No. 20-55533

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTH BAY UNITED PENTECOSTAL CHURCH, *et al.*,
Plaintiffs-Appellants,

v.

GAVIN NEWSOM,
in his official capacity as Governor of California, *et al.*,
Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the Southern District of California
Case No. 3:20-cv-865, Hon. Cynthia A. Bashant

BRIEF IN SUPPORT OF APPELLEES 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; DISCIPLES JUSTICE ACTION NETWORK; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTING JUDAISM; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of them.

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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, but that it should never be misused to cause harm.

Amici include religious organizations that are recommending not 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 connections that risk COVID-19 infection not only of congregants but also of people in the wider community with whom they associate. Applying to religious services religion-neutral restrictions on large gatherings both protects the public health and respects the Constitution.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Disciples Justice Action Network.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Southwest Conference of the United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

California, along with most of the world, continues to face a historically devastating pandemic. The United States has suffered by far the most COVID-19-related deaths worldwide (*see Covid-19 Dashboard*, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited July 2, 2020), https://bit.ly/2xR2V99), and the virus continues to pose a dire threat to California and its people (*see, e.g.*, Collen Shalby, *Record high of new coronavirus cases reported in California: More than 6,000 in a day*, L.A. TIMES (June 23, 2020), https://lat.ms/3hVCUrH). As part of California's emergency public-health response, Governor Newsom and the County Defendants issued the orders initially challenged by Plaintiffs, which temporarily required residents to remain in their homes, prohibited gatherings, and closed nonessential businesses. ER at 156–184. Evidence suggests that this response saved many lives. *See* Rong-Gong Lin II et al., *Social Distancing may have Helped California Slow the Virus and Avoid New York's Fate*, L.A. TIMES (Mar. 31, 2020), https://lat.ms/2VSbYih.

On May 25, 2020, California issued a new Guidance providing for the safe operation of houses of worship. *See* State Defs.' Mot for Judicial Notice, ECF No. 47, Ex. 2. That Guidance allows houses of worship to host services as long as attendance does not exceed 25 percent of building capacity or 100 people, whichever is lower. *Id.* at 3. On June 12, 2020, the Guidance was

amended to make clear that these limits apply only to indoor religious services, and that the only mandatory restriction affecting the size of outdoor services is that attendees from different households must be at least six feet apart. *See* State Defs.' Mot for Judicial Notice, ECF No. 47, Ex. 1 at 3. On July 1, 2020, California issued an updated version of the Guidance that keeps those restrictions in place. *See* COVID-19 INDUSTRY GUIDANCE: PLACES OF WORSHIP AND PROVIDERS OF RELIGIOUS SERVICES & CULTURAL CEREMONIES 3 (July 1, 2020), https://bit.ly/3fF534l. Although the operative Guidance relaxes earlier restrictions on houses of worship, Plaintiffs still contend that the Guidance violates their constitutional rights. *See* Appellants' Br. 32.[2]

Though Plaintiffs are temporarily required to limit the size of their worship services, their religious-exercise rights have not been violated. The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise

[2] *Amici* view this appeal as moot to the extent that Plaintiffs challenge previous restrictions. Hence—though *amici* also agree with Defendants that the Court should not reach any constitutional issue in this appeal due to other jurisdictional problems—*amici* analyze only the constitutionality of the current Guidance.

Clause of the First Amendment. The Guidance complies with this legal standard because it restricts religious services to the same degree as some, and less than other, comparable activities: Protests, cultural ceremonies, and movie theatres are subject to the same restrictions; while concert venues, nightclubs, convention centers, theme parks, festivals, indoor playgrounds, sporting events with live audiences, and professional, social, and community gatherings are closed or prohibited entirely. *See infra* at pp. 8–9. But even if heightened review under the compelling-interest test were called for—which it is not—the Guidance is valid because it is narrowly tailored to advance the compelling governmental interest in protecting California residents from a deadly disease.

What is more, the Establishment Clause forbids granting a complete exemption for religious services from California's gathering 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. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding that no size limitation may be placed on indoor religious gatherings would do just that: An outbreak at a worship service could infect scores of fellow congregants, who may then expose family,

friends, and strangers, including countless people who did not attend the event.

