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 AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST; INTERFAITH ALLIANCE FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; MUSLIM ADVOCATES; NATIONAL COUNCIL OF CHURCHES; RECONSTRUCTING JUDAISM; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; AND REV. DR. J. HERBERT NELSON, II AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The *amici curiae* are the following organizations:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Illinois Conference of the United Church of Christ.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Muslim Advocates.
- National Council of Churches.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA).

The *amici curiae* are represented by attorneys with the following firms and organizations:

- Americans United for Separation of Church and State, whose counsel (Richard B. Katskee, Alex J. Luchenitser, and Alexander C. Gouzoules) represent all the *amici*.
- Muslim Advocates, whose counsel (Nimra H. Azmi) represents only *amicus* Muslim Advocates.

All the *amici* except Reverend Nelson, who is an individual, are nonprofit organizations. None of the *amici* have any parent corporations. No publicly held corporation owns any portion of any of the *amici*. PCUSA, whose General Assembly Reverend Nelson is the Stated Clerk of, is also a nonprofit organization, which has no parent corporation, and which is not owned by any publicly held corporation.

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

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to worship freely is precious, 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 inadvisable. The religious organizations among *amici* recognize that in-person religious services inherently entail closer and more sustained human connections than the activities allowed by the challenged order, such as shopping for basic necessities. It is safest to hold religious services virtually, because in-person services risk COVID-19 infection of congregations and people with whom their members associate. Applying religion-neutral restrictions against mass gatherings to religious services both protects the public health and respects the Constitution.

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

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Illinois Conference of the United Church of Christ.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Muslim Advocates.
- National Council of Churches.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA).[2]

[2] Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the PCUSA, joins this brief as the senior ecclesiastical officer of the PCUSA. The PCUSA is a national Christian denomination with nearly 1.6 million members in over 9,500 congregations, organized into 170 presbyteries under the jurisdiction of sixteen synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Illinois, along with most of the world, continues to face a historically devastating pandemic. The United States has suffered by far the most COVID-19-related deaths worldwide (*see Covid-19 Dashboard*, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited May 27, 2020), https://bit.ly/2xR2V99), and to date the virus has killed more than 5,000 people in Illinois (*see COVID-19 Case Counts*, COOK CTY. DEP'T OF PUB. HEALTH (last visited May 27, 2020), https://bit.ly/2Xj9JoH). 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-health effort, Governor Pritzker issued Executive Order 2020-32, which required residents to limit activities outside their homes, refrain from gathering in groups of more than ten, and cease operations of nonessential businesses that cannot operate remotely. *See* Compl., Ex. H, Appellants' App'x IIB ("E.O. 2020-32") § 2, ¶¶ 1–3. The Order also expressly defined "the free exercise of religion" as an "essential activit[y]," permitted in-person religious gatherings of ten or fewer people, and encouraged houses of worship to conduct remote or drive-in services for larger groups. *Id.* § 2, ¶ 5(f).

On May 29, 2020, the Order and its restrictions on religious services expired, and Governor Pritzker replaced those restrictions with an entirely

voluntary guidance. *See* Executive Order 2020-38 (May 29, 2020), https://bit.ly/2BfCL1i; *Covid-19 Guidance for Places of Worship and Providers of Religious Services*, STATE OF ILLINOIS DEPARTMENT OF PUBLIC HEALTH (May 28, 2020), https://bit.ly/2XcQrmk. *Amici* therefore believe that this appeal is moot. But if this Court concludes that the appeal is not moot, the Court should uphold the Order.

The Order's temporary restriction of in-person religious gatherings to ten people did not violate Plaintiffs' constitutional rights. The district court correctly concluded that the Order should be subjected to only minimal judicial scrutiny, which it should easily withstand as a temporary executive action taken in response to a national emergency. *See* Opinion and Order, Appellants' App'x I, at 5–6. But even if ordinary constitutional analysis applies during the current public-health emergency, the Order was well within constitutional bounds.

The Supreme Court held 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 complied with this legal standard. All gatherings of more than ten people—whether for secular or religious purposes—were prohibited. Indeed, many secular

gathering spaces, such as movie theaters and social clubs, were closed entirely. And even if a compelling-interest test were to apply—which it doesn't—the Order would be valid because it was narrowly tailored to advance the compelling governmental interest in protecting Illinois residents from a deadly disease.

