No. 20-1507

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CALVARY CHAPEL OF BANGOR,
Plaintiff-Appellant,

v.

JANET MILLS, in her official capacity as Governor of the State of Maine,
Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the District of Maine
Case No. 1:20-cv-00156-NT, Hon. Nancy Torresen

BRIEF IN SUPPORT OF APPELLEE AND AFFIRMANCE 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; INTERFAITH ALLIANCE FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; MAINE CONFERENCE, UNITED CHURCH OF CHRIST; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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RULE 26.1 DISCLOSURE STATEMENT

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

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Interests of the *Amici Curiae*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to worship freely is precious 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 with whom they associate. 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.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Maine Conference, United Church of Christ.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

Introduction and Summary of Argument

Maine, along with most of the world, continues to face a historically devastating pandemic. The United States has suffered by far the most COVID-19-related deaths worldwide (*see Covid-19 Dashboard*, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited July 29, 2020), https://bit.ly/2xR2V99), and the virus continues to pose a dire threat to Mainers (*see, e.g.*, Christopher Burns, *29 new coronavirus cases have been reported in Maine*, BANGOR DAILY NEWS (July 29, 2020), https://bit.ly/2P8N0rK).

As part of Maine's emergency public-health response, Governor Mills issued the orders initially challenged by Plaintiff Calvary Chapel, which temporarily prohibited in-person gatherings that would put more than ten people in close proximity, restricted the operations of businesses that were permitted to remain open, and ordered residents to stay at home. *See* J.A. 56–76. Reports from other regions suggest that orders of this type have been successful in limiting transmission of COVID-19. *See, e.g.*, *The State of Our State's Coronavirus Fight*, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq.

Governor Mills subsequently issued guidance documents "to safely ease and lift prior restrictions on businesses and activities" through "successive phased-in actions . . . based on progress in limiting the spread

of COVID-19." Executive Order 55 FY 19/20 (May 29, 2020), https://bit.ly/39fOObK; *see also Together We Are Maine: Restarting Maine's Economy Plan*, STATE OF MAINE COVID-19 RESPONSE, https://bit.ly/2ZJNo6d (last visited July 29, 2020). Under the Guidance currently applicable to them, houses of worship may host services with up to fifty people. *See COVID19 Prevention Checklist Industry Guidance, Phase 1: Religious Gatherings*, MAINE DEP'T OF ECON. & COMM. DEV. (June 10, 2020), https://bit.ly/3hlBGVo. Although the Guidance relaxes earlier limitations on houses of worship, Calvary still challenges Maine's restrictions.[2]

Maine's temporary restrictions on the size of Calvary's worship services do not violate Calvary's 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. The restrictions here comply with this legal standard because they limit religious services to the same degree as comparable nonreligious

[2] *Amici* view this appeal as moot to the extent that Calvary challenges restrictions that are no longer in effect. Hence, *amici* analyze only the constitutionality of the currently operative Guidance. But even if the previous restrictions are not moot, they are constitutional for the reasons set forth in the brief that *amicus* Americans United filed on May 26, 2020, in opposition to Calvary's motion for an injunction pending appeal.

activities that involve sustained close interactions. But even if heightened scrutiny were called for—which it is not—the restrictions still should be upheld because they are narrowly tailored to advance Maine's compelling interest in protecting its residents from a deadly disease.

What is more, the First Amendment's Establishment Clause forbids granting an exemption for religious services from Maine's restrictions. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding that no size limitation may be placed on 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 countless people who did not attend the event.

With Chief Justice Roberts writing a concurring opinion that expresses reasoning similar to what *amici* explain here, the Supreme Court recently rejected an application for an emergency injunction against California restrictions on religious services akin to Maine's Guidance. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive

relief). And the overwhelming majority of other court decisions—including a subsequent one by the Supreme Court and rulings by the Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have likewise 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 Maine's Guidance. The district court's decision should be affirmed.

