No. 21-2523

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELIM ROMANIAN PENTECOSTAL CHURCH, and
LOGOS BAPTIST MINISTRIES,

Plaintiffs–Appellants

v.

JAY R. PRITZKER,
in his official capacity as Governor of the State of Illinois,

Defendant–Appellee

On Appeal from the United States District Court
for the Northern District of Illinois
In Case No. 1:20-cv-02782 before The Honorable Robert W. Gettleman

PLAINTIFFS–APPELLANTS' REPLY BRIEF

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Attorneys for Plaintiffs–Appellants

DISCLOSURE STATEMENTS
STATEMENT OF MATHEW D. STAVER, *COUNSEL OF RECORD*

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

   Elim Romanian Pentecostal Church, and
   Logos Baptist Ministries

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Liberty Counsel; Mauck & Baker, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

   N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

   N/A

DATED this January 10, 2022.

/s/ Mathew D. Staver
Mathew D. Staver, *Counsel of Record for Plaintiffs–Appellants*

DISCLOSURE STATEMENT OF HORATIO G. MIHET

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

   Elim Romanian Pentecostal Church, and
   Logos Baptist Ministries

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Liberty Counsel; Mauck & Baker, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

   N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

   N/A

DATED this January 10, 2022.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Plaintiffs–Appellants

DISCLOSURE STATEMENT OF ROGER K. GANNAM

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

   Elim Romanian Pentecostal Church, and
   Logos Baptist Ministries

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Liberty Counsel; Mauck & Baker, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

   N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

   N/A

DATED this January 10, 2022.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellants

DISCLOSURE STATEMENT OF DANIEL J. SCHMID

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

   Elim Romanian Pentecostal Church, and
   Logos Baptist Ministries

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Liberty Counsel; Mauck & Baker, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

   N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

   N/A

DATED this January 10, 2022.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants

DISCLOSURE STATEMENT OF JOHN W. MAUCK

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

   Elim Romanian Pentecostal Church, and
   Logos Baptist Ministries

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Liberty Counsel; Mauck & Baker, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

   N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

   N/A

DATED this January 10, 2022.

/s/ John W. Mauck
John W. Mauck
Attorney for Plaintiffs–Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

INTRODUCTION

The Governor hangs his entire defense on the contention that because his challenged orders have expired, there is nothing left for this Court to do, and the claims are moot. (Governor Br. 15-27). The distict court agreed. (App. I 004-009.) However, neither the expiration, modification, revocation, nor amendment of the Governor's Orders moots Churches' claims. The Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1289 (2021), and *Roman Catholic Dicoese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), ruled that neither the easing, amending, modifying, nor expiration of challenged COVID-19 restrictions moots a plaintiff's claims if the governor retains the authority to reinstate the discriminatory restrictions at any time.

More fatal for the Governor is the fact that Churches did not merely request declaratory and injunctive relief against the Orders as they existed at the time the Verified Complaint was filed, but also against: (1) "the GATHERING ORDERS **or any other order** to the extent any such order prohibits religious worship services or in-person church services at Plaintiffs' chuches" (App. II 050, V. Compl. 40 (emphasis added)); and (2) "**any future** modification, revision, or amendment of the GATHERING ORDERS or similar legal directive" (App. 051, V. Compl. 41 (emphasis added)). And Churches specifically sought both preliminary and permanent injunctive relief against the Gathering Orders and any future iteration thereof in their prayer for relief. (App. 050, V. Compl. 40.)

ARGUMENT

I. CHURCHES' CLAIMS ARE NOT MOOT, AND THE EXCEPTIONS TO MOOTNESS PLAINLY APPLY TO CHURCHES' CLAIMS.

A. The Governor Ignores the Supreme Court's Unequivocal Holdings That His Challenged Restrictions Do Not Moot a Claim if He Retains the Authority to Reinstate Prior Restrictions.

The Governor's mootness defense rests on his contention that his restrictions have expired and been lifted, and his endless declarations of emergency have temporarily ceased. (Gov. Br. 15–37.) Specifically, the Governor contends the Supreme Court announced no new mootness determinations or rules with respect to COVID-19 restrictions on religious worship. (Gov. Br. 27-28.) This contention, however, ignores the unequivocal statements of the Supreme Court concerning similarly changed, modified, or even expired orders. In *Tandon v. Newsom*, the Court declared that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. 1294, 1297 (2021). "And, so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (quoting *Roman Catholic Dicoese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020)).

