No. 20-30358

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK ANTHONY SPELL and LIFE TABERNACLE CHURCH,

Plaintiffs-Appellants,

v.

JOHN BEL EDWARDS, in his individual capacity and his official capacity as Governor of the State of Louisiana, et al.,

Defendants-Appellees.

On Appeal from the Order of the United States District Court for the Middle District of Louisiana
Case No. 3:20-cv-282, Hon. Brian A. Jackson

OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL BY *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; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; MEN OF REFORM JUDAISM; RECONSTRUCTING JUDAISM; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; TEXAS IMPACT; TEXAS INTERFAITH CENTER FOR PUBLIC POLICY; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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CERTIFICATE OF INTERESTED PERSONS

(1) Case number 20-30358, *Spell, et al., v. Edwards, et al.*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualification or recusal.

The following religious and civil-rights organizations have an interest in the outcome of the case as *amici curiae*:

- Americans United for Separation of Church of 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;
- Men of Reform Judaism;
- National Council of the Churches of Christ in the USA;
- Reconstructing Judaism;
- Reconstructionist Rabbinical Association;
- Texas Impact;
- Texas Interfaith Center for Public Policy;

- Union for Reform Judaism;
- Women of Reform Judaism.

Attorneys and law firms / institutions representing the *amici* are:

- Richard B. Katskee;
- Alex J. Luchenitser;
- Patrick Grubel;
- William P. Quigley;
- Loyola University New Orleans College of Law;
- Steven M. Freeman;
- David L. Barkey;
- Joshua Houston;
- Jeffrey I. Pasek;
- Cozen O'Connor.

All the *amici* are nonprofit organizations, and none has a parent corporation or is owned in whole or in part by any publicly held corporation.

The following parties have an interest in the outcome of the case:

- Mark Anthony Spell;
- Life Tabernacle Church;
- John Bel Edwards;
- Roger Corcoran;

- Sid Gautreaux.

Attorneys and law firms representing the parties are:

- Jeffrey Scott Wittenbrink;
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- Roy S. Moore;
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- Tara L. Johnston;
- Ashley M. Caruso;

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/s/ *Alex J. Luchenitser*
Attorney of Record for Amici Curiae

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IDENTITY AND 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, but that it should never be misused to cause harm.

Amici include religious organizations that are recommending not holding in-person worship at this time even if allowed under state law, as many of their constituent members (including congregations and faith leaders) believe that doing so under current conditions is dangerous. The religious organizations among *amici* recognize that in-person religious services inherently entail close and sustained human connections that risk COVID-19 infection of congregants and people with whom they associate. Applying religion-neutral restrictions on large gatherings to religious services both protects the public health and respects the Constitution.

The *amici* are:

- Americans United for Separation of Church and State.

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

- 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.
- Men of Reform Judaism.
- National Council of the Churches of Christ in the USA.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Texas Impact.
- Texas Interfaith Center for Public Policy.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are facing a pandemic. COVID-19 is both more contagious and far more lethal than the common flu (Dan Swenson, *Coronavirus vs. the flu*, NOLA.COM (Mar. 29, 2020 8:10 PM), https://bit.ly/3dSwF5Y), and the United States has by far the most reported COVID-19 cases and deaths worldwide (*see COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV. (last visited June 9, 2020), https://bit.ly/2xR2V99). The gravity of this challenge can hardly be questioned. *See In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020) (*Abbott II*).

Governor Edwards has taken this threat seriously and acted decisively to save Louisianans' lives by issuing a series of orders limiting people's physical contact with others. Adherence to these measures likely slowed the spread of the virus (*Coronavirus in Louisiana*, NOLA.COM (updated May 10, 2020), https://bit.ly/2zqDpbi), but the numbers are trending upward again (*Coronavirus in Louisiana, June 9*, NOLA.COM (updated June 9, 2020), https://bit.ly/3hbnkb2). Yet Plaintiffs seek a complete exemption for religious services from the Governor's current public-health order, which limits gatherings inside religious facilities to 50 percent of the facilities' maximum capacity—the same restrictions placed on other institutions whose functions entail people sitting in close proximity

for extended periods. *See* Proclamation No. 74-JBE-2020 §§ 2.G.1–6 (2020) (Edwards), https://bit.ly/3dLSN1m.[2]