Argument

I. Maine's Guidance Does Not Violate The Free Exercise Clause.

A. Rational-Basis Review Applies to the Guidance.

The freedom to worship is a value of the highest order, and many people naturally seek the comfort and support provided by faith communities in these difficult times. But as the Supreme Court recently reaffirmed, the constitutional guarantee of religious freedom "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Yet Calvary argues that the Free Exercise Clause entitles it to an exemption from Maine's temporary emergency public-health measures even in the face of a severe pandemic. That claim is wrong as a matter of law: "The right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

The Supreme Court's free-exercise jurisprudence makes clear that, while government cannot forbid a religious practice because it is religious, religion-based disagreement with the law does not excuse noncompliance. "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 are neutral toward religion and apply generally. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879.

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

Maine's Guidance does not discriminate or show animus against religion or religious conduct. The activities of houses of worship are treated similarly to a wide range of nonreligious activities. The fifty-person restriction that governs religious services also applies to secular social gatherings, weddings, graduation ceremonies, camps, concert halls, gyms, performing-arts venues, museums, libraries, community buildings, community sports, movie theaters, indoor amusement venues, restaurants, and casinos. *See COVID-19 Prevention Checklists*, MAINE DEP'T OF ECON. & COMM. DEV., https://bit.ly/2E0wack (last visited July 29, 2020), and industry-specific guidance documents linked therein; E.O. 55 FY 19/20 § I(A).

In *South Bay*, 140 S. Ct. 1613, addressing similar circumstances, the Supreme Court refused to issue an emergency injunction against a California public-health order that restricted in-person religious services to the smaller of twenty-five percent of building capacity or one hundred people. Concurring in the denial of injunctive relief, Chief Justice Roberts concluded, "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment." *Id.* at 1613. "Similar or more severe restrictions," emphasized the Chief Justice, "apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and

theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.*; *see also Attorney 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).

Calvary argues that Maine discriminates against religion because it does not impose a numerical gathering limit on institutions such as retailers and manufacturing businesses. Appellant's Br. 18–20. Justice Kavanaugh voiced a similar view in a dissent in *South Bay*, asserting, "The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." 140 S. Ct. at 1614. But this argument did not carry the day. The Chief Justice explained that California's regulatory scheme permissibly "exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 1613.

In any event, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542–43. The

existence of exemptions for objectively defined categories of nonreligious institutions or activities does not by itself trigger heightened scrutiny of a refusal to provide a religious exemption. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009) ("That the . . . regulations recognize some exceptions cannot mean that the [state] has to grant all other requests for exemption to preserve the 'general applicability' of the regulations."); *Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) (recognizing difference between free-exercise challenges to "general prohibition[s]," which are subject to rational-basis review, and challenges to "system[s] of individual exemptions," which are subject to heightened scrutiny). Rather, heightened scrutiny applies only when the exempted conduct is "similar enough in all material respects" to nonexempted religious conduct to support a conclusion that the prohibition "was based on [the prohibited conduct's] religious nature." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52–53 (10th Cir. 2013).

That is far from the case here. Maine applies its fifty-person limit to a wide array of activities, not just religious services, so there can be no serious argument that Maine's decisions are based on anti-religious animus. And retailers and manufacturers do not host large gatherings like houses of worship do. Moreover, retailers are subject to restrictions that may be more

limiting than those on religious services: employees may not gather in groups greater than ten, and no more than five customers are permitted per 1,000 square feet of shopping space. *See COVID19 Prevention Checklist Industry Guidance, Phase 1: Retail Businesses*, MAINE DEP'T OF ECON. & COMM. DEV. (July 16, 2020), https://bit.ly/2BqrOKF.