For reasons similar to those set forth here, the overwhelming majority of decisions considering religion-based challenges to COVID-19-related public-health measures—including orders of the Supreme Court, this Court, and the Fourth, Eighth, and Ninth Circuits denying injunctions pending appeal—have rejected them. If this Court does not conclude that the appeal is moot, the district court's decision should be affirmed.

ARGUMENT

I. The Order did not violate the Free Exercise Clause of the First Amendment.

A. Rational-basis review applies to the 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); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000). Plaintiffs argue that the

Free Exercise Clause entitles them to an exemption from emergency public-health measures instituted to battle 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." *Prince*, 321 U.S. at 166–67.

1. The Order was 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. 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 (1878)). 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. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879; *accord Indianapolis Baptist Temple*, 224 F.3d at 629.

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). In other words, the Free Exercise Clause

prohibits government from imposing a burden "because of (rather than in spite of, or with indifference to) . . . religious beliefs." *Endres v. Indiana State Police*, 349 F.3d 922, 924 (7th Cir. 2003). The Clause thus bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Lukumi*, 508 U.S. at 534. General applicability is the closely related concept (*id.* at 531) that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief" (*id.* at 543). The touchstone for both inquiries is whether government has purposefully discriminated against religious conduct. *See id.* at 533–34, 542–43.

The Order "appl[ied] equally to secular and religious . . . institutions and [was] thus neutral and generally applicable." *Ill. Bible Coll. Ass'n v. Anderson*, 870 F.3d 631, 643 (7th Cir. 2017); *see also Indianapolis Baptist Temple*, 224 F.3d at 629 (holding law to be neutral and of general application because it was "not restricted to . . . religion-related" entities or "enacted for the purpose of burdening religious practices"). The Order in no sense discriminated against or showed animus toward religious conduct: hospitals, food banks, shelters, and other social-service providers, for example, were permitted to remain open and continue operations (E.O. 2020-32 § 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); *see also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–11 (2d Cir. 2012) (law governing labeling of kosher products was generally applicable because it applied to all sellers and protected all customers regardless of religious affiliation).

The Order even defined the free exercise of religion as one of a select group of "essential" activities for which residents could leave their homes, as long as in-person religious gatherings did not exceed ten people. *See* E.O. 2020-32 § 2, ¶ 5(f). Religious gatherings were thus treated the same as or better than equivalent secular activity, as nonreligious gatherings *of any size* were prohibited (*see id.* § 2, ¶¶ 3, 5) at meetings halls, social clubs, movie theaters, and concert halls.

In similar circumstances, in *South Bay United Pentecostal Church v. Newsom*, __ U.S. __, No. 19A1044 (May 29, 2020), the Supreme Court refused to issue an emergency injunction against a California public-health order. Concurring in the denial of application for 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 2. "Similar or

more severe restrictions," emphasized the Chief Justice, "apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.*; *see also River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010) (en banc) (rejecting RLUIPA challenge because ordinance excluding churches from commercial zone also excluded comparable "community centers, meeting halls, and libraries," so "[s]imilar assemblies [we]re being treated the same"); *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 or concert halls).

What is more, under the Order, houses of worship were permitted to conduct drive-in services, remote services, or a series of in-person gatherings of no more than ten people at once. *See* E.O. 2020-32 § 2, ¶ 5(f). The Order was thus neutral and generally applicable.

2. The Order's treatment of essential activities that are not comparable to religious services did not trigger heightened scrutiny.

Plaintiffs assert that the Order discriminated against religion because it allowed people to leave their homes to "obtain necessary services or

supplies" (E.O. 2020-32 § 2, ¶ 5(b)) in essential retail stores (*id.* § 1, ¶ 2) without imposing a ten-person limit on those stores. *See* Appellants' Br. 29. But the Order did not permit groups of more than ten people to congregate in retail stores. *See* E.O. 2020-32 § 2, ¶ 3.

