No. 21-35005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HORIZON CHRISTIAN SCHOOL, *et al.*,

Plaintiffs-Appellants,

v.

KATE BROWN, GOVERNOR, STATE OF OREGON,

Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the District of Oregon
Case No. 3:20-cv-01345, Hon. Michael W. Mosman

BRIEF IN SUPPORT OF APPELLEE AND AFFIRMANCE 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; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; REV. DR. MARC IAN STEWART, CONFERENCE MINISTER, MONTANA-NORTHERN WYOMING CONFERENCE, UNITED CHURCH OF CHRIST; SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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RULE 26.1 DISCLOSURE STATEMENT

With the exception of Rev. Dr. Marc Ian Stewart, who is an individual, all the *amici* are nonprofit organizations that have no parent corporations and are not 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 worship freely is precious and should never be misused to cause harm or to mandate special privileges for religious institutions. They therefore oppose the argument that the Free Exercise Clause entitles religious schools to exemptions from public-health rules applicable to all public and private schools.

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.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.

[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.

- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Rev. Dr. Marc Ian Stewart, Conference Minister, Montana-Northern Wyoming Conference, United Church of Christ.
- Southwest Conference of the United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. More than 513,000 Americans, including more than 2,200 Oregonians, have died from COVID-19. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Mar. 1, 2021), https://bit.ly/31VrTAa. There is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term damage to their health. *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. And though children are less likely to suffer serious illness from the virus than are adults, some children do become very sick or die. *See* Pam Belluck, *The virus can sicken children in very different ways, a new study finds*, N.Y. TIMES (Feb. 24, 2021), https://nyti.ms/3q0PCrO; Pam Belluck, *Covid-Linked Syndrome in Children Is Growing, and Cases Are More Severe*, N.Y. TIMES (Feb. 17, 2021), http://nyti.ms/3pJ5Aqq.

As part of its response to the pandemic, Oregon issued guidance governing in-person operation of K–12 schools. *See* ORE. HEALTH AUTH. & ORE. DEP'T OF EDUC., READY SCHOOLS, SAFE LEARNERS (Version 5.6.2 Feb. 19, 2021), https://bit.ly/3pIumab; Ore. Exec. Order 20-29 (June 24, 2020), https://bit.ly/37FLnf4. The guidance restricted schools in certain counties

with high levels of COVID-19 transmission to two hours of in-person instruction per day. (Appellee's Br. 3–4.) This rule applied equally to all K–12 schools—public, secular private, and religious. *See* Exec. Order 20-29 ¶¶ 2–3.

But as of January 1, 2021, Oregon made its guidelines on when and to what extent schools may resume in-person instruction advisory rather than mandatory. Letter from Governor Kate Brown to Pat Allen, Dir., Ore. Health Auth., & Colt Gill, Dir., Ore. Dep't of Educ. 3 (Dec. 23, 2020), https://bit.ly/3uq61cW. Plaintiffs are thus now able to provide full-time in-person instruction. They nevertheless press forward with this appeal of the district court's denial of a preliminary injunction against Oregon's expired restrictions, arguing that those rules violated the Free Exercise Clause of the First Amendment.

Amici agree with Governor Brown that this Court may affirm the decision below on the ground that Plaintiffs cannot demonstrate irreparable harm because the challenged restrictions have been lifted. But if the Court nonetheless decides to reach the merits, it should hold that Oregon's expired restrictions were constitutional.

The Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Free Exercise Clause. Oregon's expired restrictions complied with this

legal standard because they applied equally to all K–12 schools, regardless of whether the schools were religious. Even if heightened scrutiny were called for, Oregon's restrictions were constitutional because they were narrowly tailored to advance Oregon's compelling interest in protecting its residents from a deadly disease. And historical analysis supports this result, showing that the Free Exercise Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety.

What is more, exempting religious schools from Oregon's expired restrictions would have violated the Establishment Clause of the First Amendment, which prohibits government from favoring religious institutions over nonreligious ones. Allowing religious schools to provide full-time in-person instruction while prohibiting nonreligious schools from doing the same would have run afoul of that principle.

The district court's decision should be affirmed.

