No. 20-1336

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDREW WOMMACK MINISTRIES, INC.,
Plaintiff-Appellant,

v.

JARED POLIS, in his official capacity as Governor of the State of Colorado; JILL HUNSAKER RYAN, in her official capacity as Executive Director of the Colorado Department of Public Health and Environment; and JACQUELINE REVELLO, in her official capacity as Director of the Teller County Department of Public Health and Environment,
Defendants-Appellees.

On Appeal from the Order of the United States District Court
for the District of Colorado
Case No. 1:20-cv-2922, Hon. Christine M. Arguello

BRIEF, IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL, OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; COVENANT NETWORK OF PRESBYTERIANS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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RULE 26.1 DISCLOSURE STATEMENT

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 *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 connections that risk COVID-19 infection not only of congregants but also of people in the wider community. Applying to religious services religion-neutral restrictions on large gatherings both protects the public health and respects the Constitution.

The *amici* are:

- Americans United for Separation of Church and State.

[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.

- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Reconstructionist Rabbinical Association.
- Southwest Conference of the United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. The United States has suffered by far the most reported COVID-19-related deaths worldwide, more than 2,000 of which have occurred in Colorado. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Oct. 1, 2020), https://bit.ly/2xR2V99. And there is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term health damage. *See, e.g.*, TYM Leung, et al., *Short- and Potential Long-term Adverse Health Outcomes of COVID-19: A Rapid Review*, EMERGING MICROBES & INFECTIONS (Sept. 17, 2020), https://bit.ly/3ikjBXJ.

As part of Colorado's ongoing emergency response, Governor Polis and Director Ryan have issued a series of orders temporarily limiting business activities and in-person gatherings. In the county where Plaintiff Andrew Wommack Ministries is located, the currently operative Public Health Order limits indoor religious services to the lower of 175 attendees or fifty-percent capacity per room. *See* Mot. 16; *Amended Public Health Order 20-35 Safer at Home Dial*, COLO. DEP'T OF PUB. HEALTH & ENV'T, § II.B.2.j (Sept. 20, 2020), https://bit.ly/34g8fiD. These kinds of restrictions have been successful in slowing the transmission of COVID-19. *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.

Wommack nevertheless challenges the Order 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 Order complies with this legal standard because Colorado's limitations on religious services are lesser than or similar to those on comparable nonreligious activities. Even if heightened scrutiny were called for, however, the Order is constitutional because it is narrowly tailored to advance Colorado's compelling interest in protecting its residents from a deadly disease.

What is more, the First Amendment's 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 nonbeneficiaries. Holding that no size limitation may be placed on indoor religious gatherings would do just that: A contagious person at a religious service could infect scores of fellow congregants, who may then expose family, friends, and strangers, including numerous people who did not attend the event.

For similar reasons, federal-court decisions—including rulings by the U.S. Supreme Court and the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have overwhelmingly denied relief in religion-based challenges to COVID-19-related public-health measures, most of which were much more restrictive of religious exercise than is Colorado's Order. This Court should likewise deny the motion for an injunction pending appeal.

ARGUMENT

I. The Order does not violate the Free Exercise Clause.

A. Rational-basis review applies.

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 Wommack argues here that the Free Exercise Clause entitles the ministry to an exemption from Colorado'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 Free Exercise Clause forbids intentional suppression of religious conduct, but it does not 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*, 505 U.S. 520, 531, 543 (1993); *Smith*, 494 U.S. at 879.

Colorado's Order complies with this principle. It restricts religious services similarly to or less than comparable nonreligious gatherings. In the County where Wommack is located, many kinds of indoor venues and events—including theatres, concerts, restaurants, receptions, markets, malls, trade shows, colleges, and universities—are governed by limits identical to those applicable to indoor religious services. *See* Mot. 16; Order §§ II.B.2.h, II.B.2.j, II.B.2.k, III.R, IV.I. Certain other types of gatherings, gyms, recreation centers, camps, and pools are governed by stricter limits. *See* Order §§ II.B.2.a, II.B.2.m, II.B.2.p. The Order imposes

no numerical limit on outdoor religious services, while other kinds of outdoor events are capped at 250, and tighter limits apply to outdoor sports and guided activities. *See id.* §§ II.B.2.j, II.B.2.l, II.B.2.n, II.B.2.o, IV.P. Moreover, casinos, amusement parks, bounce houses, ball pits, and non-food bars are closed entirely. *Id.* §§ III.A.1.

