No. 20-3048

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REV. KEVIN ROBINSON, *et al.*,

Plaintiffs-Appellants,

v.

PHIL MURPHY, Governor of the State of New Jersey,
in his official capacity, *et al.*,

Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the District of New Jersey
Case No. 2:20-cv-05420-CCC-ESK, Hon. Claire C. Cecchi

BRIEF, IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR AN EXPEDITED 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; MEN OF REFORM JUDAISM; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

JON W. GREEN
Green Savits, LLC
25B Vreeland Road,
Suite 207
Florham Park, NJ 07932
(973) 695-7777
jgreen@greensavits.com

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
SARAH R. GOETZ
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
goetz@au.org

CORPORATE DISCLOSURE STATEMENT

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

State Orders

TABLE OF AUTHORITIES—continued

Other Authorities

TABLE OF AUTHORITIES—continued

INTERESTS OF THE *AMICI CURIAE*[1]

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

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

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. An unopposed 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.
- Men of Reform Judaism.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. The United States has suffered by far the most reported COVID-19-related deaths worldwide, more than 16,000 of which have occurred in New Jersey. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV., https://bit.ly/2xR2V99 (last visited Nov. 4, 2020). And there is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term health damage. *See, e.g.*, T.Y.M. Leung et al., *Short- and Potential Long-term Adverse Health Outcomes of COVID-19: A Rapid Review*, 9 EMERGING MICROBES & INFECTIONS 2190 (2020), https://bit.ly/3ikjBXJ.

As part of New Jersey's ongoing emergency response, Governor Murphy has issued a series of executive orders temporarily limiting in-person gatherings and other activities. The order that currently governs indoor gatherings—New Jersey Executive Order No. 183 (Sept. 1, 2020), https://bit.ly/31nBn6K—limits indoor religious services to the lower of twenty-five percent of building capacity or 150 attendees. These kinds of restrictions on in-person gatherings have been successful in slowing the spread of the virus. *See, e.g.*, Timothy Bella, *Places without social distancing have 35 times more potential coronavirus spread, study finds*, WASH. POST (May 15, 2020), https://wapo.st/2EKDjhd.

Plaintiffs nevertheless challenge Order No. 183 under the Free Exercise Clause of the First Amendment. But the Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Clause. The Order complies with this legal standard because New Jersey's limitations on religious services are lesser than or similar to those imposed on comparable nonreligious activities. And even if heightened scrutiny were called for, the Order is constitutional because it is narrowly tailored to advance New Jersey's compelling interest in protecting its residents from a deadly disease.

What's more, the First Amendment's Establishment Clause forbids exempting religious services from the Order. 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 may be placed on religious gatherings would do just that: a contagious person at a religious service could infect 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, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits—have overwhelmingly denied

relief in religion-based challenges to COVID-19-related public-health measures, most of which were far more restrictive of religious exercise than is Order No. 183. This Court should likewise deny the motion for an injunction pending appeal.

ARGUMENT

I. Order No. 183 does not violate the Free Exercise Clause of the First Amendment.

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 New Jersey'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.

Order No. 183 complies with this principle because it restricts religious services similarly to or less than comparable nonreligious gatherings. Weddings, funerals, memorial services, political activities, movie theaters, concert venues, performing arts centers, and necessary participants in sporting events are subject to restrictions identical to those imposed on indoor religious services—the lower of twenty-five percent of building capacity or 150 people. *See* Exec. Ord. No. 183 ¶¶ 2, 4; N.J. Exec. Ord. No. 187 ¶ 2 (Oct. 12, 2020), https://bit.ly/2T9moJl. All other indoor gatherings are subject to stricter limitations—the lower of twenty-five percent of building capacity or twenty-five people. *See* Exec. Ord. No. 183 ¶ 4.

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 100 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.

Plaintiffs take issue with New Jersey's decision not to impose a numerical limit on the number of people who may be present at certain types of businesses and institutions, including grocery stores, hardware stores, factories, warehouses, homeless shelters, and social-service providers. (Mot. 5–6, 18–21.) But "[a] regulation does not automatically cease being neutral and generally applicable . . . simply because it allows certain secular behaviors but not certain religious behaviors." *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 265 (3d Cir. 2007). Rather, a law fails the general-applicability requirement only if it establishes a "regime of individualized, discretionary exemptions" or

"burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). The "relevant question" is whether the government "pursued its aims evenhandedly, generally allowing the kinds of uses that would further the [law's] goals and prohibiting the uses that would interfere with them." *Lighthouse*, 510 F.3d at 275–76. Heightened scrutiny applies "only when a principled distinction [cannot] be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives." *Id.* at 266.

