20-2683

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JENNA M. DIMARTILE, JUSTIN G. CRAWFORD, PAMELLA GIGLIA, JOE DUROLEK, and DAVID SHAMENDA,

Plaintiffs-Appellees,

v.

ANDREW M. CUOMO, LETITIA JAMES, and EMPIRE STATE DEVELOPMENT CORPORATION,

Defendants-Appellants,

ERIE COUNTY DEPARTMENT OF HEALTH and MARK C. POLONCARZ,

Defendants.

On Appeal from the Order of the
United States District Court for the Northern District of New York
Case No. 1:20-cv-859, Hon. Glenn T. Suddaby

BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; COVENANT NETWORK OF PRESBYTERIANS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; AND RECONSTRUCTIONIST RABBINICAL ASSOCIATION

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RULE 26.1 DISCLOSURE STATEMENT

All the *amici* are nonprofit organizations. None have parent corporations or are owned, in whole or in part, by any publicly held corporation.

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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 exercise religion freely is precious and should never be misused to cause harm.

Amici include religious organizations that are recommending against holding in-person religious gatherings 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 gatherings 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 events religion-neutral restrictions on large gatherings both protects the public health and respects the Constitution.

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[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. All parties participating in this appeal have consented to the filing of 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.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.

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 33,000 of which have occurred in the State of New York. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Oct. 20, 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; Lenny Bernstein, *'Nobody has very clear answers for them': Doctors search for treatments for covid-19 long-haulers*, WASH. POST (Oct. 16, 2020), https://wapo.st/2H8RPAT.

As part of New York's ongoing emergency response, Governor Cuomo has issued a series of public-health orders temporarily limiting in-person gatherings and other activities in the state. The currently operative Executive Order limits all gatherings to the lesser of fifty people or fifty percent of a venue's maximum capacity. (SA28.) These kinds of restrictions on in-person gatherings 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.

Plaintiffs Giglia and Durolek nevertheless challenge application of the Order to their planned wedding. Their lead argument below was that because their wedding would have religious significance and religious elements, the First Amendment's Free Exercise Clause entitles them to have 177 people at the wedding instead of fifty. But Plaintiffs have no valid Free Exercise Clause claim, for they failed to present evidence that limiting their wedding to fifty people would actually burden their religious exercise. And even if Plaintiffs had so demonstrated, the Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Clause. The Order complies with this legal standard because it imposes identical limitations on all indoor gatherings, including both religious and nonreligious weddings. Further, even if heightened scrutiny were called for, the Order is constitutional because it is narrowly tailored to advance New York's compelling interest in protecting its residents from a deadly disease.

What is more, granting a special exemption from the Order for religious weddings would violate the First Amendment's Establishment Clause. For if government imposes harms on third parties when it exempts religiously motivated conduct from the laws that govern everyone

else, it impermissibly favors the benefitted religion and its adherents over the rights and interests of others. Holding that no numerical limit may be placed on religious weddings would do just that: a contagious person at a wedding could infect many fellow attendees, who may then go on to expose family, friends, and strangers, including numerous people who did not attend the event.

For similar reasons, the overwhelming majority of court decisions—including rulings by the U.S. Supreme Court and the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits—have denied relief in religion-based challenges to COVID-19-related public-health measures. This Court should likewise reject Plaintiffs' free-exercise claim.

ARGUMENT

I. The Order does not violate the Free Exercise Clause.

A. Plaintiffs fail to demonstrate a burden on their religious exercise.

As a threshold matter, in order to invoke the protections of the Free Exercise Clause, a plaintiff must at the very least demonstrate some burden on their religious exercise. *See, e.g.*, *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 196 n.8 (2d Cir. 2014); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004). Though this Court has not yet decided whether that burden must be "substantial" (*see, e.g.*,

Brandon v. Kinter, 938 F.3d 21, 32 n.7 (2d Cir. 2019)), the Court need not do so here either, for Plaintiffs have failed to demonstrate any burden at all.

Plaintiffs do allege that their wedding ceremony would have religious significance and religious elements. (*See* JA52–55 ¶¶ 67–83.) They also allege that their wedding will be "incomplete" from their religious perspective if they are not allowed to have guests at the ceremony. (*See* JA53 ¶ 73.) But they have presented no evidence that limiting the number of in-person attendees to fifty, while allowing additional guests to attend virtually, would burden their religious exercise. Plaintiffs' free-exercise claim fails for this reason alone.

