IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LEGACY CHURCH, INC.,

***Plaintiff*,**

v.

KATHYLEEN M. KUNKEL and STATE OF NEW MEXICO,

***Defendants*.**

Case No. 1:20-cv-00327-JB-SCY

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes, Rules, and Regulations

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

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 religion and government. 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

New Mexico, along with most of the rest of the world, continues to face a devastating pandemic. The United States has suffered the most COVID-19-related deaths worldwide (*see* Lisa Shumaker, *U.S. coronavirus outbreak soon to be deadlier than any flu since 1967 as deaths top 60,000*, REUTERS (Apr. 29, 2020), https://reut.rs/2z77fSb), and the number of cases and the death toll in New Mexico are still climbing (*see* Lucas Peerman, *New Mexico surpasses 4,000 COVID-19 cases*, LAS CRUCES SUN-NEWS (May 4, 2020), https://bit.ly/3digtK6). Gallup County alone has more than 1,000 cases and recently reported an uptick of 200 cases in just two days. *See* Mallika Kallingal, *Roads closed into New Mexico city to mitigate 'uninhibited spread of Covid-19,'* CNN (May 1, 2020), https://cnn.it/2YAFmMN.

This emergency demands decisive action from leaders at all levels of government. As part of their public-health response, Governor Lujan Grisham and the New Mexico Department of Health have issued temporary orders requiring residents to stay at home, prohibiting gatherings of

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

five or more people, and restricting the operations of those essential businesses that are permitted to remain open. Memorandum Opinion & Order, Dkt. No. 29, at 7–8, 13–14. And New Mexico recalibrated its public-health response based on new developments about the spread of COVID-19 in the State, tightening restrictions as the number of cases and rate of transmission increased. Reports from other regions suggest that orders like New Mexico's have been successful in limiting transmission of COVID-19 and saving lives. *See, e.g.*, *The State of Our State's Coronavirus Fight*, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq; 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, 5:00 AM), https://lat.ms/2VSbYih.

New Mexico's April 11 order, by barring all in-person gatherings of five or more people, has the effect of temporarily limiting some of Legacy Church's religious activities. But it does not violate Legacy's constitutional religious-exercise rights. As the Supreme Court concluded in *Employment Division v. Smith*, 494 U.S. 520 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 580 U.S. 520 (1993)—and as this Court explained in its April 17 opinion, Dkt. No. 29, at 68–85—neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. The challenged 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 even if heightened scrutiny were called for—which it is not—the order still should be upheld because it is narrowly tailored to advance the compelling state interest in protecting New Mexico residents from a deadly disease.

Nor have Legacy's rights under the Assembly Clause of the First Amendment been violated. The challenged order plainly regulates conduct rather than speech. To the extent that it

burdens inherently expressive conduct, it triggers only intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), and it easily satisfies that standard because it is content neutral, advances an important governmental interest unrelated to the suppression of speech, and does not burden substantially more speech than necessary to advance that interest.

What is more, the Establishment Clause forbids granting Legacy's desired religious exemption. 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 in-person religious gatherings must be exempted from the prohibition on gatherings 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 attend the service.

This Court has already correctly concluded that the restriction on in-person gatherings does not violate Legacy's religious-exercise or assembly rights. And numerous other courts have rejected in recent weeks challenges like this one to COVID-19-related public-health orders. The Court should not depart from its earlier ruling and from the overwhelming weight of authority on this issue. Legacy's motion for a preliminary injunction should be denied, and Secretary Kunkel's motion to dismiss should be granted.

ARGUMENT

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

A. The Order Does Not Trigger Heightened Scrutiny.

The freedom to worship in accordance with one's spiritual needs is a right of the highest order, and many people naturally seek the comfort and support provided by faith communities in

times like these. But the constitutional guarantee of religious freedom has never provided absolute license to engage in conduct consistent with one's religious beliefs. *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). Yet Legacy argues that the Free Exercise Clause entitles it to an exemption from New Mexico's temporary emergency public-health measures enacted to combat a dangerous 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." *Id*.

