No. 20-1811

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

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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 June 5, 2020.

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

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

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DATED this June 5, 2020.

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INTRODUCTION

Plaintiffs–Appellants, Elim Romanian Pentecostal Church ("ERPC") and Logos Baptist Ministries ("Logos") (collectively, "Churches"), file this reply to the Brief of Defendant–Appellee Governor J.B. Pritzker (Doc. 49, the Governor's "Answer Brief"). The Governor fails to overcome Churches' entitlement to preliminary injunctive relief from the Governor's arbitrary and discriminatory Orders imposing unique restrictions on religious worship that are not imposed on myriad other Essential Activities. Nor did the Governor's sudden, and necessarily temporary, change of policy mere hours before giving an account to the Supreme Court moot Churches' claims. This Court should reverse the district court's denial of preliminary injunction relief.

SUPPLEMENTAL STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 22, 2020, Churches filed their initial brief in this appeal (Churches' "Brief") which includes a Statement of the Case (Br. 2–15) rehearsing the facts and procedural history relevant to the appeal at that time, which Churches incorporate

herein by this reference.[1] The next day, Saturday May 23, the Chicago Public Health Commissioner sent a second letter to Pastor Ionescu of Appellant ERPC, **declaring ERPC a "public health nuisance,"** and threatening further enforcement action, up to and including **"Summary Abatement."**[2] (App'x III.A.) On Sunday May 24, Village of Niles police issued two more Disorderly Conduct citations to Logos. (App'x III.B.)

The escalation and acceleration of enforcement action against Churches necessitated Churches' emergency application for writ of injunction to the Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit, on May 27, 2020. (App'x III.C.)

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[1] References to record materials in the Appendices filed by Churches (Appendix I, bound to the Brief at Doc. 24; Appendix II, filed with the Brief at Doc. 25, and Appendix III, bound to Churches' Response in Opposition to Defendant–Appellee's Emergency Motion to Dismiss Appeal as Moot at Doc. 53) are by their Appendix and Exhibit designations (*e.g.*, "App'x I.A"). References to record materials not in an appendix but otherwise filed in this Court are by this Court's Document number (*e.g.*, "Doc. 24"). References to record materials filed in the district court below which are not in an appendix and not otherwise filed in this Court are by district court Document number ("N.D. Ill. Doc. 1").

[2] "Summary abatement would mean **to put down or destroy without process**. This means the inspector can, upon his own judgment, cause the alleged nuisance to stop on his own authority and effect a destruction of property at his discretion." *City of Kankakee v. New York Cent. R. Co.*, 55 N.E.2d 87, 90 (1944) (emphasis added).

Justice Kavanaugh requested a response to the application by 8:00 PM on May 28. (App'x III.C.)

Mere hours before the Governor's response was due, he announced the release of the Illinois Department of Health (IDPH) *COVID-19 Guidance for Places of Worship and Providers of Religious Services* (May 28, 2020) (the "Worship Guidance" or "WG"[3]), signaling the Governor's new decision not to enforce the 10-person limit on religious worship imposed by his Executive Order 2020-32 (App'x II.D, "Order 32") and his Restore Illinois plan (App'x II.C), both of which remained in effect. The Governor, however, also submitted a 47-page response to Justice Kavanaugh, **vigorously defending the legality of the 10-person limit**, even as he apathetically notified the Circuit Justice of the new Worship Guidance. (App'x III.D.)

Justice Kavanaugh referred Churches' application to the full Court, which denied the application on May 29, but provided this guidance:

> The application for injunctive relief presented to Justice Kavanaugh and by him referred to the Court is denied. The Illinois Department of Public Health issued new guidance on May 28. **The denial is without prejudice to**

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[3] Churches' citations to the Worship Guidance herein are to the copy published by the IDPH at *COVID-19 Guidance for Places of Worship and Providers of Religious Services* (May 28, 2020), http://www.dph.illinois.gov/sites/default/files/Church%20Guidance.pdf.

> **Applicants filing a new motion for appropriate relief if circumstances warrant.**

Elim Romanian Church v. Pritzker, No. 19A1046, 2020 WL 2781671, at *1 (May 29, 2020) (emphasis added).

