VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

LARRY HUGHES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. CL 20-415
	)	
RALPH S. NORTHAM,	)	
	)	
Defendant.	)	

MOTION FOR LEAVE TO FILE, AND BRIEF *AMICUS CURIAE* OF CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PLAINTIFF

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae Conservative Legal Defense Fund ("CLDEF") is a nonprofit corporation organized an operating in Fairfax County, Virginia, which is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). CLDEF has filed 179 *amicus* briefs in federal and state courts — including trial courts, courts of appeal, and the U.S. Supreme Court.[1] It has a particular interest in the defense of religious liberties.

CLDEF only learned of the pendency of this challenge to Governor's Executive Order 53 yesterday, April 8, 2020, and began preparing this brief *amicus curiae*. Admittedly on short notice, *amicus* requested consent from both the plaintiff and defendant. Counsel for plaintiff takes no position, and counsel for *amicus curiae* has not heard back from the counsel for the defendant at this time.

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[1] CLDEF's website is www.cldef.org.

Amicus believes that this brief discusses a fundamental flaw in the brief filed by defendant, misconstruing the U.S. Supreme Court's 1990 holding in *Employment Division v. Smith*, and focuses this brief on that issue, and the Virginia roots of the free exercise clause.

Amicus requests that the Court grant leave to file its *amicus* brief, which appears below.

BRIEF AMICUS CURIAE

I. Defendant Misstates the Threshold Question to Be Addressed in Free Exercise Cases.

Although Plaintiff asserts a violation of the Constitution of Virginia, and does not assert a violation of the Free Exercise Clause of the First Amendment of the U.S. Constitution, Defendant's Memorandum in Opposition to Motion for Temporary Injunction relies heavily on *Employment Division* v. *Smith*, 494 U.S. 872 (1990), interpreting the First Amendment, to urge this Court to defeat Plaintiff's claim based on free exercise of religion. *See* Defendant's Response at 10-13.

Defendant urges this Court to disregard plaintiff's claim that the "gatherings restriction 'substantially interferes with [his] exercise of his Christian faith," (Defendants' Response at 10) based on its understanding of *Smith*. Defendant asserts that under *Smith*:

> the **threshold question** is whether the temporary gatherings restrictions is "a valid and neutral [rule] of general applicability." *Smith*, 494 U.S. at 879... If so, even if the temporary gatherings restriction "substantially burdens the free exercise of religion," it survives constitutional scrutiny so long as it "rationally advances a legitimate state interest." [Defendant's Memorandum at 12 (citation omitted) (emphasis added).]

Defendants badly misstates the rule of *Smith.* The threshold question claimed by defendants is most definitely not the threshold question under *Smith* that this Court must address.

Indeed, by misdirecting the Court away from the true threshold question, it invites this Court into error.

A proper understanding of *Smith* requires a return to the text of the First Amendment's Free Exercise Clause, its historical context, and the threshold jurisdictional principle referenced in Smith, which is completely ignored by the Commonwealth.

II. *Employment Division v. Smith* Applied a Textual Analysis of the Free Exercise Clause to Identify the True Threshold Question: Does the Government have Jurisdiction over the Conduct?

The constitutional analysis in *Smith* begins with the principle that the "free exercise of religion means, first and foremost, the right to **believe and profess** whatever religious doctrine one desires." *Smith* at 877 (emphasis added). After listing illustrations of cases following that principle, the Court continued:

> But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: **assembling with others for a worship service**.... [*Id*. (emphasis added).]

The Court then points out that in the *Smith* case, the plaintiffs "seek to carry the meaning of 'prohibiting the free exercise [of religion]' **one large step further**." *Id.* at 878 (emphasis added). In that case, the issue was "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use." *Id*. at 874.

Then the Court stated the lynchpin of its holding:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law **prohibiting conduct that the State is free to regulate**. [*Id.* at 878.]

The Court had just specified what conduct that the State is **not** free to regulate — identifying right after "the **right to believe and profess** whatever religious doctrine one desires" the very issue involved in this case — "**assembling with others for a worship service**. *Id*. at 877.

The Defendant's position in this case is that so long as the law[2] is generally applicable and religiously neutral, and applying "rational basis"[3] review the Governor can lawfully prohibit "assembling with [more than 10] others for a worship service." **But if that were true, then the Governor also could specify what Virginians must "believe and profess,"** if he issued an Executive Order that is generally applicable to everyone, and religiously neutral.