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. Dkt. No. 29, at 49–52, 69–70. "To 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 touchstone in both inquiries is whether the government has discriminated against religious conduct. *Lukumi*, 508 U.S. at 533–34, 542–43.

As this Court correctly concluded, the public-health order challenged here does not discriminate against religious conduct but rather applies to religious and secular activities equally. Dkt No. 29, at 70–78. It bans *all* mass gatherings that would bring five or more people together, whether for religious or secular activities. *Id.* at 14. That the challenged order removed an earlier exemption for houses of worship evinces not religious discrimination or animus but rather solicitude toward religion until greater restrictions became necessary in the face of a rapidly escalating public-health crisis. What is more, the order still specially permits faith leaders and

others to be present at houses of worship as necessary to hold services through audiovisual means. *Id.*

Nor is the general applicability of the order undermined by the State's allowing essential businesses—those that sell goods and services "related to health, safety and well-being, such as medical facilities, child care centers and any business that assists in the production, distribution or sale of food and medical products" (*id.* at 8)—to continue to operate. As this Court noted, "[a]ll laws are selective to some extent" (*id.* at 77 (quoting *Lukumi*, 508 U.S. at 542) (alteration in original)) and need not be universal to be generally applicable. In assessing general applicability, courts must compare the burdened religious conduct with analogous nonreligious conduct. *Lukumi*, 508 U.S. at 542–46. Here, as this Court correctly found, religious and nonreligious mass gatherings are equally restricted, and comparisons to "essential business" activities are inapt. Dkt. No. 29, at 76–81; *cf. Attorney General 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, restaurants, and concert halls).

What is more, the businesses deemed essential further New Mexico's interest in safeguarding public health during the COVID-19 crisis. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134–35 (9th Cir. 2009) (exemptions that directly or indirectly further governmental interest at issue do not undermine general applicability). If in combating the virus the government were to forbid leaving home to get groceries, medicine, healthcare, and similar goods and services, or, indeed, to close automotive and other transportation services that allow adequate staffing of essential businesses, the current health crisis would be exacerbated: The entire medical system would suffer greater strain from additional illness and injury caused by the public's inability to eat, treat existing illnesses, and maintain sanitary living conditions.

In addition, the order's defined categories of essential businesses draw no distinctions based on religious views or motivations. *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). Hospitals, shelters, and media organizations, for example, may remain open (Compl. Ex. B, Dkt. 1, at 3) regardless of whether they have a religious affiliation.

Simply put, "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)). Here, the challenged order "prescribe[s] and proscribe[s] the same conduct for all, regardless of motivation" and is therefore neutral and generally applicable. *Stormans*, 794 F.3d at 1077. As this Court concluded, the order "is both neutral with respect to religion and generally applicable without regard to religion." Dkt. 29, at 81. Legacy's religious beliefs do not afford a constitutional excuse from compliance.

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

Even if the Court were to conclude that the April 11 order must for some reason satisfy heightened scrutiny, Legacy's free-exercise claim would still fail. More than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand even the strictest judicial scrutiny.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407

(1963); *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)). The Court's pre-*Smith* free-exercise decisions made clear that the test, while exacting, is not "fatal in fact" (*Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003)). And those decisions routinely acknowledged that there is no right to religious exemptions from laws, like the order challenged here, that were tailored to shield the public from serious disease.

1. The order serves a compelling governmental interest.

Legacy does not contest that New Mexico has a compelling interest in preventing the spread of COVID-19. *See* Dkt. 29, at 21. Nor could it: Government has a compelling interest in protecting the health and safety of the public in general and in preventing the spread of communicable disease in particular. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20; *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655–56 (4th Cir. 1995). "[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). 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 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)). 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. *See Jacobson*, 197 U.S. at 27.

The Supreme Court has thus repeatedly reaffirmed that public-health regulations that burden religious exercise withstand heightened judicial scrutiny. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that satisfies compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67. Indeed, as this Court noted, "[w]hen 'faced with a society-threatening epidemic,' state governments . . . have an interest of the highest order in taking measures to protect the populace." Dkt. 29, at 81 n.12 (quoting *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020), and citing *C.M. v. Urbina*, 640 F. App'x 825, 831 (10th Cir. 2016)). And lower federal courts have also consistently 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); *accord 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 holding that government's interest in fighting spread of contagious disease is compelling); *see also Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (noting, in case involving statutory exemptions from vaccination law, that "[c]onstitutionally, [plaintiff] has no right to an exemption"). New Mexico's interest here in stanching the spread of COVID-19 is no less compelling.

