IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES TOLLE,

Plaintiff/Appellant,

v.

GOVERNOR RALPH NORTHAM and the COMMONWEALTH OF VIRGINIA,

Defendants/Appellees.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Amicus Curiae.

Docket No. 20-1419

OPPOSITION OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* TO APPELLANT'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, OR STAY PENDING APPEAL

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1419 Caption: James Tolle v. Governor Ralph Northam, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Americans United for Separation of Church and State
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Kenneth D. Upton Date: 4/17/2020

Counsel for: Americans United for Separation of Church and State

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Constitutions, Statutes, and Orders

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United has long fought to uphold the guarantees of the First Amendment's Religion Clauses that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, third parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Virginia, along with most of the rest of the world, is facing a pandemic. The virus that causes COVID-19 is significantly more deadly than the seasonal flu. *E.g.*, Katie Mettler, *How the coronavirus compares with the flu*, WASH. POST (Mar. 10, 2020, 3:30 PM), https://wapo.st/3b3xC9L. And the United States now has the most reported deaths worldwide, with the highest concentration on the East Coast. *See Coronavirus Map: Tracking the Global Outbreak*, N.Y TIMES (updated

[1] *Amicus* affirms that no counsel for a party authored this opposition in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the opposition's preparation or submission. A motion for leave to file accompanies this opposition.

Apr. 16, 2020, 9:10 PM), https://nyti.ms/3beGucs. Leaders at all levels of government have therefore been asked to act decisively to slow the spread of the virus and to protect their constituents' lives. As part of a statewide emergency public-health response, Governor Northam has issued a temporary order barring all in-person gatherings that would put ten or more people in close proximity.

Though this order does have the effect of limiting some of Plaintiff's religious activities, it does not violate his religious-exercise rights. The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505 U.S. 520 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. Governor Northam's order complies with this principle: The virus is just as likely to spread at religious events as at nonreligious ones, so the order applies to all gatherings equally, regardless of motivation. And the order allows faith leaders and houses of worship to continue operating under constraints similar to those imposed on other permitted activities.

But even if the Court were to determine that heightened scrutiny should apply here, the order is still lawful because it is appropriately tailored to achieve the State's compelling interest in protecting all

Virginians from a deadly contagious disease. Indeed, many other courts have rejected similar challenges to COVID-19-related orders in recent weeks. *See Hotze v. Hidalgo,* No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction); City News Service, *Judge Denies Church's Attempt to Hold In-Person Easter Sunday Services*, Fox5SanDiego.com (Apr. 10, 2020), https://bit.ly/3ccPvTG (San Diego, California, federal judge denied TRO); Matthew Barakat, *Judge rejects lawsuit over order; no religious exemption*, WASH. POST (Apr. 9, 2020), https://wapo.st/2xiqeIE (Russell County, Virginia, state judge denied TRO); *see also Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *1 (Pa. Apr. 13, 2020) (rejecting First Amendment and other constitutional challenges by non-life-sustaining businesses); *Civil Rights Defense Firm v. Wolf*, No. 63 MM 2020, 2020 WL 1329008, at *1 (Pa. Mar. 22, 2020) (rejecting challenge brought by gun stores and others); *Brandy v. Villanueva*, No. 2:20-cv-02874-AB-SK, ECF No. 29 (C.D. Cal. Apr. 6, 2020) (denying TRO sought by gun-rights advocates and gun-related businesses).

What is more, the Establishment Clause forbids granting an exemption from the order 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 the nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding that religious gatherings must be exempted from the Governor's public-health order would do just that: A single contagious person at a religious service can infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not choose to attend the service.

ARGUMENT

I. THE ORDER DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

A. The Order Is Subject To Rational-Basis Review.

It is natural that, in difficult and scary times like these, people will desire the comfort and support that their faith community provides. The freedom to worship in accordance with one's spiritual needs is a right of the highest order. But the legal guarantees of religious freedom do not provide (and never have provided) absolute license to engage in conduct consistent with one's religious beliefs. *E.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion). Yet Plaintiff argues here that the Free Exercise Clause prohibits temporary limitations on religious gatherings even in the face of a severe pandemic. That claim is not supported by the

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).

Though government cannot forbid a religious practice because it is religious, religion-based disagreement with the law does not excuse noncompliance. As Justice Scalia explained on behalf of the Supreme Court in *Smith*, "[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." 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). Rather, laws that burden religious conduct are constitutionally permissible—and need satisfy rational-basis review only—when they are neutral toward religion and apply generally. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879. Governor Northam's order here easily satisfies these requirements.

1. The order is neutral toward religion.

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). That prohibition bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534.