With Chief Justice Roberts writing a concurring opinion expressing reasoning similar to points explained here, the Supreme Court recently rejected an application in this litigation by Plaintiffs for an emergency injunction against the Guidance. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). Likewise, in a published opinion concluding that Plaintiffs were unlikely to succeed on the merits of this appeal, this Court denied a motion for injunction pending appeal against an earlier version of California's restrictions that prohibited in-person religious services entirely. *See S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). Moreover, the overwhelming majority of other court decisions—including rulings by the First, Third, Fourth, Fifth, Seventh, and Eighth Circuits—have denied relief in religion-based challenges to COVID-19-related public-health measures, most of which also were much more restrictive of religious exercise than is California's current Guidance. The district court's decision should be affirmed.

ARGUMENT

I. The Guidance Does Not Violate The Free Exercise Clause of the First Amendment.

A. Rational-Basis Review Applies to the Guidance.

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 the legal guarantees of religious freedom do not provide (and never have provided) an absolute right to engage in conduct consistent with one's religious beliefs. *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1128 (9th Cir. 2009). Plaintiffs nevertheless argue that the Free Exercise Clause entitles them to an exemption from California's emergency public-health measures in the face of a severe pandemic. That claim is wrong as a matter of law: "The right to practice religion freely does not include liberty to expose the community . . . to a communicable disease." *Prince*, 321 U.S. at 166–67.

The Supreme Court's Free Exercise jurisprudence makes clear that, while government cannot forbid a religious practice because it is religious, religion-based disagreement with the law does not excuse noncompliance. As Justice Scalia wrote for the Court, "[t]o permit this would be to make the 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." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Supreme Court has therefore held that laws that place burdens on religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they apply generally and are neutral toward religion. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879.

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

Defendants' emergency public-health measures do not discriminate or show animus against religious conduct. Under the Guidance, houses of worship are permitted to host indoor religious services as long as attendance does not exceed the lesser of 25 percent of building capacity or 100 people, and outdoor religious services of any size are allowed as long as attendees

from different households are at least six feet apart or remain in their cars. *See* Guidance at 3; *Stay home Q&A*, COVID19.CA.GOV (updated July 1, 2020), https://bit.ly/2Bmgcb5 (section entitled "Protected activities"). The same rules apply to protests, cultural ceremonies, and movie theatres. *See* Guidance at 2; *Stay home Q&A* (sections entitled "Are gatherings permitted?" and "Protected activities"); COVID-19 INDUSTRY GUIDANCE: FAMILY ENTERTAINMENT CENTERS 3, 12–13 (July 2, 2020), https://bit.ly/30TGIDA. Other kinds of gatherings are prohibited—including professional, social, and community gatherings, festivals, and sporting events with live audiences. *See Stay home Q&A* (sections entitled "What's closed statewide?" and "Are gatherings permitted?"). And concert venues, nightclubs, convention centers, theme parks, and indoor playgrounds remain closed. *See id.* (section entitled "What's closed statewide?"); *Resilience Roadmap*, COVID19.CA.GOV (updated June 18, 2020), https://bit.ly/2YRPPTW. California thus restricts religious services in the same way as some and much less than other comparable activities.

Accordingly, concurring in the denial of Plaintiffs' application in this litigation for emergency injunctive relief against the Guidance, Chief Justice Roberts concluded, "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment." *S. Bay*, 140 S. Ct. at

1613. "Similar or more severe restrictions," emphasized the Chief Justice, "apply 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.*; *see also Attorney Gen. 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 or concert halls).

Plaintiffs argue that California discriminates against religion because it does not impose a 25-percent-occupancy or 100-person limit on institutions such as retail stores, shopping malls, factories, offices, and restaurants. *See* Appellants' Br. at 50–55. Justice Kavanaugh voiced a similar view in a dissent from the Supreme Court's denial of Plaintiffs' emergency application for injunctive relief, 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 "exempts or treats 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.

Similarly, this Court in a published opinion earlier in this appeal denied a request for an injunction pending appeal against a prior version of California's public-health restrictions that prohibited *all* in-person gatherings. *S. Bay*, 959 F.3d at 939. Like Plaintiffs and Justice Kavanaugh, Judge Collins expressed the view in a dissenting opinion that California's restrictions improperly favored retail stores, factories, offices, and restaurants. *See id.* at 945. But the majority concluded that Plaintiffs "ha[d] not demonstrated a sufficient likelihood of success on appeal." *Id.* at 939. The majority explained that "[w]here 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." *Id.* (quoting *Lukumi*, 508 U.S. at 533, 543).