ARGUMENT

I. Oregon's expired restrictions did not violate the Free Exercise Clause of the First Amendment.

A. Rational-basis review applies to the restrictions.

Religious freedom is a value of the highest order, and the provision of religious education for children is particularly important to many people of

faith 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). As Justice Scalia wrote for the Court, to "h[o]ld that an individual's religious beliefs excuse him from compliance with an otherwise valid law" would make "'professed doctrines of religious belief superior to the law of the land'" and "'in effect . . . permit every citizen to become a law unto himself.'" *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (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.

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. The Free Exercise Clause thus bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). 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 government has discriminated against religious conduct. *See id.* at 533–34, 542–43.

Oregon's expired restrictions did not discriminate against religion. Instead, they applied equally to all K–12 schools—public, secular private, and religious private. That should be enough to end the analysis.

Indeed, in *Kentucky ex rel. Danville Christian Academy v. Beshear*, 981 F.3d 505 (6th Cir. 2020), the Sixth Circuit held that religious schools were unlikely to succeed on the merits of a similar challenge to a Kentucky order that temporarily prohibited in-person instruction at all K–12 schools in the state. The court explained that the Kentucky order "applie[d] to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it [was] therefore neutral and of general applicability and [did not] need [to] be justified by a compelling governmental interest." *Id.* at 509. "Any burden on plaintiffs' religious practices [was] 'incidental' and therefore not subject to strict scrutiny," added the court. *Id.* at 510 (citing *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020)).

Two days after the Sixth Circuit issued its decision, the religious schools filed an emergency application for injunctive relief with the Supreme Court. *See* Docket, *Danville Christian Academy v. Beshear*, No. 20A96 (U.S., docketed Dec. 1, 2020), https://bit.ly/3ks7FpF. Kentucky Governor Beshear filed his opposition three days later, on December 4, 2020. *See id.* Nearly two weeks later, on December 17, the Supreme Court issued a decision. 141 S.Ct. 527 (2020). The Court noted that the Kentucky order would expire by January 4, 2021, and that "many Kentucky schools" would be on a holiday break starting December 18. *Id.* at 527. The Court ruled: "Under all of the circumstances, especially the timing and the impending expiration of the Order, we deny the application without prejudice to the applicants or other parties seeking a new preliminary injunction if the Governor issues a school-closing order that applies in the new year." *Id.* at 528. Only two Justices (Alito and Gorsuch) dissented. *See id.* at 528–30. Though the Court did not adjudicate the merits of the matter, the absence of other dissenters and the Court's lack of immediate action on the application when plenty of time remained before the challenged order's expiration suggest that a majority of the Court believes that restrictions such as Kentucky's—and Oregon's—do not violate the Free Exercise Clause.

The order in *Danville Christian* exempted preschools, colleges, and universities (981 F.3d at 508), but that made no difference to the Sixth Circuit or the Supreme Court. Yet Plaintiffs here contend that Oregon's expired restrictions were not neutral and generally applicable because they did not cover in-person daycare or university classes. (Appellants' Br. 1, 13.) Plaintiffs' argument is apparently that Oregon discriminated against religion by restricting secular daycare centers and universities less than religious K–12 schools. But many daycare centers and universities are religious too. And just as Oregon treated religious and secular K–12 schools the same way, the rules that Oregon applied to religious daycare centers applied equally to secular daycare centers, and the rules that Oregon applied to religious universities applied equally to secular universities. *See* Ore. Exec. Order 20-19 (Apr. 23, 2020), https://bit.ly/3bw3RzG; Ore. Exec. Order 20-28 (June 12, 2020), https://bit.ly/2MnCwar. In other words, while Oregon treated the three levels of education differently, within each level religious and secular institutions were treated exactly the same. There was no discrimination against religion, so the different rules that applied to different levels of education cannot give rise to a colorable Free Exercise Clause claim.