2. The order is narrowly tailored.

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); *accord 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 a compelling-interest test.

The order here operates in the same way. No vaccine for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, OEI-06-20-00300, *Hospital Experiences Responding to the COVID-19 Pandemic* (Apr. 2020), https://bit.ly/2VTEMIm. Without the capacity to test comprehensively for the virus, the only way to slow its spread is to temporarily restrict the number and size of in-person gatherings. And the order is no broader than necessary to ensure that the targeted activities—physical gatherings that create opportunities for transmission of the virus—are curtailed.

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

For reasons similar to those set forth above, numerous courts have, in recent weeks, rejected challenges like this one to COVID-19-related orders. *See Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832-JAM-CKD, 2020 WL 2121111 (E.D. Cal. May 5, 2020) (denying TRO); *Roberts v. Neace*, __ F. Supp. 3d __, 2:20-cv-054, 2020 WL 2115358 (E.D. Ky. May 4, 2020) (denying preliminary injunction with respect to religious services), *appeal docketed*, No. 20-5465 (6th Cir. May 5, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (denying TRO and preliminary injunction), *appeal filed*, ECF No. 46 (May 4, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040-AWA-RJK, 2020 WL 2110416 (E.D. Va. May 1, 2020) (denying TRO and preliminary injunction), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (denying TRO), *appeal docketed*, No. 20-55445 (9th Cir. Apr. 28, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL

1970712 (E.D. Tenn. Apr. 17, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683-BAS-AHG, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020) (reaffirming and explaining denial of preliminary injunction), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020) (denying TRO); *Hotze v. Hidalgo,* No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

Only three courts have reached contrary determinations in similar cases, and in two of them the relief was limited to drive-in religious services. *See Maryville Baptist Church, Inc. v. Beshear*, __ F.3d __, No. 20-5427, 2020 WL 2111316, at *5 (6th Cir. May 2, 2020) (granting injunction pending appeal against any restriction on drive-in religious gatherings, but denying injunction with respect to in-person services); *On Fire Christian Ctr., Inc. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249, at *1 (W.D. Ky. Apr. 11, 2020) (granting TRO against ban on drive-in religious services); *see also First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021, at *9 (D. Kan. Apr. 18, 2020) (granting TRO based on reasoning rejected by this Court and weight of authority). The order at issue here does not prohibit drive-in religious services. *See* Dkt. 29, at 27.

The Court should not depart from the conclusions of its prior opinion and of the overwhelming majority of courts to have considered similar issues.

II. THE ORDER DOES NOT VIOLATE THE ASSEMBLY CLAUSE.

Legacy's claim that the challenged order violates its First Amendment right of assembly fares no better than its free-exercise claim.

As this Court pointed out, the right to assemble has been subsumed under free-speech doctrine regarding expressive association. *See* Dkt. 29, at 56–58; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565, 609–11 (2010). The First Amendment's protections for free expression do not prohibit government from regulating conduct in a way that incidentally burdens expressive activity. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Thus, it "has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). By temporarily limiting the size of all in-person gatherings, the challenged order plainly regulates conduct rather than speech. All mass gatherings—social, civic, recreational, religious, and otherwise—are subject to the same conduct-based limitation without regard to their purpose or the content of any expression that might be involved. *See* Part I.A, *supra*.

As a regulation of conduct, the order can, at most, trigger intermediate scrutiny—and only if it were interpreted to regulate "inherently expressive" conduct. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010); *Rumsfeld*, 547 U.S. at 66; *O'Brien*, 391 U.S. at 377. Gathering with five or more other people is not, however, inherently expressive. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (holding that there is no generalized First Amendment right to associate with others); *Roberts*, 468 U.S. at 618 (association is expressive only if done "for the purpose of engaging in those activities protected by the First Amendment").