In any event, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable. *See Lukumi*, 508 U.S. at 542; *see also Ill. Bible Coll.*, 870 F.3d at 640–43 (explaining that only discretionary, individualized exemptions can trigger compelling-interest test under Free Exercise Clause, and applying rational-basis review despite presence of categorical exemptions); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009) ("That the . . . regulations recognize some exceptions cannot mean that the [state] has to grant all other requests for exemption to preserve the 'general applicability' of the regulations."). Exemptions for nonreligious activities undermine neutrality and general applicability only if the exempted conduct is "similar enough in all material respects" to nonexempted religious conduct to support a conclusion that the prohibition "was based on [the prohibited conduct's] religious nature." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52–53 (10th Cir. 2013).

Thus, in *South Bay United Pentecostal*, the Supreme Court did not accept the proposition that retail stores are a proper comparator to religious services. The Chief Justice's opinion explained that the order

challenged there "exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." __ U.S. __, No. 19A1044, at 2. As the Chief Justice recognized, unlike religious gatherings, at which members of a faith community join together for an extended period, shopping for necessary services and supplies involves at most only limited, transitory interactions between customers and vendors. The decision not to prohibit less dangerous yet indispensable activities did not negate the Order's neutrality. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 499–51 (2015) (when a prohibited activity "creates a categorically different and more severe risk of undermining" the state's interest, a "failure to ban" less risky activities "does not undercut [its] rationale").

Moreover, the permitted types of shopping furthered Illinois's interest in safeguarding the public by ensuring that people were able to obtain items essential to their health, thus allowing them to shelter at home safely while the healthcare system dealt with the outbreak of the virus. *See Stormans,* 586 F.3d at 1134–35 (exemptions that directly or indirectly further governmental interest at issue do not undermine general applicability). Similarly, other entities that were allowed to operate under the Order—such as manufacturers that operated under public-health

guidelines or nonessential stores that operated by telephone and delivery (E.O. 2020-32 § 1, ¶¶ 3–4)—were indispensable for the distribution of basic necessities or else posed far less risk than in-person religious services.

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 did not afford a constitutional justification for an exemption from the Order.

3. Plaintiffs' "hybrid rights" argument is meritless.

Finally, Plaintiffs' hybrid-rights argument (Appellants' Br. at 31–32) fails to invoke a heighted standard of review. Simply put, "a plaintiff does not allege a hybrid rights claim . . . merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (quotation omitted). Plaintiffs are not entitled to relief under their free-speech and assembly claims. *See* Section II, *infra*. They cannot prevail by "merely recast[ing] the same Free Exercise Clause objection . . . under a variety of other constitutional

clauses" through arguments that "all lack merit." *Ill. Bible Coll.*, 870 F.3d at 641.

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 *Smith*, 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 Order did here. For government has a compelling interest in protecting the public's health and safety, and that interest is undeniable when it

comes to preventing the spread of a deadly, infectious disease. *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 might somehow bar 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 & n.20 (same); *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 (5th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases).

There can be no doubt that Illinois has a compelling interest in stanching the spread of COVID-19, a disease for which there is no established treatment. *E.g.*, *United States v. Salerno*, 481 U.S. 739, 755 (1987) (a "primary concern of every government [is] a concern for the safety and indeed the lives of its citizens"); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 271 (7th Cir. 1978) ("Public safety and welfare . . . are clearly important interests."). And that interest supported limiting all gatherings, including religious ones, so as not to undermine governmental efforts to save lives by reducing transmission of the virus.

A compelling-interest test, if it applied, would also ask whether the Order was narrowly tailored to address the governmental interest at issue. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982). That,

too, was the case 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 complete ban on gender discrimination is narrowly tailored to combating evil of gender discrimination). Thus the 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 Order operated 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 could not safely limit restrictions during a major outbreak to those who were actually able to be tested and were determined to have the virus. Temporarily limiting in-person gatherings was the only way for Illinois to achieve its compelling objectives of limiting the pandemic's spread, relieving pressure on the

healthcare system, protecting the health and safety of its citizens, and decreasing deaths.

And the Order was no broader than necessary to ensure that the targeted activities—physical gatherings that create substantial opportunities for transmission of the virus—were curtailed. At the same time, the Order was carefully tailored to restrict religious activities only as necessary to achieve that goal: Places of worship were permitted to remain open and people could seek spiritual fulfillment from them, either in groups of fewer than ten or through online or drive-in services. *See* E.O. 2020-32 § 2, ¶ 5(f).