The reason for this is simple: "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that

always seem to put restoration of liberty just around the corner." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 713, 716 (2021) (Gorsuch, J., statement). Indeed, "officials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S. Ct. at 1297.

Thus, despite his contention that the expiration of his Orders moots Churches' claims, the Governor misses the point that he retains the authority to reinstate them at any time, and he has clearly stated he may reimpose restrictions in his discretion. Put simply, the Supreme Court has recognized that given the ever-changing nature of COVID-19 restrictions on religious worship services, "there is no reason why [churches] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Roman Catholic Diocese*, 141 S. Ct. at 68–69. And, because the Governor moved the goalposts at every turn, Churches did not have sufficient time to fully litigate their constitutional claims through the court system. The Governor's continual moving of the goalposts, his retention of authority to reimpose the restrictions, and his orders' statement that he may reimpose restrictions in his discretion permits Churches to continue its claims for permanent injunctive relief and declaratory relief.

B. The Governor Fails to Address Precedent Demonstrating That His Orders Were Too Short in Duration to Be Fully Adjudicated.

The Governor's treatment of Churches' "capable of repetition yet evading review" contentions demonstrates his inability to overcome that exception to

mootness. (Gov. Br. 34–35.) The Governor claims that his restrictions were not too short in duration to be fully adjudicated because he regularly issues extensions of his executive orders. (*Id.* at 35.) This is a non sequitur. The capable of repetition, yet evading review standard applies where "(1) the challenged action is in its duration too short to be *fully litigated* prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wisconsion Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (emphasis added) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

1. A matter is not "fully litigated" unless there is time for appellate and Supreme Court review.

Under the Supreme Court's test, a matter is not "fully litigated" unless complete review of the merits can be had by a trial court, appellate court, and the Supreme Court. Indeed, "fully litigated" means that the merits challenge of a government action makes its way "through the state courts (and arrive here) prior to its expiration." *Turner v. Rogers*, 564 U.S. 431, 440 (2011). As the Ninth Circuit has recognized, "[a]n action is 'fully litigated' if it is reviewed by this Court and the Supreme Court." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287 (9th Cir. 2013).

That a matter is not fully litigated unles there is time for appllate and Supreme Court review is universally recognized. *See, e.g.*, *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, (9th Cir. 2012) ("We have recognized that 'evading review'

means that the underlying action is almost certain to run its course before either this court or the Supreme Court can give the case full consideration." (quoting *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999)); *Marshall v. Local Union 20, Int'l Broth. of Teamsters*, 611 F.2d 645, 648 (6th Cir. 1979) (matter is too short in duration to be fully litgated if "unlikely under these circumstances that this court could hear and decide an appeal"); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1165 (4th Cir. 1977) (fully litigated includes appeals of the underlying action); *Praxis Prop., Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 61 (3d Cir. 1991) ("fully litigated" requires enough time for an "appellate court to complete its review"); *id.* at 62 ("90-day automatic stay provision was too short in duration to ever be fully litigated and appealed"); *Video Tutorial Servs., Inc. v. MCI Tele. Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (matter too short in duration if it cannot be "effectively appealed before it expired").

Here, there is no question that the durations of the challenged Orders were always going to be too short to be fully litigated prior to cessation or expiration. Indeed, Executive Order 2020-04 was issued on March 13, 2020 (App. II 019, V. Compl. ¶ 29), which was modified three days later on March 16, 2020 by Executive Order 2020-07. (App. II 019, V. Compl. ¶ 30.) Four days later, on March 20, the Governor further amended his COVID-19 orders with Executive Order 2020-10. (App. II 020, V. Compl. ¶ 34.) The Governor then modified the restrictions again on

April 1 with Executive Order 2020-18 (App. II 021, V. Compl. ¶ 36), and again on April 30 with Executive Order 2020-32 (App. II 021, V. Compl. 38), and yet again five days later, on May 5, with the Restore Illinois Plan. (App. II 022, V. Compl. ¶ 45.) It appears that the life span of the Orders runs from 3 days to 30 days.