Considering analogous circumstances in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), the Supreme Court refused to issue an emergency injunction against a California order that limited religious gatherings to the smaller of twenty-five percent of building capacity or one hundred people. Concurring in the denial of injunctive relief, Chief Justice Roberts explained that California's order "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 theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.* at 1613; *see also 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).

Wommack takes issue with Colorado's decision not to impose a numerical limit on the number of people who may be present at businesses such as grocery stores, hardware stores, and laundromats. Mot. 11. But Justice Kavanaugh made a similar argument in dissent in *South Bay* (140 S.Ct. at 1614), and it did not carry the day. For as the Chief Justice's concurring opinion explained, California "exempt[ed] or treat[ed] more leniently [than religious services] only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 1613.

Nor are Colorado's restrictions discriminatory (*cf.* Mot. 6–8) because they apply to Wommack's worship services but not to social-welfare programs—such as operating a food bank—that Wommack may wish to provide (*see* Order App. A, § 8). The sustained congregation of worshippers speaking, singing, and interacting 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 gatherings and social-welfare programs that apply to Wommack govern nonreligious institutions equally. That Wommack treats the delivery of social-welfare programs by religious and nonreligious institutions the same way only underscores that Colorado's restrictions are neutral and generally applicable. *Cf. Ungar v.*

N.Y.C. Hous. Auth., 363 F.App'x 53, 56 (2d Cir. 2010) (unpublished) (limited categorical exemptions from public-housing policy did not negate general applicability because exemptions were equally available to religious and nonreligious applicants).

Wommack also contends that stricter limits apply to its religious activities than to higher-education activities that may be conducted in its facilities. Mot. 8–10. But that argument is contrary to the plain text of Colorado's Order, which imposes identical limits on houses of worship and higher-education institutions. *See* Order §§ II.B.2.j, II.B.2.k, III.R.

Finally, Wommack spills much ink on allegations that Colorado has failed to enforce the Order against outdoor protests. Mot. 14–18. Yet Wommack seeks only an injunction permitting it to exceed the Order's limitations on *indoor* religious gatherings. *See id.* at 1–2. Outdoor activities are not comparable to indoor gatherings because they pose far less risk of transmission of the virus. *See, e.g.*, Tara Parker-Pope, *How Safe Are Outdoor Gatherings?*, N.Y. TIMES (July 3, 2020), https://nyti.ms/3j4fH6g. Indeed, one study concluded that the odds of infection are nearly twenty times higher at indoor gatherings than outdoor ones. *See id.* And in any event, as noted above, Colorado does not impose a statewide limit on outdoor worship services. *See* Order § II.B.2.j.

Moreover, enforcement decisions are "particularly ill-suited to judicial review," 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)). Wommack's Motion cites no evidence that Colorado declined to take enforcement action against protests for any religion-related reason, as opposed to legitimate considerations such as avoiding a spiral of violence.

Further, even if Colorado's treatment of protests were to be construed as a *de facto* categorical exemption for outdoor protests, that would not help Wommack's case. This Court has repeatedly held that the existence of a categorical exemption for secular conduct from a law is insufficient to trigger heightened scrutiny of a decision not to exempt religious conduct. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701–02 (10th Cir. 1998). Rather, heightened scrutiny applies only when the exempted conduct is "similar enough in all material respects" to the nonexempted religious conduct—here, indoor worship services—to support a conclusion that the difference in treatment "was based on [the prohibited conduct's] religious nature." *Taylor v. Roswell*

Indep. Sch. Dist., 713 F.3d 25, 52 (10th Cir. 2013). Wommack cannot come close to making such a showing.

