20-3590

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,
Plaintiff-Appellant,

v.

GOVERNOR ANDREW M. CUOMO, in his official capacity,
Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the Eastern District of New York
Case No. 20-cv-4844, Hon. Nicholas G. Garaufis

BRIEF, IN SUPPORT OF APPELLEE AND IN OPPOSITION TO APPELLANT'S 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; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; INTERFAITH ALLIANCE FOUNDATION; METHODIST FEDERATION FOR SOCIAL ACTION; NEW YORK CONFERENCE, UNITED CHURCH OF CHRIST; AND RECONSTRUCTIONIST RABBINICAL ASSOCIATION

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

RULE 26.1 DISCLOSURE STATEMENT

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

Statutes

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.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- New York Conference, United Church of Christ.
- 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. 22, 2020), https://bit.ly/2xR2V99. 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. And mounting evidence indicates that the fall season will bring with it the risk of a dangerous new surge in cases. *See, e.g.*, Mola Lenghi, *U.S. battles fall coronavirus surge as states see record new cases*, CBS NEWS (Oct. 16, 2020), https://cbsn.ws/3dJzLcA.

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 applicable Executive Order restricts gatherings by establishing capacity limits tied to the severity of the outbreak in the relevant geographical zone. *See* Executive Order 202.68 (Oct. 6, 2020), Mastro Decl. Ex. I-35, Dkt. No. 20-3 at 67–68. In high-severity or "red" zones, non-essential gatherings must be

postponed in their entirety, while houses of worship may operate subject to a limit of the smaller of twenty-five percent of building capacity or ten people. *See id.* In moderate severity or "orange" zones, non-essential gatherings are subject to a ten-person limit, and houses of worship are limited to the smaller of thirty-three percent of building capacity or twenty-five people. *See id.* Finally, in precautionary or "yellow" zones, non-essential gatherings are limited to twenty-five people, and houses of worship are subject to a building-capacity limitation of fifty percent. *See id.* 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.

The Diocese of Brooklyn nevertheless challenges under the Free Exercise Clause of the First Amendment the ten-person and twenty-five-person temporary limits established for houses of worship in "red" and "orange" zones. But the Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Free Exercise Clause. The Order complies with this legal standard because New York's limitations on religious services are similar to or less restrictive than those placed on comparable nonreligious

activities. Even if heightened scrutiny were called for, however, 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, the First Amendment's Establishment Clause forbids granting a complete exemption for religious services from New York's emergency restrictions. 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. Exempting religious gatherings from the state's requirements 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, numerous federal-court decisions—including rulings by the U.S. Supreme Court and the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits—have overwhelmingly denied relief in religion-based challenges to COVID-19-related public-health measures. This Court should likewise deny the motion for an injunction pending appeal.

ARGUMENT

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

A. Rational-basis review applies.

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). On the contrary, "a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption." *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 196 (2d Cir. 2014). Yet the Diocese argues here that the Free Exercise Clause entitles it to an exemption from New York'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.

New York's Order complies with this nondiscrimination principle because it restricts religious services similarly to or less than comparable nonreligious gatherings. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–12 (2d Cir. 2012) (law governing labeling of kosher products was generally applicable because it applied to all sellers and protected all customers regardless of religion); *Ungar v. N.Y.C. Hous. Auth.*, 363 F.App'x 53, 56 (2d Cir. 2010) (exceptions to public-housing policy did not negate general applicability because they were equally available to religious and nonreligious applicants). Within each tier of severity, comparable non-religious gatherings such as secular community meetings are restricted to a greater degree than are religious gatherings. For example, non-essential gatherings must be either postponed or cancelled in "red zones," while houses of worship are permitted to operate

at the lesser of twenty-five percent of building capacity or ten people. *See* E.O. 202.68. In "orange zones," non-essential gatherings are limited to ten people, while houses of worship may operate at the lower of thirty-three percent of building capacity or twenty-five people. *See id.*

Considering similar 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 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).

The Diocese takes issue with New York's decision not to impose a numerical limit on the number of people who may be present at businesses

such as grocery stores, pet-food stores, and banks. Mot. 15. 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.

Furthermore, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542. Heightened scrutiny applies only when a law demonstrates religious hostility by being "*substantially* underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong.*, 763 F.3d at 197 (emphasis added); *see also, e.g.*, *Lukumi*, 508 U.S. at 543–44; *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013).

