No. 20-2117

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEGACY CHURCH, INC.,

Plaintiff-Appellant,

v.

KATHYLEEN M. KUNKEL and STATE OF NEW MEXICO,

Defendants-Appellees.

On Appeal from the Order of the United States District Court
for the District of New Mexico
Case No. 1:20-cv-327, Hon. James O. Browning

BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); REV. TALITHA ARNOLD, SENIOR MINISTER, UNITED CHURCH OF SANTA FE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; COVENANT NETWORK OF PRESBYTERIANS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; FIRST CONGREGATIONAL UNITED CHURCH OF CHRIST ALBUQUERQUE; INTERFAITH ALLIANCE FOUNDATION; KANSAS-OKLAHOMA CONFERENCE, UNITED CHURCH OF CHRIST; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; REV. DR. MARC IAN STEWART, CONFERENCE MINISTER, MONTANA-NORTHERN WYOMING CONFERENCE, UNITED CHURCH OF CHRIST; AND SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST

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RULE 26.1 DISCLOSURE STATEMENT

With the exception of Rev. Dr. Marc Ian Stewart and Rev. Talitha Arnold, who are individuals, 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 interactions that present substantial risks of COVID-19 transmission—not only to congregants, but also to people in the wider community. Applying to religious services religion-neutral restrictions on large gatherings both protects the public health and respects the Constitution.

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. All parties have consented to the filing of this brief.

- ADL (Anti-Defamation League).
- Rev. Talitha Arnold, Senior Minister, United Church of Santa Fe.
- Bend the Arc: A Jewish Partnership for Justice.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- First Congregational United Church of Christ Albuquerque.
- Interfaith Alliance Foundation.
- Kansas-Oklahoma Conference, United Church of Christ.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Rev. Dr. Marc Ian Stewart, Conference Minister, Montana-Northern Wyoming Conference, United Church of Christ.
- Southwest Conference of the United Church of Christ.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are in the midst of a devastating pandemic. The United States has suffered by far the most reported COVID-19-related deaths worldwide, over 1,100 of which have occurred in New Mexico. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited Nov. 12, 2020), https://bit.ly/2xR2V99. There is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term damage to their health. *See, e.g.*, T.Y.M. Leung et al., *Short- and Potential Long-term Adverse Health Outcomes of COVID-19: A Rapid Review*, 9 EMERGING MICROBES & INFECTIONS 2190 (2020), https://bit.ly/3ikjBXJ; Lenny Bernstein, *'Nobody has very clear answers for them': Doctors search for treatments for covid-19 long-haulers*, WASH. POST (Oct. 16, 2020), https://wapo.st/2H8RPAT. And across the country, the rates of infection are surging higher than ever. *See, e.g.*, Lauren Leatherby, *United States Records Its Worst Week Yet for Virus Cases*, N.Y. TIMES (Oct. 30, 2020), https://nyti.ms/2HOP2Ng; Susan Montoya Bryan, *New Mexico Hospitals Seeing Strain as COVID-19 Cases Climb*, U.S. NEWS (Nov. 9, 2020), https://bit.ly/32KrtNB.

As part of New Mexico's ongoing emergency response, the State's Department of Health has issued a series of orders temporarily limiting business activities and in-person gatherings in the state. 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.

New Mexico's current public-health order limits indoor religious services to forty percent of maximum building occupancy as determined by the relevant fire marshal or fire department. N.M. Dep't of Health Pub. Health Order 7 ¶ 6 (Nov. 5, 2020), https://bit.ly/2Ufmujc. Plaintiff Legacy Church does not challenge that order. Instead, Legacy contests under the Free Exercise Clause of the First Amendment a June 30, 2020 order that limited religious services to twenty-five percent of building capacity—an order that expired four months ago. *See* Kunkel Br. 19.

Amici agree with Secretary Kunkel that Legacy's challenge to the June 30 Order is moot. *See id.* at 22–27. But even if this case were still justiciable, the June 30 Order did not violate the Free Exercise Clause.

The Supreme Court has held that neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Clause. The June 30 Order complied with this legal standard because the Order's limitations on religious services were lesser than or similar to those on comparable nonreligious activities. Even if heightened scrutiny were called for, however, the June 30 Order was constitutional because it

was narrowly tailored to advance New Mexico's compelling interest in protecting its residents from a deadly disease.