Though the Governor takes issue with these calculations, and claims that the reissuance of some orders extended the period "beyond 30 days" (Gov. Br. 35), even that period of time is insufficient to permit a claim to be fully litigated on the merits up to the Supreme Court. As such, Churches' claims are capable of repetition, yet evading review, and the district court's decision was in error.

2. The Governor's lengthiest order was not in place long enough to be fully litigated.

Even assuming the Governor's contention that his longest order was in place over 30 days because of extensions (Gov. Br. 35), that is still insufficient time to fully litigate a matter. The Supreme Court has found that litigation involving challenges that cannot be reviewed in two years are too short in duration to be fully litigated. *See, e.g.*, *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (two years is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (same). It has also found that 12- and 18-month periods are too short to be fully litigated. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short).

3. Government action that is inherently temporary necessarily meets the capable of repetition, yet evading review exception.

The capable of repetition, yet evading review exception "normally arises where the underlying facts are inherently temporary such that they will predictably have changed and foreclosed meaningful relief by the time the case has worked its way through the legal system." *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48, 54 (1st Cir. 2004); *see also Robinson v. City of Chicago*, 868 F.2d 959, 967 (7th Cir. 1989) ("The 'capable of repetition, yet evading review' doctrine applies where a claim is so transitory that a plaintiff may have standing when the litigation begins but loses it—loses his personal stake—as the litigation continues."); *Bell v. Wolfish*, 441 U.S. 520, 526 n.5 (1979) (claims are capable of repetition yet evading review when they are "temporary").

Since the inception of this litigation, the Governor has claimed that his orders restricting the constitutional freedoms of Illinoisans have been "temporary," which squarely implicates this Court's "inherently transitory" standard. In his brief, the Governor continues to state that the restrictions at issue in the instant litigation were "temporary." (Gov. Br. 13 ("[T]he Governor temporarily limited religious gatherings . . . .).) And, with that inherently temporary duration, the Governor's orders changed with great frequency. (*See, e.g.*, Executive Order 2020-04 issued on March 13, 2020 (App. II 019, V. Compl. ¶ 29), modified three days later on March 16, 2020 by Executive Order 2020-07. (App. II 019, V. Compl. ¶ 30); Executive

Order 2020-10 on March 20, 2020. (App. II 020, V. Compl. ¶ 34); Executive Order 2020-18 on April 1, 2020 (App. II 021, V. Compl. ¶ 36), modified again on April 30, 2020 with Executive Order 2020-32 (App. II 021, V. Compl. ¶ 38), and modified yet again five days later on May 5, 2020 with the Restore Illinois Plan. (App. II 022, V. Compl. ¶ 45).) Given that the life span of the Orders runs from 3 days to 30 days, it was always too short to be fully litigated.

4. Churches did not waive the capable of repetition yet evading review argument.

The Governor claims that Churches waived the capable of repetition yet evading review argument by not raising it in the district court. (Gov. Br. 5.) This is incorrect legally and factually. Churches raised the argument concerning the temporary and limited duration of the Governor's Orders as a basis for why Churches' claims are not moot, and thus raised the argument that the questions were capable of repetition yet evading review. (*See* dkt. 70, Response Opposing Motion to Dismiss, at 5–6.) Thus, this issue was raised in the district court.

And, even assuming the Governor was correct, Churches are still not foreclosed from raising the issue on appeal for several reasons. First, "[w]hether a cause of action was properly dismissed for mootness is a question of law." *Breneisen v. Motorola, Inc.*, 656 F.3d 701, 706 (7th Cir. 2011). And, this Court reviews even arguments raised for the first time on appeal when they "entertain arguments that turn on pure issues of law." *Allen v. City of Chicago*, 865 F.3d 936, 944 (7th Cir.

2017). Indeed, where—as here—the Court is reviewing a matter de novo, it has the discretion to address even issues raised for the first time on appeal, particularly those involving questions of law. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) ("We, in contrast, are proceeding on a de novo basis, and we have discretion to address issues for the first time on appeal. . . . We often exercise that discretion to entertain arguments that turn on pure issues of law." (cleaned up)).

C. The Governor Fails to Satisfy His Burden Under the Voluntary Cessation Exception to Mootness.

1. Even the Governor's brief fails to demonstrate it is "absolutely clear" that he will never again reinstate disciminatory restrictions on Churches' religious worship services.