The order here evinces no hostility toward religion. It treats all gatherings the same, religious or not: No gatherings that would put ten or more people in close contact are allowed anywhere for any purpose. Executive Order Fifty-Five (2020) (Northam) (E.O. 55) ¶ 2. And while people may leave their homes for only a limited set of purposes, one of the permitted purposes is traveling to and from places of worship. *Id.* ¶ 1(f). The same social-distancing guidelines apply no matter one's reason for leaving home. *Id.* ¶ 1.

2. The order is generally applicable.

General applicability is closely related to neutrality. *Lukumi*, 508 U.S. at 531. It means that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. In other words, government cannot restrict religious conduct while allowing substantial comparable "nonreligious conduct that endangers [the asserted governmental] interests in a similar or greater degree." *Id.*

COVID-19 spreads through person-to-person contact, so Governor Northam has generally prohibited large gatherings. And he has specifically permitted travel to places of worship while barring most other out-of-home activities. The order thus plainly does not pursue the State's

interests "only against conduct with a religious motivation." *See Lukumi*, 508 U.S. at 546.

That the order contains some categorical exemptions—for example, for hospitals and foodbanks (E.O. 55 ¶ 7)—does not negate its general applicability. Because "[a]ll laws are selective to some extent," they need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542–43. Rather, the fundamental question is whether the scope of a law's coverage demonstrates animus toward a religion or religious practice. *See id.* at 542–46 (explaining that city ordinances ostensibly aimed at protecting public health and preventing animal cruelty worked to bar Santeria religious rituals only). A law must not "single[ ] out religious practices for discriminatory treatment." *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995).

Governor Northam's order does not disfavor religion. Indeed, it actually treats places of worship *better* than comparable nonreligious places of assembly: Social clubs and theaters, among others, are closed entirely while places of worship are not. Executive Order Fifty-Three (2020) (Northam) (E.O. 53) ¶ 4; *cf. Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, United States Department of Justice (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like similar nonreligious

gatherings, such as movie theaters, restaurants, and concert halls). Moreover, the order draws no distinctions based on religious views or motivations with respect to the exempt activities and locations—hospitals and food banks, for example, may remain open whether or not they have a religious affiliation. E.O. 55 ¶ 7; *cf. Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that limited categorical exceptions to public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants).

In sum, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Governor Northam's order complies with the Free Exercise Clause and does not trigger heightened scrutiny under it.

B. The Order Satisfies The Compelling-Interest Test.

Even if the Court were to conclude that the Governor's order must for some reason satisfy heightened scrutiny, it would still be lawful because it is narrowly tailored to achieve a compelling governmental interest. *See Lukumi*, 508 U.S. at 531 (defining the compelling-interest test).

More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand the strictest judicial scrutiny. Before its decision in *Smith* in 1990, 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); *see also* 42 U.S.C. § 2000bb(b) (stating that the purpose of the 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)). The Court's pre-*Smith* free-exercise decisions make clear that the test, while exacting, is not "fatal in fact" (*Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (regarding race discrimination)). And they routinely denied religious exemptions from laws that, like the order here, were tailored to protect public health from serious threats.

1. The order serves a compelling governmental interest.

The State has a compelling interest in protecting the health and safety of the public; and in particular, it has a compelling interest in preventing the spread of disease. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20; *Am. Life League*, 47 F.3d at 655–56.

Indeed, an extensive body of case law reflects the overriding importance of the governmental interest in combatting communicable diseases.

"[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 the Supreme Court 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 such 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. J.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 subject to reasonable restrictions—especially during a public-health emergency such as the one that we now face. *Jacobson*, 197 U.S. at 26–27.

The Supreme Court has thus repeatedly reaffirmed that public-health measures like mandatory immunizations that burden religious exercise withstand strict scrutiny. *See Sherbert*, 374 U.S. at 402–03 (citing

mandatory vaccinations in *Jacobson* as example of burden on religion that is permissible under strict scrutiny); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67. Lower federal courts have also routinely recognized that the governmental interest in preventing the spread of communicable disease is compelling. *See, e.g.*, *Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353–54 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases showing compelling governmental interest in fighting the spread of contagious disease). The State's interest here in stanching the spread of COVID-19 is no less compelling. And it calls for placing limitations consistent with the State's public-health interests on all mass gatherings, including religious ones.

2. The order is narrowly tailored.

The compelling-interest test requires that the challenged law be narrowly tailored to the interest being served. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 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); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (ban on all gender discrimination is narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *Jacobson*, 197 U.S. at 26–27)) and many other courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d at 1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy strict judicial review.

Governor Northam's order operates in the same way. No vaccine for this novel coronavirus yet exists, so the only way to slow its spread is to limit the number of opportunities for person-to-person transmission. Temporarily limiting the size of in-person gatherings and enforcing social-distancing guidelines in permitted activities is how the State achieves that objective. And because the State cannot know who is infected at any given time, the order is no broader than necessary to ensure that the targeted evils—physical gatherings that create opportunities for transmission of the virus—are curtailed. Indeed, the order's restrictions on religious activities are carefully tailored to allow houses of worship and faith leaders to continue operations, while many businesses and other institutions are forced to close completely.