The Diocese cannot satisfy this standard. The sustained congregation of worshippers speaking, singing, and interacting poses a different and greater category of risk than the fleeting, sequential exchanges between customers and staff at essential retail vendors. *See,*

e.g., JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH CENTER FOR HEALTH SECURITY, PUBLIC HEALTH PRINCIPLES FOR A PHASED REOPENING DURING COVID-19: GUIDANCE FOR GOVERNORS 12, 16 (Apr. 17, 2020), https://bit.ly/2CKc5qz. Essential retail activities are thus not "as harmful to the legitimate government interests" pursued by the Order as sustained gatherings are. *Cent. Rabbinical Cong.*, 763 F.3d at 197; *see also Commack*, 680 F.3d at 211 (upholding law that had "neutral, secular purpose" and did not target practices "because of their religious motivation").

B. The Order 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 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). The Court's 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). Here, the Diocese does not contest that New York has a compelling interest in stanching the spread of COVID-19. *Cf.* Mot. 19–21; *see also* Mot. for Prelim. Inj., ECF No. 4, at 20 ("granting that protecting public health is a compelling (and admirable) governmental interest"). Yet it argues that the Order is not narrowly tailored to the governmental interest at stake.

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. And temporarily restricting the size of indoor 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 potentially dangerous activities occur more safely.

The Diocese argues that its churches have, to date, implemented sufficient safety measures at religious gatherings and avoided COVID-19 outbreaks among their congregations. *E.g.*, Mot. 2–3. But New York

cannot devote its limited public-health resources to monitoring the particular measures taken at individual houses of worship and confirming that each is operating safely. *Cf. Commack*, 680 F.3d at 212 (state's choice to "require more than uninspected certification[s]" in law governing labelling of kosher products was reasonable). And because asymptomatic carriers may unwittingly infect people in close proximity (*see, e.g.*, *S. Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring)), even the most diligent efforts to encourage people with symptoms to avoid gatherings may not be sufficient to avoid outbreaks and protect others from the virus.

Moreover, 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.*, 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.

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: the fewer people present and engaged in prolonged close interactions, the lower the risk of transmission. *See, e.g.*, *Considerations for Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated July 7, 2020), https://bit.ly/33fUlh1.

Additionally, 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.

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. 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)). 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 in challenges to the application of public-health restrictions to worship services. *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); *Andrew Wommack Ministries v. Polis*, No. 20-1336, 2020 WL 5983978 (10th Cir. Oct. 5, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-2922, 2020 WL 5810525 (D. Colo. Sept. 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. 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 (C.D. Cal. Apr. 23, 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); *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 (M.D. La. May 15, 2020); *Legacy Church v. Kunkel*, __ F.Supp.3d __, No. 1:20-cv-327, 2020 WL 3963764 (D.N.M. July 13, 2020), *appeal docketed*, No. 20-2117 (10th Cir. Aug. 12, 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 dismissed*, No. 20-1515 (4th Cir. Oct. 13, 2020); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30 (Or. 2020); *see also DiMartile v. Cuomo*, 820 F.App'x 62 (2d Cir. 2020) (summary order), *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 health orders. All but three 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, at *1–2, 5–6 (E.D. Ky. May 8, 2020); *First Baptist Church v. Kelly*, 455 F.Supp.3d 1078, 1082 (D. Kan. 2020); *On Fire Christian Ctr. v. Fischer*, 453 F.Supp.3d 901

(W.D. Ky. 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 second-guessed state officials' policy judgments regarding what measures were necessary to render in-person gatherings 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. *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).)

Two out of the three post-*South Bay* decisions that granted injunctions utilized reasoning inconsistent with *South Bay* also and are now on appeal—one to this Court. *See Soos v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-651, 2020 WL 3488742, at *11 (N.D.N.Y. June 26, 2020), *appeals docketed*, Nos. 20-2414, 20-2418 (2d Cir. July 30, 2020); *Denver Bible Church v. Azar*, No. 1:20-cv-2362, 2020 WL 6128994, at *9–13 (D. Colo. Oct. 15, 2020), *appeal docketed*, No. 20-1377 (10th Cir. Oct. 16, 2020). And the third 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).

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 the religious exemption that the Diocese seeks 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 the Diocese an exemption from New York's emergency public-health regulations here would elevate that ministry's religious preferences over the health of the entire community. Not only would the

Diocese's 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*, AP (June 16, 2020), https://bit.ly/2YWFlT1; 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* at pp. 13–14.

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 potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources.

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

CONCLUSION

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

Respectfully submitted,

s/ *Alex J. Luchenitser*
RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
katskee@au.org
luchenitser@au.org

Counsel for Amici Curiae

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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 4,947 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*