To suggest, as Plaintiffs do, that the Order was not narrowly tailored because, in their view, large in-person gatherings could be carried out with some social-distancing measures in place (*e.g.*, Appellants' Br. 34–35) ignores the obvious: Barring large gatherings entirely is more likely to reduce transmission of COVID-19 than is permitting them to proceed with attempts at social distancing. Under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's goal. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004); *accord Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000). That is the case here. For example, 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. Similarly, a church service in Canada 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. And there are many other reports of religious services leading to COVID-19 clusters. *See, e.g.*, 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; Bailey Loosemore & Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020), https://bit.ly/2XkKCnd; 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; 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/2WxQyae.

Moreover, the Chief Justice's opinion in *South Bay United Pentecostal* explained that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." __ U.S. __, No. 19A1044, at 2. The Chief Justice added, "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* (quoting *Jacobson*, 197 U.S. at 38 (alteration in original)). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,'" continued the Chief Justice, "their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974) (alteration in original)). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people," concluded the Chief Justice. *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). Accordingly, this Court should not second-guess Governor Pritzker's decisions 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, even before the Supreme Court's ruling in *South Bay United Pentecostal*, numerous decisions

around the country—including this Court's earlier order in this case (ECF No. 16) and orders of the Fourth, Eighth, and Ninth Circuits—have rejected challenges like this one by religious organizations to in-person-gathering restrictions and stay-at-home orders. For example, in its opinion in *South Bay United Pentecostal v. Newsom*, the Ninth Circuit noted 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). In another case in which the Ninth Circuit denied a motion for an injunction pending appeal, a California district court held that because challenged state and local "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). And in a case in which the Fourth Circuit denied a motion for injunction pending appeal, a Virginia district court held not only that the plaintiff was unlikely to succeed on the merits but also 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-363, 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. 19-1283 (U.S. May 12, 2020).

Many other federal and state courts have reached similar conclusions when evaluating challenges like this one. *See, e.g.*, *Antietam Battlefield KOA v. Hogan*, __ F. Supp. 3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *7–10, 12–14 (D. Md. May 20, 2020), *appeal docketed*, No. 20-1579 (May 22, 2020); *Spell v. Edwards*, __ F. Supp. 3d __, No. 3:20-cv-282, 2020 WL 2509078, at *2–4 (M.D. La. May 15, 2020); *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), *appeal docketed*, No. 20-1507 (1st Cir. May 11, 2020); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111, at *5–7 (E.D. Cal. May 5, 2020), *appeal dismissed*, No. 20-15977, ECF No. 14 (9th Cir. May 29, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *6–11 (N.D. Ill. May 3, 2020), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *4–8 (E.D. Va. May 1, 2020), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327, 2020 WL 1905586, at *30–38 (D.N.M. Apr. 17,

2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *2–3 (E.D. Tenn. Apr. 17, 2020); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020); *see also Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 2020); *Elkhorn Baptist Church v. Brown*, No. S067736 (Ore. May 23, 2020); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-cv-152 (N.H. Super. Ct. Mar. 25, 2020); *cf. Hawse v. Page*, No. 4:20-cv-588, 2020 WL 2322999, at *3 (E.D. Mo. May 11, 2020) (standing-based ruling), *motion for injunction pending appeal denied*, No. 20-1960 (8th Cir. May 19, 2020).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—has any injunctive relief been granted 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*, 957 F.3d 610 (6th Cir. 2020) (same); *Berean Baptist Church v. Cooper*, __ F. Supp. 3d __, No. 4:20-cv-81, 2020 WL 2514313 (E.D.N.C. May 16, 2020); *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 those decisions are inconsistent with both the Chief Justice's subsequent opinion in *South Bay United Pentecostal* and the law of this Circuit: They incorrectly held that the compelling-interest test was applicable on the ground that the challenged orders contained categorical exemptions for nonreligious activities—such as office work or walking down a store aisle—that are not analogous to religious services and pose less danger of spreading the virus. *Compare, e.g.*, *Neace*, __ F.3d __, 2020 WL 2316679, at *4, *with South Bay United Pentecostal*, __ U.S. __, No. 19A1044, at 2 (Roberts, C.J., concurring in denial of application for injunctive relief), *and River of Life*, 611 F.3d at 373. Moreover, in concluding that restrictions on large religious gatherings were not narrowly tailored to preventing transmission of the virus, those cases incorrectly second-guessed the public-health judgments of governmental officials and ignored the fact that social-distancing measures are less effective at preventing transmission than outright bans of large gatherings. *Compare, e.g.*, *Neace,* __ F.3d __, 2020 WL 2316679, at *4, *with South Bay United Pentecostal*, __ U.S. __, No. 19A1044, at 2 (Roberts, C.J.,