What is more, the First Amendment's Establishment Clause forbade granting a complete exemption from the June 30 Order for religious events. 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, this Court, and the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have overwhelmingly rejected religion-based challenges to COVID-19-related public-health measures, most of which were much more restrictive of religious gatherings than was the June 30 Order. If this Court determines that this case is justiciable, it should affirm the district court's decision.

ARGUMENT

I. The June 30 Order did 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 Legacy argues here that the Free Exercise Clause entitled it to an exemption from the emergency public-health measures set forth in the June 30 Order. 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*, 508 U.S. 520, 531, 543 (1993); *Smith*, 494 U.S. at 879.

The June 30 Order complied with this principle. It restricted religious services similarly to or less than comparable nonreligious gatherings. Under the June 30 Order, indoor worship services were subject to a cap of twenty-five percent of building capacity as determined by the relevant fire marshal or fire department, and no limit was placed on the size of outdoor religious services. N.M. Dep't of Health Pub. Health Order 6 ¶ 2 (June 30, 2020), https://bit.ly/3p1QAVh. Grocery stores, supermarkets, convenience stores, hardware stores, other retail stores, indoor shopping malls, mailing and shipping providers, auto- and bike-repair facilities, various other kinds of businesses, and funeral homes were governed by the same twenty-five-percent cap. *Id.* at 3–6 ¶¶ 1(d), 1(l), 1(m), 1(p), 1(s), 11; 7 ¶¶ 5–7. Nonreligious gatherings of groups of people—including ceremonies, parades, organized events, and other public and private functions—were limited to five people, regardless of whether they were indoors or outdoors. *Id.* at 5–6 ¶ 4; 6 ¶ 1. And movie theaters, concert halls, event and performance venues, bars, museums, amusement parks, arcades, bowling alleys, miniature-golf courses, go-kart tracks, and other

places of indoor recreation and entertainment were closed entirely. *Id.* at 6 ¶ 7; 7 ¶¶ 4, 11.

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).

Legacy takes issue (Appellant's Br. 11–13) with provisions in the June 30 Order (5 ¶ 1(u); 7 ¶ 8) that allowed restaurants and gyms to operate at fifty percent of maximum occupancy of their spaces—as determined by the relevant fire marshal or fire department—instead of the

twenty-five-percent-capacity limit for houses of worship. But this disparity did not actually disfavor houses of worship: Because of differences in how fire-code maximum occupancy is calculated for different kinds of spaces, the June 30 Order did not have the effect of permitting people to be present in restaurants or gyms at a higher *density* than at worship services. Under the applicable fire and safety standards, the normal capacity limit in spaces with fixed seating is simply the number of seats—or, for benches (as in a church sanctuary with pews), one person per eighteen inches of bench length. INT'L BLDG. CODE § 1004.4 (2015), https://bit.ly/2I7fL82 (incorporated in N.M. CODE R. §§ 10.25.5.15, 14.7.2.18). Spaces with chairs but no fixed seating (as in a meeting hall that smaller congregations may use) require seven square feet per person, while spaces with tables and chairs (as in a restaurant) require fifteen square feet per person. INT'L BLDG. CODE § 1004.1.2. Exercise facilities (as in gyms) require fifty square feet per person. *Id.* Thus a twenty-five-percent occupancy limit for places of worship would generally enable *more* people to be present in the same amount of space than would a fifty-percent occupancy limit for a restaurant or a gym.

What is more, even if the June 30 Order were to be regarded as imposing tighter restrictions on houses of worship than on restaurants and gyms, rational-basis scrutiny would still apply under the Free Exercise

Clause. This Court has repeatedly held that the existence of some categorical exemptions from a law for some forms of secular conduct is insufficient by itself 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 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). Here, Legacy presented no evidence that the Secretary acted with antireligious animus. Rather, the Secretary based her decisions on scientific analysis, including guidance prepared by public-health experts at Johns Hopkins University who concluded that large gatherings at places such as houses of worship pose greater risks of transmission of COVID-19 than do the operations of restaurants and gyms, because the latter kinds of settings typically involve less contact among unrelated people, at greater distances, and for shorter periods. *See* Aplt. App. Vol. II at 160–62, 289; JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH CENTER FOR HEALTH SECURITY, PUBLIC HEALTH

PRINCIPLES FOR A PHASED REOPENING DURING COVID-19: GUIDANCE FOR GOVERNORS 11–12, 16, 18–19 (Apr. 17, 2020), https://bit.ly/2CKc5qz.

In addition, in *South Bay* the Supreme Court did not enjoin California's twenty-five-percent-occupancy limit on houses of worship even though restaurants were not subject to that limit. *See* 140 S.Ct. at 1614–15 (Kavanaugh, J., dissenting). The Chief Justice's concurring opinion explained that California "exempt[ed] or treat[ed] more leniently [than religious services] only dissimilar activities . . . in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 1613. Subsequently, in *Calvary Chapel Dayton Valley v. Sisolak*, the Supreme Court denied a request for injunctive relief against a Nevada fifty-person limit on religious services even though restaurants and gyms were not subject to that restriction and were permitted to operate at fifty percent of capacity. *See* 140 S.Ct. 2603, 2609 (2020) (Kavanaugh, J., dissenting).

Legacy also complains about New Mexico's lack of enforcement of its gathering-restrictions against *outdoor* protests. Appellant's Br. 13–16. But the June 30 Order did not impose any capacity or numerical limit on outdoor religious services (*see* Kunkel Br. 39–40), so New Mexico did not disfavor outdoor religious gatherings as compared to other outdoor activities.

In any event, Legacy's complaint sought relief concerning only indoor religious services. *See* Aplt. App. Vol. I at 7 ¶¶ 15, 17; 9 ¶¶ 31, 35; 10 ¶ c. Outdoor activities are not comparable to indoor gatherings because the latter pose far more 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 at outdoor ones. *See id.*

Legacy's argument concerning protests really amounts to a claim of selective enforcement. But 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)). Legacy cites no evidence that New Mexico declined to take enforcement action against protests because of antireligious animus rather than legitimate considerations such as avoiding a spiral of violence.

In addition, neither the Supreme Court nor this Court has been swayed by arguments that allowing large outdoor protests invalidates limitations on indoor religious activities. In *Calvary Chapel Dayton Valley*, the Supreme Court denied injunctive relief against Nevada's restrictions

on religious services notwithstanding Nevada's lack of enforcement against outdoor protests of its limitations on gatherings. *See* 140 S.Ct. at 2607–08 (Alito, J., dissenting). Similarly, this Court has twice denied injunctions pending appeal against Colorado's restrictions on religious gatherings in cases where the plaintiffs' arguments focused principally or substantially on the state's lack of enforcement of its gathering-limits against protests. *See High Plains Harvest Church v. Polis*, No. 20-1280, ECF No. 10110436748 (10th Cir. Nov. 12, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 1:20-cv-1480, 2020 WL 4582720 (D. Colo. Aug. 10, 2020) (unpublished); *Andrew Wommack Ministries v. Polis*, No. 20-1336, 2020 WL 5983978, at *1 (10th Cir. Oct. 5, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 1:20-cv-2922, 2020 WL 5810525, at *2–3 (D. Colo. Sept. 29, 2020) (unpublished).

B. The June 30 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 would 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 the June 30 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)).

Following incorporation of the Free Exercise Clause against the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court relied on *Jacobson* to underscore that reasonable public-health measures burdening religious exercise withstand a compelling-interest inquiry. *See Sherbert*, 374 U.S. at 402–03; *Yoder*, 406 U.S. at 230 & n.20; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that 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); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F.App'x 348, 353–54 (4th Cir. 2011); *Whitlow v. California*, 203 F.Supp.3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases). There can thus be no doubt that New Mexico has a compelling interest in stanching the spread of COVID-19, a point that Legacy has conceded (*see* Aplt. App. Vol. II at 175).

A compelling-interest test, if it applied, would also ask whether the June 30 Order was 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.

The June 30 Order was far less restrictive than a blanket ban and thus satisfied 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 was the best way for New Mexico to advance its compelling objective of slowing community spread and saving lives. At the same time, the June 30 Order was no broader than necessary to ensure that the targeted activities—indoor gatherings that create significant risks of contagion—occurred more safely.

Legacy has argued that New Mexico's capacity restrictions were not narrowly tailored because Secretary Kunkel could have imposed laxer restrictions on religious services, such as physical-distancing requirements. (Aplt. App. Vol. I at 34, 36.) But under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). It is obvious that a ceiling on the size of

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

Indeed, airborne transmission of COVID-19 can render physical-distancing and cleaning measures ineffective. *See, e.g.*, Renyi Zhang, et al., *Identifying airborne transmission as the dominant route for the spread of COVID-19*, 117 PNAS 14,857 (2020), https://bit.ly/2HTGSnf. Outbreaks of the virus have thus resulted from religious gatherings despite physical-distancing and other safety precautions. *See, e.g.*, Shelly Bradbury, *Fatal COVID-19 outbreak linked to Colorado religious group suing state over limits on gatherings*, DENVER POST (Oct. 6, 2020), https://dpo.st/3k5nHVl; Kate Conger, et al., *Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 10, 2020), https://nyti.ms/30BOhgq; Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; Alex Acquisto, *This Central Kentucky church reopened on May 10 and became a COVID-19 hot spot*, LEXINGTON HERALD-LEADER (June 6, 2020), https://bit.ly/3dDbQdq; Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6; Chris Epp, *'I would do anything for a do-over':*

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

What is more, as the Chief Justice explained in his concurrence in *South Bay*, state officials' decisions about "when restrictions on particular social activities should be lifted during the pandemic . . . should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." 140 S.Ct. at 1613–14 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). For "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* (quoting *Jacobson*, 197 U.S. at 38 (alteration in original)).

C. The vast majority of courts to consider similar challenges to COVID-19-related orders have rejected them.

In addition to the cases cited above, numerous decisions—including rulings by the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have rejected challenges like this one by religious organizations to restrictions on gatherings. And the vast majority of the public-health orders in those cases limited worship services substantially more than the June 30 Order did.

In *Elim Romanian Pentecostal Church v. Pritzker*, for example, the Seventh Circuit upheld an Illinois order that capped religious gatherings at ten people, explaining that religious services are "most like other congregate functions that occur in auditoriums, such as concerts and movies," which Illinois had banned completely. 962 F.3d 341, 342, 347 (7th Cir. 2020) (Easterbrook, J.), *petition for cert. docketed*, No. 20-569 (Oct. 22, 2020). Likewise, in *Harvest Rock Church v. Newsom*, 977 F.3d 728, 730 (9th Cir. 2020), the Ninth Circuit denied an injunction pending appeal in a challenge to California orders that "appl[ied] the same restrictions to worship services as they d[id] to other indoor congregate events, such as lectures and movie theaters," notwithstanding that "more lenient treatment" was afforded to "certain secular activities, such as shopping in a large store." In *Agudath Israel of America v. Cuomo*, __ F.3d __, No. 20-3572, 2020 WL 6559473, at *3 (2d Cir. Nov. 9, 2020), the Second Circuit rejected a request for an injunction pending appeal against a New York order that limited worship services to the smaller of ten people or twenty-five percent of building capacity, noting that "COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause." And in its opinion in *South Bay United Pentecostal Church v. Newsom*, the Ninth Circuit 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, 2020 WL 3067488, at *1 (1st Cir. June 2, 2020) (unpublished), *denying motion for injunction pending appeal of* 459 F.Supp.3d 273, 280 (D. Me. 2020) (ten-person limit); *Robinson v. Murphy*, No. 20-3048, ECF No. 27 (3d Cir. Nov. 10, 2020) (unpublished), *denying motion for injunction pending appeal of* No. 2:20-cv-5420, 2020 WL 5884801, at *1 (D.N.J. Oct. 2, 2020) (unpublished) (lesser of twenty-five percent capacity or 150 people); *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); *Tolle v. Northam*, __ F.App'x __,

No. 20-1419, 2020 WL 6267786 (4th Cir. Oct. 26, 2020) (unpublished), *dismissing appeal of* No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (unpublished) (ten-person limit); *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* 460 F.Supp.3d 671, 673, 675–77 (M.D. La. 2020) (ten-person limit); *Cassell v. Snyders*, 458 F.Supp.3d 981, 988 (N.D. Ill. 2020) (ten-person limit), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F.Supp.3d 758, 763, 768–71 (E.D. Cal. 2020) (no gatherings of any size permitted), *appeal dismissed*, No. 20-15977, ECF No. 14 (9th Cir. May 29, 2020); *Antietam Battlefield KOA v. Hogan*, 461 F.Supp.3d 214, 224 (D. Md. 2020) (ten-person limit), *appeal dismissed*, No. 20-1579, ECF No. 35 (4th Cir. July 2, 2020); *Lighthouse Fellowship Church v. Northam*, 458 F.Supp.3d 418, 428–32 (E.D. Va. 2020) (ten-person limit), *appeal dismissed*, No. 20-1515 (4th Cir. Oct. 13, 2020); *Soos v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-651, 2020 WL 6384683, at *2, 4–7 (N.D.N.Y. Oct. 30, 2020) (limit of lesser of ten people or twenty-five percent of capacity), *appeal docketed*, No. 20-

3737 (2d Cir. Nov. 2, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, __ 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); *Abiding Place Ministries v. Newsom*, __ F.Supp.3d __, No. 3:20-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); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 51–52 & n.16 (Or. 2020) (twenty-five-person limit); *DiMartile v. Cuomo*, 820 F.App'x 62 (2d Cir. 2020) (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); *Tigges v. Northam*, __ F.Supp.3d __, No. 3:20-cv-410, 2020 WL 4197610, at *8 (E.D. Va. July 21, 2020) (restrictions on weddings); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-687, 2020 WL 3766496, at *10–17 (N.D.N.Y. July 6, 2020) (closure of overnight camps); *Shelton v. City of Springfield*, __ F.Supp.3d __, No. 6:20-cv-3258, 2020 WL 6323935, at *5 (W.D. Mo. Oct. 28, 2020) (mask requirement).[2]

[2] *See also Whitsitt v. Newsom*, No. 2:20-cv-691, 2020 WL 4818780 (E.D. Cal. Aug. 19, 2020) (unpublished), *report and recommendation adopted*, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020) (unpublished); *Williams v. Trump*, No. 1:20-cv-2495, 2020 WL 6118560, at *3–5 (N.D. Ill. Oct. 16, 2020) (unpublished); *Murphy v. Lamont*, No. 3:20-cv-694, 2020 WL

In only a few jurisdictions—principally the Sixth Circuit and courts within it—have courts granted injunctive relief based on freedom-of-religion arguments in challenges to COVID-19-related health orders. All but three of these cases were decided before the Supreme Court's decision in *South Bay* and considered restrictions far tighter than the June 30 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*, 460 F.Supp.3d 651, 653–54 (E.D.N.C. 2020) (ten-person limit); *Tabernacle Baptist Church v. Beshear*, 459 F.Supp.3d 847, 851 (E.D. Ky. 2020) (order prohibiting gatherings of any size); *First Baptist Church v. Kelly*, 455 F.Supp.3d 1078,

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4435167, at *14–15 (D. Conn. Aug. 3, 2020) (unpublished), *appeal docketed*, No. 20-3707 (2d Cir. Oct. 29, 2020); *Solid Rock Baptist Church v. Murphy*, No. 1:20-cv-6805, 2020 WL 4882604 (D.N.J. Aug. 20, 2020) (unpublished); *County of Los Angeles v. Superior Court*, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020) (unpublished); *Christian Cathedral v. Pan*, No. 3:20-cv-3554, 2020 WL 3078072 (N.D. Cal. June 10, 2020) (unpublished); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (unpublished); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020) (unpublished); *MacEwen v. Inslee*, No. 3:20-cv-5423, 2020 WL 4261323 (W.D. Wash. July 24, 2020) (unpublished).

1082 (D. Kan. 2020) (ten-person limit); *On Fire Christian Ctr. v. Fischer*, 453 F.Supp.3d 901, 907 (W.D. Ky. 2020) (purported ban on drive-in services). Contrary to the Chief Justice's analysis in *South Bay*, most of these earlier decisions treated religious services as comparable to grocery shopping and office work, and they second-guessed state officials' judgments on what means were necessary to render religious services safe. *See, e.g.*, *Neace,* 958 F.3d at 414–15. (The exception is *Holly Springs*, which did not set forth its reasoning or even explain whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the city ban at issue. *Compare* 959 F.3d at 670 *with id.*, No. 20-60399, ECF No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).)

And while two out of the three post-*South Bay* decisions that granted injunctions required *outdoor* religious services to be treated similarly to outdoor protests and other outdoor activities that had been subject to looser restrictions, neither required *indoor* religious services to be treated the same as *outdoor* activities. *See Soos v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-651, 2020 WL 3488742, at *11–13 (N.D.N.Y. June 26, 2020), *appeals docketed*, Nos. 20-2414, 20-2418 (2d Cir. July 30, 2020); *Capitol Hill Baptist Church v. Bowser*, __ F.Supp.3d __, No. 1:20-cv-2710, 2020 WL 5995126, at *1–3, 12 (D.D.C. Oct. 9, 2020) (decision based on Religious

Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, not Free Exercise Clause). The other relied on reasoning inconsistent with the Chief Justice's opinion in *South Bay* and has been temporarily stayed by this Court. *See Denver Bible Church v. Azar*, No. 20-1377, ECF No. 10110427952 (10th Cir. Oct. 22, 2020) (unpublished), *temporarily staying injunction pending appeal but cautioning that Court was not expressing view on merits of* No. 1:20-cv-2362, 2020 WL 6128994, at *9–13 (D. Colo. Oct. 15, 2020) (unpublished).

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 Legacy a religious exemption from the June 30 Order would have violated 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 Legacy an exemption here would have elevated the church's religious preferences over the health of the entire community. Not only would Legacy's congregants have faced greater danger, but the same would have been true with respect to everyone with whom they came into contact, including the elderly and others at heightened risk of severe illness.

Religious gatherings are just as likely as other gatherings to lead to COVID-19 outbreaks; and the examples have sadly piled up across the country. *See, e.g.*, Nakia McNabb, *At least 18 West Virginia Covid-19 outbreaks linked to church services, governor says*, CNN (Oct. 19, 2020), https://cnn.it/31CLODY; Kaitlin McKinley Becker, *More Than 200 COVID-19 Cases Linked to Fitchburg Church*, NBC10 BOSTON (Nov. 7, 2020), https://bit.ly/2GK6Tox; Minyvonne Burke, *More than 100 coronavirus cases and 3 deaths linked to North Carolina church event*, NBC NEWS (Oct. 23, 2020), https://nbcnews.to/3kyjNEN; Bill Bostock, *Nearly 100 people in*

Ohio got sick after one man infected with the coronavirus attended a church service, BUSINESS INSIDER (Aug. 6, 2020), https://bit.ly/2Qi2eeF; Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu; Sara Cline, *Church tied to Oregon's largest coronavirus outbreak*, AP (June 16, 2020), https://bit.ly/2YWFlT1; Ryan Burns, *A Redding Megachurch Leader Came to Humboldt and Flouted Mask Rules; Her Ministry is Now the Source of a Major COVID Outbreak*, LOST COAST OUTPOST (Oct. 13, 2020), https://bit.ly/3m86USh; Stephanie Becker, *At least 70 people infected with coronavirus linked to a single church in California, health officials say*, CNN (Apr. 4, 2020), https://cnn.it/2NgYN6l; Lee Roop, *A small Alabama church had a revival and now 40 people have coronavirus*, AL.COM (July 27, 2020), https://bit.ly/2Ekzsav; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (June 4, 2020), https://bit.ly/3hZQnyI; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; Rachel Needham, *Anatomy of an outbreak: New documents reveal a significant number of the county's COVID-19 cases can be traced to Castleton church*, RAPPAHANNOCK NEWS (Sept. 1, 2020), https://bit.ly/33hLAlG; Wyatt Massey, *Church of God denomination facing significant COVID-19 outbreak; leaders won't say how many infected*,

CHATTANOOGA TIMES FREE PRESS (July 7, 2020), https://bit.ly/3bTiWLl; Allison James, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 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; Trudy Balcom, *COVID-19 outbreak on the Navajo Nation linked to church rally*, WHITE MOUNTAIN INDEP. (Mar. 24, 2020), https://bit.ly/2YSR6di; Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL (May 2, 2020), https://bit.ly/2SFVYyX; *see also supra* at pp. 17–18.

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 may pass the virus to his neighbors in the pews, who may 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, the Court should affirm the district court's decision.

Respectfully submitted,

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