trade shows, hair salons, colleges, and universities—are governed by limits similar to those applicable to indoor religious services. *See* Health Order 20-35 §§ II.C.2.f, II.C.2.h, II.C.2.j, II.C.2.k, III.R, IV.I. Certain other types of gatherings, gyms, recreation centers, camps, pools, and smoking lounges are governed by stricter limits. *See id.* §§ II.C.2.a, II.C.2.i, II.C.2.m, II.C.2.p. And casinos, amusement parks, bounce houses, ball pits, and non-food bars are closed entirely. *Id.* § III.A.1.

Considering analogous circumstances in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), the Supreme Court refused to issue an emergency injunction against a California order that limited religious gatherings to the smaller of twenty-five percent of building capacity or one hundred people. Concurring in the denial of

injunctive relief, Chief Justice Roberts explained that California's order "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; *see also Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, U.S. DEP'T OF JUSTICE (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls).

The district court took issue with Colorado's decision not to impose a numerical cap on the number of people who may be present at businesses such as grocery and retail stores. (Mot. Ex. 41 at 22.) But Justice Kavanaugh made a similar argument in dissent in *South Bay* (140 S.Ct. at 1614), and it did not carry the day. For as the Chief Justice's concurring opinion explained, California "exempt[ed] or treat[ed] more leniently [than religious services] 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." *Id.* at 1613.

The district court went further astray by concluding that Colorado's mask requirement discriminates against religion. (Mot. Ex. 41 at 22–23.) The mask requirement is neutral with respect to religion because it applies in virtually every indoor location in Colorado other than a personal dwelling place. *See* Exec. Order D 2020 138 §§ II.2.G, II.2.R. Moreover, "[i]ndividuals who are officiating at a religious service" are exempt from the requirement, just as "[i]ndividuals who are giving a speech for broadcast or an audience" are. *Id.* §§ II.2.M.7, II.2.M.8.

And while non-officiating church members are required to wear masks at worship services, the only explanation Plaintiffs give for how that restriction allegedly infringes their religious exercise is that it curtails their ability to communicate emotions through facial expressions. (Mot. Ex. 1 ¶¶ 2, 107.) But no one engaged in secular activity—such as political, social, or community meetings—is exempted from the mask requirement for the purpose of communicating emotions with their face either. The mask mandate thus restricts religious and secular facial communication equally.

In addition, all the exemptions to the mask requirement—other than the ones for religious officiants and public speakers—are for physical or safety reasons, such as eating or checking identification. *See* Exec. Order D 2020 138 §§ II.2.L, II.2.M. This Court has repeatedly held that the

existence of categorical exemptions for secular conduct from a law is insufficient by itself to trigger heightened scrutiny of a decision not to exempt religious conduct. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701–02 (10th Cir. 1998). Rather, heightened scrutiny applies only when the exempted conduct is "similar enough in all material respects" to the nonexempted religious conduct to support a conclusion that the difference in treatment "was based on [the prohibited conduct's] religious nature." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013). Plaintiffs cannot come close to making such a showing here.

**B. The Orders would satisfy even a compelling-interest test.**

Even if a compelling-interest test did apply here, 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 a 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). Those pre-*Smith* decisions repeatedly

acknowledged that there is no right to religious exemptions from laws that, like Colorado's Orders, 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, 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)).

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 government has a compelling

interest in preventing the spread of communicable diseases. *See, e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Whitlow v. California*, 203 F.Supp.3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases). Therefore, there can be no doubt that Colorado has a compelling interest in stanching the spread of COVID-19.

A compelling-interest test, if it applied, would also ask whether the Orders are 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.

Colorado's Orders are far less restrictive than a blanket ban and thus satisfy the narrow-tailoring standard more easily. 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 limiting the size of gatherings and requiring masks is the best way for Colorado to advance its

compelling objective of slowing community spread and saving lives. At the same time, the Orders are no broader than necessary to ensure that the targeted activities—indoor interactions that create significant risks of contagion—occur more safely.

The district court concluded that the Orders are not narrowly tailored because Colorado could impose laxer restrictions on religious services, such as physical-distancing and sanitation requirements. (Mot. Ex. 41 at 25–26, 29.) But 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). It is obvious that imposing a ceiling on the size of gatherings and requiring face coverings will more likely reduce transmission of COVID-19 than would permitting the gatherings to proceed under looser rules.