In any event, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542; *Stormans,* 586 F.3d at 1135 ("That the . . . regulations recognize some exceptions cannot mean that the [state] has to grant all other requests for exemption to preserve the 'general applicability' of the regulations."). Exemptions for nonreligious activities undermine neutrality and general

applicability only if the exempted conduct is "similar enough in all material respects" to nonexempted religious conduct to support a conclusion that the prohibition "was based on [the prohibited conduct's] religious nature." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52–53 (10th Cir. 2013); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079–82 (9th Cir. 2015) (rejecting arguments that secular exemptions that were not comparable to desired religious exemption could trigger strict scrutiny). Here, the types of institutions that Plaintiffs contend are less restricted usually do not host the large gatherings that houses of worship have, and those kinds of institutions typically have more compartmentalized layouts than do the spaces in houses of worship where religious services normally occur. What is more, California has imposed extensive and stringent restrictions on the operations of those types of institutions—such as specific distancing requirements, installation of impermeable barriers, cleaning mandates, and restrictions on when and how customers may be served—that are tailored to the institutions' specific natures and thus have an overall impact similar to that of the occupancy limits on houses of worship. *See, e.g.*, COVID-19 INDUSTRY GUIDANCE: RESTAURANTS, BARS, AND WINERIES (July 2, 2020), https://bit.ly/3ddTgrO; COVID-19 INDUSTRY GUIDANCE: RETAIL (July 2, 2020), https://bit.ly/3ee3GJk; COVID-19 INDUSTRY GUIDANCE: SHOPPING

MALLS, DESTINATION SHOPPING CENTERS, STRIP AND OUTLET MALLS, AND SWAP MEETS (July 2, 2020), https://bit.ly/2UQx9S0.

California's public-health measures thus do not work any unconstitutional discrimination against religious activity, and heightened scrutiny does not apply.

B. The Guidance Would Satisfy Even A Compelling-Interest Test.

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

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest standard whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *see also* 42 U.S.C. § 2000bb(b) (purpose of federal Religious Freedom Restoration Act was "to restore the compelling interest test as set forth in" *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). But even the Court's pre-*Smith* decisions routinely recognized that the Clause does not require religious exemptions from laws that protect public health from serious

threats, as the challenged public-health measures do here. For government has a compelling interest in protecting the health and safety of the public, and that interest is undeniable when it comes to preventing the spread of an infectious disease that puts lives at risk. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20.

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

Following incorporation of the Free Exercise Clause against the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court relied on *Jacobson* to reaffirm that state public-health measures burdening religious exercise withstand a compelling-interest test. *See Sherbert*, 374

U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that is permissible under compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have routinely recognized that the "state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011); *accord McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *see also Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases). There can be no doubt that California has a compelling interest in stanching the spread of COVID-19. As this Court stated in its opinion denying Plaintiffs' motion for an injunction pending appeal, "We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure." *S. Bay*, 959 F.3d at 939.

A compelling-interest test, if it applied, would also ask whether the Guidance is narrowly tailored to address the governmental interest at issue. *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, 485 (1988); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29

(1984) (holding that complete ban on gender discrimination is narrowly tailored to combating evil of gender discrimination). Thus the Supreme Court (*see 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.

The Guidance here is far less restrictive than a blanket ban and satisfies the narrow-tailoring standard more easily. No vaccine or accepted treatment for COVID-19 yet exists, and asymptomatic carriers may unwittingly infect those with whom they are in close proximity. *See, e.g.*, *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Temporarily limiting the size of in-person gatherings is the only way for California to achieve its compelling objectives of limiting the pandemic's spread, relieving pressure on the healthcare system, protecting the health and safety of all Californians, and decreasing deaths. At the same time, the State's public-health measures are carefully tailored to restrict religious activities only as necessary to achieve that goal: Places of worship may conduct services indoors at reduced capacity, outdoors with six-foot distancing, via drive-in services, or remotely.

To suggest, as Plaintiffs do, that the Guidance is not narrowly tailored because California could impose laxer restrictions on religious services—

such as physical-distancing requirements without any occupancy limits (*see* Appellants' Br. at 59)—ignores the obvious: Imposing a ceiling on the size of gatherings is more likely to reduce transmission of COVID-19 than is permitting them to proceed under looser rules. Under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

That is the case here. COVID-19 outbreaks have resulted from religious gatherings in spite of physical-distancing and other safety precautions taken by houses of worship. *See, e.g.*, 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; Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; Chris Epp, *'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience*, CTV NEWS (May 11, 2020), https://bit.ly/3dLUv2l; Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6. As this Court stated in its opinion earlier in this case, recounting "the words of Justice Robert Jackson, if a '[c]ourt does not temper its doctrinaire logic with a little practical

wisdom, it will convert the constitutional Bill of Rights into a suicide pact.'" *S. Bay*, 959 F.3d at 939 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (alteration in original)).

