No. 20-1811

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Elim Romanian Pentecostal Church, *et al.*,

Plaintiffs-Appellants,

v.

Jay Pritzker,
in his official capacity as Governor of Illinois,

Defendant-Appellee.

On Appeal from the Order of the
United States District Court for the Northern District of Illinois
Case No. 1:20-cv-02782, Hon. Robert W. Gettleman

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The counsel listed on this brief represent solely *amicus curiae* Americans United for Separation of Church and State.

All lawyers who are or will represent Americans United in this case are employees of Americans United.

Americans United is a nonprofit organization. It has no parent corporations, and no publicly held corporation owns any portion of it.

Federal Rules of Appellate Procedure 26.1(b) and (c) are inapplicable in this case.

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Interests of the *Amicus Curiae*[*]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United has long fought to uphold the guarantees of the First Amendment's Religion Clauses that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, third parties.

Introduction and Summary of Argument

Illinois, along with most of the world, continues to face a devastating pandemic. The United States has suffered the most COVID-19-related deaths worldwide (*see* Associated Press, *20,000: US Death Toll Overtakes Italy's as Midwest Braces* (Apr. 11, 2020), https://bit.ly/2YcRDXJ), and to date the virus has killed over 4,000 in Illinois (*see Coronavirus Disease 2019*, ILL. DEP'T OF PUB. HEALTH, https://dph.illinois.gov/covid19). Leaders at all levels of government have been asked to act decisively to protect the lives of their constituents. As part of an emergency statewide public-

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[*] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

health effort, Governor Pritzker issued Executive Order 2020-32, which requires residents to limit activities outside their homes, refrain from gathering in groups of more than ten, and cease operations of nonessential businesses. *See* Compl., Ex. H, Dkt. No. 1-8 § 2, ¶¶ 1–3. Religious gatherings of fewer than ten people are defined as "Essential Activities" by the order, and religious entities are encouraged to conduct remote or drive-in services. *Id.* § 2, ¶ 5(f).

Although the order has the effect of temporarily limiting religious gatherings of more than ten people, Plaintiffs' constitutional rights have not been violated. The district court correctly concluded that the order is subject to only minimal judicial scrutiny, and easily withstands it, because it is a temporary executive action taken in response to a national emergency. *See* Opinion and Order, Dkt. No. 33, at 5–6.

But even if traditional constitutional analysis applies during the current public-health emergency, the order is well within constitutional bounds. The Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993), that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. The order complies with

this legal standard. The virus is just as likely to spread at religious events as at nonreligious ones, so the order applies to all large gatherings equally.

And even if a compelling-interest test were to apply here—which it doesn't—the challenged order would be valid because it is narrowly tailored to advance the compelling governmental interest in protecting Illinois residents from a deadly disease. For the same reason, Plaintiffs' claim under the Illinois Religious Freedom Restoration Act, 775 I.L.C.S. 35/10, would fail even if it were not barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

What is more, the Establishment Clause forbids granting Plaintiffs' desired religious exemption. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Holding that religious gatherings must be exempted from the order's prohibition on mass gatherings would do just that: contagious persons at a religious service, who may themselves be asymptomatic, can infect scores of fellow congregants, who may then expose family, friends, and strangers.

For reasons similar to those set forth here, the overwhelming majority of decisions considering religion-based challenges to COVID-19-related

public-health orders—including Fourth and Ninth Circuit orders denying injunctions pending appeal—have rejected them. Plaintiffs' motion for an injunction pending appeal should likewise be denied.

Argument

I. The Challenged Order Does Not Violate The Free Exercise Clause of the First Amendment.

A. Rational-Basis Review Applies to the Challenged Order.

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 the legal guarantees of religious freedom do not provide (and never have provided) an absolute right to engage in conduct consistent with one's religious beliefs. *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). Plaintiffs argue that the Free Exercise Clause entitles them to an exemption from Illinois's emergency public-health measures in the face of a severe pandemic. That claim is wrong as a matter of law: "The right to practice religion freely does not include liberty to expose the community . . . to a communicable disease." *Id*.

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. As Justice Scalia wrote for the Court, "[t]o permit this would be to make

the professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Supreme Court has therefore held that laws that place burdens on religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they apply generally and are neutral toward religion. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879.

