No. 20-55907

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HARVEST ROCK CHURCH, INC., *et al.*,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM,

Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the Central District of California
Case No. 2:20-cv-06414, Hon. Jesus G. Bernal

BRIEF IN SUPPORT OF APPELLEE AND AFFIRMANCE OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; COVENANT NETWORK OF PRESBYTERIANS; INTERFAITH ALLIANCE FOUNDATION; METHODIST FEDERATION FOR SOCIAL ACTION; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; REV. DR. MARC IAN STEWART, CONFERENCE MINISTER, MONTANA-NORTHERN WYOMING CONFERENCE, UNITED CHURCH OF CHRIST; AND SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST

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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 that 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.

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.

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

The *amici* are:

- Americans United for Separation of Church and State.
- Covenant Network of Presbyterians.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. More than 261,000 Americans, including nearly 19,000 Californians, have died from COVID-19. *See COVID-19 Dashboard*, Ctr. for Sys. Sci. & Eng'g at Johns Hopkins Univ. (last visited Nov. 25, 2020), 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 across the country, the rates of infection are surging higher than ever. *See, e.g.*, Christina Maxouris & Dakin Andone, *US Coronavirus Hospitalizations, New Cases Break Record for Second Straight Day*, CNN (Nov. 20, 2020), https://cnn.it/3nJFT8v.

As part of California's ongoing emergency response, Governor Newsom has issued a series of directives temporarily limiting in-person gatherings and other activities. California's currently operative Guidance restricts religious services less than or similarly to comparable nonreligious activities, tying the levels of restriction to metrics of COVID-19 transmission by county: only outdoor services are allowed in counties with widespread transmission of the virus; indoor services limited to the

lesser of 25 percent of building capacity or 100 people are permitted in counties with substantial transmission; the limit is 50 percent of capacity or 200 people in counties with moderate transmission; and the only limit is 50 percent of capacity in counties with minimal transmission. *See Industry Guidance to Reduce Risk*, COVID19.CA.GOV (updated Nov. 24, 2020), https://bit.ly/3lI7KG7. These kinds of restrictions on in-person gatherings have been successful in slowing the transmission of the virus. *See, e.g.*, Timothy Bella, *Places without social distancing have 35 times more potential coronavirus spread, study finds*, WASH. POST (May 15, 2020), https://wapo.st/2EKDjhd.

Plaintiffs nevertheless challenge California's Guidance 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 Guidance complies with this legal standard because it limits religious services less than or similarly to analogous nonreligious activities. But even if heightened scrutiny were called for, the Guidance is constitutional because it is narrowly tailored to advance California's compelling interest in protecting its residents from a deadly disease.

What's more, the First Amendment's Establishment Clause forbids granting an exemption from the Guidance for religious services. 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 religious gatherings must be exempted from the Guidance would do just that: A contagious person at a religious service could infect scores of fellow congregants, who may then expose many family members, friends, and strangers who did not attend the event.

For similar reasons, this Court rejected Plaintiffs' motion for an injunction pending appeal, and both the U.S. Supreme Court and this Court rejected challenges to earlier versions of California's Guidance that are materially indistinguishable from current restrictions. The overwhelming majority of other court decisions—including rulings by the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits—have likewise denied relief in religion-based challenges to COVID-19-related public-health measures. 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 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 that the Free Exercise Clause entitles them to an exemption from California'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 Supreme Court's Free Exercise jurisprudence makes clear that, while government cannot intentionally suppress religious conduct, religion-based disagreement with the law does not excuse noncompliance. As Justice Scalia wrote for the Court, to permit this would 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.

California's Guidance complies with this principle. Cultural ceremonies, movie theaters, restaurants, universities, and political protests and rallies are covered by rules identical to those applicable to houses of worship.[2] And concert venues, live theatres, festivals, convention centers, bars, breweries, distilleries, wineries, nightclubs, family entertainment centers, playgrounds, amusement parks, theme parks, gyms, fitness centers, yoga studios, bowling alleys, cardrooms, racetracks, sporting events with live audiences, and private gatherings are subject to stricter restrictions or—in many cases—are entirely closed or prohibited

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[2] *See Industry Guidance to Reduce Risk*, *supra*; *About COVID-19 Restrictions*, COVID19.CA.GOV (updated Nov. 25, 2020), https://bit.ly/2Bmgcb5 (section entitled "Can I engage in political rallies and protest gatherings?").

statewide.[3] California thus restricts religious services similarly to or less than comparable nonreligious gatherings.