In his brief, the Governor fails to meet the requisite standard. He "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his] policy" of imposing unique and discriminatory numerical limits and restrictions on religious worship services, because his change in policy is neither permanent nor irrevocable. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). The Governor does not make it "absolutely clear" that he will not return to his old ways, but merely says he has not done so. That is not the same test. The fact that the Governor has not done so provides Churches' little relief, and it is irrelevant under *Tandon* because

"officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." 141 S. Ct. at 1297. The retention of authority forecloses the necessary absolute clarity that restrictions cannot be reimposed. Moreover, the issue is **not** whether the Governor has done so again or whether it is unlikely that he will reimpose the "10-person limit on gatherings," but rather whether he will **never** reimpose discriminatory restrictions on religious gatherings. The Governor refuses to cabin his discretionary authority within the parameters set forth by the Supreme Court.

The Governor has "neither asserted nor demonstrated that [he] will never resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998). Rather, the Governor has laid the groundwork for imposing more, not fewer, restrictions going forward. In fact, before this very Court in the previous appeal, the Governor conceded that it is not absolutely clear he will not return to his prior restrictions. The Governor unequivocally refused to state he would never reimpose the challenged restrictions. (App. II 121 ("THE COURT: [I]s the governor willing to make an iron-clad commitment not to rescind the current order? [COUNSEL]: No, Your Honor, we are not."); App. II 132 ("THE COURT: Would you be willing . . . to say that you will not enforce or go back to the original order without coming to this Court to seek permission? [Counsel]: Your Honor, we are not willing to do that.").) The Governor's own contentions preclude

satisfaction of the applicable standard. Thus, not only has the Governor not disavowed reinstatement of his restrictions on religious worship, he has expressly reserved and pursued his desire to do so. This hedging precludes any mootness argument. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where intent to reinstate is present, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . ."), *id.* at *5–6 ("The Court is not fooled."), *rev'd on other grounds*, 965 F.3d 1085 (9th Cir. 2020).

2. The Governor maintainted the constitutionality of his restrictions long after it became clear that they were unconstitutional under unequivolcal Supreme Court precedent.

The Governor attempts to diminish the unquestionable import of *Roman Catholic Diocese* and *Tandon* by suggesting that the time frame was different. (Gov. Br. 26-29.) But, this ignores the salient point of those decisions: that the Governor's continued authority (and, in this case, actual exercise of that authority) to impose discriminatory restrictions on religious worship services irrespective of a 10-person numerical restriction demonstrates that Churches' claims are not moot. As the Supreme Court noted, plaintiffs "otherwise entitled to emergency injunctive relief remain entitled to such relief where applicants '*remain under a constant threat*' that

government officials will use their power to reinstate the challenged restrictions." *Tandon*, 141 S. Ct. at 1297 (emphasis added) (quoting *Roman Catholic Diocese*, 141 S. Ct. at 68).

Despite an unequivocal decision from the Supreme Court on November 25, 2020, *see Roman Catholic Diocese*, 141 S. Ct. 63, the Governor continued to argue that his restrictions on Churches' religious worship services were constitutional. Indeed, he maintained their constitutionality on May 14, 2021 in support of his Motion to Dismiss. (*See* App. II 170, Memorandum in Support of Motion to Dismiss at 14 ("That the Supreme Court has now issued opinions that arguably changed these legal principles does not alter that EO32 was lawful at the time it was enacted.") And it was not just *Roman Catholic Diocese* that should have demonstrated to the Governor the constitutional error of his ways. Including *Roman Catholic Diocese*, the Supreme Court issued no fewer than 10 decisions in 10 months demonstrating that discriminatory restrictions on religious worship plainly violate the First Amendment. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021); *Robinson v. Murphy*, 141 S. Ct. 972 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Agudath Israel of Am. v.*

Cuomo, 141 S. Ct. 889 (2020); *Roman Catholic Diocese*, 141 S. Ct. 63 (2020). The latest of the decisions, *Tandon*, was issued on April 9, 2021. Even **35 days** after that, the Governor continued to argue his restrictions were constitutional. Yet, the Governor now comes to this Court saying Churches' claims are moot because he learned the lesson from the first of those decisions, *Roman Catholic Diocese*, issued November 25, 2020. But all the Governor can muster is that it is "highly unlikely" he will reimpose a discriminatory restriction. The Governor has obviously not learned enough from the numerous Supreme Court decisions that are directly on point regarding discriminatory restricitons on religious gatherings. His contentions are erroneous and should be rejected.