B. The Order does not discriminate against religion.

Even if the Court concludes that Plaintiffs have alleged a cognizable burden on their religious practice, the Order does not violate their free-exercise rights because it does not discriminate against religious exercise. As the Supreme Court recently reaffirmed, the constitutional guarantee of religious freedom "does not mean that religious [believers] enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). The Free Exercise Clause does not make "professed doctrines of religious belief superior to the law of the land" because that 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)). Rather, 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.

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). The Free Exercise Clause thus bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534. General applicability is the closely related concept (*id.* at 531) that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief" (*id.* at 543). The touchstone in both inquiries is whether the government has discriminated against religious conduct. *Lukumi*, 508 U.S. at 533–34, 542–43.

New York's restriction on large gatherings does not discriminate or show animus against religion or religious conduct. The Order's limitation of gatherings to fifty people or fifty percent of a venue's capacity (whichever is lower) applies equally to all weddings, regardless of whether they are religious. (SA28.) That is enough to defeat any religious-

discrimination argument concerning weddings. *See, e.g.*, *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–11 (2d Cir. 2012) (law governing labeling and marketing of kosher food was neutral and generally applicable because "[i]t applie[d] to any seller who offer[ed] products for sale as 'kosher' regardless of the seller's religious belief or affiliation").

The same conclusion would follow even if it were proper to compare religious weddings with other, non-wedding activities subject to New York's restrictions. The Order imposes the same fifty-person/fifty-percent limitation on a wide variety of gatherings, regardless of whether they have religious content, and also regardless of whether the motivation for them is religious. (SA28.) Moreover, New York imposes greater restrictions on some nonreligious activities: for example, concerts and live theatrical performances are barred entirely,[2] as is attendance by fans at professional sporting events.[3]

Considering similar circumstances in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), the Supreme Court refused to

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[2] *Interim Guidance for Low-Risk Indoor Arts & Entertainment During the Covid-19 Public Health Emergency*, N.Y. DEP'T OF HEALTH, at 1 (June 23, 2020), https://on.ny.gov/3cIPmbQ.

[3] *Interim Guidance for Professional Sports Competitions with No Fans During the Covid-19 Public Health Emergency*, N.Y. DEP'T OF HEALTH, at 3 (Sept. 11, 2020), https://on.ny.gov/3nfMPLk.

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 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; *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).

Plaintiffs have argued that weddings are restricted more than the general operations of restaurants, bowling alleys, gyms, and museums, which are subject to capacity limits of fifty (SA31), fifty,[4] thirty-three,[5] and

[4] *See Interim Guidance for Sports and Recreation During the Covid-19 Public Health Emergency*, N.Y. DEP'T OF HEALTH, at 4–5 (Aug. 15, 2020), https://on.ny.gov/37cjyLY.

[5] *See Interim Guidance for Gyms & Fitness Centers During the Covid-19 Public Health Emergency*, N.Y. DEP'T OF HEALTH, at 3, 5 (Aug. 17, 2020), https://on.ny.gov/3n5lGup.

twenty-five percent[6] (respectively) but not to any numerical cap on the total number of people who may be in the venues at once. But *gatherings* of more than fifty people in any of these venues remain prohibited (as opposed to the presence of more than fifty unconnected individuals at the same time).[7]

What is more, New York had good reason to conclude that gatherings at weddings and similar events pose greater risks of transmission of COVID-19 than do unconnected groups of patrons being present in venues such as restaurants at the same time: wedding guests stay much longer; they are likely to mingle; they arrive, leave, and move from one phase of the event to the next together; and speeches, cheering, singing, and shouting are common. (JA585–87.) As the CDC has explained, "[t]he more people an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk" of contracting and spreading the virus. *Considerations for Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated July 7, 2020) (emphasis omitted), https://bit.ly/33fUlh1.

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[6] *See Interim Guidance for Low-Risk Indoor Arts & Entertainment*, *supra*, at 3.

[7] *See* SA28; JA333–34; *Interim Guidance for Sports and Recreation*, *supra*, at 6, 7; *Interim Guidance for Gyms & Fitness Centers*, *supra*, at 6; *Interim Guidance for Low-Risk Indoor Arts & Entertainment*, *supra*, at 6.

Plaintiffs have also pointed out that New York's attendance limit for *outdoor* graduations is 150[8] and have alleged that the State has not enforced against *outdoor* protests its limitations on gatherings. Yet Plaintiffs seek an injunction permitting them to exceed the Order's fifty-person cap in an *indoor* facility. (JA55 ¶¶ 80–82.) Outdoor gatherings are not comparable to indoor gatherings because outdoor gatherings pose far less risk of transmission of the virus; indeed, one study concluded that the odds of infection are nearly twenty times higher at indoor gatherings than at outdoor ones. *See* Tara Parker-Pope, *How Safe Are Outdoor Gatherings?*, N.Y. TIMES (July 3, 2020), https://nyti.ms/3j4fH6g. And though Plaintiffs have cited a newspaper article reporting that some indoor businesses allowed protesters to use their bathrooms and obtain rest and refreshments (JA223–25), Plaintiffs have presented no evidence that protesters exceeded the limit on gathering size in these places.

Moreover, enforcement decisions are "particularly ill-suited to judicial review," 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.*

[8] *See Updated Interim Guidance for Graduation Celebrations During the COVID-19 State of Emergency*, N.Y. DEP'T OF HEALTH, at 3 (June 14, 2020), https://on.ny.gov/31aToFj.

Hayes, 434 U.S. 357, 364 (1978)). Plaintiffs have not introduced any evidence that any of the Defendants declined to take enforcement action against protests for any religion-related reason, as opposed to legitimate considerations such as avoiding an escalating spiral of violence or increased risk of COVID-19 infection that could result from arresting or detaining protesters.

Finally, Plaintiffs have complained that New York allows in-person special-education classes, but this argument is puzzling, as each class is limited to ten students.[9]

New York's public-health measures thus do not work any religious discrimination against religious weddings and therefore do not trigger heightened scrutiny under the Free Exercise Clause.

C. The Order would satisfy even a compelling-interest test.

Even if a compelling-interest test were to apply, Plaintiffs' free-exercise challenge would still fail. More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand a compelling-interest test.

[9] *See Interim Advisory for In-Person Special Education Services and Instruction During the COVID-19 Public Health Emergency*, N.Y. DEP'T OF HEALTH, at 3 (June 8, 2020), https://on.ny.gov/2H9Z8Ie.

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. As the Court stated in *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944), "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease." For government has an undeniably compelling interest in protecting the public from the spread of deadly infections. *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, the Supreme Court in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), 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 New York has a compelling interest in stanching the spread of COVID-19. Yet Plaintiffs have argued that New York's scheme of regulating activities according to their relative health risks negates the State's compelling interest in combatting the virus. That is incorrect: policymakers' assertions of a compelling interest are not defeated by a decision to "focus on their most pressing concerns"—here, large indoor gatherings—rather than to impose broader restrictions. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

A compelling-interest test, if it applied, would also ask whether New York's 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 against refusing immunizations satisfy a compelling-interest test.

New York's Order is far less restrictive than a blanket ban and thus satisfies 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 is the best way for New York to advance its compelling objective of slowing community spread and saving lives. At the same time, the Order is no broader than necessary to ensure that the targeted activities—indoor gatherings that create the most significant risks of contagion—occur more safely.

Plaintiffs have argued that the Order is not narrowly tailored because New York could impose laxer restrictions on religious weddings, such as physical-distancing and sanitation requirements. 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 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.

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; Kimberly A. Prather, et al., *Airborne transmission of SARS-CoV-2*, SCIENCE (Oct. 16, 2020), https://bit.ly/3iYMGZ7. Outbreaks of the virus have thus resulted from religious gatherings in spite of physical-distancing and other safety precautions. *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; 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; 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; 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.

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)).

D. The vast majority of courts to consider religion-based challenges to COVID-19-related orders have rejected them.

For reasons similar to those explained above and by the Chief Justice in *South Bay*, numerous other decisions—including a subsequent one by the Supreme Court and rulings by the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits—have rejected religion-based challenges to restrictions on gatherings. And the vast majority of those cases addressed restrictions that were much more stringent than those here, and that were challenged as applied to worship services—not, as in this case, as applied to activities that merely have some religious elements or motivations.

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" and did not take enforcement action against outdoor protests (*id.*, No. 3:20-cv-303, 2020 WL 4260438, at *3–4 (D. Nev. June 11, 2020)). 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), *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 on religious services); *Andrew Wommack Ministries v. Polis*, No. 20-1336, 2020 WL 5983978, at *1 (10th Cir. Oct. 5, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-2922, 2020 WL 5810525, at *2–3 (D. Colo. Sept. 29, 2020) (limit was lower of fifty-percent capacity or 175 people); *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, at *3 (D. Me. May 9, 2020) (ten-person limit); *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, at *1–2 (E.D. Va. Apr. 8, 2020) (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), *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); *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, at *1, 3 (E.D. Mo. May 11, 2020) (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); *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ 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), *appeal docketed*, No. 20-3590 (2d Cir. Oct. 20, 2020); *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, 763, 768–71 (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*, __ F.Supp.3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *3–8 (E.D. Va. May 1, 2020) (ten-person limit), *appeal dismissed*, No. 20-1515 (4th Cir. Oct. 13, 2020); *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. 20-16274 (9th Cir. June 30, 2020); *Abiding Place Ministries v. Newsom*, __ F.Supp.3d __, No. 3:20-cv-683, 2020 WL 2991467, at *1–2 (S.D. Cal. June 4, 2020) (noting prior denial of TRO against order prohibiting gatherings of any size); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-687, 2020 WL 3766496, at *10–17 (N.D.N.Y. July 6, 2020) (closure of overnight camps); *Tigges v. Northam*, __ F.Supp.3d __, No. 3:20-cv-410, 2020 WL 4197610, at *8 (E.D. Va. July 21, 2020) (restrictions on weddings); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 51–52 & n.16 (Or. 2020) (twenty-five-person limit).[10]

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[10] *See also Robinson v. Murphy*, No. 2:20-cv-5420, 2020 WL 5884801 (D.N.J. Oct. 2, 2020), *appeal docketed*, No. 20-3048 (3d Cir. Oct. 8, 2020); *High Plains Harvest Church v. Polis*, No. 1:20-cv-1480, 2020 WL 4582720 (D. Colo. Aug. 10, 2020), *appeal docketed*, No. 20-1280 (10th Cir. Aug. 11, 2020); *Whitsitt v. Newsom*, No. 2:20-cv-691, 2020 WL 4818780 (E.D. Cal. Aug. 19, 2020), *report and recommendation adopted*, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020); *Williams v. Trump*, No. 1:20-cv-2495, 2020 WL 6118560, at *3–5 (N.D. Ill. Oct. 16, 2020); *Murphy v. Lamont*, No. 3:20-cv-694, 2020 WL 4435167, at *14–15 (D. Conn. Aug. 3, 2020); *Solid Rock Baptist Church v. Murphy*, No. 1:20-cv-6805, 2020 WL 4882604 (D.N.J. Aug. 20, 2020); *County of Los Angeles v. Superior Court*, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020); *Christian Cathedral v. Pan*, No. 3:20-cv-3554, 2020 WL 3078072 (N.D. Cal. June 10, 2020); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020); *MacEwen v. Inslee*, No. 3:20-cv-5423, 2020 WL 4261323 (W.D. Wash. July 24, 2020); *Maxwell v. Lee*, No. 1:20-cv-1093, 2020 WL 5670115 (W.D. Tenn. June 29, 2020), *report and recommendation adopted*, 2020 WL

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 health orders. All but three of those cases were decided before the Supreme Court's decision in *South Bay* and considered restrictions on worship services far tighter than New York's limits on weddings. *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.*

4220123 (W.D. Tenn. July 23, 2020); *Agudath Israel of America v. Cuomo*, No. 1:20-cv-4834 (E.D.N.Y. Oct. 9, 2020), *appeal docketed*, No. 20-3572 (2d Cir. Oct. 19, 2020); *Harborview Fellowship v. Inslee*, No. 3:20-cv-5518, ECF No. 42 (W.D. Wash. June 18, 2020); *Dwelling Place Network v. Murphy*, No. 1:20-cv-6281, ECF No. 35 (D.N.J. June 15, 2020); *Diaz-Bonilla v. Northam*, No. 1:20-cv-377, ECF No. 25 (E.D. Va. June 5, 2020); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. 281st Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-cv-152 (N.H. Super. Ct. Mar. 25, 2020); *County of Ventura v. Godspeak Calvary Chapel*, No. 56-2020-544086 (Cal. Super. Ct. Ventura Cty. Aug. 7, 2020).

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). Most of these earlier decisions cannot be squared with the Chief Justice's analysis in *South Bay*, because they 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. *Compare, e.g.*, *Neace,* 958 F.3d at 414–15, *with S. Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring). (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).)

And while two out of the three post-*South Bay* decisions that granted injunctions required *outdoor* religious services to be treated similarly to *outdoor* protests and other *outdoor* activities that had been subject to looser restrictions, neither required *indoor* religious services to be treated the same as *outdoor* activities. *See Soos v. Cuomo*, __ 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); *Capitol Hill Baptist Church v. Bowser*, No. 1:20-cv-2710, 2020 WL 5995126, at *1–3, 12 (D.D.C. Oct. 9, 2020) (decision based on Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, not Free Exercise Clause). Finally, the most recent decision granting an injunction relied on reasoning inconsistent with the Chief Justice's opinion in *South Bay* and is now the subject of a pending motion for stay of injunction pending appeal. *See Denver Bible Church v. Azar*, No. 1:20-cv-2362, 2020 WL 6128994, at *9–13 (D. Colo. Oct. 15, 2020), *motion for stay of injunction pending appeal filed*, No. 20-1377, ECF No. 10110425548 (10th Cir. Oct. 19, 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 an exemption from New York's Order based on the religious nature of their planned wedding 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* a religious group 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 and their guests face greater danger, but so would everyone with whom they come into contact, including the elderly and others at heightened risk of severe illness.

Weddings, sadly, are common sources of COVID-19 outbreaks. *See* Appellants' Br. 32–33; *see also* Alyson Krueger, *Weddings as a Coronavirus Super-Spreader Worry*, N.Y. TIMES (Aug. 9, 2020), https://nyti.ms/3jkjtc6; Robert Handa, *Coronavirus Outbreak Linked to Wedding at Iconic San Francisco Church*, NBC BAY AREA (July 27, 2020), https://bit.ly/3jj7FGZ; Chris Anderson, *COVID-19 outbreak among Ashland County's Amish community originated from wedding, health*

department says, CLEVELAND 19 NEWS (June 18, 2020), https://bit.ly/3n5Gr97; Eyewitness News, *Coronavirus Live Updates: 16 cases linked to New York City wedding*, ABC 7 N.Y. (Aug. 19, 2020), https://7ny.tv/3476Tqc; Anthony Conn, *16 COVID-19 cases traced back to South Charleston wedding*, WCHS (Sept. 15, 2020), https://bit.ly/2SgKdhM; Bob Thibault, *13 positive coronavirus cases associated with local wedding*, KSNT (updated Aug. 19, 2020), https://bit.ly/36nVdlY; Canadian Press, *Toronto wedding leads to 23 cases of COVID in the GTA*, NAT'L POST (Sept. 7, 2020), https://bit.ly/3cKaEG6.

And like other kinds of large gatherings, worship services and other religious events have triggered many outbreaks of the virus as well. *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*, 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; 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; Lee Roop, *A small Alabama church had a revival and now 40 people have coronavirus*, AL.COM (July 27, 2020), https://bit.ly/2Ekzsav; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (June 4, 2020), https://bit.ly/3hZQnyI; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; Rachel Needham, *Anatomy of an outbreak: New documents reveal a significant number of the county's COVID-19 cases can be traced to Castleton church*, RAPPAHANNOCK NEWS (Sept. 1, 2020), https://bit.ly/33hLAlG; Wyatt Massey, *Church of God denomination facing significant COVID-19 outbreak; leaders won't say how many infected*, CHATTANOOGA TIMES FREE PRESS (July 7, 2020), https://bit.ly/3bTiWLl; 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; 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; Trudy Balcom, *COVID-19 outbreak on the Navajo Nation linked to church rally*, WHITE MOUNTAIN INDEP. (Mar. 24, 2020), https://bit.ly/2YSR6di; 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. 16–17.

As these examples show, a single unwitting carrier at Plaintiffs' wedding could cause a ripple effect throughout an entire community: That one infected person might pass the virus to another guest (or many), who might then return home and pass it to their family members and co-workers, 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 district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,638 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font, in a size measuring no less than 14 points.

s/ *Alex J. Luchenitser*