If Plaintiffs' contrary view of the law were correct, multiple decisions of the Supreme Court in free-exercise cases would have come out the opposite

way. For example, in *Smith*, 494 U.S. at 874, 890, the Supreme Court held that Oregon's general criminal prohibition of use of the mind-altering drug peyote could be constitutionally applied to people who use peyote as a religious sacrament. The Court concluded that the Oregon law was neutral and generally applicable, as it prohibited both religious and nonreligious uses of peyote. *See id.* at 874, 879–80. Yet on Plaintiffs' view, because Oregon has long allowed people to use another mind-altering substance—alcohol—for secular and religious purposes, Oregon's statutes would amount to unconstitutional religious discrimination between secular uses of alcohol and religious uses of peyote.

Likewise, in *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989), the Supreme Court ruled that the Free Exercise Clause did not entitle a religious group's members to an exemption from taxation of income paid for spiritual-training sessions. The Court explained that the tax code contains a general prohibition against deducting from income money paid to nonprofits in exchange for services. *See id.* at 687–88, 699–700. Of course, the tax code allows taxpayers to deduct contributions to both religious and nonreligious charities when the taxpayer receives nothing in return. *See id.* at 687–88. Yet Plaintiffs' view of the law would require that *Hernandez* come out the other way because the tax code affords different

treatment to payments for spiritual-training sessions than to pure gifts to nonreligious charities.

Similarly, in *Gallagher v. Crown Kosher Super Market of Massachusetts*, 366 U.S. 617, 618–19, 630–31 (1961) (plurality opinion), the operators of a Kosher supermarket unsuccessfully challenged under the Free Exercise Clause a Massachusetts law that prohibited all supermarkets from being open on Sundays. The law allowed people to attend religious services and to engage in various recreational activities on Sundays. *Id.* at 621. If Plaintiffs' view of the law were right, the Massachusetts law would have been struck down on the ground that it discriminated between operation of a religious supermarket and secular recreational activities.

In addition, just last year, the Supreme Court ruled in *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246, 2251, 2255 (2020), that the Free Exercise Clause barred Montana from using a tax-credit program to fund tuition at private secular schools while excluding religious schools—solely because of those schools' religious character—from the program's benefits. But the Court made clear that "[a] State need not subsidize private education" at all. *Id.* at 2261. In other words, funding public schools but not private religious and secular schools is not discrimination against religion under the Free Exercise Clause. For

purposes of determining whether government is discriminating against religion, the treatment of religious private schools should therefore be compared only to the treatment of secular private schools, not to rules applicable to other kinds of institutions, businesses, or activities.

Plaintiffs rely on *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), and *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020). Those cases enjoined restrictions on worship services, as did a similar decision issued after Plaintiffs filed their opening brief, *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021). But in all three cases, states subjected houses of worship to special rules that applied only to them while imposing lesser restrictions on activities that the courts deemed comparable. *See Diocese of Brooklyn*, 141 S.Ct. at 66–67; *S. Bay*, 141 S.Ct. at 717, 719 (statement of Gorsuch, J.); *Calvary Chapel*, 982 F.3d at 1231, 1233. Here on the other hand, Oregon's expired restrictions applied to a broad category of institutions defined without reference to religion—elementary and secondary schools. There is thus no justification for considering rules applicable to other types of institutions.

For similar reasons, Plaintiffs are wrong in arguing (Appellants' Br. 1–3, 13) that Oregon's restrictions on K–12 education were not neutral and generally applicable because Oregon has allowed large *outdoor* protests. To begin with, Plaintiffs cite nothing beyond a single press release for

their allegations about protests. (Appellants' Br. 1–2.) But even if it were proper for this Court to consider the issue, and to compare (notwithstanding the points above) indoor religious education to outdoor protests, that comparison would not demonstrate any discrimination against religion by Oregon. For Oregon has been permitting large outdoor worship services too. *See Guidance*, CORONAVIRUS.OREGON.GOV (last visited Mar. 1, 2021), https://bit.ly/3dID4D1 (section entitled "Guidance Details / Metrics"). And it is sensible for Oregon to limit indoor activities (such as in-person schooling) more than outdoor activities because there is far less risk of transmission of COVID-19 outdoors; indeed, one study concluded that the odds of infection are nearly twenty times higher at indoor events 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. Thus, this Court correctly was not swayed in *Calvary Chapel* by an argument (982 F.3d at 1231) that indoor religious services should be compared to outdoor protests; the Court instead compared Nevada's restrictions on indoor worship services to the state's restrictions on various nonreligious indoor activities (*see id.* at 1233–34).

The only case of which *amici* are aware that actually might be in line with Plaintiffs' arguments here is *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020). There, a

Sixth Circuit panel granted an injunction pending appeal prohibiting enforcement against religious schools of an Ohio county's temporary restrictions on all in-person education for seventh through twelfth graders. *Id.* at 479, 482. Even though the order treated religious and nonreligious schools the same way, the panel took the view that there was a Free Exercise Clause violation because "gyms, tanning salons, office buildings, and the Hollywood Casino" were allowed to remain open. *Id.* at 482. For the reasons stated above, the *Monclova* panel erred by comparing religious education to activities that have nothing to do with education, religious or secular. In any event, *Monclova* is not precedent even within the Sixth Circuit, because it directly conflicts with that circuit's earlier decision in *Danville Christian*, 981 F.3d 505, and under Sixth Circuit law the earlier decision controls when there is an intracircuit conflict. *See United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000).

Oregon's expired restrictions on in-person K–12 education thus did not work any religious discrimination against religious schools and therefore should not be subjected to any level of scrutiny higher than rational-basis review under the Free Exercise Clause. *See, e.g.*, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). As the restrictions were rationally related to Oregon's interest in combatting the pandemic—

something that Plaintiffs do not challenge—the restrictions did not violate the Clause.

B. Oregon's expired restrictions 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 that scrutiny. Before its decision in *Smith*, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Yet those pre-*Smith* decisions repeatedly acknowledged that there is no right to religious exemptions from laws that shield the public from illness.

More than one hundred years ago, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court explained 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." *See id.* at 26. The Court thus straightforwardly rejected the view that the Constitution bars compulsory

measures to protect public health, recognizing instead the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the . . . health . . . of the state.'" *Id.* (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). Because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," individual rights are defined so as to ensure that government may implement reasonable restrictions to protect the public health. *Id.* at 27.

Although *Jacobson* did not specifically consider a Free Exercise Clause argument, perhaps because the Clause was not yet at that time applicable against the States, several of the Court's subsequent decisions have recognized that the principles of the case apply in the free-exercise context as in all others. In *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), for example, the Court explained that one "cannot claim freedom from compulsory vaccination . . . on religious grounds." For the "right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Id.* at 166–67. In *Sherbert*, 374 U.S. at 402–03, the Court, citing *Jacobson* and *Prince*, noted that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when "[t]he conduct or actions so regulated have invariably posed some substantial threat to

public safety, peace or order." And in *Yoder*, 406 U.S. at 230 & n.20, the Court underscored that free-exercise claims are denied when "harm to the physical or mental health . . . or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred"; in explaining that foundational principle, the Court specifically pointed to *Jacobson*, as well as a case expressly rejecting a free-exercise challenge to a mandatory-vaccination law (*Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644 (Ark. 1965)), and a case rejecting an attempt to use the Free Exercise Clause to block a lifesaving blood transfusion (*In re President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000, 1007–10 (D.C. Cir. 1964) (Wright, J., in chambers)).

The Supreme Court has also repeatedly rejected in other contexts free-exercise claims for religious exemptions that would have imposed harms on third parties. For example, in *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court denied 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." In *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (plurality opinion), 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." And in *Prince*, 321

U.S. at 170, the Court denied a request for an exemption from child-labor laws barring distribution of religious literature by minors, because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free, in identical circumstances, to make martyrs of their children."

Consistent with this line of cases, the Supreme Court held in *Diocese of Brooklyn*, 141 S.Ct. at 67, that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." Oregon's restrictions advanced that interest. COVID-19 outbreaks have occurred in religious schools as well as secular private and public schools—even when precautions such as mask-wearing and social distancing were implemented. *See, e.g.*, Leah Romero, *Mesilla Valley Christian School reports COVID-19 outbreak, required to close for two weeks*, LAS CRUCES SUN NEWS (Feb. 9, 2021), http://bit.ly/3dzanID; Joe McLean, *Jacksonville private school pivots to distance learning over uptick in COVID-19 cases*, NEWS4JAX (Feb. 9, 2021), http://bit.ly/3aEvZl0; Liz Bowie, *Large COVID-19 outbreaks afflict three Baltimore County private schools*, BALT. SUN (Feb. 5, 2021), http://bit.ly/3skqGwP; Jennifer Smith Richards, *Hundreds of Illinois schools potentially exposed to COVID-19 in last month, new contact tracing data shows*, CHI. TRIBUNE (Nov. 6, 2020), http://bit.ly/3s8GK4W; Susan

Vela, *State reports Plymouth Christian dealing with COVID-19 outbreak*, HOMETOWN LIFE (Oct. 19, 2020), http://bit.ly/3aFEtIs.

As these examples demonstrate, a single unwitting carrier at a school (religious or secular) could cause a ripple effect throughout an entire community: One infected person might pass the virus to students or teachers, who might then return home and transmit 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.

A compelling-interest test, if it applied, would also ask whether Oregon's restrictions were narrowly tailored to the governmental interest at stake. *E.g.*, *Diocese of Brooklyn*, 141 S.Ct. at 67. The Supreme Court and this Court concluded in *Diocese of Brooklyn*, *South Bay*, and *Calvary Chapel* that the restrictions there were not narrowly tailored because they effectively prohibited worship services or because, without sufficient justification, they restricted worship more than activities that the decisions treated as comparable. *See Diocese of Brooklyn*, 141 S.Ct. at 67–

68; *S. Bay*, 141 S.Ct. at 717 (Roberts, C.J., concurring in partial grant of application for injunctive relief); *Calvary Chapel*, 982 F.3d at 1234.

By contrast, Oregon's expired limitations on K–12 schools were not overly restrictive of religious exercise, as schools were allowed to provide up to two hours per day of in-person instruction. (Appellee's Br. 4.) Moreover, Oregon carefully tailored to the characteristics of the relevant populations and risks its rules governing K–12 education and the other activities that Plaintiffs argue are comparable. The State did not limit in-person daycare to two hours per day, because daycare cannot be provided virtually, and because daycare programs are typically much smaller than K–12 schools and therefore pose less risk of large viral outbreaks. Instead, Oregon imposed other substantial restrictions on daycare providers, including daily temperature checks, limited cohort sizes, and regular inspections. Similarly, Oregon did not limit in-person higher-education classes to two hours per day because (i) college students are more likely than K–12 students to be able to comply with masking, sanitation, and distancing guidelines; (ii) college students in all events typically spend far less time in class per day than do K–12 students; and (iii) the vast majority of Oregon institutions of higher education were on their own initiative holding classes only virtually at the time anyway. And Oregon regulated colleges and universities through other restrictions, such as

limiting the size of in-person classes. (*See* Resp. Mem. to Pls.' Mot. for Prelim. Inj., Doc. 40 (Oct. 23, 2020), at 8–12 and citations therein.) Finally, outdoor protests pose far less risk of viral transmission than do indoor activities, as noted above. *See* Parker-Pope, *supra*.

Thus, even if the compelling-interest test were applicable, Oregon's expired restrictions on K–12 education satisfied it.

C. The Free Exercise Clause was neither intended nor originally understood to require exemptions from laws that protect the health and safety of the public.

1. The intent and writings of the Founders.

The conclusion that Oregon's restrictions did not violate the Free Exercise Clause is bolstered by a review of the Clause's historical context, which shows that the Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety. In its recent jurisprudence, the Supreme Court has looked to "history for guidance" when determining the meaning of provisions of the Bill of Rights. *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2087 (2019) (plurality opinion); *see also, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014); *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010). In *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008), for example, the Court considered "the history that the founding generation knew" in concluding that the Second Amendment's preface is consistent

with an individual right to bear arms. The Court explained that "the way tyrants had eliminated a militia" in England informed "the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 598–99; *see also McDonald*, 561 U.S. at 768.