Also on May 29, the Governor issued his new Executive Order 2020-38 ("Order 38") (Mot. Dismiss 2, n.2), which expressly supersedes Order 32, but does not purport to supersede or amend the Restore Illinois plan. Order 38 does not impose a 10-person limit on religious worship, but rather encourages religious organizations to follow the new Worship Guidance and "to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures." (Order 38 § 3.j.a.)

Also on May 29, the Governor filed his Emergency Motion to Dismiss Appeal as Moot in this Court (Doc. 32, "Motion to Dismiss"), and on June 1 Churches filed their Response in Opposition (Doc. 53, Churches' "Response to Motion to Dismiss") on June 1. Also on June 1, the Governor submitted his Answer Brief to this Court (Doc. 49).

ARGUMENT

I. THE APPEAL IS NOT MOOT.

This appeal is not moot, contrary to the assertions of the Governor. (Ans. Br. 15–17.) As shown in Churches' Response to Motion to Dismiss (Doc. 53), which Churches incorporate herein by reference, the Governor's sudden change of policy

does not moot this case because the Governor has not carried the heavy burden of making absolutely clear that he cannot revert back to the arbitrary and discriminatory policies he has vigorously defended to the district court, this Court, and the Supreme Court, and because the nature and timing of the COVID-19 pandemic and the Governor's orders in response satisfy the mootness exception for disputes capable of repetition, yet evading review. Despite the Governor's inherently temporary edict lifting restrictions for now, Churches are not finally and irrevocably released from the 10-person limit imposed by the Governor's Orders, and the Court should hear this appeal on the merits.

II. THE GOVERNOR'S ARGUMENTS FAIL TO OVERCOME CHURCHES' LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CONSTITUTIONAL AND STATUTORY CLAIMS AGAINST THE GOVERNOR'S EXECUTIVE ORDERS.

A. This Court Should Follow the Analytical Line of Cases Holding That Restricting Religious Worship While Exempting Myriad Non-Religious Activities Violates the First Amendment, and Reject the Deferential Line of Cases Relied on by the Governor to Avoid Strict Scrutiny of His Discriminatory Orders.

Churches' Brief cites numerous cases supporting their free exercise claims for injunctive relief against the worship limits in the Governor's Orders that are not imposed on myriad other Essential Activities. (Br. 17–26.) The Governor's Answer Brief cites a line of cases decided the other way. (Ans. Br. 28 n.18.) Although there are some variations of facts, two distinct lines of reasoning emerge from these cases:

the **analytical** line, which examines the real and practical similarities and differences in contagion danger as between worship services and the non-religious conduct exempted from restrictions, and the **deferential** line, which accepts the superficial categorizations of allowed and prohibited activities with only shallow examination of their relative dangers. This Court should follow the analytical line and hold that, as a real and practical matter, the Governor's 10-person worship limit arbitrarily and discriminatorily restricts worship services in violation of Churches' free exercise rights.

The **analytical** approach is exemplified in the Sixth Circuit's decision in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), and *Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313 (E.D.N.C. May 16, 2020), both discussed in Churches' Brief (Br. 17–23). *See also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *First Pentecostal Church v. City of Holly Springs, Miss.*, No. 20-60399 (5th Cir. May 22, 2019); *South Bay United Pentecostal Church v. Newsom*, No. 20-55533, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020) (Collins, J., dissenting). (*Cf.* Br. 23–26.)

In *Roberts*, for example, the court rejected the Kentucky Governor's suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport," 958 F.3d at 416, and explained,

> the reason a group of people go to one place has nothing to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.

Id. The *Berean Baptist* court likewise observed,

> Eleven men and women can stand side by side working indoors Monday through Friday at a hospital, at a plant, or at a package distribution center and be trusted to follow social distancing and hygiene guidance, but those same eleven men and women cannot be trusted to do the same when they worship inside together on Saturday or Sunday. "The distinction defies explanation . . . ."

2020 WL 2514313 at *8 (quoting *Roberts*, 958 F.3d at 414).

The **deferential** line is typified by *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970 (C.D. Ca. Apr. 23, 2020), cited in the Governor's Answer Brief.[4] (Ans. Br. 18, 22, 30.) The *Gish* court's analysis of California's stay-at-home orders prohibiting travel for in-person worship began with the proposition that, under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), "during an emergency, traditional constitutional scrutiny does not apply." 2020 WL 1979970, at *5. Under this

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[4] The district court below heavily relied on *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020), which itself heavily relied on *Gish*. *See Cassell*, 2020 WL 2112374, at *6, 9–10. (TRO/PI Order 5–8; Br. 36–41.) Thus, both *Cassell* and the TRO/PI Order are part of the deferential line of cases typified by *Gish*.

deferential, alternative standard to "traditional constitutional scrutiny" gleaned from *Jacobson*, the *Gish* court was satisfied that plaintiffs "remain free to practice their religion in whatever way they see fit so long as they remain within the confines of their own homes." *Id.*

The *Gish* court also concluded that the California orders survived "traditional constitutional scrutiny," under the lowest-level rational basis review, because the orders were neutral and generally applicable under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). 2020 WL 1979970, at *5–6. Continuing its deferential approach, the *Gish* court disregarded plaintiffs' argument that the orders were "underinclusive of secular activities that may also contribute to the spread of COVID-19 because they allow grocery stores, fast food restaurants, and marijuana dispensaries to remain open" because, the court reasoned,

> An in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. Instead, it is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience. Those activities are prohibited under the Orders.

Id. at *6. Thus, the court concluded, "[b]ecause the Orders treat in-person religious gatherings the same as they treat secular in-person communal activities, they are generally applicable," and "easily survive rational basis." *Id.*

The deferential line of reasoning typified in *Gish* is not only shallow, but incorrect as a matter of constitutional law. First, the *Gish* court's supposition that "during an emergency, traditional constitutional scrutiny does not apply," 2020 WL 1979970, at *5, cannot be true for the reasons stated in Churches' Brief. (Br. 36–39.) Namely, the "traditional" scrutiny applicable to Churches' free exercise claims would not be developed by the Supreme Court until decades after *Jacobson* was decided, so *Jacobson* could not possibly stand for the proposition that an as-yet-undeveloped standard does not apply "during an emergency." *See Roberts*, 958 F.3d 414–15 ("While the law may take periodic naps during a pandemic, we will not let it sleep through one."); *On Fire Christian Ctr., Inc. v. Fisher*, No. 3:20-CV-264-JRW, 2020 WL 1820249, *8 (W.D. Ky. Apr. 11, 2020) ("[E]ven under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose."); *cf. Berean Baptist*, 2020 WL 2514313, at *1 ("There is no pandemic exception . . . ."). (Br. 36–38.)

Second, the superficial *Gish* analysis reaches the wrong conclusion under *Lukumi*. 2020 WL 1979970, at *6. Contra *Gish*, executive orders imposing restrictions on worship that are not imposed on other similar conduct, which is no safer as a practical matter, are not neutral laws of general applicability subject only to rational basis review. The *Gish* court relied on superficial characterizations of what religious worship may look like **under ordinary circumstances**—"attending

school or a concert—activities where people sit together in an enclosed space to share a communal experience." *Id.* But the worshippers in *Gish* wanted to worship **under CDC social distancing guidelines**, not under ordinary circumstances. *Id.* at *3. Under distancing, worshippers are neither "together" nor "communal" in any ordinary sense, and are no different as a practical matter from people engaging in exempted essential activities where they "enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete." *Id.* The *Gish* court did not explain, nor could it, how properly distanced worship inside a building, where people primarily sit and stand still for 1–2 hours, once a week on Sunday, necessarily results in more contact between persons than distanced essential shopping—or working full workdays and workweeks where essential shopping occurs—which necessarily involves constant movement among surfaces and air potentially touched or breathed by hundreds (or thousands) of others on a given day. But logic dictates that worshippers who "enter a [church] quickly, do not engage with others except [from a recommended distance], and leave once the [service] is complete" are safer from contagion than shoppers moving, **or workers working full days**, throughout a normal Walmart for a similar period of time.

The contrast between the robust, analytical line of reasoning and shallow, deferential line of reasoning on this issue was recently illuminated by a 5-4 Supreme Court decision denying an extraordinary writ of injunction to a church challenging

the next iteration of California's COVID-19 restrictions after *Gish*, which imposed a 100-person or 25% occupancy limit, whichever is lower, on houses of worship but not on "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056, at *2 (U.S. May 29, 2020) [hereinafter *South Bay*] (Kavanaugh, J., dissenting). The Court did not issue an opinion, noting only that Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the injunction. *Id.* at *1. But the decision was accompanied by the concurring opinion of Chief Justice Roberts, in which *no other justice joined*, and the dissenting opinion of Justice Kavanaugh, in which Justices Thomas and Gorsuch joined. *Id.* at *1–3.