Accordingly, both the Supreme Court and this Court have rejected requests for injunctions against California's limitations on houses of worship. This Court denied Plaintiffs' motion for an injunction pending appeal in a published decision in this case (*Harvest Rock Church v. Newsom*, 977 F.3d 728 (9th Cir. 2020)), and a merits panel should "not lightly overturn a decision made by a motions panel during the course of the same appeal" (*United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986)). In *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), the Supreme Court refused to issue an emergency injunction against the restrictions that are now applicable in counties with substantial transmission of the virus. Concurring in the denial of injunctive relief, Chief Justice Roberts explained that the restrictions "appear[ed] consistent with the Free Exercise Clause" because "[s]imilar or more severe restrictions appl[ied] to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and

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[3] *See Industry Guidance to Reduce Risk*, *supra*; *Blueprint for a Safer Economy*, COVID19.CA.GOV (updated Nov. 25, 2020), https://bit.ly/3jAoI7b (section entitled "Find the status of activities in your county"); *About COVID-19 Restrictions*, *supra* (section entitled "Are gatherings permitted?").

theatrical performances, where large groups of people gather in close proximity for extended periods of time." 140 S.Ct. at 1613. And, earlier in the same litigation, this Court concluded that plaintiffs challenging restrictions that are now applicable in counties with widespread transmission of the virus "ha[d] not demonstrated a sufficient likelihood of success on appeal," for "where state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543); *see also Gish v. Newsom*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020), *denying motion for injunction pending appeal of* No. 5:20-cv-755, 2020 WL 1979970, at *2, 5–6 (C.D. Cal. Apr. 23, 2020) (order upholding same restrictions).

Plaintiffs take issue with California's decision not to impose on all retail establishments the kinds of restrictions that are applicable to religious services. (Appellants' Br. 31.) But dissenters from both the Supreme Court's and this Court's decisions in *South Bay* made similar arguments, and they did not prevail. *See* 140 S.Ct. at 1614 (Kavanaugh, J., dissenting); 959 F.3d at 945 (Collins, J., dissenting). As the Chief Justice's concurrence explained, 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." 140 S.Ct. at 1613.

Moreover, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542. "That . . . 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." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009). Rather, heightened scrutiny applies under the Free Exercise Clause only when 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))—a showing that Plaintiffs do not and cannot make.

Plaintiffs additionally object (Appellants' Br. 34–35) to a prohibition on singing and chanting at indoor religious services. But California also prohibits singing and chanting at indoor cultural ceremonies,[4] indoor

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[4] COVID-19 INDUSTRY GUIDANCE: PLACES OF WORSHIP AND PROVIDERS OF RELIGIOUS SERVICES & CULTURAL CEREMONIES 2–3 (July 29, 2020), https://bit.ly/3fF534l.

political protests and rallies,[5] schools,[6] restaurants,[7] and indoor private gatherings.[8] Other venues and events that commonly feature singing or chanting—including concert halls, live theatres, festivals, and nightclubs—are closed or barred entirely.[9] And singing and chanting are still permitted at outdoor religious services.[10] Again, California is not discriminating against religion.

Nor are California's restrictions discriminatory (*cf*. Appellants' Br. 29–30) because they apply to Plaintiffs' worship services but not to social-welfare programs that Plaintiffs may wish to provide, such as operating a food bank. The sustained congregation of worshippers is different from the fleeting, sequential exchanges between a volunteer at a food bank and a person picking up pantry staples. And the rules concerning social-welfare

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[5] *About COVID-19 Restrictions*, *supra* (section entitled "Can I engage in political rallies and protest gatherings?").

[6] COVID-19 INDUSTRY GUIDANCE: SCHOOLS AND SCHOOL-BASED PROGRAMS 12 (Aug. 3, 2020), https://bit.ly/2FXK93C.

[7] COVID-19 INDUSTRY GUIDANCE: RESTAURANTS, BARS, AND WINERIES 14 (July 29, 2020), https://bit.ly/3k7T69z.

[8] *About COVID-19 Restrictions*, *supra* (section entitled "Are gatherings permitted?").

[9] *See Blueprint, supra* (section entitled "Find the status of activities in your county").

[10] *See* INDUSTRY GUIDANCE: PLACES OF WORSHIP, *supra*, at 3.

programs govern religious and nonreligious institutions equally,[11] underscoring that California's restrictions are neutral and generally applicable. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–12 (2d Cir. 2012) (law governing labeling of kosher products was generally applicable because it applied to all sellers and protected all customers regardless of religion); *Ungar v. N.Y.C. Hous. Auth.*, 363 F.App'x 53, 56 (2d Cir. 2010) (limited categorical exemptions from public-housing policy did not negate general applicability because exemptions were equally available to religious and nonreligious applicants).