Similarly, both Religion Clauses of the First Amendment were informed by the history of European and colonial religious persecution. For the Founders of our Nation well knew that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947); *see also Engel v. Vitale*, 370 U.S. 421, 432–33 (1962); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982). During the seventeenth and eighteenth centuries, Catholics and Puritans in England were subjected to laws enacted to "destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). Emigration to colonial America was spurred by these religious conflicts and persecutions. *See* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 57 (2009). Yet some colonists then came to engage in

similar practices themselves, using political authority to impose their own preferred beliefs and religious institutions at the expense of other denominations. *See Everson*, 330 U.S. at 9–10.

These "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause" (*Bowen v. Roy*, 476 U.S. 693, 703 (1986)), including, notably, James Madison, the primary architect of the First Amendment (*Everson*, 330 U.S. at 13). As Madison explained, "[t]orrents of blood ha[d] been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissent of Rutledge, J.). In contrast, noted Madison, "the forbearance of our laws to intermeddle with Religion" "has produced" "moderation and harmony" in America. *Id.*

Accordingly, those who drafted the First Amendment sought to ensure (*see Everson*, 330 U.S. at 13) that government would, as Madison put it, be prevented from "proscribing all difference in Religious opinion" (*Memorial and Remonstrance*, *reprinted in Everson*, 330 U.S. at 69). Thus, the Supreme Court has recognized the Free Exercise Clause to forbid governmental actions that have "as their object the suppression of religion" (*Lukumi*, 508 U.S. at 542), that evince "hostility toward . . .

sincere religious beliefs" (*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1729 (2018)), or that "impose special disabilities on the basis of religious status" (*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017) (quoting *Lukumi*, 508 U.S. at 533) (alterations omitted)).

But while the Free Exercise Clause was intended to prohibit governmental disfavor toward or targeting of particular faiths, it was not originally understood to mandate exemptions from laws that protect public safety or health. For example, though Madison believed that the right to practice one's religion freely was of utmost importance, he cautioned that it should not be construed to "trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 1822), https://bit.ly/34wu2n5.

So too, it is "quite clear that Jefferson did not" endorse a "broad principle of affirmative accommodation" for religious objections against laws that secure public safety. *See City of Boerne v. Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in part). While Jefferson warned against the dangers of allowing government to "restrain the profession or propagation of [religious] principles," he believed that government might validly "interfere when [those] principles break out into overt acts against

peace and good order." *See* Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), https://bit.ly/2JShvmT.

Likewise, George Washington expressed the "wish and desire that the Laws may always be as extensively accommodated to [freedom of conscience], as a due regard for the Protection and essential Interests of the Nation may Justify, and permit." Letter from George Washington to the Society of Quakers (Oct. 1789), https://bit.ly/3lQjkxG. In other words, Washington believed that religion should be accommodated willingly and enthusiastically, but not at the expense of public safety.

Prominent religious thinkers of the day also shared as a theological commitment this same understanding that religious objectors were not entitled to exemptions from public-safety laws, as the writings of Isaac Backus and John Leland demonstrate. *See* Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 630–32 (1990). They adopted and defended the views of Roger Williams, the Baptist theologian and founder of Rhode Island, who had likewise opposed the idea of an entitlement to religious exemptions from general laws protecting public safety. *See id.*

2. Early state constitutions and court decisions.

Most Founding Era state constitutional analogues to the Free Exercise Clause contained caveats reflecting this basic understanding of the

Framers that the right to free exercise did not override public-safety concerns. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461–62 (1990). For example, the free-exercise guarantee of Delaware's Declaration of Rights of 1776 included the qualifier "unless, under Colour of Religion, any Man disturb the . . . Safety of Society." Del. Decl. of Rights of 1776, § 3. The free-exercise guarantee of the Maryland Constitution of 1776 contained the limitation "unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights." Md. Const., art. XXXIII (1776). The free-exercise clause of New York's 1777 Constitution provided that "the liberty of conscience, hereby granted, shall not be so construed as to . . . justify practices inconsistent with the peace or safety of this State." N.Y. Const., art. XXXVIII (1777). The Georgia Constitution of 1777 recognized that all "persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." Ga. Const., art. LVI (1777). And the New Hampshire Constitution of 1784 stated that although everyone has "a natural and unalienable right to worship God according to the dictates of his own conscience," none have the right to "disturb the public peace or disturb others in their religious worship." N.H. Const., part I, art. 5 (1784);

accord Mass. Const., art. II (1780); R.I. Charter (1663); S.C. Const., art. VIII, § 1 (1790).