But even if the challenged order were construed as regulating inherently expressive conduct, it would nonetheless pass constitutional muster. Under the applicable intermediate-scrutiny test, burdens on expressive conduct are upheld if they (1) are content-neutral, (2) advance important governmental interests unrelated to the suppression of speech, and (3) do not burden "substantially more speech than necessary" to further those interests. *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 189 (1997). All three requirements are satisfied here.

First, the justification for the restriction on the size of gatherings—to fight a deadly virus by reducing person-to-person transmission—"ha[s] nothing to do with content." *See Boos v. Barry*, 485 U.S. 312, 320 (1988). The order applies to all gatherings regardless of their purpose; religious gatherings are covered not because they are religious (or because they include speech) but because they entail bringing people together in person. *See* Part I.A, *supra*.

Second, there can be no question that combating a deadly outbreak of a global pandemic is an important interest unrelated to the suppression of expression. Indeed, the Supreme Court has held that much less important interests satisfy intermediate scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (ensuring that bandshell events are both loud enough and not too loud); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (keeping public park clean and accessible); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984) (avoiding aesthetic visual clutter from signs and billboards).

Third, the order does not burden substantially more expressive conduct than necessary to advance the State's interest in slowing the spread of COVID-19. The order restricts large in-person gatherings precisely because they are most conducive to spreading the virus. *See* Part I.B.2, *supra*.

In-person gatherings of four or fewer people are not prohibited, nor are virtual gatherings or ones during which people remain in their vehicles.[2]

III. THE ESTABLISHMENT CLAUSE FORBIDS THE 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 County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). That neutrality requirement not only forbids government to target religion for worse treatment (*see* Part I.A, *supra*) but also prohibits granting 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 nonbeneficiaries, in violation of the Establishment Clause. Exempting Legacy from New Mexico's order 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,

[2] Moreover, even if the order were subject to a compelling-interest test, it would still pass constitutional muster, as this Court has already found (Dkt. 29, at 87–92). *See also* Part I.A, *supra*.

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*, 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 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 to allow a minor to distribute religious literature because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free . . . 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 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 U.S. 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*, 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. 565 U.S. 171, 194–95 (2012). And in *Corporation of the Presiding Bishop v. Amos*, the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. 483 U.S. 327, 339–40 (1987). These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated "church autonomy." *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 that special protection for ecclesiastical authority because it does not present questions regarding internal matters such as hiring clergy or determining religious membership. Rather, it 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.

c. Granting an exemption here would elevate Legacy's religious preferences over the health of the entire community. By holding in-person religious gatherings, Legacy would not only put its members in danger but also increase the risk of contagion for everyone outside the congregation with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness.

New Mexico is facing an unprecedented public-health emergency, and in response to this grave threat, Governor Lujan Grisham and the New Mexico Department of Health have restricted

people's ability to gather in person with others. New Mexico officials have determined that these steps will slow the spread of the virus and ultimately save lives. If New Mexico is instead forced to exempt Legacy—and therefore also all other houses of worship that want exemptions—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. Officials in Sacramento County, California, for example, traced roughly a third of the county's first several hundred 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. 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. A single church event in Louisville has been "linked to at least 28 cases . . . and two deaths." Bailey Loosemore & Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020), https://bit.ly/2XkKCnd. And a church service in West Virginia led to a cluster of infections that devastated a small community. 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/2WxQyae.

A single unwitting carrier at one of Legacy's worship services 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 deny Legacy's motion for a preliminary injunction and grant Secretary Kunkel's motion to dismiss.

Respectfully submitted,

/s/ Sarah R. Goetz

RICHARD B. KATSKEE*
ALEX J. LUCHENITSER*
SARAH R. GOETZ (Federal Bar No. 19-88)
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
luchenitser@au.org
goetz@au.org

Counsel for Amicus Curiae

Date: May 6, 2020

*Notice of association of attorney licensed outside the District forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I electronically filed the foregoing with the Clerk of the Court through the CM/ECF system, causing service to be effected on counsel for all parties.

/s/ Sarah R. Goetz

SARAH R. GOETZ (Federal Bar No. 19-88)
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
goetz@au.org