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

The challenged public-health measures "apply equally to secular and religious . . . institutions and are thus neutral and generally applicable." *Ill. Bible Coll. Ass'n v. Anderson*, 870 F.3d 631, 643 (7th Cir. 2017). The order in no sense discriminates against religious conduct—in fact it defines religious activities as one of a select group of "essential" activities for which residents may leave their homes, as long as the religious gatherings do not exceed ten people. *See* Compl., Ex. H, Dkt. No. 1-8 § 2, ¶ 5(f). Religion is thus treated equally as or better than comparable secular activity: meetings of political or social groups, for example, are not defined as essential. *See id.*

Nor is the general applicability of the order undermined by its exceptions for essential activities such as obtaining food at a grocery store. "All laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542. The defined categories of essential infrastructure allowed to continue operations draw no distinctions based on religious views or motivations: Hospitals, food banks, and shelters, for example, may remain open (Compl., Ex. H, Dkt. No. 1-8 § 2, ¶¶ 7, 12(c)) regardless of whether they have a religious affiliation. *See Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (exceptions to public-housing policy did not negate general applicability because they were equally available to religious and nonreligious applicants).

Simply put, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)); *see also Ill. Bible Coll.*, 870 F.3d at 643. Plaintiffs' religious beliefs do not afford a constitutional excuse for noncompliance.

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

Even if a compelling-interest test were to apply to Plaintiffs' religious-exercise claims, as it did in Free Exercise Clause cases before the *Smith* decision, Plaintiffs' challenge would still fail. More than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand even compelling-interest scrutiny.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of a compelling-interest standard whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *see also* 42 U.S.C. § 2000bb(b) (purpose of federal Religious Freedom Restoration Act was "to restore the compelling interest test as set

forth in" *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). But even the Court's pre-*Smith* free-exercise decisions routinely denied religious exemptions from laws that protected public health from serious threats, as the challenged public-health measures do here. For government has a compelling interest in protecting the health and safety of the public, and that interest is undeniable when it comes to preventing the spread of an infectious disease that puts lives at risk. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20.

"[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, the Supreme Court more than a century ago upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (citing "the authority of a state to enact quarantine laws and 'health laws of every description'"). The Court straightforwardly rejected the idea that the Constitution barred compulsory measures to protect health, citing the "fundamental principle" that personal liberty is subject to some restraint "in order to secure the . . . health . . . of the state." *Id.* at 26 (quoting *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

Following incorporation of the Free Exercise Clause against the states (*Cantwell v. Connecticut*, 310 U.S. 296 (1940)), the Supreme Court relied on *Jacobson* to reaffirm that state public-health measures burdening religious exercise withstand a compelling-interest test (*see Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that is permissible under compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67). And lower federal courts have routinely recognized that the "state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman v. Mingo City Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011); *accord McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases).

There can be no doubt that Illinois has a compelling interest in stanching the spread of COVID-19. And that interest calls for limiting all gatherings, including religious ones, so as not to undermine governmental efforts to reduce transmission of the virus.

A compelling-interest test, if it applied, would also ask whether the challenged order is narrowly tailored to address this governmental

interest. *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). That, too, is true here. 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, 485 (1988); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (holding that a ban on gender discrimination is narrowly tailored to combating evil of gender discrimination). Accordingly, the U.S. Supreme Court (*see 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 challenged order operates in the same way. No vaccine for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, OEI-06-20-00300, *Hospital Experiences Responding to the COVID-19 Pandemic* (Apr. 2020), https://bit.ly/3fjvLjt, at 3. Without the capacity to test comprehensively for the virus, Illinois cannot safely limit restrictions to those who have actually been able to be tested and have received a positive diagnosis. Temporarily limiting in-person gatherings is the only way for Illinois to achieve its compelling objective of saving lives. And the order is no broader than necessary to ensure that the targeted activities—physical

gatherings that create opportunities for transmission of the virus—are curtailed. At the same time, the order is carefully tailored to restrict religious activities only as necessary to achieve that goal: Places of worship may remain open and people may seek spiritual fulfillment from them, either in groups of fewer than ten or through online or drive-in services. *See* Compl., Ex. H, Dkt. No. 1-8 § 2, ¶ 5(f). Thus, the order would satisfy even the compelling-interest standard, were that standard to govern here.

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 set forth above, numerous decisions around the country—including Fourth and Ninth Circuit orders denying injunctions pending appeal—have rejected challenges like this one to in-person-gathering restrictions and stay-at-home orders. For example, the Eastern District of California held that analogous state and local orders "are permissible exercises of emergency police powers especially given the extraordinary public health emergency facing the State." *See Cross Culture Christian Center v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832-JAM-CKD, 2020 WL 2121111, at *5–7 (E.D. Cal. May 5, 2020). The Central District of California held that because similar "orders apply to both religious and secular gatherings, they do not discriminate, and are

therefore facially neutral." *Gish v. Newsom,* No. 5:20-cv-755, 2020 WL 1979970, at *5–6 (C.D. Cal. Apr. 23, 2020), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020). In a case challenging the same order that is at issue here, the Northern District of Illinois rejected the attempt to equate prohibited religious gatherings, which "seek to promote conversation and fellowship," to exempted essential retail activities, explaining that there "are many examples where religious services have accelerated the pathogen's spread." *Cassell v. Snyders*, __ F. Supp. 3d __, 2020 WL 2112374, at *6–11 (N.D. Ill. May 3, 2020), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020). The Eastern District of Virginia held that a plaintiff church had "not shown that it is being disparately targeted as compared to more similar gatherings [than essential retail stores] such as birthday parties, book clubs, group fitness classes, secular marriage celebrations, and other similar gatherings." *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040-AWA-RJK, 2020 WL 2110416, at *4–8 (E.D. Va. May 1, 2020), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020). And another case from the same District, in addition to holding that a plaintiff was not likely to succeed on the merits, explained that the balance of equities favored the state because "it is no exaggeration to recognize that the stakes for residents . . . are life-or-death." *Tolle v. Northam*, No. 1:20-cv-00363-LMB-

MSN, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *petition for cert. docketed*, No. 20-1419 (U.S. May 12, 2020).

Many other federal and state courts have reached similar conclusions when evaluating challenges like this one. *See, e.g.*, *Calvary Chapel of Bangor v. Mills*, __ F. Supp. 3d __, No. 1:20-cv-156, 2020 WL 2310913, at *6–10 (D. Me. May 9, 2020) (denying TRO), *appeal docketed*, No. 20-1507 (1st Cir. May 11, 2020); *First Pentecostal Church v. City of Holly Springs*, __ F. Supp. 3d __, No. 3:20-cv-119, 2020 WL 1978381, at *1–3 (N.D. Miss. Apr. 24, 2020) (denying TRO); *Legacy Church, Inc. v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327-JB-SCY, 2020 WL 1905586, at *30–38 (D.N.M. Apr. 17, 2020) (denying TRO in 100-page opinion); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *2–3 (E.D. Tenn. Apr. 17, 2020) (denying TRO); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Spell v. Edwards*, No. 3:20-cv-282, ECF No. 46 (M.D. La. May 15, 2020) (denying TRO and preliminary injunction); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020) (denying TRO); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020)

(denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

In only two jurisdictions—the Sixth Circuit and the District of Kansas—have courts deviated from the principles in these cases and issued injunctive relief in religion-based challenges to COVID-19 orders. *See Roberts v. Neace*, __ F.3d __, No. 20-5465, 2020 WL 2316679 (6th Cir. May 9, 2020) (per curiam order on motion for injunction pending appeal); *Maryville Baptist Church v. Beshear*, __ F.3d __, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (same); *Tabernacle Baptist Church v. Beshear*, __ F. Supp. 3d __, No. 3:20-cv-33, 2020 WL 2305307 (E.D. Ky. May 8, 2020); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). But these decisions are inconsistent with the law of this Circuit: They incorrectly held that the compelling-interest test was applicable, on the grounds that the challenged orders contained categorical exemptions for nonreligious activities—such as office work or walking down a store aisle—that are not even analogous to religious services. *Compare, e.g.*, *Neace*, __ F.3d __, 2020 WL 2316679, at *4, *with Ill. Bible Coll.*, 870 F.3d at 640–43 (explaining that only discretionary, individualized exemptions can trigger strict scrutiny under Free Exercise

Clause, and applying rational-basis scrutiny despite presence of categorical exemptions). Moreover, in concluding that restrictions on large religious gatherings were not narrowly tailored to preventing transmission of the virus, these cases ignored the obvious—that barring large gatherings entirely is more likely to reduce transmission of COVID-19 than is allowing large gatherings with attempts at social distancing. *Compare Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (under compelling-interest test, law is narrowly tailored if "proposed alternatives will not be as effective" in achieving government's goal), *with Neace,* __ F.3d __, 2020 WL 2316679, at *4 ("Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that . . . ?").

II. Plaintiffs' IRFRA Claim Is Meritless.

Plaintiffs' arguments fare no better when repackaged under state law. The Eleventh Amendment bars federal courts from enjoining state officials to comply with state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Nelson v. La Crosse Cty. Dist. Atty.*, 301 F.3d 820, 827 n.7 (7th Cir. 2002). But even if this Court were to consider Plaintiffs' Illinois Religious Freedom Restoration Act claim, the challenged order would, for the reasons already explained, withstand the compelling-interest review (*see* Section I.B, *supra*) that would be triggered by that statute (*see* 775 ILCS 35/10(b)(1) (purpose of IRFRA is to "restore the

compelling interest test as set forth in *Wisconsin v. Yoder* . . . and *Sherbert v. Verner*")).

III. The Establishment Clause Forbids Government To Grant The Exemption That Plaintiffs Seek.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. The federal Religion Clauses "mandate[ ] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This neutrality requirement forbids the government not just to target religion for worse treatment (*see* Section I.A, *supra*) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton*, 472 U.S. at 709–10). For when government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. *See, e.g.*, *id*. Exempting Plaintiffs from the challenged order would contravene this settled constitutional rule.

In *Estate of Thornton*, for example, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of

the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries" by making them bear costs "to offset the benefit bestowed on subscribers to religious publications." 498 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent, demonstrating that even under a compelling-interest standard, the First Amendment cannot require religious exemptions that harm others. In *Lee*, the Court rejected an Amish employer's request for an exemption from paying Social Security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince*, the Court denied a request for an

exemption from child-labor laws to allow minors to distribute religious literature because, while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free, in identical circumstances, to make martyrs of their children." 321 U.S. at 170. In reaching that conclusion, the Court in *Prince* cited *Jacobson*, *supra*, and noted that case's rejection of an exemption from vaccination laws. *Id.* at 166 & n.12.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) and must not "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be detrimentally affected, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when the Establishment and Free Exercise Clauses together prohibited government from involving itself in the structuring of religious institutions. In *Hosanna-Tabor Lutheran Evangelical 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 improper religious favoritism, and therefore were permissible under the Establishment Clause, because both Religion Clauses limit governmental intrusion into the internal organizational structure of churches.

This case does not implicate that narrow ecclesiastical-authority doctrine because Plaintiffs' challenge to the state public-health measures does not present any question regarding "religious organizations[']" autonomy in matters of internal governance" (*Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring)). *See Ill. Bible Coll.*, 870 F.3d at 641 (explaining that *Hosanna-Tabor* did not apply because challenged statute did "not require the [plaintiffs] to hire or retain any specific minister"). Rather, this case presents the opposite question: whether there is a constitutional right to put countless people *outside* the plaintiff churches at greater risk of exposure to a deadly virus.

Granting an exemption here would elevate Plaintiffs' religious beliefs over the health of the entire community. For the exemption that Plaintiffs seek would not put only their members in danger. It would also increase

the risk of contagion for everyone with whom Plaintiffs' members come into contact, including, most especially, the elderly, the immunocompromised, and all others at elevated risk of severe illness.

Illinois faces an unprecedented public-health emergency. As the Northern District of Illinois recognized in another case challenging the order at issue here, COVID-19 has already killed more Americans "than the number of people who perished during the 9/11 terrorist attacks, Pearl Harbor, and the Battle of Gettysburg combined." *Cassell*, __ F. Supp. 3d __, 2020 WL 2112374, at *1. Though much about the virus remains unknown, what we do know demands a strong response: "asymptomatic individuals may carry and spread the virus, and there is currently no known vaccine or effective treatment." *Id.* Temporarily limiting the size of permitted gatherings will reduce contacts among people and between people and contaminated surfaces, slow the spread of the virus, and save lives.

If Plaintiffs are instead allowed because of their religious beliefs to ignore the critical public-health order at issue, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely to spread COVID-19 as any other mass gatherings, and the examples are tragically numerous. Officials in Sacramento County, California, for example, traced roughly a third of that County's first several hundred

cases back to church gatherings. 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. Seventy-one cases were tied to one Sacramento church alone. Tony Bizjak, et al., *71 infected with coronavirus at Sacramento church; Congregation tells county 'leave us alone,'* SACRAMENTO BEE (Apr. 2, 2020), https://bit.ly/2yOL4jk. A church service in West Virginia led to a cluster of infections that devastated a small community. Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL, https://bit.ly/2SFVYyX. After a church-choir practice—at which members attempted to observe social-distancing and 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. And in Canada, a church service that complied with social-distancing guidelines nonetheless 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 (updated May 11, 2020), https://bit.ly/3dLUv2l.

The short of it is that a single unwitting carrier in one church could cause a ripple effect throughout an entire community: The infected but

asymptomatic individual might pass the virus to neighbors in the pews, who might then return home and pass it to family members, including people at high risk of severe illness. If any of those people then go to the hospital or the grocery store, they may potentially expose healthcare providers or other essential workers, 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, putting healthcare workers at particular risk because of shortages of personal protective equipment (*see* OEI-06-20-00300 at 3), and increasing the chances that people will die due to a lack of healthcare resources.

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

Conclusion

The motion for an injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 29 because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 4,835 words.

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

/s/ *Alex J. Luchenitser*