Indeed, airborne transmission of COVID-19 can render physical-distancing and cleaning measures ineffective. *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.*, Shelly Bradbury, *Fatal COVID-19 outbreak linked to Colorado religious group suing state over*

*limits on gatherings*, DENVER POST (Oct. 6, 2020), https://dpo.st/3k5nHVl; 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.

In addition, as the Chief Justice explained in his concurrence in *South Bay*, state officials' decisions about "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." 140 S.Ct. at 1613–14 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). For "[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.'" *Id.* (quoting *Jacobson*, 197 U.S. at 38 (alteration in original)).

### C. The vast majority of courts to consider similar challenges to COVID-19-related orders have rejected them.

The district court's decision to grant an injunction was contrary to the great weight of authority concerning pandemic-related gathering restrictions and mask mandates.

In addition to *South Bay*, numerous decisions—including a subsequent one by the Supreme Court and rulings by this Court and the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have rejected religion-based challenges to restrictions on gatherings. And most of the public-health orders in those cases limited worship services substantially more than Colorado does.

For example, in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020), the Supreme Court denied an application for an injunction against a Nevada fifty-person limit on religious services, where Nevada imposed similar or greater restrictions on "lectures, museums, movie theaters, specified trade/technical schools, nightclubs and concerts" but allowed "casinos, restaurants, nail salons, massage centers, bars, gyms, bowling alleys and arcades . . . to operate at 50% of official fire code capacity" (*id.*, No. 3:20-cv-303, 2020 WL 4260438, at *3–4 (D. Nev. June 11, 2020) (unpublished)). In *Andrew Wommack Ministries v. Polis*, this Court denied a motion for an injunction pending appeal against Colorado's capacity limits for houses of worship. *See* No. 20-1336, 2020 WL 5983978 (10th Cir. Oct. 5, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 1:20-cv-2922, 2020 WL 5810525 (D. Colo. Sept. 29, 2020) (unpublished).

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. In *Harvest Rock Church v. Newsom*, __ F.3d __, No. 20-55907, 2020 WL 5835219, at *1 (9th Cir. Oct. 1, 2020), the Ninth Circuit denied an injunction pending appeal in a challenge to California orders that "appl[ied] the same restrictions to worship services as they d[id] to other indoor congregate events, such as lectures and movie theaters," notwithstanding that "more lenient treatment" was afforded to "certain secular activities, such as shopping in a large store." And in its opinion in *South Bay United Pentecostal Church v. Newsom*, the Ninth Circuit denied a motion for injunction pending appeal against state and local orders that prohibited *all* in-person gatherings, explaining that "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." 959 F.3d 938, 939 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543).

Many other federal courts have reached similar conclusions. *See, e.g.*, *Bullock v. Carney*, 806 F.App'x 157, 157 (3d Cir. 2020) (unpublished), *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); *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 1:20-cv-3590, ECF No. 29 (2d Cir. Oct. 22, 2020) (unpublished), *denying request for administrative stay of decision denying preliminary injunction in* __ F.Supp.3d __, No. 1:20-cv-4844, 2020 WL 6120167, at *2 (E.D.N.Y. Oct. 16, 2020) (limit of lesser of ten people or twenty-five percent of capacity); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, ECF No. 117596871 (1st Cir. June 2, 2020) (unpublished), *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); *Tolle v. Northam*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (unpublished) (ten-person limit), *and petition for cert. denied*, No. 19-1283 (U.S. Oct. 5, 2020); *Gish v. Newsom*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020) (unpublished), *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) (unpublished) (no gatherings of any size); *Hawse v. Page*, No. 20-1960, ECF No. 4914708 (8th Cir. May 19, 2020)

(unpublished), *denying motion for injunction pending appeal of* No. 4:20-cv-588, 2020 WL 2322999, at *1, 3 (E.D. Mo. May 11, 2020) (unpublished) (standing-based dismissal of challenge to ten-person limit); *Spell v. Edwards*, 962 F.3d 175, 180 (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, at *1, 2–4 (M.D. La. May 15, 2020) (ten-person limit); *Legacy Church v. Kunkel*, __ F.Supp.3d __, No. 1:20-cv-327, 2020 WL 3963764, at *8, 14 (D.N.M. July 13, 2020) (five-person and twenty-five-percent capacity limits), *appeal docketed*, No. 20-2117 (10th Cir. Aug. 12, 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); *Cross Culture Christian Ctr. v. Newsom*, 445 F.Supp.3d 758, 769 (E.D. Cal. 2020) (no gatherings of any size permitted), *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, at *2 (D. Md. May 20, 2020) (ten-person limit), *appeal dismissed*, No. 20-1579, ECF No. 35 (4th Cir. July 2, 2020); *Lighthouse Fellowship Church v. Northam*, 458 F.Supp.3d 418, 428–32 (E.D. Va. 2020) (ten-person limit), *appeal dismissed*, No. 20-1515 (4th Cir. Oct. 13, 2020); *see also DiMartile v. Cuomo*, 820 F.App'x 62 (2d Cir. 2020) (unpublished),

*staying injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-859, 2020 WL 4558711, at *1 (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 based on freedom-of-religion arguments in challenges to COVID-19-related restrictions on gatherings. All but two of these cases (not including the decision below) were decided before the Supreme Court's decision in *South Bay* and considered restrictions far tighter than Colorado's Order. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (Kentucky order prohibiting gatherings of any size); *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (purported ban on drive-in services); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020) (order prohibiting all in-person worship 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); *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) (order prohibiting gatherings of any size); *First Baptist Church v. Kelly*, 455 F.Supp.3d 1078, 1082 (D. Kan. 2020) (ten-person limit); *On Fire Christian Ctr. v. Fischer*, 453 F.Supp.3d 901, 907 (W.D. Ky. 2020) (purported ban on

drive-in services). 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 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 at issue. *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).)

One of the two post-*South Bay* decisions granting injunctions addressed a policy that—unlike Colorado's Health Order—restricted religious services substantially more than restaurants, hair salons, and high-school graduations. *See Soos v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-651, 2020 WL 3488742, at *11–12 (N.D.N.Y. June 26, 2020), *appeals docketed*, Nos. 20-2414, 20-2418 (2d Cir. July 30, 2020). The other was based on the federal Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, which imposes a stricter standard of review than the Free Exercise Clause does. *See Capitol Hill Baptist Church v. Bowser*, No. 1:20-cv-2710, 2020 WL 5995126, at *4 (D.D.C. Oct. 9, 2020) (unpublished).

Finally, aside from the decision below, free-exercise challenges to mask requirements have been rejected by all courts that have considered them. *See Bullock*, 806 F.App'x at 157, *denying motion for injunction pending appeal of* __ F.Supp.3d __, 2020 WL 2813316, at *4–5; *Robinson v. Murphy*, No. 2:20-cv-5420, 2020 WL 5884801, at *7–8 (D.N.J. Oct. 2, 2020) (unpublished), *appeal docketed*, No. 20-3048 (3d Cir. Oct. 8, 2020); *Tigges v. Northam*, __ F.Supp.3d __, No. 3:20-cv-410, 2020 WL 4197610, at *3–4 & n.13, 7–8 (E.D. Va. July 21, 2020).

## 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 religious exemptions from Colorado's Orders 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 exemptions 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.*, Nakia McNabb, *At least 18 West Virginia Covid-19 outbreaks linked to church services, governor says*, CNN (Oct. 19, 2020), https://cnn.it/31CLODY; 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; Minyvonne Burke, *More than 100 coronavirus cases and 3 deaths linked to North Carolina church event*, NBC NEWS (Oct. 23, 2020), https://nbcnews.to/3kyjNEN; 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*, AP (June 16, 2020), https://bit.ly/2YWFlT1; Ryan Burns, *A Redding Megachurch Leader Came to Humboldt and Flouted Mask Rules; Her Ministry is Now the Source of a Major COVID Outbreak*, LOST COAST OUTPOST (Oct. 13, 2020), https://bit.ly/3m86USh; 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* at pp. 13–14.

As these examples show, a single unwitting carrier at a large worship service can 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 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 these reasons, the motion for stay of injunction pending appeal should be granted.

Respectfully submitted,

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I certify that on October 26, 2020, I filed the foregoing brief using the Court's CM/ECF system, which caused service to be effected on counsel for all parties to this appeal.

s/ *Alex J. Luchenitser*