This Court has explained that public-health responses to the COVID-19 pandemic are constitutional if "the measures have at least some 'real or substantial relation' to the public health crisis and [are] not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Abbott II*, 954 F.3d at 784 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). Governor Edwards's order satisfies this test. The order's limitations on in-person interactions have a substantial relation to the public-health crisis because they inhibit person-to-person transmission of the virus. And as applied to religious gatherings, the order is not "beyond all question" unconstitutional; rather, it would easily satisfy the Free Exercise Clause even if the "beyond all question" standard did not apply, because its restrictions on religious gatherings are no stricter than those imposed on analogous nonreligious activities.

What is more, the Establishment Clause forbids granting the complete exemption that Plaintiffs seek. 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

[2] *Amici* believe that Appellants' challenges to prior restrictions are moot.

over the rights, interests, and beliefs of nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Fully exempting religious gatherings from Louisiana's public-health order would do just that: A single contagious person at a religious service may infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not choose to attend the event.

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

ARGUMENT

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

The freedom to worship in accordance with one's spiritual needs is a right of the highest order. And it is natural that, in difficult and perilous times like these, people will seek the comfort and support that their faith community provides. But legal guarantees of religious freedom have never provided absolute license to engage in conduct consistent with one's religious beliefs in the face of general legal restrictions. *E.g.*, *Cantwell v.*

Connecticut, 310 U.S. 296, 303–04 (1940). Yet Plaintiffs argue here that the Free Exercise Clause entitles them to a complete exemption from the temporary, emergency public-health measures ordered by Governor Edwards to combat a 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).

As this Court explained in a case challenging a component of Texas's COVID-19 response, constitutional rights may "be reasonably restricted" during this crisis, and courts' authority to override public-health measures taken in response is very narrow. *Abbott II*, 954 F.3d at 784 (citing *Jacobson*, 197 U.S. at 29, 31); *accord In re Abbott*, 956 F.3d 696, 716 (5th Cir. 2020) (*Abbott VI*). Thus, "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and [are] not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Abbott II*, 954 F.3d at 784 (quoting *Jacobson*, 197 U.S. at 31). Put another way, the measures must not be arbitrary or a pretext for oppression. *Id.* at 785 (citing *Jacobson*, 197 U.S. at 38). And "courts may not second-guess the wisdom or efficacy of the measures" adopted by other

branches of government to protect the public health. *Id.* at 785 (citing *Jacobson*, 197 U.S. at 28, 30). This analysis applies to all individual rights, including religious exercise. *See id.* at 778 n.1.

Governor Edwards's order easily clears this low bar. Limiting transmission of the virus by restricting the size of in-person gatherings is related to the current public-health crisis. And as applied to Plaintiffs' religious activities, the order is not "beyond all question" a violation of their rights (*id.* at 784), because it would satisfy even the regular standards for evaluating religious-exercise claims under the First Amendment.

A. The Order Is Neutral And Generally Applicable.

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." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they apply generally and are neutral toward religion. *Church of the*

Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 879. Governor Edwards's order satisfies these requirements.

The neutrality requirement means that a law must not "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). That prohibition bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534. General applicability is a closely related concept (*id.* at 531) that forbids government to impose a "burden[ ] *only* on conduct motivated by religious belief" (*id.* at 543 (emphasis added)). The touchstone for both inquiries is whether government has purposefully discriminated against religious conduct. *See id.* at 533–34, 542–43.

The order here neither evinces hostility toward religion nor subjects religious conduct to special burdens not imposed on comparable nonreligious conduct. Rather, it restricts conduct "for the harm it causes, not because the conduct is religiously motivated." *See Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995). The risk of COVID-19 transmission is heightened when people are in close proximity for prolonged periods. *See, e.g.*, 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. The order therefore treats religious facilities the same way as many other

institutions—such as restaurants, salons, gyms, and casinos—that entail sustained close interactions in indoor spaces. *See* Proclamation 74-JBE-2020 §§ 2.G.1–6. And religious facilities are treated *better* than other comparable venues, including concert halls, festivals, and fairs, which must remain closed. *See id.* § 2.E.