But the key point is that the Governor's Executive Order fails on the true threshold question — he is only free to **prohibit "conduct that the State is free to regulate.**" Assembling for a worship service is **not** in that category, as made clear by the history of religious liberty in America — and particularly in Virginia.

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[2] Of course here, there is not even a "law" – just an Executive Order.

[3] This case requires application of no balancing test such as rational basis, intermediate scrutiny or strict scrutiny, as the Governor's Executive Order restricting religious services is wholly outside the scope of the lawful power of government.

A. "Religion" Defined.

The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise of [religion]." In *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court traced the lineage of this prohibition to the 1776 Virginia Declaration of Rights. Id. at 162-63. Because "'religion' is not defined in the Constitution," but is defined in the Virginia Declaration, the Supreme Court looked to that definition. *See id.* at 162-63. Section 16 of the Virginia Declaration defined religion to be "the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence." *See* Section 16, Constitution of Virginia, reprinted in Sources of Our Liberties 312 (R. Perry & J. Cooper, eds., rev. ed., ABA Found.: 1978).

In the words of the *Reynolds* Court, "religion," as so defined, "was not within the cognizance of civil government." *Id.*, 98 U.S. at 163. The Court further acknowledged that this **jurisdictional principle** was explained in James Madison's Memorial and Remonstrance, a document that Madison penned in June 1785 and circulated among members of the Virginia Assembly in support of Jefferson's Bill for Establishing Religious Freedom. Quoting from Section 16 of the 1776 Declaration, Madison proclaimed:

> Because we hold it for a fundamental and undeniable truth, "that **Religion** or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, **not by force or violence.**" [citation omitted]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds **cannot follow the dictates of other men.** [J. Madison, "Memorial and Remonstrance" to the honorable the General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders'

> Constitution, p. 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987) (emphasis added).]

Four months later, the General Assembly enacted into law Thomas Jefferson's "Act for Establishing Religious Freedom," the preamble of which, the *Reynolds* Court wrote, affirmed this same **jurisdictional principle**. Id., 98 U.S. at 163. The Act's preamble read:

> Whereas Almighty God hath created the mind free; that **all attempts to influence it by temporal punishments or burthens, or by civil incapacitations**, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the **impious presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time.... [Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item # 44) (emphasis added).]

B. Free Exercise of Religion.

The 1776 Virginia Declaration not only defined "religion," but also secured its "free exercise," that is, its exercise free from any and all claims of civil jurisdiction. And the choice could not have been more deliberate. As originally drafted by George Mason, Section 16 of that Virginia Declaration read, as follows:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator and **the manner of discharging it**, can only be by Reason and Conviction, not by force or violence, and therefore that all Men should enjoy the fullest Toleration in the **exercise of religion**, according to the dictates of Conscience, unpunished and unrestrained by the magistrate unless under color of religion any man disturb the Peace, the Happiness, or Safety of Society, or of individuals .... [George Mason & Historic Humans Rights Documents, First Draft May 20-26, 1776) (emphasis added).[4]]

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[4] http://www.gunstonhall.org/georgemason/human_rights/vdr_first_draft.html.

At the state constitutional convention, James Madison objected to the provision "'that all men should enjoy the fullest toleration of the exercise of religion'"[5]:

> Madison wanted to move beyond the tradition of religious toleration introduced by John Locke and the English Toleration Act of 1689.... So the twenty-five year old delegate from Orange County to Virginia's constitutional convention put forward these words: 'All men are equally entitled to the free exercise of religion." [Constitutional Debates on Freedom of Religion at 31.]

"Madison's proposal that a right to 'free exercise of religion' should replace the phrase on religious toleration was approved." *Id*. Thus, Section 16 as adopted by the convention read, in pertinent part, "and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience," removing any and all reference to any and all exceptions for the peace, happiness, or safety of the larger society as determined by any civil magistrate.

Nine years later, in his 1785 Memorial and Remonstrance, Madison painstakingly explained the absolute principle upon which the free exercise of religion rests. The right "is unalienable ... because what is here a right towards men, is a duty towards the Creator"[6]:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that **Religion is wholly exempt from its cognizance**. [*Id.* (emphasis added.)]

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[5] *See* Constitutional Debates on Freedom of Religion, p. 31 (J. Patrick & G. Long, eds., Greenwood Press: 1999).

[6] "Memorial and Remonstrance," The Founders' Constitution at 82.