Calvary also argues that Maine's gathering limit is discriminatory because it applies to Calvary's worship services but not to social-welfare programs—such as operating a food bank—that Calvary might wish to provide. Appellant's Br. 12–14. But 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 Calvary govern nonreligious institutions equally. That Maine treats the delivery of social-welfare programs by religious and nonreligious institutions the same way only underscores that Maine's restrictions are neutral and generally applicable. *Cf. Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that limited categorical exceptions from public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants).

Calvary further contends that Governor Mills has "encouraged" recent protest activity in Maine, thereby undercutting the general applicability of Maine's restrictions on gathering size. Appellant's Br. 29–31. But the Governor's statement that Calvary cites does not promote protests—much less protests in groups of greater than fifty. The Governor instead cautioned "all Maine people who are gathering" to "exercise that fundamental right with respect and to do so safely." *Governor Mills' Statement Ahead of President's Visit to Maine*, OFFICE OF GOVERNOR JANET T. MILLS (June 4, 2020), https://bit.ly/3jrSUCe. Further, outdoor activities such as protests are not analogous to indoor religious services because indoor activities pose a much higher risk of infection than do outdoor ones. *See, e.g.*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH CENTER FOR HEALTH SECURITY, PUBLIC HEALTH PRINCIPLES FOR A PHASED REOPENING DURING COVID-19: GUIDANCE FOR GOVERNORS 15, 20 (Apr. 17, 2020), https://bit.ly/2CKc5qz.

Finally, Calvary takes issue with an online application process that businesses must complete to reopen (Appellant's Br. 7, 47), but Maine has expressly exempted religious organizations from this requirement (*see COVID-19 Prevention Checklists*, *supra*).

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

B. Maine's Guidance Would Satisfy Even A Compelling-Interest Test.

Even if a compelling-interest test were to apply, Calvary's free-exercise challenge would still fail. More than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand even compelling-interest 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.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). But even the Court's pre-*Smith* free-exercise decisions routinely denied religious exemptions from laws that protected public health from serious threats, as the public-health measures challenged here do. For government has a compelling interest in protecting the health and safety of the public, and that interest is undeniable when it comes to preventing the spread of an infectious disease that puts lives at risk. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20.

"[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, the Supreme Court more than a century ago upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (citing "the authority of a state to enact quarantine laws and 'health laws of every description'"). The Court straightforwardly rejected the idea that the Constitution barred compulsory measures to protect health, citing the "fundamental principle" that personal liberty is subject to 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 has repeatedly reaffirmed that public-health regulations that burden religious exercise withstand a compelling-interest test. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that satisfies compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that the government has a compelling interest in preventing the spread of communicable disease. *See, e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997) ("[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).

Indeed, as this Court has recognized, "few interests are more central to a state government than protecting the safety and well-being of its citizens." *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018). There can be no doubt that Maine has a compelling interest here in stanching the spread of COVID-19. And that interest calls for limiting all large gatherings, including religious ones, so as not to undermine governmental efforts to reduce transmission of the virus.

A compelling-interest test, if it applied, would also call for determining whether Maine's Guidance is narrowly tailored to the interest at stake. *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); *accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984). Accordingly, the Supreme Court (*see 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.

Maine's Guidance is far less burdensome than a blanket ban and satisfies the narrow-tailoring standard more easily. No vaccine or accepted

treatment for COVID-19 yet exists, and asymptomatic carriers may unwittingly infect people in close proximity. *See, e.g.*, *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Temporarily limiting the size of in-person gatherings is the only way for Maine to achieve its compelling objectives of limiting the pandemic's spread, relieving pressure on the healthcare system, protecting the health and safety of all Mainers, and decreasing deaths. At the same time, the Guidance is carefully tailored to restrict religious activities only as necessary to achieve that goal: Places of worship may conduct in-person services indoors at reduced capacity, online services, or drive-in services (which are not subject to the fifty-person limit, *see COVID19 Prevention Checklist Industry Guidance, Phase 2: Town Meetings,* MAINE DEP'T OF ECON & COMM. DEV. (June 15, 2020), https://bit.ly/2X2IlMk).