Here, New Jersey has made principled distinctions based on public-health considerations. Public-health experts have concluded that venues such as stores pose much less risk of transmission of COVID-19 than do gatherings such as worship services, in part because customers' interactions with others at stores are generally transient, while attendees at large gatherings may sit near an infectious person for long periods and thus suffer exposure to a much greater amount of the virus. *See* 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, 18 (Apr. 17, 2020), https://bit.ly/2CKc5qz. And severely restricting activities such as manufacturing and social services would harm the public health by depriving people of food, medicine, shelter, and other necessities. Moreover, *gatherings* at the institutions about which Plaintiffs complain are still restricted to the lesser of twenty-five-percent capacity or twenty-five people. Exec. Ord. No. 183 ¶ 4.

Justice Kavanaugh made an argument similar to the one that Plaintiffs make here in his dissent in *South Bay*, asserting, "The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." *S. Bay*, 140 S.Ct. at 1614. But this argument did not carry the day. The Chief Justice explained that California "exempt[ed] or treat[ed] more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 1613.

Plaintiffs also point to New Jersey's decision to allow schools to reopen. (Mot. 15–18.) But to minimize the risk of large COVID-19 outbreaks, New Jersey has instructed schools to keep students separated

in small cohorts—no greater than a class, and thus far smaller than the permitted size for religious services. *See* N.J. DEP'T OF HEALTH, COVID-19 PUBLIC HEALTH RECOMMENDATIONS FOR LOCAL HEALTH DEPARTMENTS FOR K-12 SCHOOLS 4, 15 (Sept. 8, 2020), https://bit.ly/3mQfchU. And religious schools are treated just like secular schools, underscoring that New Jersey's restrictions are neutral and generally applicable. *See Ungar v. N.Y.C. Hous. Auth.*, 363 F.App'x 53, 56 (2d Cir. 2010) (limited categorical exemptions from public-housing policy did not negate general applicability because exemptions were equally available to religious and nonreligious applicants).

Finally, Plaintiffs argue that New Jersey's restrictions on *indoor* religious services should be enjoined because New Jersey sets no numerical limit on *outdoor* religious services and political activities. (Mot. 19–20.) But New Jersey's treatment of outdoor gatherings only further confirms that the State is not discriminating against religion, as other types of outdoor gatherings are limited to 500 people. N.J. Exec. Ord. No. 161 ¶ 1 (July 2, 2020), https://bit.ly/35ZeJmV. In addition, outdoor gatherings are not comparable to indoor gatherings because there is far less risk of transmission of the virus outdoors; indeed, one study concluded that the odds of infection are nearly twenty times higher at indoor

gatherings than at outdoor ones. *See, e.g.*, Tara Parker-Pope, *How Safe Are Outdoor Gatherings?*, N.Y. TIMES (July 3, 2020), https://nyti.ms/3j4fH6g.[2]

B. Order No. 183 would satisfy even a compelling-interest test.

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

Before its decision in *Smith*, the Supreme Court interpreted the Free Exercise Clause to require application of the compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Those pre-*Smith* decisions repeatedly acknowledged that there is no right to religious exemptions from laws that shield the public from illness. For government has an undeniably compelling interest in protecting the public from the spread of deadly communicable diseases. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20.

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[2] As New Jersey just issued an order providing that its mask requirement "does not apply . . . to religious institutions to the extent that application of the health and safety protocols would prohibit the free exercise of religion" (N.J. Exec. Ord. No. 192 ¶ 3 (Oct. 28, 2020), https://bit.ly/360nP2O), *amici* view Plaintiffs' objections to earlier versions of New Jersey's mask rules (Mot. 21–23) as moot, at least in the context of a request for an emergency injunction.

"[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, more than a century ago in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Supreme Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court straightforwardly rejected the idea that the Constitution bars compulsory measures to protect health, citing the "fundamental principle" that personal liberty is subject to restraint "'in order to secure the . . . health . . . of the state.'" *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

The Supreme Court later relied on *Jacobson* to reaffirm that reasonable public-health measures burdening religious exercise withstand a compelling-interest inquiry. *See Sherbert*, 374 U.S. at 402–03; *Yoder*, 406 U.S. at 230 & n.20; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that the state has a compelling interest in preventing the spread of communicable disease. *See, e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F.App'x 348, 353–54 (4th Cir. 2011); *Whitlow v. California*, 203 F.Supp.3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases).

There can thus be no doubt that New Jersey has a compelling interest in stanching the spread of COVID-19. Yet Plaintiffs argue that New Jersey's rules concerning activities such as manufacturing and shopping negate the State's interest in strictly regulating indoor gatherings. (Mot. 24.) But 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 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 Order No. 183 is narrowly tailored to the governmental interest at stake. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982). Even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *Jacobson*, 197 U.S. at 26–27)) and many other federal and state courts (*see, e.g.*, *Whitlow*, 203 F.Supp.3d at 1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy a compelling-interest test.

Order No. 183 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 indoor gatherings is the best way for New Jersey 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 significant risks of contagion—occur more safely.