Chief Justice Roberts' concurrence focused primarily on the extremely high bar an applicant must reach to obtain emergency, interlocutory injunctive relief from the Supreme Court, noting "[t]his power is used where 'the legal rights at issue are indisputably clear' and, even then, 'sparingly and only in the most critical and exigent circumstances.'" *Id.* at *1. But the Chief Justice also performed a cursory constitutional analysis of the challenged restriction, akin to the superficial, deferential analysis typified by *Gish*. Applying the neutral and generally applicable analysis of *Lukumi*, the Chief Justice concluded the occupancy limit restrictions "appear consistent" with the Free Exercise Clause because "[s]imilar or more severe

restrictions 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.* (emphasis added). And, the Chief Justice reasoned, "the [restriction] 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." *Id.* In so doing, however, the Chief Justice committed the same error of superficial analysis as the *Gish* court, assuming worship services under the current pandemic circumstances necessarily involve "large groups of people . . . in close proximity for extended periods of time," *id.*, and therefore must be differentiated from exempt activities in which people do not. *Id.* As demonstrated in the *Gish* discussion, *supra*, this assumption is false, and the apples-to-oranges comparison is irrelevant.[5]

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[5] To be sure, neither the Court's decision denying the extraordinary writ of injunction, nor Chief Justice Roberts' lone concurrence, are binding. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting) ("Denials of certiorari **never** have precedential value, and the **denial of a stay can have no precedential value either** . . . ." (emphasis added) (citations omitted)); *South Bay*, 2020 WL 2813056, at *1 (Roberts, C.J., concurring) (noting writ of injunction pending appeal "demands a significantly higher justification than a request for a stay"); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014) (advising grant of writ of injunction pending appeal "should not be construed as an expression of the Court's views on the merits"); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 312 (3d Cir. 2013) ("[F]ederal courts should not give 'much precedential weight' to a concurring opinion.").

In his dissent, joined by two other Justices, Justice Kavanaugh engaged in a much more robust analysis of the constitutionality of the California restrictions. Contra the Chief Justice's assumption, Justice Kavanaugh noted that the plaintiff church "is willing to abide by . . . the rules regarding social distancing and hygiene." *Id.* at *2. Thus, he explained, "[t]he basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." *Id.* at *2. Applying strict scrutiny, and relying heavily on the Sixth Circuit's *Roberts* decision, Justice Kavanaugh recognized California's "compelling interest in combating the spread of COVID-19 and protecting the health of its citizens," *id.*, but also that "'restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.'" *Id.* Thus, he explained, "[w]hat California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap," *id.*, and concluded, "California has not shown such a justification." *Id.* Ultimately, Justice Kavanaugh concluded that "California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment." *Id.* at *3.

Importantly, neither Chief Justice Roberts nor Justice Kavanaugh cited *Jacobson* as providing an alternative First Amendment analysis. The Chief Justice cited *Jacobson*, but only *after* his First Amendment analysis, and then only for the general proposition that safety and health are the purview of state officials under the Constitution. *Id.* at *1. Justice Kavanaugh did not cite *Jacobson* at all, though he did observe, *after* his First Amendment analysis, that "[t]he State . . . has substantial room to draw lines, especially in an emergency." *Id.* at *3. "But," he also explained, "the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion." *Id.*

Here, Churches want to worship free of the Governor's harsh limit—not as they normally would, but subject to the same guidelines applicable to other Essential Activities. Indeed, Churches are willing to exceed those guidelines, self-imposing even more severe distancing and sanitization. (Br. 9–12.) Under these circumstances, the Constitution does not allow the Governor to discriminate against worship services by imposing a unique 10-person limit.

B. The Comparisons Used by the Governor in an Attempt to Avoid Strict Scrutiny Are Fraught With False and Unreasonable Assumptions That Contradict the Record.

Relying on the erroneous deferential line of cases, the comparisons used by the Governor to obscure the arbitrary and discriminatory application of his Orders are fraught with false and unreasonable assumptions that contradict the record. (Ans.