To suggest, as Calvary does, that the Guidance is not narrowly tailored because Maine could impose laxer restrictions on religious services—such as physical-distancing requirements without any occupancy limits (Appellant's Br. 43)—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 aim. *Ashcroft v.*

ACLU, 542 U.S. 656, 665 (2004); *accord Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002). That is the case here. COVID-19 outbreaks have resulted from religious gatherings in spite of physical-distancing and other safety precautions taken by houses of worship. *See, e.g.*, Alex Acquisto, *This Central Kentucky church reopened on May 10 and became a COVID-19 hot spot*, LEXINGTON HERALD-LEADER (June 6, 2020), https://bit.ly/3dDbQdq; Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; 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; Chris Epp, *'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience*, CTV NEWS (May 11, 2020), https://bit.ly/3dLUv2l; Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6.

Moreover, as the Chief Justice explained in *South Bay*, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." 140 S. Ct. at 1613–14. "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.*

(quoting *Jacobson*, 197 U.S. at 38 (alteration in original)). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974) (alteration in original)). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). Accordingly, this Court should not second-guess Governor Mills's determinations here.

C. The Vast Majority Of Courts To Consider Similar Challenges To COVID-19-Related Orders Have Rejected Them.

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

For example, in *Calvary Chapel Dayton Valley v. Sisolak*, __ S. Ct. __, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020), the Supreme Court

denied an application for an injunction against a Nevada fifty-person limit on religious services, where Nevada imposed similar or greater restrictions on "lectures, museums, movie theaters, specified trade/technical schools, nightclubs and concerts" but allowed "casinos, restaurants, nail salons, massage centers, bars, gyms, bowling alleys and arcades . . . to operate at 50% of official fire code capacity" (*id.*, No. 3:20-cv-303, 2020 WL 4260438, at *3 (D. Nev. June 11, 2020)). In *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342, 347 (7th Cir. 2020), the Seventh Circuit upheld an Illinois order that capped religious and similar gatherings at ten people. Writing for the court, Judge Easterbrook emphasized that "the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally applicable laws." *Id.* at 345. He further explained that the Illinois order did not unconstitutionally "disfavor[ ] religious services," because they are "most like other congregate functions that occur in auditoriums, such as concerts and movies," and the order restricted those types of events *more* than religious services. *Id.* at 346–47. 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,[3] explaining that "where state

[3] California eased its restrictions between the Ninth Circuit's and Supreme Court's rulings.

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).

A plethora of other federal and state courts have reached similar conclusions. *See, e.g.*, *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); *Bullock v. Carney*, 806 F. App'x 157, 157 (3d Cir. 2020), *denying motion for injunction pending appeal of* __ F. Supp. 3d __, No. 1-20-cv-674, 2020 WL 2813316, at *1 (D. Del. May 29, 2020) (thirty-percent-capacity limit); *Hawse v. Page*, No. 20-1960, ECF No. 4914708 (8th Cir. May 19, 2020), *denying motion for injunction pending appeal of* No. 4:20-cv-588, 2020 WL 2322999, at *1, 3 (E.D. Mo. May 11, 2020) (standing-based dismissal of challenge to ten-person limit); *Gish v. Newsom*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020), *denying motion for injunction pending appeal of* No. 5:20-cv-755, 2020 WL 1979970, at *2, 5–6 (C.D. Cal. Apr. 23, 2020) (no gatherings of any size); *Tolle v. Northam*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-363, 2020 WL