For these reasons, federal courts have repeatedly rejected arguments that allowing large outdoor protests invalidates limitations on indoor religious activities. In *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2607–08 (2020), Justice Alito made such an argument in dissent from a Supreme Court denial of injunctive relief against Nevada restrictions on religious services, but it did not prevail. Many federal district courts have rejected such arguments as well. *See High Plains Harvest Church v. Polis*, No. 1:20-cv-1480, 2020 WL 4582720, at *2 (D. Colo. Aug. 10, 2020) (unpublished), *motion for injunction pending appeal filed*, No. 20-1280, ECF No. 10110395024 (10th Cir. Aug. 21, 2020); *Harvest Rock Church v. Newsom*, No. 20-cv-6414, 2020 WL 5265564, at *2–3 (C.D. Cal. Sept. 2, 2020) (unpublished), *motion for injunction pending appeal denied*, __ F.3d __, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020); *Legacy Church, Inc. v. Kunkel*, __ F.Supp.3d __, No. 1:20-cv-327, 2020 WL 3963764, at *15, 84–87 (D.N.M. July 13, 2020), *appeal docketed*, No. 20-2117 (10th Cir. Aug. 12, 2020); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-687, 2020 WL 3766496, at *14–16 (N.D.N.Y. July 6, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, __ F.Supp.3d __, No. 2:20-cv-907, 2020 WL 3108716, at *4 (D. Nev. June 11,

2020), *appeal docketed*, No. 20-16274 (9th Cir. June 30, 2020); *Solid Rock Baptist Church v. Murphy*, No. 1:20-cv-6805, 2020 WL 4882604, at *10, 13 (D.N.J. Aug. 20, 2020) (unpublished). And even *Soos v. Cuomo*, on which Wommack leans heavily (Mot. 15–16), did not require *indoor* religious services to be treated the same as *outdoor* protests; it merely required *indoor* religious services to be treated similarly to certain nonreligious *indoor* gatherings, and *outdoor* religious services to be treated similarly to *outdoor* protests. *See* __ 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).

B. The Order would satisfy even a compelling-interest test.

Even if a compelling-interest test did apply here, 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 a compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). Those pre-*Smith* decisions repeatedly acknowledged that there is no right to religious exemptions from laws that, like Colorado's Order, 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, 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 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; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that government has a compelling interest in preventing the spread of communicable diseases. *See, e.g.*, *McCormick v.*

Stalder, 105 F.3d 1059, 1061 (5th Cir. 1997); *Whitlow v. California*, 203 F.Supp.3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases).

There can thus be no doubt that Colorado has a compelling interest in stanching the spread of COVID-19. Yet Wommack argues that Colorado's allowance of outdoor protests negates the State's interest in regulating indoor gatherings more strictly. Mot. 21 n.3. 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 the Order 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.

Colorado's Order is far less restrictive than a blanket ban and thus satisfies the narrow-tailoring standard more easily. No accepted cure or 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 limiting the size of gatherings is the best way for Colorado to advance its compelling objective of slowing community spread and saving lives. At the same time, the Order is no broader than necessary to ensure that the targeted activities—indoor gatherings that create significant risks of contagion—occur more safely.

To suggest, as Wommack does, that the Order is not narrowly tailored because Colorado could impose laxer restrictions on religious services—such as physical-distancing and sanitation requirements (Mot. 20–22)—ignores the obvious: Imposing 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. 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).

That is the case here. Airborne transmission of COVID-19 can overcome physical-distancing and cleaning measures. *See, e.g.*, Dyani

Lewis, *Mounting evidence suggests coronavirus is airborne—but health advice has not caught up*, NATURE (updated July 23, 2020), https://go.nature.com/3k68T8L. Outbreaks of the virus have thus resulted from religious gatherings in spite of physical-distancing and other safety precautions taken by houses of worship. *See, e.g.*, 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.

Moreover, as the Chief Justice explained in his concurrence in *South Bay*, "[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.'" 140 S.Ct. at 1613 (quoting *Jacobson*, 197 U.S. at 38 (alteration in original)). Therefore, state officials' decisions on "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." *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

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 other decisions—including rulings by the First, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have rejected challenges like this one by religious organizations to in-person-gathering restrictions. And the vast majority of the public-health orders in those cases limited worship services substantially more than Colorado's Order does.

For example, in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342, 347 (7th Cir. 2020) (Easterbrook, J.), 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. Likewise, the Ninth Circuit, in its opinion in *South Bay*, denied a motion for injunction pending appeal at a time when the challenged state and local orders prohibited *all* in-person gatherings, explaining that "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." 959 F.3d 938, 939 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543).

Many other federal courts have reached similar conclusions. *See, e.g.*, *Bullock v. Carney*, 806 F.App'x 157, 157 (3d Cir. 2020) (unpublished), *denying motion for injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-674, 2020 WL 2813316, at *1 (D. Del. May 29, 2020) (thirty-percent-capacity limit); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, ECF No. 117596871 (1st Cir. June 2, 2020) (unpublished), *denying motion for injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-156, 2020 WL 2310913, at *3 (D. Me. May 9, 2020) (ten-person limit); *Tolle v. Northam*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (unpublished) (ten-person limit), *and petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020); *Gish v. Newsom*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020) (unpublished), *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) (unpublished) (no gatherings of any size); *Hawse v. Page*, No. 20-1960, ECF No. 4914708 (8th Cir. May 19, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 4:20-cv-588, 2020 WL 2322999, at *1, 3 (E.D. Mo. May 11, 2020) (unpublished) (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* __ F.Supp.3d __, No. 3:20-cv-282, 2020 WL 2509078, at *1, 2–4 (M.D. La. May 15, 2020) (ten-person limit); *Cassell v. Snyders*, __ F.Supp.3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *2, 6–11 (N.D. Ill. May 3, 2020) (ten-person limit), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F.Supp.3d 758, 769 (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*, __ F.Supp.3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *2 (D. Md. May 20, 2020) (ten-person limit), *appeal dismissed*, No. 20-1579, ECF No. 35 (4th Cir. July 2, 2020); *Lighthouse Fellowship Church v. Northam*, __ F.Supp.3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *3–8 (E.D. Va. May 1, 2020) (ten-person limit), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *see also DiMartile v. Cuomo*, 820 F.App'x 62 (2d Cir. 2020) (unpublished), *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).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—have courts granted injunctive relief in religion-based challenges to COVID-19-related health orders. Other than *Soos*, 2020 WL

3488742, which is addressed above (as well as a couple decisions that were promptly stayed on appeal[2]), ***all*** of those cases (i) were decided before the Supreme Court's decision in *South Bay* ***and*** (ii) considered restrictions far tighter than Colorado's Order. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (Kentucky order prohibiting gatherings of any size); *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (purported ban on drive-in services); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020) (order prohibiting all in-person worship services); *Berean Baptist Church v. Cooper*, __ F.Supp.3d __, No. 4:20-cv-81, 2020 WL 2514313, at *1, 11 (E.D.N.C. May 16, 2020) (ten-person limit); *Tabernacle Baptist Church v. Beshear*, __ F.Supp.3d __, No. 3:20-cv-33, 2020 WL 2305307, at *1–2, 5–6 (E.D. Ky. May 8, 2020) (order prohibiting gatherings of any size); *First Baptist Church v. Kelly*, __ F.Supp.3d __, No. 6:20-cv-1102, 2020 WL 1910021, at *1–2, 8–9 (D. Kan. Apr. 18, 2020) (ten-person limit); *On Fire Christian Ctr. v. Fischer*, 453 F.Supp.3d 901, 2020 WL 1820249, at *1–2 (W.D. Ky. Apr. 11, 2020) (purported ban on drive-in services). Contrary to the Chief Justice's analysis in *South Bay*, most of these decisions treated

[2] *See DiMartile*, 820 F.App'x 62; *County of Los Angeles v. Superior Court*, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020) (unpublished).

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).)

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)). Granting Wommack the religious exemption that the ministry seeks would violate this principle. 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 Wommack an exemption here would elevate that ministry's religious preferences over the health of the entire community. Not only would Wommack's 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.*, 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; 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; Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL (May 2, 2020), https://bit.ly/2SFVYyX; *see also supra* at p. 16.

As these examples show, a single unwitting carrier at a large worship service can 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 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 government to grant religious exemptions for conduct that threatens so much harm to so many.

CONCLUSION

For the foregoing reasons, Wommack's motion for an injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 3, 2020, I filed the foregoing brief using the Court's CM/ECF system, which caused service to be effected on counsel for all parties to this appeal except for defendant-appellee Governor Polis, whom I served by emailing his counsel Emily.Buckley@coag.gov, as no appearance has yet been made on his behalf in this appeal.

s/ *Alex J. Luchenitser*