Plaintiffs argue that the Order is not narrowly tailored because New Jersey could impose laxer restrictions on religious services, such as physical-distancing and sanitation requirements. (Mot. 25.) 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 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.*, Renyi Zhang, et al., *Identifying airborne transmission as the dominant route for the spread of COVID-19*, 117 PNAS 14,857 (2020), https://bit.ly/2HTGSnf. 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.

In addition to *South Bay*, numerous decisions—including a subsequent one by the Supreme Court and rulings by this Court and the

First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth 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 New Jersey 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" 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 *Bullock v. Carney*, this Court denied a motion for an injunction pending appeal of a Delaware order restricting indoor religious services to thirty-percent capacity. 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). In *Elim Romanian Pentecostal Church v. Pritzker*, 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. 962 F.3d 341, 342, 347 (7th Cir. 2020) (Easterbrook, J.), *petition for cert. docketed*, No. 20-569 (Oct. 22, 2020). And in *Harvest Rock Church v. Newsom*, 977 F.3d 728, 2020 WL 5835219, at *1 (9th Cir. 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."

Many other federal-court decisions have reached similar conclusions. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (no gatherings of any size permitted); *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); *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-3590, ECF No. 29 (2d Cir. Oct. 22, 2020), *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, 2020 WL 3067488, at *1

(1st Cir. June 2, 2020), *denying motion for injunction pending appeal of* 459 F.Supp.3d 273, 280 (D. Me. 2020) (ten-person limit); *Tolle v. Northam*, __ F.App'x __, No. 20-1419, 2020 WL 6267786 (4th Cir. Oct. 26, 2020), *dismissing appeal of* No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (ten-person limit); *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* 460 F.Supp.3d 671, 673, 675–77 (M.D. La. 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*, 458 F.Supp.3d 981, 988 (N.D. Ill. 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*, 461 F.Supp.3d 214, 224 (D. Md. 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).

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 these cases were decided before the Supreme Court's decision in *South Bay* and considered restrictions far tighter than Order No. 183. *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*, 460 F.Supp.3d 651, 653–54 (E.D.N.C. 2020) (ten-person limit); *Tabernacle Baptist Church v. Beshear*, 459 F.Supp.3d 847, 851 (E.D. Ky. 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 earlier decisions treated religious services as comparable to grocery shopping and office work, and they second-guessed state officials'

judgments on what means were necessary to render religious services safe. *See, e.g.*, *Neace,* 958 F.3d at 414–15. (The exception is *Holly Springs*, which did not set forth its reasoning or even explain whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the city ban 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 has been temporarily stayed by the Tenth Circuit. *See Denver Bible Church v. Azar*, No. 20-1377, ECF No. 10110427952 (10th Cir. Oct. 22,

2020), *temporarily staying injunction pending appeal of* No. 1:20-cv-2362, 2020 WL 6128994, at *9–13 (D. Colo. Oct. 15, 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 the religious exemption that they seek would violate this principle. For the neutrality requirement of the First Amendment's Religion Clauses forbids government not just to target religion for worse treatment but also to grant religious exemptions that would detrimentally affect nonbeneficiaries. When government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it improperly prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries.

In *Estate of Thornton v. Caldor, Inc.*, for example, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. 703, 709–10 (1985). The Court held

that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries" by making them pay "to offset the benefit bestowed on subscribers to religious publications." 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent, demonstrating that religious exemptions that harm others cannot be required even under a compelling-interest test. In *United States v. Lee*, for instance, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince*, the Court denied a request for an exemption from child-labor laws barring distribution of religious literature by minors, because of the danger that the exemption would have posed to

children's welfare. 321 U.S. at 170. These holdings all embody the fundamental precept that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) or "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

To be sure, the Supreme Court held in *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), and *Our Lady of Guadalupe*, 140 S.Ct. at 2055, that employment-discrimination laws cannot be enforced in a way that would interfere with a congregation's selection of its ministers. But those cases concerned core decisions of houses of worship—about religious beliefs, practices, and internal structures—that affect only their own members. This case presents a far different question: whether there is a constitutional right to put countless people *outside* the congregation at greater risk of exposure to deadly disease.

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

Religious gatherings are just as likely as other gatherings to lead to COVID-19 outbreaks, and the examples have sadly piled up across the country. *See, e.g.*, 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; 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. 14–15.

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

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

CONCLUSION

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

Respectfully submitted,

s/ *Alex J. Luchenitser*

JON W. GREEN
Green Savits, LLC
25B Vreeland Road,
Suite 207
Florham Park, NJ 07932
(973) 695-7777
jgreen@greensavits.com

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
SARAH R. GOETZ
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
goetz@au.org

Counsel for Amici Curiae

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CERTIFICATIONS OF COUNSEL

The undersigned counsel certifies that:

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Date: November 5, 2020 s/ *Alex J. Luchenitser*