Moreover, the Chief Justice's opinion in this case explained that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *S. Bay*, 140 S. Ct. at 1613–14. The Chief Justice added, "Our 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)). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,'" continued the Chief Justice, "their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974) (alteration in original)). "Where those broad limits are not exceeded, they 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," concluded the Chief Justice. *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). Indeed, deference to elected officials is all the more warranted during the reopening process, as governors across the country have needed to rapidly adjust their reopening

plans in response to new COVID-19 outbreaks. *See, e.g.*, Rachel Treisman, *With COVID-19 Cases Rising, Some States Slow Their Reopening Plans*, NPR (June 24, 2020), https://n.pr/2Nt1u5d. Accordingly, this Court should not second-guess Governor Newsom's determinations here.

C. The Vast Majority of Courts to Consider Similar Challenges to COVID-19 Orders Have Rejected Them.

For reasons similar to those set forth above, in addition to the Supreme Court's and this Court's previous rulings in this case, numerous other decisions—including rulings by this Court in two other cases and by the First, Third, Fourth, Fifth, Seventh, and Eighth Circuits—have rejected challenges like this one by religious organizations to in-person-gathering restrictions and stay-at-home orders. And the vast majority of the public-health orders in those cases limited worship services substantially more than California's Guidance does.

For example, in *Elim Romanian Pentecostal Church v. Pritzker*, __ F.3d __, No. 20-1811, 2020 WL 3249062, at *1, 6 (7th Cir. June 16, 2020), the Seventh Circuit upheld an Illinois order that capped religious and similar gatherings at ten people. Writing for the court, Judge Easterbrook emphasized that "the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally applicable laws." *Id.* at *4. He further explained that the Illinois order did not

unconstitutionally "disfavor[ ] religious services," because they are "most like other congregate functions that occur in auditoriums, such as concerts and movies," and the order restricted those types of events *more* than religious services. *Id.* at *4–6. Likewise, in a case in which this Court denied a motion for an injunction pending appeal against a version of California's restrictions that prohibited gatherings of any size, a California district court held that because challenged state and local "orders appl[ied] to both religious and secular gatherings, they d[id] not discriminate, and [we]re therefore facially neutral." *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970, at *5–6 (C.D. Cal. Apr. 23, 2020), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020). And in a case in which this Court denied a motion for an injunction pending appeal against a Nevada directive limiting religious services to fifty people, the district court found that the directive was not "an implicit or explicit attempt to specifically target places of worship," because "secular entities and activities similar in nature to church services have been subject to similar or more restrictive limitations on their operations." *Calvary Chapel Lone Mountain v. Sisolak*, __ F. Supp. 3d __, No. 2:20-cv-907, 2020 WL 3108716, at *4 (D. Nev. June 11, 2020) (fifty-person limit), *motion for injunction pending appeal denied*, No. 20-16169, ECF No. 20 (9th Cir. July 2, 2020).

A plethora of other federal and state courts have reached similar conclusions. *See, e.g.*, *Spell v. Edwards*, __ F.3d __, No. 20-30358, 2020 WL 3287239, at *3–4 (5th Cir. June 18, 2020), *denying as moot motion for injunction pending appeal, dismissing appeal as moot, and vacating* __ F. Supp. 3d __, No. 3:20-cv-282, 2020 WL 2509078, at *1, 2–4 (M.D. La. May 15, 2020) (ten-person limit); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, ECF No. 117596871 (1st Cir. June 2, 2020), *denying motion for injunction pending appeal of* __ F. Supp. 3d __, No. 1:20-cv-156, 2020 WL 2310913, at *3 (D. Me. May 9, 2020) (ten-person limit); *Bullock v. Carney*, 806 F. App'x 157, 157 (3d Cir. May 30, 2020), *denying motion for injunction pending appeal of* __ F. Supp. 3d __, No. 1-20-cv-674, 2020 WL 2813316, at *1 (D. Del. May 29, 2020) (thirty-percent-capacity limit); *Hawse v. Page*, No. 20-1960 (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); *Tolle v. Northam*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (ten-person limit, *see* Executive Order Fifty-Five (Mar. 30, 2020) (Northam), https://bit.ly/2M4U9rG), *and petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020); *High Plains Harvest Church v. Polis*, No. 1:20-cv-1480, 2020 WL 3263902, at *1 (D. Colo. June 16, 2020)

(fifty-person limit); *Abiding Place Ministries v. Newsom*, No. 20-cv-683, 2020 WL 2991467, at *1–2 (S.D. Cal. June 4, 2020) (noting prior denial of TRO against order prohibiting gatherings of any size); *Antietam Battlefield KOA v. Hogan*, __ F. Supp. 3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *2 (D. Md. May 20, 2020) (ten-person limit), *appeal dismissed*, No. 20-1579, ECF No. 35 (July 2, 2020); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111, at *1, 5–7 (E.D. Cal. May 5, 2020) (no gatherings of any size permitted), *appeal dismissed*, ECF No. 14, No. 20-15977 (9th Cir. May 29, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *3–8 (E.D. Va. May 1, 2020) (ten-person limit), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *2, 6–11 (N.D. Ill. May 3, 2020) (ten-person limit), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 1905586, at *1, 30–38 (D.N.M. Apr. 17, 2020) (five-person limit); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *1–3 (E.D. Tenn. Apr. 17, 2020) (ten-person limit and ban on drive-in services); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020) (no gatherings of any size); *Elkhorn Baptist Church v. Brown*, 366 Or. 506, 542 & n.16 (2020) (twenty-five-person limit); *see also Harborview Fellowship v. Inslee*, 3:20-cv-5518,

ECF No. 42 (W.D. Wash. June 18, 2020); *Dwelling Place Network v. Murphy*, No. 1:20-cv-6281, ECF No. 35 (D.N.J. June 15, 2020); *Diaz-Bonilla v. Northam*, No. 1:20-cv-377, ECF No. 25 (E.D. Va. June 5, 2020); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-cv-152 (N.H. Super. Ct. Mar. 25, 2020).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—has any injunctive relief been granted in religion-based challenges to COVID-19 orders. Virtually all those cases were decided before the Supreme Court's decision in this case and considered restrictions far tighter than California's Guidance. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (per curiam order granting motion for injunction pending appeal against Kentucky order prohibiting gatherings of any size); *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (purported restrictions on drive-in services); *Berean Baptist Church v. Cooper*, __ F. Supp. 3d __, No. 4:20-cv-81, 2020 WL 2514313, at *1, 11 (E.D.N.C. May 16, 2020) (ten-person limit on indoor religious services); *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) (Kentucky order

prohibiting gatherings of any size); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021, at *1–2, 8–9 (D. Kan. Apr. 18, 2020) (ten-person limit); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249, at *1–2 (W.D. Ky. Apr. 18, 2020) (purported ban on drive-in services). Furthermore, contrary to the Chief Justice's analysis in this case (*S. Bay*, 140 S. Ct. at 1613–14), these 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. Meanwhile, a Fifth Circuit order granting a partial injunction pending appeal against a Mississippi city's complete ban on in-person religious services did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption of the city's ban by a state order. *Compare First Pentecostal Church v. City of Holly Springs*, __ F.3d __, No. 20-60399, 2020 WL 2616687, at *1 (5th Cir. May 22, 2020), *with id.*, ECF No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal). And, unlike California's Guidance, a New York State policy that was partially enjoined by a recent Northern District of New York decision restricted religious services much more than protests and high-school graduations. *See Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *11–12 (N.D.N.Y. June 26, 2020).

II. The Guidance Does Not Violate Plaintiffs' Religious-Exercise Rights Under the California Constitution.

Plaintiffs' arguments fare no better when repackaged as a claim under the California Constitution's free-exercise guarantee (CAL. CONST. art. I § 4). With respect to the State Defendants, the claim is barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). And even if the Eleventh Amendment does not bar the claim with respect to the County Defendants (*but see Vasquez v. Rackauckas*, 734 F.3d 1025, 1041 (9th Cir. 2013)), the claim lacks merit under California law.

Although the California Supreme Court has not formally decided whether the *Smith* standard governs free-exercise claims under the California Constitution (*see N. Coast Women's Care Med. Grp. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008)), it has historically "applied the federal and state free exercise clauses interchangeably, without ascribing any independent meaning to the state clause" (*Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 90–91 (Cal. 2004))—strongly suggesting that *Smith*'s rational-basis analysis governs. California's Guidance easily meets that standard. *See* Section I.A, *supra*.

And as already explained (*see* Section I.B, *supra*), the Guidance would withstand challenge even under a compelling-interest test, were that the

applicable standard. Indeed, the California Court of Appeals, assuming without deciding that the compelling-interest test applied, has held that the free-exercise guarantee of the California Constitution did not mandate a religious exemption from a mandatory-vaccination law. *See Brown v. Smith*, 235 Cal. Rptr. 3d 218, 224–25 (Cal. Ct. App. 2018); *see also Love v. State Dep't of Educ.*, 240 Cal. Rptr. 3d 861, 873 (Cal. Ct. App. 2018). The California Constitution provides Plaintiffs with no right to an exemption here.

III. The Establishment Clause Forbids Plaintiffs' Requested Exemption.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. The First Amendment's Religion Clauses "mandate[ ] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This neutrality requirement forbids the government not only to target religion for worse treatment but also to grant religious exemptions that would detrimentally affect nonbeneficiaries. *See, e.g.*, *Estate of Thornton*, 472 U.S. at 709–10. For when government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it prefers the religion

of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. *See, e.g.*, *id.* Exempting Plaintiffs from the Guidance would contravene this settled constitutional rule.

a. In *Estate of Thornton*, for example, the U.S. 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. at 709–10. 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 bear costs "to offset the benefit bestowed on subscribers to religious publications." 498 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent with this principle, demonstrating that even under a heightened compelling-interest standard the First Amendment cannot require religious exceptions that harm others. In *United States v. Lee*, 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). And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow minors to distribute religious literature 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." 321 U.S. at 170. In doing so, the Court cited *Jacobson* and noted that case's rejection of an exemption from vaccination laws. *Id.* at 166 & n.12.

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)) and must not "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.

b. In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when the Establishment and Free Exercise Clauses

together prohibited the government from involving itself in the ecclesiastical structuring of religious institutions. In *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), the Court held that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339–40 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to improper religious favoritism, and therefore were permissible under the Establishment Clause, because both Religion Clauses limit governmental intrusion into the internal organizational structure of churches.

This case does not implicate that narrow ecclesiastical-authority doctrine, because Plaintiffs' challenge to the Guidance does not present a question regarding "religious organizations[']autonomy in matters of internal governance" (*Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring)). Rather, it presents the opposite question: whether there is a constitutional right to put countless people *outside* a religious gathering at greater risk of exposure to a deadly virus.

c. Granting an exemption here would elevate Plaintiffs' religious beliefs 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, the immunocompromised, and all others at elevated risk of severe illness.

California continues to face an unprecedented public-health emergency. COVID-19 has already killed more Americans than the number of Americans troops who have died in all armed conflicts since the start of the Korean War. *See* Lance Lambert, *The coronavirus has now killed more Americans than every war since the start of the Korean War—combined*, FORTUNE (June 10, 2020), https://bit.ly/37MLmVt. Though much about the virus remains unknown, what we do know demands a strong response: "there is no known cure, no effective treatment . . . no vaccine [and] people may be infected but asympomatic . . . unwittingly infect[ing] others." *S. Bay*, 140 S. Ct. 1613–14 (Roberts, C.J., concurring). Limiting the size of permitted gatherings and activities will allow those who do attend to properly distance themselves, reducing contacts among them and with contaminated surfaces, slowing the spread of the virus, and saving lives.

If Plaintiffs are instead permitted to ignore the Guidance and host indoor gatherings without size limitations, everyone will be in greater danger of contracting the virus. 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.*, Trudy Balcom, *COVID-19*

outbreak on the Navajo Nation linked to church rally, WHITE MOUNTAIN INDEPENDENT (Mar. 24, 2020), https://bit.ly/2YSR6di; 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; Sara Cline, *Church tied to Oregon's largest coronavirus outbreak*, ABC NEWS (June 16, 2020), https://abcn.ws/2BhPtwC; 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; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (June 4, 2020), https://bit.ly/3hZQnyI; Allison James, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, MORBIDITY & MORTALITY WEEKLY REPORT (May 22, 2020), https://bit.ly/3f6MYM2; Bailey Loosemore & Mandy McLaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, LOUISVILLE COURIER JOURNAL (Apr. 3, 2020), https://bit.ly/2V1Jjrs; Molly Parker, *As more places begin to reopen Friday, Jackson County experiences COVID-19 spike*, THE SOUTHERN ILLINOISAN (May 28, 2020), https://bit.ly/3ev7KVW; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; 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 p. 17.

As these examples demonstrate, a single unwitting carrier at a large worship service could cause a ripple effect throughout an entire community: That one carrier might pass the virus to his neighbors at the event, 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 grocery store or the hospital, they may potentially expose essential retail workers or healthcare providers, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources.

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

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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Date: July 6, 2020.

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FOR THE NINTH CIRCUIT

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