As Professor McConnell has explained, "[t]he wording of the state provisions . . . casts light on the meaning of the first amendment," "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, 103 HARV. L. REV. at 1456. And that original meaning, according to Professor McConnell, was that "the free exercise right should prevail" "[w]here the rights of others are not involved" but should not override "peace and safety limitations" "necessary for the protection of others." *Id.* at 1462, 1464–66.

Early state-court decisions point in the same direction. Professor Vincent Phillip Muñoz has determined that "no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions" from public-safety laws. Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1099 (2008) (citing Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 276–95 (1991)).

Indeed, the few early court decisions to address the issue demonstrate precisely the opposite. For instance, the Pennsylvania Supreme Court held

in 1831 that while "religious scruples of persons concerned with the administration of justice[ ] will receive all the indulgence that is compatible with the business of government," respect for religious obligations "must not be suffered to interfere with the operations of that organ of the government which has more immediately to do with the protection of person[s]." *Phillips v. Gratz*, 2 Pen. & W. 412, 416–17 (Pa. 1831). Similarly, in 1854, the Supreme Judicial Court of Maine noted that it "is not disputed" that "society['s] . . . right to interfere on the principle of self-preservation" prevails over the right to freely exercise religion. *Donahoe v. Richards*, 38 Me. 379, 412 (Me. 1854).

* * * * *

A ruling that the Free Exercise Clause gave Plaintiffs a right to a religious exemption from Oregon's expired restrictions on K–12 education would be squarely at odds with the Framers' intent that the Clause not override laws that protect public safety.

II. Exempting religious schools from Oregon's restrictions would have violated the Establishment Clause.

Providing an exemption for religious schools from Oregon's expired restrictions on K–12 education would also have violated the First Amendment's Establishment Clause. "The First Amendment mandates governmental neutrality . . . between religion and nonreligion" (*Epperson*

v. Arkansas, 393 U.S. 97, 104 (1968)); "the government may not favor . . . religion over irreligion" (*McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005)). The Establishment Clause thus bars government from granting religious organizations or individuals special benefits that it does not extend to similarly situated nonreligious organizations or individuals.

For example, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14–15 (1989) (plurality opinion), the Supreme Court invalidated a sales-tax exemption for religious periodicals because it did not extend to nonreligious publications. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 & n.9 (1985), the Court struck down a law that gave religious adherents an unqualified right not to work on their Sabbath, in part because the law did not give nonreligious employees any comparable right. And in *Board of Education v. Grumet*, 512 U.S. 687, 702, 705 (1994), the Court held unconstitutional the creation of a school district that matched the boundaries of a religious enclave, partly because a religious group had received "the benefit of a special franchise."

Exempting religious schools from Oregon's two-hour limit on in-person instruction would have been contrary to these cases. If Oregon had done so, it would have granted benefits to religious schools that were not available to nonreligious schools. Parents of children at religious schools

who desired in-person instruction for their kids would likewise have received special benefits not afforded to other parents.

Indeed, the exemption that Plaintiffs sought would have given some parents strong, state-conferred incentives to enroll their children at religious schools rather than public or private secular schools. But the Establishment Clause prohibits government from giving people "incentive[s] to undertake religious indoctrination" or otherwise to "modify their religious beliefs or practices." *See Agostini v. Felton*, 521 U.S. 203, 231–32 (1997); *accord Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002).

Finally, the Establishment Clause requires that religious exemptions "must be measured so that [they do] not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). Thus, the Sabbath-day-off law at issue in *Estate of Thornton* was held unconstitutional partly because it "would [have] cause[d] the employer substantial economic burdens" and "require[d] the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *See* 472 U.S. at 710. Similarly, the sales-tax exemption for religious publications in *Texas Monthly* was invalidated partly because it "markedly" "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [wa]s needed to offset the benefit bestowed on

subscribers to religious publications." *See* 489 U.S. at 15, 18 n.8 (plurality opinion). Here, the religious exemption demanded by Plaintiffs would have harmed Oregon's efforts to control the pandemic, leading to increased illness and death.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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