In similar circumstances, in *South Bay United Pentecostal Church v. Newsom*, __ S. Ct. __, No. 19A1044, 2020 WL 2813056 (May 29, 2020), 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 25 percent of building capacity or 100 people—substantially less than what Louisiana permits. Concurring in the denial of injunctive relief, Chief Justice Roberts explained, "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 *1. "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.* "And the Order exempts or treats more leniently only dissimilar activities," added the Chief Justice, "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.*; *see also Attorney Gen. 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 and concert halls).

As Louisiana's order treats religious facilities and gatherings no worse—and in some cases *better*—than comparable nonreligious institutions and gatherings, it does not work any unconstitutional discrimination against religion. Hence, heightened scrutiny does not apply.

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

But even if a compelling-interest test did apply to Plaintiffs' religious-exercise claim, their 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 the compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). But even those pre-*Smith*

decisions repeatedly acknowledged that there is no right to religious exemptions from laws, like the order here, that shield the public from illness. For government has a compelling interest in protecting the health and safety of the public in general, and that interest is undeniable when it comes to preventing the spread of deadly communicable diseases. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20; *Am. Life League*, 47 F.3d at 655–56.

"[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*, 197 U.S. at 25 (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 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 (*see Cantwell*, 310 U.S. at 303), the Supreme Court 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 (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 this Court has likewise recognized that the governmental "interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling." *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *see also Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353–54 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases). There can be no doubt that Louisiana has a compelling interest in slowing this "society-threatening epidemic." *Abbott II*, 954 F.3d at 784.

A compelling-interest test, if it applied, would also ask whether the challenged 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.

Governor Edwards's order is far less restrictive than a blanket ban and easily satisfies the narrow-tailoring standard. No vaccine or accepted treatment for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* CHRISTI A. GRIMM, U.S. DEP'T OF HEALTH & HUMAN SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC 3 (Apr. 2020), https://bit.ly/2VTEMIm. Without the capacity to test comprehensively, temporarily restricting the size and density of in-person gatherings is the best way for Louisiana to advance its compelling objective of slowing community spread and saving lives. The order is no broader than necessary to ensure that the targeted activities—physical gatherings that create significant risks of contagion—occur more safely.

It is no rebuttal for Plaintiffs to suggest that Louisiana has less restrictive alternatives in the form of laxer—and thus less effective—regulations. *Cf.* Mot. for Inj. Pending Appeal 18–19. 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). And as the Chief Justice explained in his opinion 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.'" __ S. Ct. __, 2020 WL 2813056, at *1 (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)); *accord Abbott II*, 956 F.3d at 784.

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

For reasons similar to those explained above, the great majority of decisions around the country both before and after the Supreme Court's ruling in *South Bay*—including orders from the First, Third, Fourth, Seventh, Eighth, and Ninth Circuits—have denied injunctive relief in challenges to COVID-19-related orders that restricted religious gatherings. And all those public-health orders limited worship services substantially more than Governor Edwards's order does.

For example, the Seventh Circuit denied a motion for an injunction pending appeal of an order that capped religious gatherings at ten people, because the order's "temporary numerical restrictions on public gatherings

appl[ied] not only to worship services but also to the most comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods." *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020) (per curiam) (Easterbrook, Kanne, & Hamilton, JJ.), *injunction pending appeal denied after challenged order expired*, __ S. Ct. __, No. 19A1046, 2020 WL 2781671 (U.S. May 29, 2020). 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 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." __ F.3d __, No. 20-55533, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020) (quoting *Lukumi*, 508 U.S. at 543).

Many other federal courts have reached similar conclusions. *See, e.g.*, *Calvary Chapel of Bangor v. Mills*, No. 20-1507, Doc. No. 117596871 (1st Cir. June 2, 2020), *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)

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

(ten-person limit); *Bullock v. Carney*, __ F.3d __, No. 20-2096, 2020 WL 2819228 (3d Cir. May 30, 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); *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); *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 docketed*, No. 20-1579 (May 22, 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*, ECF No. 14, No. 20-15977 (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 4, 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); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 1905586, at *1, 30–38 (D.N.M. Apr. 17, 2020) (five-person limit); *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); *see also Hawse v. Page*, No. 20-1960 (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).

Although this Court did grant a partial injunction pending appeal against a Mississippi city's complete ban on in-person religious services in *First Pentecostal Church of Holly Springs v. City of Holly Springs*, that injunction was limited to requiring the city to apply to religious services the rules applicable in that community to "similarly situated businesses and operations" (__ F.3d __, No. 20-60399, 2020 WL 2616687, at *1 (5th Cir. May 22, 2020))—something that Louisiana already does. Moreover, that ruling did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the local measure that was challenged. *Compare id. with id.*, Doc. No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).

In only a few other jurisdictions—principally the Sixth Circuit and courts within it—has any injunctive relief been granted in religion-based challenges to COVID-19 orders; and all those cases, which were decided before the Supreme Court's decision in *South Bay*, considered restrictions far tighter than Louisiana's. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (per curiam order granting motion for injunction pending appeal against Kentucky order prohibiting gatherings of any size); *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (purported restrictions 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 (W.D. Ky. Apr. 18, 2020) (purported ban on drive-in services). Furthermore, contrary to the Chief Justice's analysis in *South Bay*, __ S. Ct. __, 2020 WL 2813056, at *1, 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.

II. THE ORDER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, BUT GRANTING A COMPLETE RELIGIOUS EXEMPTION WOULD.

The Religion Clauses "mandate[ ] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Because the Governor's order treats religious gatherings no worse than analogous nonreligious gatherings, Plaintiffs are wrong in arguing that the order violates the Establishment Clause. Rather, granting the religious exemption that they seek would violate the Clause. For the neutrality requirement of the First Amendment's Religion Clauses forbids the state not just to target religion for worse treatment but also to grant religious exemptions that would detrimentally affect nonbeneficiaries.

a. In *Estate of Thornton*, for example, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect

that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, 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. 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). And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow a minor to distribute religious literature, because of the danger that the exemption would have posed to the child'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.

b. In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), the Court held that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop 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 the applicable legal requirements would otherwise directly interfere with "church autonomy." *Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017).

This case does not implicate that special protection for ecclesiastical authority because it does not present questions regarding "religious organizations['] autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Rather, it presents a far different question: whether there is a constitutional right to put countless people *outside* the church at greater risk of exposure to deadly disease.

c. Granting Plaintiffs a complete exemption from Louisiana's COVID-19 response here would elevate their religious preferences over the health of the entire community. If Plaintiffs were permitted to hold religious gatherings without restrictions, not only would their members face greater danger, but so would everyone with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness.

Louisiana is facing an unprecedented public-health emergency. Though much about the virus remains unknown, what we do know demands a strong response. Limiting the numbers of people allowed to gather at religious facilities and comparable nonreligious venues will reduce contacts between people, slow the spread of the virus, and potentially save lives.

If Louisiana is instead forced to completely exempt religious gatherings from its emergency public-health order, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely as other gatherings to spread COVID-19. And the examples have sadly piled up across the country, demonstrating that the virus remains a grave risk even when houses of worship take safety precautions. For instance, churches in Texas and Georgia that had reopened recently had to close again after church leaders and members contracted the virus at church despite social-distancing measures. Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x. A church service in Canada that complied with social-distancing guidelines led to an outbreak that infected half of those present. 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. And after a church-choir practice in Washington State—at which members attempted to observe hygiene guidance—45 out of 60 attendees fell ill, and two died. Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6. *See also, e.g.*, Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1,

2020, 2:55 PM), https://bit.ly/2XlCpPu; 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.

As these examples demonstrate, continued adherence to public-health orders is critical to protecting the public from COVID-19. A single unwitting carrier at a worship service could cause a ripple effect throughout the entire community: That one carrier might pass the virus to his neighbors in the pews, who might then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members then go to the doctor's office, or to the grocery store for milk, they may potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources.

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that:

(i) this opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts exempted by Rule 32(f), it contains 5,169 words;

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

/s/ *Alex J. Luchenitser*

CERTIFICATE OF SERVICE

I certify that on June 11, 2020, the foregoing opposition was filed using the Court's CM/ECF system. All participants in the case are registered users and will be served electronically via that system.

/s/ *Alex J. Luchenitser*