C. Free Exercise Restricted and Now Revived.

For 170 years after the ratification of the Bill of Rights, Madison's jurisdictional principle went unchallenged.[7] In 1963, however, the U.S. Supreme Court departed from that tradition, reducing the free exercise guarantee as if it were a mere rule of religious toleration, limiting the jurisdictional principle to only those cases involving "religious belief," and subjecting laws impacting on "religious practices" to a balancing test to determine whether the law could be justified as protecting the health, safety and welfare of the civil society.[8] That atextual experiment came to an end in 1990 when the Court refused to limit the free exercise guarantee to just religious belief and profession, stating:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: **assembling with others for a worship service**, participating in the sacramental use of bread and wine, proselytizing, abstaining from certain modes of transportation. [*Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added).[9]]

Having rejected tolerance as the governing principle of the free exercise guarantee, the *Smith* Court rejected the belief/practice dichotomy, returning the Court to the text's jurisdictional principle. While the state had no jurisdiction to regulate "religion," the free exercise guarantee did not "excuse compliance" with an "otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79.

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[7] *See* H. Titus, "The Free Exercise Clause: Past, Present and Future," 6 *Regent L. Rev.* 7, 10-15 (1995).

[8] *Id.* at 15-22.

[9] *See also* Titus, "The Free Exercise Clause" at 22-23.

Whether the state is free to regulate particular conduct is, then, determined by the original definition of "religion" in the free exercise guarantee itself. This is the teaching of the original First Amendment text as illuminated by the express definition of "religion" of its Virginia forerunner. And this, in turn, is the lesson of the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

In *Hosanna-Tabor,* the Court rejected the EEOC's argument that the American Disabilities Act's prohibition of employer retaliation against employees filing a grievance under the Act was immune from a free exercise challenge because it was a "neutral law of general applicability." *See id.* at 706-07. It did so on the ground that the internal governance of a church body, including the hiring and firing of ministers, is outside the jurisdiction of the federal government. Although the Court did not explicitly pose the issue as to whether such employment relations involve duties owed to the Creator, enforceable only "by reason and conviction, not by force or violence," the Court relied upon ecclesiastical history to establish that the free exercise guarantee grew out of a jurisdictional conflict between parishioners and the English monarchy over church self-government. *Id*. at 702-03. "[T]he religion clauses," Chief Justice Roberts wrote, "ensured that the new Federal Government — unlike the English Crown would have no role in filling ecclesiastical offices" — citing in support none other than James Madison who the Chief Justice reminded was "'the leading architect of the religion clauses of the First Amendment.'" *Id.* at 703.

As its chief architect, it was Madison, along with Jefferson, who understood that the First Amendment erected a **jurisdictional barrier** between matters that belonged to **church** government and matters that belonged to **civil government** of the state, the latter having

absolutely no jurisdiction over duties owed to the Creator which, by nature, are enforceable only "by reason and conviction."

As Robert Louis Wilken, William R. Kenan Professor Emeritus of the History of Christianity at the University of Virginia, has recently observed:

> Religious freedom rests on a simple truth: religious faith is an inward disposition of the mind and heart and for that reason **cannot be coerced by external force**. This truth was stated for the first time by Tertullian of Carthage, a Christian writer who lived in North Africa in the early third century. Tertullian said: "It is only just and a privilege inherent in human nature that every person should be able to worship according to his own convictions; the religious practice of one person.... It is not part of religion to coerce religious practice, for it is by choice not coercion that we should be led to religion." [Roger Louis Wilken, Liberty in The Things of God: The Christian Origins of Religious Freedom (Yale University Press: 2019) at 1 (emphasis added).]

It is that threshold jurisdictional limitation on government power that Governor Northam has breached.

III. Governor Northam Has No Authority Whatsoever Over the People's Free Exercise of Religion to Assemble to Worship.

Governor Northam's EO 53, seeks to prevent the assembly of believers in worship of Almight God. Insofar as he seeks to apply that Executive Order to control the actions of the church, he violates the threshold jurisdictional barrier imposed as a barrier to his power by the free exercise of religion. Since Governor Northam has intruded on a a subject matter than belongs to the church, it matters not at all that his EO 53 imposes a rule of general applicability. He has exceeded his jurisdiction, and his action violates the Virginia Constitution.

Respectfully Submitted,
CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2020, I served a true and accurate copy of the foregoing MOTION FOR LEAVE TO FILE, AND BRIEF *AMICUS CURIAE* OF CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PLAINTIFF to counsel for plaintiff and defendant, by email, by fax, and by First-Class Mail, as follows:

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