concurring in denial of application for injunctive relief), *and Ashcroft*, 542 U.S. at 665. Meanwhile, a Fifth Circuit order granting a partial injunction pending appeal did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the local order that was at issue. *Compare First Pentecostal Church v. City of Holly Springs*, No. 20-60399, ECF No. 515426773, at 2 (5th Cir. May 22, 2020) (per curiam order), *with id.*, ECF No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).

II. Plaintiffs' remaining claims are meritless.

Plaintiffs' arguments fare no better when repackaged under state law, under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, under the Establishment Clause, or as speech or assembly claims. As an initial matter, the Eleventh Amendment bars federal courts from enjoining state officials to comply with state law, unless the state has unequivocally waived its sovereign immunity—which Illinois has not. *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 Order would, for the reasons already explained, withstand the compelling-interest review (*see* Section I.B, *supra*) that may 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*")).

Plaintiffs' RLUIPA arguments fare no better. That statute provides that government must satisfy a compelling-interest test (which the Order here would satisfy in all events) only if it substantially burdens religious exercise through "land use regulation[s]," which the statute defines as a "zoning or landmarking law, or the application of such a law." 42 U.S.C. § 2000cc-5(5). The Order was not a zoning or landmarking law; it regulated whether and under what circumstances people could leave their homes and gather, not the purposes for which land could be used.

Nor did the Order violate the Establishment Clause. The Establishment Clause "mandates 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)). Because the Order treated large religious gatherings like nonreligious ones, it did not run afoul of that principle.

Finally, the Order did not violate Plaintiffs' First Amendment speech or assembly rights. The First Amendment's protections for free expression do not prohibit government from regulating conduct in a way that incidentally burdens expressive activity. *See Rumsfeld v. Forum for*

Academic & Institutional Rights, Inc., 547 U.S. 47, 62 (2006). Thus, it "has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). This principle applies equally to Plaintiffs' assembly claim, as the First Amendment freedoms of speech and assembly are "cognate rights" that are subject to the same protections. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Accordingly, the right to assemble has been subsumed under free-speech doctrine regarding expressive association. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tulane L. Rev. 565, 609–11 (2010).

By temporarily limiting all in-person gatherings of more than ten people, the Order regulated conduct rather than speech: All mass gatherings—social, civic, religious, and otherwise—were subject to the same conduct-based limitation without regard to their purpose or the content of any expression that might be involved. *See* Part I.A, *supra*.

As a regulation of conduct, the Order could, at most, trigger intermediate scrutiny—and only if interpreted to regulate "inherently expressive" conduct. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010); *Rumsfeld*, 547 U.S. at 66; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Gatherings with more than ten people are not, however,

inherently expressive. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (holding that there is no generalized First Amendment right to associate with others).

But even if the Order were construed as regulating inherently expressive conduct, it would nonetheless pass the applicable intermediate-scrutiny test, which requires that governmental action (1) be content-neutral, (2) advance important governmental interests unrelated to the suppression of speech, and (3) not burden "substantially more speech than necessary" to further those interests. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997). All three requirements are satisfied here. The justification for the restriction on the size of gatherings—to fight a deadly virus by reducing person-to-person transmission—had nothing to do with content. The government's interest is beyond important. *See* Section I.B, *supra*. And the Order did not burden substantially more expressive conduct than necessary to advance Illinois's interest. Large, in-person gatherings were restricted precisely because they are most conducive to spreading the virus.

CONCLUSION

If the Court does not conclude that this appeal is moot, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 29 because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,015 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 not less than 14 points.

/s/ *Alex J. Luchenitser*