II. CHURCHES' AS-APPLIED CHALLENGES AND CLAIMS FOR A PERMANENT INJUNCTION SURVIVE MOOTNESS.

A. Churches' As-Applied Challenges Are Necessarily Backward Looking at the Governor's Past Unconstitutional Actions.

The Governor contends that Churches' as-applied challenges are moot because there can be no relief obtained from the Governor's past conduct. (Gov. Br. 32-33.) This is incorrect. As the First Circuit correctly held in *McGuire v. Reilly*, an "as-applied challenge, must, logically be aimed at past conduct." 386 F.3d 45, 64 (1st Cir. 2004). And, there need not be any pending enforcement actions against Churches for them to have standing to maintain an as-applied challenge under the First Amendment. *Id.* at 59 (when plaintiffs have alleged "they have been chilled in

the exercise of their [First Amendment] rights . . . we have no doubt that plaintiffs have standing under the First Amendment doctrine for equitable relief."). Indeed, even in the context of an amendment to a challenged restriction, while the amendment or modification may moot a facial challenge, "whether the statute as applied to appellant" was a violation of the First Amendment is still justiciable and "of greater moment" in that context. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *see also Massachusetts v. Oakes*, 491 U.S. 576 (1989) (even where change to statute rendered facial challenge "moot for the future," the matter is not moot where "the issues involved the as-applied challenge of continuing importance"); *id.* (noting that *Bigelow* decided the as-applied challenge despite the previous revision to the statute that rendered the facial challenge otherwise moot).

B. If Preliminary Injunctive Relief Is Still Permissible for Modified Restrictions, Which It Is Under *Tandon*, Then Claims for Permanent Injunctive Relief Must Necessarily Remain Justiciable Where the Governor Retains the Authority to Reinstate Past Restrictions.

As *Tandon* and *Roman Catholic Diocese* make plain, a party who remains under the threat that prior restrictions can be reinstated at any time remains entitled to injunctive relief. *See Tanon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (holding that plaintiffs are still entitled to injunctive relief "where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." (quoting *Roman Catholic Diocese*, 141 S. Ct. at 68)).

And, if that statement is true in the context of a preliminary injunction, then it is necessarily true in the context of a permanent injunction because the standards are the same for both. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success rather than actual succcess." (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)). And, here, there can be no question that the Supreme Court has determined that discriminatory restrictions on religious worship services violate the First Amendment. Indeed, at least 10 times, the Supreme Court either issued an emergency writ of injunction or granted certiorari, vacated the lower court's erroneous denial of injunctive relief, and instructed the court to follow the Court's clear teachings. *See Tandon, etc.*, *supra* pp. 12–13.

Claims for permanent injunction are not moot where—as here—"prior patterns of contradictory behavior left the court with no assurances that the alleged constitutional violations would not recur." *Brown v. Colegio De Abagados de Puerto Rico*, 613 F.3d 44, 48 (1st Cir. 2010). This Court "may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief." *United Air Lines, Inc. v. Air Line Pilots Ass'n Int'l.*, 563 F.3d 257, 275 (7th Cir. 2009). *See also* Wright & Miller, 13A Fed. Prac. & Procedure Juris. 2d §3533.7 (1984) ("It is equally easy to deny mootness if officials who have changed

their practices warn that former practices may be resumed at any time.") This is precisely what is at issue here. Nothing prevents the Governor from reinstating any of his past restrictions on Churches' religious worship services, and the Governor has maintained the authority to do just that. Churches' claims for a permanent injunction are not moot.

CONCLUSION

Because the Governor retains the authority to reimpose his discriminatory restrictions at any time, and because the matters before this Court were too short in duration to be fully litigated before a merits determination, the district court's decision was in error and should be reversed.

Respectfully submitted,

Dated: January 10, 2022

/s/ Daniel J. Schmid
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiffs–Appellants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 3,937 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2022, a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants