No. 20-1757

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Stephen Cassell, *et al.*,

Plaintiffs-Appellants,

v.

David Snyders, *et al.*,

Defendants-Appellees.

On Appeal from the Order of the
United States District Court for the Northern District of Illinois
Case No. 3:20-cv-50153, Hon. John Z. Lee

BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; COVENANT NETWORK OF PRESBYTERIANS; ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST; JEWISH SOCIAL POLICY ACTION NETWORK; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; AND RECONSTRUCTIONIST RABBINICAL ASSOCIATION

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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.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Covenant Network of Presbyterians.
- Illinois Conference of the United Church of Christ.
- Jewish Social Policy Action Network.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.

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*.
- ADL (Anti-Defamation League), whose counsel (Steven M. Freeman, David L. Barkey, and Miriam Zeidman) represent only *amicus* ADL.

- Cozen O’Connor (attorney Jeffrey I. Pasek), representing only *amicus* Jewish Social Policy Action Network.

No other firm, organization, or attorney has appeared or is expected to appear for *amici* in this case.

All the *amici* are nonprofit organizations. None of the *amici* have any parent corporations. No publicly held corporation owns any portion of any of the *amici*.

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 and should never be misused to cause harm.

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

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Covenant Network of Presbyterians.
- Illinois Conference of the United Church of Christ.
- Jewish Social Policy Action Network.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.

Introduction and Summary of Argument

We are in the midst of a devastating pandemic. The United States has suffered by far the most COVID-19-related deaths worldwide, and to date the virus has killed more than 8,500 in Illinois. *See Covid-19 Dashboard*, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited Sept. 14, 2020), https://bit.ly/2xR2V99.

As part of Illinois's emergency response to the initial outbreak of the virus, Governor Pritzker issued Executive Order 2020-32 on April 30, 2020. The Order required residents to limit activities outside their homes, refrain from gathering in groups of more than ten, and cease operations of nonessential businesses. *See id.* § 2, ¶¶ 1–3. Religious gatherings of fewer than ten people were defined as essential, and religious entities were encouraged to conduct remote or drive-in services. *Id.* § 2, ¶ 5.

Though the Order was replaced on May 29, 2020, by a new directive that removed all limitations on religious services, this Court determined on June 16, 2020, in *Elim Romanian Pentecostal Church v. Pritzker*, that a challenge to the Order was not moot because it was not "absolutely clear" that the Governor would not reinstate it. 962 F.3d 341, 345 (7th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The Court then upheld the Order, concluding that

"Illinois has not discriminated against religion and so has not violated the First Amendment." *Id.* at 347.

Plaintiffs nevertheless continue to challenge the Order, principally relying on the Illinois Religious Freedom Restoration Act. That claim fails even if there are some defendants in this appeal who are not entitled to Eleventh Amendment immunity (*but see* Appellees' Br. 23–25) and even if a compelling-interest test applies under the Act (*but see id.* at 25–31). For the Order used the least restrictive means appropriate to advance a compelling governmental interest in protecting Illinois residents from a deadly disease.

Plaintiffs also contend that "*Elim Romanian Pentecostal* was wrongly decided, and it should be either overruled or restricted." Appellants' Br. 25. But no basis exists for the Court to deviate from this three-month-old precedent. *Elim Romanian* is squarely consistent with Supreme Court case law and the overwhelming weight of authority from other circuits. 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 trigger heightened scrutiny under the Free Exercise Clause of the First Amendment. The Order passed muster under *Smith* and *Lukumi* because

it limited religious services similarly to or more than comparable nonreligious activities. Considering analogous circumstances in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), the Supreme Court recently rejected an application for an emergency injunction against California restrictions on religious services, with Chief Justice Roberts writing a concurring opinion expressing reasoning similar to that of *Elim Romanian*. The vast majority of other court decisions—including a subsequent one by the Supreme Court and rulings by the First, Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits—have denied relief in religion-based challenges to COVID-19-related public-health measures as well.

The district court's decision should be affirmed.

Argument

I. The Order did not violate the Illinois Religious Freedom Restoration Act.

The Illinois Religious Freedom Restoration Act was adopted to restore as a matter of state law the "compelling interest test, as set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963)." 775 ILCS 35/10; *accord Diggs v. Snyder*, 775 N.E.2d 40, 44–45 (Ill. App. Ct. 2002). That test governed federal Free Exercise Clause cases before the Supreme Court ruled in *Smith*, 494 U.S. at 878–79, that only

rational-basis scrutiny applies to laws that are neutral with respect to religion and generally applicable. Illinois courts have thus looked to pre-*Smith* federal free-exercise cases in interpreting the Act. *See Diggs*, 775 N.E.2d at 44–45; *People v. Latin Kings Street Gang*, No. 2-18-0610, 2019 WL 2150804, at *17 (Ill. App. Ct. May 13, 2019). And, even assuming that not all of the defendants are entitled to Eleventh Amendment immunity and that the Order is subject to review under the Act's compelling-interest test, analysis of pre-*Smith* case law demonstrates that the Order satisfies that test.

A. The Order advanced a compelling governmental interest.

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 Supreme Court's pre-*Smith* decisions repeatedly rejected free-exercise claims for religious exemptions that would have imposed harms on third parties. For example, in *United States v. Lee*, the Court denied an Amish employer's request for an exemption from paying Social Security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their

competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince v. Massachusetts*, the Court denied a request for an exemption from child-labor laws barring distribution of religious literature by minors, 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. 158, 170 (1944).

In keeping with this line of cases, the Supreme Court's pre-*Smith* free-exercise decisions repeatedly acknowledged that there is no right to religious exemptions from laws that, like the Order, shield the public from illness. As stated in *Prince*, 321 U.S. at 166–67, the "right to practice religion freely does not include liberty to expose the community . . . to communicable disease." 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, more than a century ago in *Jacobson v.* Massachusetts, 197 U.S. 11, 25

(1905), the Supreme Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court straightforwardly rejected the idea that the Constitution bars compulsory measures to protect health, emphasizing the "fundamental principle" that personal liberty is subject to restraint "'in order to secure the . . . health . . . of the state.'" *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

The Supreme Court later relied on *Jacobson* to reaffirm that public-health regulations burdening religious exercise satisfy a compelling-interest test. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that meets test); *Yoder*, 406 U.S. at 230 & n.20; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that the "state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman v. Mingo*, 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 thus be no doubt that Illinois has a compelling interest in stanching the spread of COVID-19. And that interest supported limiting all large gatherings in which people congregated for extended periods, including religious ones, so as not to undermine governmental efforts to reduce transmission of the virus.

Plaintiffs contend that Illinois's decision not to ban in the Order activities such as food production and distribution, healthcare for the elderly, and housing for the homeless should be viewed as evidence that the State was not pursuing a compelling interest when it restricted religious services. *See* Appellants' Br. 18–21. But an order that prevented people from getting food, healthcare, and housing would have gravely undermined the state interest in protecting public health that the Order sought to advance. *See Elim Romanian*, 962 F.3d at 347.

In any event, policymakers' assertions of a compelling interest are not defeated by a decision to "focus on their most pressing concerns" without imposing broader restrictions. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). Heightened risks "that persons with COVID-19 may transmit the virus" arise from gatherings—such as religious services—that "put[ ] members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air." *Elim Romanian*, 962 F.3d at 346.

Indeed, sadly, numerous examples of religious gatherings leading to COVID-19 outbreaks have piled up across the country. *See, e.g.*, Bill Bostock, *Nearly 100 people in Ohio got sick after one man infected with the coronavirus attended a church service*, BUSINESS INSIDER (Aug. 6, 2020), https://bit.ly/2Qi2eeF; Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu; Sara Cline, *Church tied to Oregon's largest coronavirus outbreak*, AP (June 16, 2020), https://bit.ly/2YWFlT1; Stephanie Becker, *At least 70 people infected with coronavirus linked to a single church in California, health officials say*, CNN (Apr. 4, 2020), https://cnn.it/2NgYN6l; Lee Roop, *A small Alabama church had a revival and now 40 people have coronavirus*, AL.COM (July 27, 2020), https://bit.ly/2Ekzsav; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (June 4, 2020), https://bit.ly/3hZQnyI; John Raby, *Virus outbreak grows to 28 cases at West Virginia church*, AP (June 15, 2020), https://bit.ly/30WTqBm; Rachel Needham, *Anatomy of an outbreak: New documents reveal a significant number of the county's COVID-19 cases can be traced to Castleton church*, RAPPAHANNOCK NEWS (Sept. 1, 2020), https://bit.ly/33hLAlG; Wyatt Massey, *Church of God denomination facing significant COVID-19 outbreak; leaders won't say how many infected*,

CHATTANOOGA TIMES FREE PRESS (July 7, 2020), https://bit.ly/3bTiWLl; Allison James, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, MORBIDITY & MORTALITY WEEKLY REPORT (May 22, 2020), https://bit.ly/3f6MYM2; Bailey Loosemore & Mandy McLaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, LOUISVILLE COURIER-JOURNAL (Apr. 3, 2020), https://bit.ly/2V1Jjrs; Trudy Balcom, *COVID-19 outbreak on the Navajo Nation linked to church rally*, WHITE MOUNTAIN INDEP. (Mar. 24, 2020), https://bit.ly/2YSR6di; Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL (May 2, 2020), https://bit.ly/2SFVYyX; *see also infra* at p. 14.

As these examples demonstrate, a single unwitting carrier at a large worship service can cause a ripple effect throughout an entire community. That one infected person might pass the virus to his neighbors in the pews, who might then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members then go to the doctor's office or the grocery store, they may potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on

the hospital system, and the greater the chance that people die due to lack of healthcare resources.

B. The Order was appropriately tailored.

The Act's compelling-interest test also asks whether the state used the "least restrictive means of furthering th[e] compelling governmental interest." 775 ILCS 35/15. Even completely banning undesirable activity can be a least restrictive means in appropriate circumstances. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984); *see also Frisby v. Schultz,* 487 U.S. 474, 485 (1988). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *Jacobson*, 197 U.S. at 26–27)) and many other 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 likewise did so. No accepted cure or vaccine for COVID-19 exists yet, and asymptomatic carriers may unwittingly infect people in close proximity. *See, e.g.*, *S. Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief); *Elim Romanian*, 962 F.3d at 346–47. Temporarily restricting the size of in-person gatherings that were likely to facilitate transmission 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 all state residents, and decreasing deaths.

At the same time, the Order was carefully tailored to restrict religious services only as necessary to achieve that goal. It defined religious activities as one of a select group of "essential" activities for which residents had special entitlement to leave their homes (as long as religious gatherings did not exceed ten people). *See* E.O. 2020-32 § 2, ¶ 5. Meetings of political or social groups, by contrast, were not defined as essential. *See id.* And the Order closed entirely movie and live theaters, concert and music halls, country and social clubs, museums, and all "places of public amusement." *See id.* § 2, ¶ 3.

To suggest, as Plaintiffs do, that the Order's means fail review because Illinois might have imposed laxer restrictions on religious services—such as physical-distancing requirements without a numerical cap (*see* Appellants' Br. 21)—ignores the obvious: Imposing a ceiling on the size of gatherings was more likely to reduce transmission of COVID-19 than was permitting the gatherings to proceed under looser rules. Under the compelling-interest test, a law's means are least restrictive if "proposed alternatives will not be as effective" in achieving the government's aim. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

That was the case here. Airborne transmission of COVID-19 can overcome physical-distancing and cleaning measures. *See, e.g.*, Dyani Lewis, *Mounting evidence suggests coronavirus is airborne—but health advice has not caught up*, NATURE (updated July 23, 2020), https://go.nature.com/3k68T8L. Outbreaks of the virus have thus resulted from religious gatherings in spite of physical-distancing and other safety precautions taken by houses of worship. *See, e.g.*, Kate Conger, et al., *Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 10, 2020), https://nyti.ms/30BOhgq; Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x; Alex Acquisto, *This Central Kentucky church reopened on May 10 and became a COVID-19 hot spot*, LEXINGTON HERALD-LEADER (June 6, 2020), https://bit.ly/3dDbQdq; Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6; Chris Epp, *'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience*, CTV NEWS (May 11, 2020), https://bit.ly/3dLUv2l.

Moreover, as the Chief Justice explained in *South Bay*, "[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." 140 S.Ct. at 1613–14 (Roberts, C.J., concurring). "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,' 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." *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). This Court should not second-guess Governor Pritzker's decisions here.

II. *Elim Romanian* was correctly decided.

Plaintiffs also argue that "*Elim Romanian Pentecostal Church* was wrongly decided and should be overruled." *See* Appellants' Br. 12. But this Court "'require[s] a compelling reason to overturn circuit precedent,'" such as a contrary "decision by a higher court or a statutory overruling." *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006) (quoting *McClain v. Retail Food Emps. Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005)), *aff'd*, 553 U.S. 507 (2008). Plaintiffs present no such basis for overruling

the three-month-old *Elim Romanian* decision; instead, they simply disagree with it. *See* Appellants' Br. 25–26. Moreover, under Circuit Rule 40(e), any proposed opinion that would overrule a prior opinion of this Court must be circulated to all active judges of the Court for potential en banc review. On July 27, 2020, this Court denied a petition for rehearing en banc in *Elim Romanian* after not a single judge requested a vote on it. *See* No. 20-1811, ECF No. 82 (7th Cir. July 27, 2020). Further, on September 3, 2020, this Court reaffirmed *Elim Romanian* in *Illinois Republican Party v. Pritzker*, __ F.3d __, No. 20-2175, 2020 WL 5246656, at *8, 10 (7th Cir. Sept. 3, 2020).

In any event, *Elim Romanian* was correctly decided. The opinion is squarely consistent with Supreme Court case law and the overwhelming weight of authority from other circuits.

A. *Elim Romanian* correctly held that the Order was valid under the Free Exercise Clause.

As the Supreme Court recently reaffirmed, the constitutional guarantee of religious freedom "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Smith, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)). Instead, the Supreme Court has held that laws that place burdens on religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they are neutral toward religion and apply generally. *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). The touchstone in both inquiries is whether the state has discriminated against religious conduct. *See Lukumi*, 508 U.S. at 533–34, 542–43; *accord Ill. Bible Coll. Ass'n v. Anderson*, 870 F.3d 631, 643 (7th Cir. 2017).

The Order did not do so. Instead, as noted above, it restricted religious services less than comparable secular activities, defining religious activity as an "essential" activity for which residents could leave their homes, while prohibiting or closing entirely meetings of political and social groups, movie and live theaters, concert and music halls, country and

social clubs, museums, and "places of public amusement." *See* E.O. 2020-32 § 2, ¶¶ 3, 5.

In *South Bay*, 140 S.Ct. 1613, addressing similar circumstances, the Supreme Court refused to issue an emergency injunction against a California public-health order that restricted in-person religious services to the smaller of twenty-five percent of building capacity or one hundred people. Concurring in the denial of injunctive relief, Chief Justice Roberts concluded, "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 1613. "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 Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, U.S. DEP'T OF JUSTICE (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls).

Just as they did in contending that the Order did not serve a compelling interest, Plaintiffs rely on the Order's exceptions for essential activities such as provision of food and medicine to argue that the Order was not

generally applicable. Appellants' Br. 25–26. But Justice Kavanaugh made a similar argument in dissent in *South Bay*, 140 S.Ct. at 1614, and it did not carry the day. For as the Chief Justice's concurring opinion explained, California "exempt[ed] or treat[ed] more leniently [than religious services] 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." *Id.* at 1613. And as the Supreme Court held in *Lukumi*, 508 U.S. at 542, "[a]ll laws are selective to some extent" and need not be universal to be generally applicable.

What is more, the defined categories of essential infrastructure that could continue operating under the Order drew no distinctions based on religious views or motivations: Hospitals, food banks, and shelters, for example, were permitted to remain open (E.O. 2020-32 § 2, ¶¶ 7, 12) regardless of whether they had a religious affiliation. *See Ungar v. N.Y.C. Hous. Auth.*, 363 F.App'x 53, 56 (2d Cir. 2010) (exceptions from public-housing policy did not negate general applicability because they were equally available to religious and nonreligious applicants).

The Order thus was neutral and generally applicable and therefore did not trigger heightened scrutiny under the Free Exercise Clause. *See, e.g.*, *Lukumi*, 508 U.S. at 531. And even if a compelling-interest test were to apply, the Order satisfied it for the reasons set forth in Part I above.

B. *Elim Romanian* aligns with the vast majority of decisions by other courts in similar cases.

For reasons similar to those set forth in *Elim Romanian* and by the Chief Justice in *South Bay*, numerous other decisions—including a subsequent one by the Supreme Court and rulings by the First, Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits—have rejected religion-based challenges to in-person-gathering restrictions and stay-at-home orders.

For example, in *Calvary Chapel Dayton Valley v. Sisolak*, __ S.Ct. __, No. 19A1070, 2020 WL 4251360 (July 24, 2020), the Supreme Court denied an application for an injunction against a Nevada fifty-person limit on religious services, where Nevada imposed similar or greater restrictions on "lectures, museums, movie theaters, specified trade/technical schools, nightclubs and concerts" but allowed "casinos, restaurants, nail salons, massage centers, bars, gyms, bowling alleys and arcades . . . to operate at 50% of official fire code capacity" (*id.*, No. 3:20-cv-303, 2020 WL 4260438, at *3 (D. Nev. June 11, 2020)). Likewise, the Ninth Circuit in its opinion in *South Bay* denied a motion for injunction pending appeal at a time when the challenged state and local orders prohibited *all* in-person gatherings,[2]

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

explaining that "where state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." 959 F.3d 938, 939 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543).

The vast majority of other federal and state courts to consider such cases have reached similar conclusions. *See, e.g.*, *Bullock v. Carney*, 806 F.App'x 157, 157 (3d Cir. 2020), *denying motion for injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-674, 2020 WL 2813316, at *1 (D. Del. May 29, 2020) (thirty-percent-capacity limit on religious services); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, ECF No. 117596871 (1st Cir. June 2, 2020), *denying motion for injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-156, 2020 WL 2310913, at *3 (D. Me. May 9, 2020) (ten-person limit); *Tolle v. Northam*, No. 20-1419, ECF No. 14 (4th Cir. Apr. 28, 2020), *denying motion for injunction pending appeal of* No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020) (ten-person limit), *and petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020); *Gish v. Newsom*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020), *denying motion for injunction pending appeal of* No. 5:20-cv-755, 2020 WL 1979970, at *2, 5–6 (C.D. Cal. Apr. 23, 2020) (no gatherings of any size); *DiMartile v. Cuomo*, __ F.App'x __, No. 20-2683, 2020 WL 5406781 (2d Cir.

Sept. 8, 2020), *staying injunction pending appeal of* __ F.Supp.3d __, No. 1:20-cv-859, 2020 WL 4558711, at *1 (N.D.N.Y. Aug. 7, 2020) (fifty-person limit on weddings); *Hawse v. Page*, No. 20-1960, ECF No. 4914708 (8th Cir. May 19, 2020), *denying motion for injunction pending appeal of* No. 4:20-cv-588, 2020 WL 2322999, at *1, 3 (E.D. Mo. May 11, 2020) (standing-based dismissal of challenge to ten-person limit on religious services); *Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020), *denying as moot motion for injunction pending appeal, dismissing appeal as moot, and vacating* __ F.Supp.3d __, No. 3:20-cv-282, 2020 WL 2509078, at *1, 2–4 (M.D. La. May 15, 2020) (ten-person limit); *Legacy Church v. Kunkel*, __ F.Supp.3d __, No. 1:20-cv-327, 2020 WL 3963764, at *8, 14 (D.N.M. July 13, 2020) (five-person and twenty-five-percent capacity limits), *appeal docketed*, No. 20-2117 (10th Cir. Aug. 12, 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F.Supp.3d 758, 763, 768–71 (E.D. Cal. 2020) (no gatherings of any size), *appeal dismissed*, No. 20-15977, ECF No. 14 (9th Cir. May 29, 2020); *Antietam Battlefield KOA v. Hogan*, __ F.Supp.3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *2 (D. Md. May 20, 2020) (ten-person limit), *appeal dismissed*, No. 20-1579, ECF No. 35 (4th Cir. July 2, 2020); *Lighthouse Fellowship Church v. Northam*, __ F.Supp.3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *3–8 (E.D. Va. May 1, 2020) (ten-person limit), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Harvest*

Rock Church v. Newsom, __ F.Supp.3d __, No. 2:20-cv-6414, 2020 WL 5265564, at *2 (C.D. Cal. Sept. 2, 2020) (no gatherings of any size), *appeal docketed*, No. 20-55907 (9th Cir. Aug. 31, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, __ F.Supp.3d __, No. 2:20-cv-907, 2020 WL 3108716, at *1 (D. Nev. June 11, 2020) (fifty-person limit), *appeal docketed*, No. 20-16274 (9th Cir. June 30, 2020); *Abiding Place Ministries v. Newsom*, __ F.Supp.3d __, No. 3:20-cv-683, 2020 WL 2991467, at *1–2 (S.D. Cal. June 4, 2020) (noting prior denial of TRO against order prohibiting gatherings of any size); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 51–52 & n.16 (Or. 2020) (twenty-five-person limit); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F.Supp.3d __, No. 1:20-cv-687, 2020 WL 3766496, at *10–17 (N.D.N.Y. July 6, 2020) (closure of overnight camps); *Tigges v. Northam*, __ F.Supp.3d __, No. 3:20-cv-410, 2020 WL 4197610, at *8 (E.D. Va. July 21, 2020) (restrictions on weddings).[3]

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[3] *See also High Plains Harvest Church v. Polis*, No. 1:20-cv-1480, 2020 WL 4582720 (D. Colo. Aug. 10, 2020), *appeal docketed*, No. 20-1280 (10th Cir. Aug. 11, 2020); *Whitsitt v. Newsom*, No. 2:20-cv-691, 2020 WL 4818780 (E.D. Cal. Aug. 19, 2020); *Murphy v. Lamont*, No. 3:20-cv-694, 2020 WL 4435167, at *14–15 (D. Conn. Aug. 3, 2020); *Solid Rock Baptist Church v. Murphy*, No. 1:20-cv-6805, 2020 WL 4882604 (D.N.J. Aug. 20, 2020); *County of Los Angeles v. Superior Court*, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020); *Christian Cathedral v. Pan*, No. 3:20-cv-3554, 2020 WL 3078072 (N.D. Cal. June 10, 2020); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020); *MacEwen v.*

In only a few jurisdictions—principally the Sixth Circuit and courts within it—have courts granted injunctive relief in challenges to the application to worship services of COVID-19-related health orders. All but one of those decisions (not counting two that were promptly stayed on appeal[4]) were issued before the Supreme Court's decision in *South Bay*. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020); *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); *First Baptist Church v. Kelly*, __ F.Supp.3d __, No. 6:20-cv-1102,

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Inslee, No. 3:20-cv-5423, 2020 WL 4261323 (W.D. Wash. July 24, 2020); *Harborview Fellowship v. Inslee*, No. 3:20-cv-5518, ECF No. 42 (W.D. Wash. June 18, 2020); *Dwelling Place Network v. Murphy*, No. 1:20-cv-6281, ECF No. 35 (D.N.J. June 15, 2020); *Diaz-Bonilla v. Northam*, No. 1:20-cv-377, ECF No. 25 (E.D. Va. June 5, 2020); *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); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. 281st Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-cv-152 (N.H. Super. Ct. Mar. 25, 2020); *County of Ventura v. Godspeak Calvary Chapel*, No. 56-2020-544086 (Cal. Super. Ct. Ventura Cty. Aug. 7, 2020).

[4] *See DiMartile*, 2020 WL 5406781; *County of Los Angeles*, 2020 WL 4876658.

2020 WL 1910021 (D. Kan. Apr. 18, 2020); *On Fire Christian Ctr. v. Fischer*, __ F.Supp.3d __, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). Contrary to the Chief Justice's analysis in *South Bay*, most of these decisions treated religious services as comparable to grocery shopping and office work, and they second-guessed state officials' judgments on what means were necessary to render religious services safe. *See, e.g.*, *Neace,* 958 F.3d at 414–15. (The exception is *Holly Springs*, which did not set forth its reasoning or even explain whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the city ban that was at issue. *Compare* 959 F.3d at 670 *with id.*, No. 20-60399, ECF No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).) Finally, unlike Illinois's Order, the only policy limiting worship services that has been enjoined after *South Bay* restricted such services substantially more than restaurants, salons, protests, and high-school graduations. *See Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *11–12 (N.D.N.Y. June 26, 2020), *appeals docketed*, Nos. 20-2414, 20-2418 (2d Cir. July 30, 2020).

Conclusion

For the foregoing reasons, 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 5,421 words.

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