1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (ten-person limit, *see* Executive Order Fifty-Five (Mar. 30, 2020) (Northam), https://bit.ly/2M4U9rG), *and petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 3963764, at *8, 14 (D.N.M. July 13, 2020) (five-person and twenty-five-percent capacity limits); *High Plains Harvest Church v. Polis*, No. 1:20-cv-1480, 2020 WL 3263902, at *1 (D. Colo. June 16, 2020) (fifty-person limit); *Calvary Chapel Lone Mountain v. Sisolak*, __ F. Supp. 3d __, No. 2:20-cv-907, 2020 WL 3108716, at *1 (D. Nev. June 11, 2020) (fifty-person limit), *appeal docketed*, No. 20-16274 (9th Cir. June 30, 2020); *Christian Cathedral v. Pan*, No. 20-cv-3554, 2020 WL 3078072, at *1 (N.D. Cal. June 10, 2020) (no indoor gatherings); *Abiding Place Ministries v. Newsom*, __ F. Supp. 3d __, No. 20-cv-683, 2020 WL 2991467, at *1–2 (S.D. Cal. June 4, 2020) (noting prior denial of TRO against order prohibiting gatherings of any size); *Antietam Battlefield KOA v. Hogan*, __ F. Supp. 3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *2 (D. Md. May 20, 2020) (ten-person limit), *appeal dismissed*, No. 20-1579, ECF No. 35 (4th Cir. July 2, 2020); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111, at *1, 5–7 (E.D. Cal. May 5, 2020) (no gatherings of any size permitted), *appeal dismissed*, No. 20-15977, ECF No. 14 (9th Cir. May 29, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *3–8

(E.D. Va. May 1, 2020) (ten-person limit), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *2, 6–11 (N.D. Ill. May 3, 2020) (ten-person limit), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *1–3 (E.D. Tenn. Apr. 17, 2020) (ten-person limit and ban on drive-in services); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020) (no gatherings of any size); *Elkhorn Baptist Church v. Brown*, 366 Or. 506, 542 & n.16, 466 P.3d 30, 51–52 & n.16 (2020) (twenty-five-person limit).[4]

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 orders. Virtually all those cases (i) were decided before the Supreme Court's decision in *South Bay and* (ii) considered restrictions far tighter than Maine's Guidance. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (per curiam order granting motion for injunction pending

[4] *See also MacEwen v. Inslee*, No. 3:20-cv-5423, 2020 WL 4261323 (W.D. Wash. July 24, 2020); *Harborview Fellowship v. Inslee*, 3:20-cv-5518, ECF No. 42 (W.D. Wash. June 18, 2020); *Dwelling Place Network v. Murphy*, No. 1:20-cv-6281, ECF No. 35 (D.N.J. June 15, 2020); *Diaz-Bonilla v. Northam*, No. 1:20-cv-377, ECF No. 25 (E.D. Va. June 5, 2020); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-cv-152 (N.H. Super. Ct. Mar. 25, 2020).

appeal against 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); *Berean Baptist Church v. Cooper*, __ F. Supp. 3d __, No. 4:20-cv-81, 2020 WL 2514313, at *1, 11 (E.D.N.C. May 16, 2020) (ten-person limit on indoor religious services); *Tabernacle Baptist Church v. Beshear*, __ F. Supp. 3d __, No. 3:20-cv-33, 2020 WL 2305307, at *1–2, 5–6 (E.D. Ky. May 8, 2020) (Kentucky order prohibiting gatherings of any size); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021, at *1–2, 8–9 (D. Kan. Apr. 18, 2020) (ten-person limit); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249, at *1–2 (W.D. Ky. Apr. 11, 2020) (purported ban on drive-in services). Furthermore, contrary to the Chief Justice's analysis in *South Bay*, these decisions treated religious services as comparable to grocery shopping and office work, and they second-guessed state officials' judgments on what means were necessary to render religious services safe. *See, e.g.*, *Neace,* 958 F.3d at 414–15. Meanwhile, a Fifth Circuit order granting a partial injunction pending appeal against a Mississippi city's complete ban on in-person religious services did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption of the city's ban by a state order. *Compare First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020), *with id.*, No. 20-

60399, ECF No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal). And, unlike Maine's guidelines, a New York State policy that was partially enjoined by a recent Northern District of New York decision restricted religious services substantially more than restaurants, salons, protests, and high-school graduations. *See Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *11–12 (N.D.N.Y. June 26, 2020), *appeals docketed*, Nos. 20-2414, 20-2418 (2d Cir. July 30, 2020).

II. Maine's Guidance Does Not Violate The Establishment Clause, But Granting A Religious Exemption Would.

The Establishment Clause of the First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Because Maine's Guidance treats religious gatherings like analogous nonreligious gatherings, Calvary is wrong in arguing that it violates the Establishment Clause. Rather, *granting* Calvary the religious exemption that it seeks would violate the Establishment Clause. For the neutrality requirement of the First Amendment's Religion Clauses forbids government not just to target religion for worse treatment (*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).

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. For when government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. *See, e.g.*, *id.* Exempting Calvary from Maine's limitations on gatherings would contravene this settled constitutional rule.

In *Estate of Thornton*, for example, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries" by making them 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 to exempt the distribution of religious literature from child-labor laws, 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. "Real 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.

In only one narrow set of circumstances 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), and *Our Lady of Guadalupe*, 140 S. Ct. at 2055, the Court held that employment-discrimination laws cannot be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339–40 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because both Religion Clauses limit governmental intrusion into the internal organizational structure of churches.

This case does not implicate that 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 a deadly disease.

Granting an exemption here would elevate Calvary's religious preferences over the health of the entire community. Not only would Calvary's congregants face greater danger, but so would everyone with whom they come into contact, including the elderly, the immunocompromised, and all others at elevated risk of severe illness.

Simply put, Maine continues to face an unprecedented public-health emergency. COVID-19 has killed more than 150,000 Americans. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (updated July 30, 2020), https://nyti.ms/39lS2uy. Though much about the virus remains unknown, what we do know—that "there is no known cure, no effective treatment, and no vaccine" and the "infected but asymptomatic . . . may unwittingly infect others" (*S. Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring))—demands a determined response. Restricting the size of in-person gatherings will reduce contacts between people and with contaminated surfaces, slow the spread of the virus, and save lives.

If Maine is instead forced to exempt Calvary—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 to spread COVID-19 as are other gatherings, and the examples have sadly

piled up across the country. *See, e.g.*, Trudy Balcom, *COVID-19 outbreak on the Navajo Nation linked to church rally*, WHITE MOUNTAIN INDEP. (Mar. 24, 2020), https://bit.ly/2YSR6di; Stephanie Becker, *At least 70 people infected with coronavirus linked to a single church in California, health officials say*, CNN (Apr. 4, 2020), https://cnn.it/2NgYN6l; Sara Cline, *Church tied to Oregon's largest coronavirus outbreak*, ABC NEWS (June 16, 2020), https://abcn.ws/2BhPtwC; Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (June 4, 2020), https://bit.ly/3hZQnyI; Allison James, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, MORBIDITY & MORTALITY WEEKLY REPORT (May 22, 2020), https://bit.ly/3f6MYM2; Bailey Loosemore & Mandy McLaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, LOUISVILLE COURIER-JOURNAL (Apr. 3, 2020), https://bit.ly/2V1Jjrs; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; Lee Roop, *A small Alabama church had a revival and now 40 people have coronavirus*, AL.COM (July 27, 2020), https://bit.ly/2Ekzsav; 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* p. 17 (describing additional COVID-19 outbreaks stemming from religious services).

As these examples demonstrate, a single unwitting carrier at a large worship service could cause a ripple effect throughout an entire community: That one infected but asymptomatic individual might pass the virus to his neighbors in the next pew, who might then return home and pass it to their family members, including people at high risk of severe illness. If any of those infected family members then go to the doctor's office, or to the grocery store for milk, they may expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources.

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

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,488 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font measuring no less than 14 points.

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I certify that on July 31, 2020, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Alex J. Luchenitser*