Plaintiff questions whether the State has taken the "right" steps, according to science, to address the pandemic (*e.g.*, Mot., at 7–8, 13), but *Jacobson* unambiguously left that determination to the elected branches of government: "It is no part the function of a court or a jury to determine which . . . [response] was likely to be the most effective for the protection of the public against disease." 197 U.S. at 30. Plaintiff has no right to use the Free Exercise Clause to substitute his policy determination for the Governor's.

II. THE ESTABLISHMENT CLAUSE FORBIDS A RELIGIOUS EXEMPTION FROM THE ORDER.

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 Religion Clauses "mandate[ ] 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)). That neutrality requirement forbids government not just to target religion for worse treatment (*see* Part I.A, *supra*) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see 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 the nonbeneficiaries, in violation of the Establishment Clause. Exempting religious gatherings from the Governor's order would contravene this settled constitutional rule.

a. In *Estate of Thornton*, 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. 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 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 the compelling-interest test. In *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. at 261. In *Braunfeld*, 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. at 608–09. 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. That is because "[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)) and must not "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be detrimentally affected, 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 core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. 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 of the Church of Jesus Christ of Latter-day Saints 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 impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated "church autonomy," which is "enshrined in the constitutional fabric of this country." *Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017).

This case does not implicate the special protections for ecclesiastical authority because it does not present questions regarding internal matters such as hiring clergy or determining religious membership. Rather, it presents the opposite question: whether there is a constitutional right to

put countless people *outside* the church at greater risk of exposure to deadly disease.

c. Granting an exemption for religious services here would elevate the religious beliefs of some over the health of the entire community. For Plaintiff and others who are determined to host or attend in-person religious gatherings do not put only themselves in danger; they also increase the risk of contagion for everyone with whom they, their fellow congregants, and their families come into contact, including children, the elderly, and others at the highest risk of severe illness.

The State is facing an unprecedented public-health emergency, and in response to this grave threat, the Governor has ordered the people of Virginia to forgo mass gatherings and to observe social-distancing guidelines during permitted activities. Governor Northam has determined that these steps will reduce contacts between people and with contaminated surfaces, slow the spread of the virus, and ultimately save lives.

If the State is instead forced to provide religious exemptions from the Governor's order, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely as any other gathering to spread COVID-19, and the examples are sadly piling up across the country. After a church-choir practice—at which members attempted to

observe distancing and hygiene guidance—45 out of 60 attendees fell ill, and two tragically died. 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. Officials in Sacramento County, California, have traced roughly a third of the county's more than 300 confirmed cases back to church gatherings. Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020, 2:55 PM), https://bit.ly/2XlCpPu. Similarly, about a quarter of all cases in the state of Kansas are "tied to religious gatherings." Anna Christianson & Tiffany Littler, *Gov. Kelly issues executive order to limit church gatherings, funerals*, KSNT (updated Apr. 7, 2020 4:13 PM), https://bit.ly/3bZV0F5. And several cases in New Rochelle, New York, have been linked to attendance at a synagogue. Sheena Jones & Christina Maxouris, *New York Officials traced more than 50 coronavirus cases back to one attorney*, CNN (updated Mar. 11, 2020), https://cnn.it/2JtqAPb.

A single unwitting carrier in a congregation could cause a ripple effect throughout the entire community: That one carrier 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 to the

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

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

CONCLUSION

For the foregoing reasons, the Court should reject Plaintiff's argument that the Governor's order violates the Free Exercise Clause.

Respectfully submitted,

/s/ *Kenneth D. Upton, Jr.*

VICTOR M. GLASBERG
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
(703) 684-1100
(703) 684-1104 (fax)
vmg@robinhoodesq.com

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
KENNETH D. UPTON, JR.*
PATRICK GRUBEL
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234
(202) 466-3353 (fax)
katskee@au.org
luchenitser@au.org
upton@au.org
grubel@au.org

Counsel for Amicus Curiae

Date: April 17, 2020

* Admitted in Texas and Oklahoma only. Supervised by Richard B. Katskee, a member of the D.C. Bar.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that:

(i) This document complies with the type-volume limits of Rule 27(d)(2)(A) because, excluding the parts of the document exempted by Rule 32(f), it contains 3,974 words;

(ii) This document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ Kenneth D. Upton, Jr.

CERTIFICATE OF SERVICE

I certify that on April 17, 2020, the foregoing document was filed using the Court's CM/ECF system; that Appellant consented to accept electronic service of this document and that I served it on him electronically by emailing it to the address provided on Appellant's Notice of Appeal, Dkt. No. 11 ("jtmail0000@yahoo.com"); and that I emailed a copy of the document to the Solicitor General of Virginia at solicitorgeneral@oag.state.va.us.

/s/ *Kenneth D. Upton, Jr.*