Finally, Plaintiffs spill much ink arguing that California's restrictions on *indoor* religious services should be enjoined because California allows *outdoor* protests. (Appellants' Br. 18–21, 32–35.) But, as noted above, the rules that California imposes on protests are *identical* to the rules applicable to religious services: *outdoor* protests and religious services are permitted statewide, while *indoor* protests and religious services are barred in some counties and governed by uniform limitations in others.[12] Furthermore, outdoor gatherings are not comparable to indoor gatherings because there is far less risk of transmission of the virus

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[11] See *Essential Workforce*, COVID19.CA.GOV (updated Sept. 22, 2020), https://bit.ly/35kQalC (section entitled "Food and Agriculture," ¶ 12).

[12] See *About COVID-19 Restrictions*, *supra* (section entitled "Can I engage in political rallies and protest gatherings?").

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.

Plaintiffs thus fall back on an argument that California selectively enforces its Guidance against houses of worship but not protests. (Appellants' Br. 32.) Enforcement decisions are "particularly ill-suited to judicial review," however, and courts defer to them unless they are "'deliberately based upon an unjustifiable standard such as . . . religion.'" *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Plaintiffs cannot come close to making such a showing here because they have presented no evidence that any official who reports to the only defendant in this case—Governor Newsom—has taken any enforcement action against them or any other house of worship. (*See* Appellants' Br. 24.)

In addition, neither the Supreme Court nor this Court has been swayed by arguments that allowing large outdoor protests invalidates limitations on indoor religious activities. In *Calvary Chapel Dayton Valley v. Sisolak*, the Supreme Court denied injunctive relief against Nevada's restrictions on religious services notwithstanding Nevada's lack of enforcement against outdoor protests of its limitations on gatherings. The

motions panel's decision earlier in this case also rejected this argument. *See* Appellants' Mot. for Injunction Pending Appeal, ECF No. 6, at 6–10 (Sept. 11, 2020). And the Tenth Circuit has twice denied injunctions pending appeal against Colorado's restrictions on religious gatherings in cases where the plaintiffs' arguments focused principally or substantially on the state's lack of enforcement of its gathering-limits against protests. *See High Plains Harvest Church v. Polis*, __ F.App'x __, No. 20-1280, 2020 WL 6749073, at *2 (10th Cir. Nov. 12, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-1480, 2020 WL 4582720 (D. Colo. Aug. 10, 2020); *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).

B. California's Guidance 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.

"[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 California has a compelling interest in stanching the spread of COVID-19. As this Court stated in its opinion in *South Bay*, 959 F.3d at 939, "We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure."

Yet Plaintiffs argue that California's allowance of outdoor gatherings negates its interest in regulating indoor gatherings more strictly. (Appellants' Br. 48.) 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 California's Guidance 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.

No cure or widely available 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 restricting gatherings is the best way for California to advance its compelling objective of slowing community spread and saving lives. At the same time, the Guidance 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 California's Guidance is not narrowly tailored because the State could have imposed laxer restrictions on religious services, such as physical-distancing requirements. (Appellants' Br. 50–51.) But under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). It is obvious that a ceiling on the size of gatherings is more likely to reduce

transmission of COVID-19 than is permitting the gatherings to proceed under looser rules.

Indeed, airborne transmission of COVID-19 can render physical-distancing and cleaning measures ineffective. *See, e.g.*, 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 despite physical-distancing and other safety precautions. *See, e.g.*, Shelly Bradbury, *Fatal COVID-19 outbreak linked to Colorado religious group suing state over limits on gatherings*, DENVER POST (Oct. 6, 2020), https://dpo.st/3k5nHVl; Kate Conger, et al., *Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 10, 2020), https://nyti.ms/30BOhgq; Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; Alex Acquisto, *This Central Kentucky church reopened on May 10 and became a COVID-19 hot spot*, LEXINGTON HERALD-LEADER (June 6, 2020), https://bit.ly/3dDbQdq; Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6; Chris Epp, *'I would do anything for a do-over':*

Calgary church hopes others learn from their tragic COVID-19 experience, CTV NEWS (May 11, 2020), https://bit.ly/3dLUv2l.

What is more, 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 the cases cited above, numerous decisions—including rulings by the First, Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits—have rejected challenges like this one by religious organizations to restrictions on gatherings.

In *Elim Romanian Pentecostal Church v. Pritzker*, for example, 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. 30, 2020). Likewise, in *Agudath Israel of America v. Cuomo*, __ F.3d __, No. 20-3572, 2020 WL 6750495, at *3 (2d Cir. Nov. 9, 2020), the Second Circuit rejected a request for an injunction pending appeal against a New York order that limited worship services to the smaller of ten people or twenty-five percent of building capacity, noting that "COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause."

Many other federal courts have reached similar conclusions. *See, e.g.*, *Bullock v. Carney*, 806 F.App'x 157, 157 (3d Cir. 2020), *denying motion for injunction pending appeal of* 463 F.Supp.3d 519, 521 (D. Del. 2020) (thirty-percent-capacity limit); *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); *Robinson v. Murphy*, No. 20-3048, ECF No. 27 (3d Cir. Nov. 10, 2020), *denying motion for injunction pending appeal of* No. 2:20-cv-5420, 2020 WL 5884801, at *1 (D.N.J. Oct. 2, 2020) (lesser of twenty-five percent capacity or 150 people); *Tolle v. Northam*, 827 F.App'x 338 (4th Cir. 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); *Soos v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-651, 2020 WL 6384683, at *2, 4–7 (N.D.N.Y. Oct. 30, 2020) (limit of lesser of ten people or twenty-

five percent of capacity), *appeal docketed*, No. 20-3737 (2d Cir. Nov. 2, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, 466 F.Supp.3d 1120, 1122 (D. Nev. 2020) (fifty-person limit), *appeal docketed*, No. 20-16274 (9th Cir. June 30, 2020); *Abiding Place Ministries v. Newsom*, 465 F.Supp.3d 1068, 1069 (S.D. Cal. 2020) (noting prior denial of TRO against order prohibiting gatherings of any size); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 51–52 & n.16 (Or. 2020) (twenty-five-person limit); *DiMartile v. Cuomo*, 820 F.App'x 62 (2d Cir. 2020), *staying injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-859, 2020 WL 4558711, at *1 (N.D.N.Y. Aug. 7, 2020) (fifty-person limit on weddings); *Tigges v. Northam*, __ F.Supp.3d __, No. 3:20-cv-410, 2020 WL 4197610, at *8 (E.D. Va. July 21, 2020) (restrictions on weddings); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-687, 2020 WL 3766496, at *10–17 (N.D.N.Y. July 6, 2020) (closure of overnight camps); *Shelton v. City of Springfield*, __ F.Supp.3d __, No. 6:20-cv-3258, 2020 WL 6323935, at *5 (W.D. Mo. Oct. 28, 2020) (mask requirement).[13]

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[13] *See also Whitsitt v. Newsom*, No. 2:20-cv-691, 2020 WL 4818780 (E.D. Cal. Aug. 19, 2020), *report and recommendation adopted*, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020); *Williams v. Trump*, No. 1:20-cv-2495, 2020 WL 6118560, at *3–5 (N.D. Ill. Oct. 16, 2020); *Murphy v. Lamont*, No. 3:20-cv-694, 2020 WL 4435167, at *14–15 (D. Conn. Aug. 3, 2020), *appeal docketed*, No. 20-3707 (2d Cir. Oct. 29, 2020); *Solid Rock Baptist Church v. Murphy*, No. 1:20-cv-6805, 2020 WL 4882604 (D.N.J. Aug. 20, 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*. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020); *Berean Baptist Church v. Cooper*, 460 F.Supp.3d 651 (E.D.N.C. 2020); *Tabernacle Baptist Church v. Beshear*, 459 F.Supp.3d 847 (E.D. Ky. 2020); *First Baptist Church v. Kelly*, 455 F.Supp.3d 1078 (D. Kan. 2020);

County of Los Angeles v. Superior Court, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020); *Christian Cathedral v. Pan*, No. 3:20-cv-3554, 2020 WL 3078072 (N.D. Cal. June 10, 2020); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020); *MacEwen v. Inslee*, No. 3:20-cv-5423, 2020 WL 4261323 (W.D. Wash. July 24, 2020); *Maxwell v. Lee*, No. 1:20-cv-1093, 2020 WL 5670115 (W.D. Tenn. June 29, 2020), *report and recommendation adopted*, 2020 WL 4220123 (W.D. Tenn. July 23, 2020); *Harborview Fellowship v. Inslee*, No. 3:20-cv-5518, ECF No. 42 (W.D. Wash. June 18, 2020); *Dwelling Place Network v. Murphy*, No. 1:20-cv-6281, ECF No. 35 (D.N.J. June 15, 2020); *Diaz-Bonilla v. Northam*, No. 1:20-cv-377, ECF No. 25 (E.D. Va. June 5, 2020); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. 281st Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-cv-152 (N.H. Super. Ct. Mar. 25, 2020); *County of Ventura v. Godspeak Calvary Chapel*, No. 56-2020-544086 (Cal. Super. Ct. Ventura Cty. Aug. 7, 2020).

On Fire Christian Ctr. v. Fischer, 453 F.Supp.3d 901 (W.D. Ky. 2020). Contrary to the Chief Justice's analysis in *South Bay*, most of these 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*, __ F.Supp.3d __, 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). The other 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 but cautioning that Court was not expressing view on merits 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)). Because California's Guidance treats religious gatherings like analogous nonreligious gatherings, Plaintiffs are wrong in arguing (Appellants' Br. 55–57) that it violates the Establishment Clause. Rather, *granting* Plaintiffs the religious exemption that they seek would violate the Establishment Clause. For the neutrality requirement of the First Amendment's Religion Clauses forbids government not just to target religion for worse treatment but also to grant religious exemptions that would detrimentally affect nonbeneficiaries. When government purports to accommodate the religious

exercise of some by shifting costs or burdens to others, it improperly prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries.

In *Estate of Thornton v. Caldor, Inc.*, for example, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. 703, 709–10 (1985). The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries" by making them pay "to offset the benefit bestowed on subscribers to religious publications." 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent, demonstrating that religious exemptions that harm others cannot be required even under a compelling-interest test. In *United States v. Lee*, for instance, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would

have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince*, the Court denied a request for an exemption from child-labor laws barring distribution of religious literature by minors, because of the danger that the exemption would have posed to children's welfare. 321 U.S. at 170. These holdings all embody the fundamental precept that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26.

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

To be sure, the Supreme Court held in *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), and

Our Lady of Guadalupe, 140 S.Ct. at 2055, that employment-discrimination laws cannot be enforced in a way that would interfere with a church's selection of its ministers. But those cases concerned core decisions of houses of worship that affect only their own members and internal structures. This case presents a far different question: whether there is a constitutional right to put countless people *outside* the church at greater risk of exposure to deadly disease.

Granting 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; Kaitlin McKinley Becker, *More Than 200 COVID-19 Cases Linked to Fitchburg Church*, NBC10 BOSTON (Nov. 7, 2020), https://bit.ly/2GK6Tox; Derek Dellinger, *Charlotte Church Connected to Nearly 200 Cases of COVID-19 Given Go-ahead to Open Some Locations*, FOX46 CHARLOTTE (Oct. 30, 2020), https://bit.ly/3pMJx3f; Bill Bostock,

Nearly 100 people in Ohio got sick after one man infected with the coronavirus attended a church service, BUSINESS INSIDER (Aug. 6, 2020), https://bit.ly/2Qi2eeF; Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu; Sara Cline, *Church tied to Oregon's largest coronavirus outbreak*, AP (June 16, 2020), https://bit.ly/2YWFlT1; Ryan Burns, *A Redding Megachurch Leader Came to Humboldt and Flouted Mask Rules; Her Ministry is Now the Source of a Major COVID Outbreak*, LOST COAST OUTPOST (Oct. 13, 2020), https://bit.ly/3m86USh; Stephanie Becker, *At least 70 people infected with coronavirus linked to a single church in California, health officials say*, CNN (Apr. 4, 2020), https://cnn.it/2NgYN6l; Lee Roop, *A small Alabama church had a revival and now 40 people have coronavirus*, AL.COM (July 27, 2020), https://bit.ly/2Ekzsav; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (June 4, 2020), https://bit.ly/3hZQnyI; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; Rachel Needham, *Anatomy of an outbreak: New documents reveal a significant number of the county's COVID-19 cases can be traced to Castleton church*, RAPPAHANNOCK NEWS (Sept. 1, 2020), https://bit.ly/33hLAlG; Wyatt Massey, *Church of God denomination facing*

significant COVID-19 outbreak; leaders won't say how many infected, CHATTANOOGA TIMES FREE PRESS (July 7, 2020), https://bit.ly/3bTiWLl; Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 632 (2020), https://bit.ly/3f6MYM2; Bailey Loosemore & Mandy McLaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, LOUISVILLE COURIER-JOURNAL (Apr. 3, 2020), https://bit.ly/2V1Jjrs; Trudy Balcom, *COVID-19 outbreak on the Navajo Nation linked to church rally*, WHITE MOUNTAIN INDEP. (Mar. 24, 2020), https://bit.ly/2YSR6di; Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL (May 2, 2020), https://bit.ly/2SFVYyX; *see also supra* pp. 18–19.

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

hospital system, and the greater the chance that people die due to lack of healthcare resources.

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

CONCLUSION

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

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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