Br. 30–31.) First, like in *Gish*, the Governor makes pre-pandemic, business-as-usual assumptions about worship—that all "religious services are not brief, and they involve communal, verbal interactions among large numbers of people," and participants "'remain in close proximity for extended periods.'" (Ans. Br. 30 (quoting *South Bay*, 2020 WL 2813056, at *1 (Roberts, C.J., concurring)).) But the record evidence of Churches' actual approach to worship, including ERPC's unrefuted accounts of actual services, demonstrates the services are less than 2 hours, and do not involve "communal, verbal interactions among large numbers of people" or participants' "remain[ing] in close proximity for extended periods," because all participants are sitting or standing still, in a building limited to a fraction of its capacity, maintaining distance from each other—they are not mingling and speaking to each other in groups of any size, for any time at all, let alone in large groups for extended times.[6] (Br. 9–12.)

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[6] It would be a mistake to conclude that Churches' willingness to abide by distancing guidelines means that remote, online streaming services become an adequate substitute:

> Who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25.

The Governor has provided no evidence to support his illogical assumptions that visits to laundromats and Walmarts are materially shorter, or that patrons of such venues are speechless, or that patrons "do not engage directly with" employees or managers or other patrons prior to checking out. (Ans. Br. 30.) Indeed, the Governor has certainly not banned speech or direct engagement in any of the other activities he has deemed "Essential." And the Governor has said nothing about the **full workdays** and **workweeks** spent by "large numbers" of employees in myriad Essential businesses, like Walmart, necessarily involving "verbal interactions" within varying proximities "for extended periods." (Br. 29–31.) Nor has the Governor said anything about the practical reality that all of Churches' worshippers enter a sanitized building, and occupy an individually distanced and sanitized space within the building, every time they worship (Br. 9–12); whereas, patrons of Essential stores enter buildings and move about throughout their interior spaces, coming into contact with numerous surfaces touched—and air breathed—by potentially hundreds or thousands of others since the last sanitization.

And the Governor has utterly failed to show any difference between church congregants and grocery or liquor shoppers, or patrons of any Essential Activity, in

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> [T]hat's exactly what the federal courts are not to judge—
> how individuals comply with their own faith as they see it.

Roberts, 958 F.3d at 416–17.Churches have established that assembling in-person for worship is essential to their exercise of religion. (App'x II.A at 21 ¶ 85.)

terms of how they "'enter a building quickly . . . and leave once the task is complete'" (Ans. Br. 30)—it strains credulity to differentiate churches from other buildings on this point. Indeed, Churches enforced one-way foot traffic to minimize contact entering and leaving. (Br. 9–10.) To be sure, at any Essential Activity venue other than a house of worship, patrons are free to enter slowly, join others inside with no numerical limit,[7] linger with no time limit, speak directly and closely with any number of employees and other patrons they desire, and touch as many items as they desire, including items touched by unknown numbers of others with no sanitization in between. Ultimately, the Governor cannot reasonably impute voluntary COVID-19 conscientiousness and virtuousness to patrons and operators of other Essential Activities while assuming the worst about worshippers, as if they necessarily revert to pre-pandemic, business-as-usual practices once through the church doors:

> **Come to think of it, aren't the two groups of people often the *same people***—going to work on one day and going to worship on another? How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? **The distinction defies explanation, or at least the Governor has not provided one.**

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[7] Except, perhaps, a 50% customer capacity limit for retailers, but even then, only "to the greatest extent possible." (Br. 7.)

Roberts, 958 F.3d at 414 (bold emphasis added).

The Court should reject the Governor's false and unfair comparisons, and instead credit the record evidence showing Churches are engaging in responsible, sanitized, and distanced worship which cannot be shown to be different in danger from myriad other Essential Activities exempted from the arbitrary 10-person limit. Thus, the Governor's 10-person limit "fall[s] well below the minimum standard necessary to protect First Amendment rights" because it "**fail[s] to prohibit nonreligious conduct that endangers [the Governor's] interests in a similar or greater degree**" than the prohibited religious conduct. *Lukumi*, 508 U.S. at 543 (emphasis added). (Br. 28–31.)

C. The Governor's Anecdotal Accounts of Church Gatherings Do Not Advance His Burden to Justify His Worship Restrictions.

As shown in Churches' Brief (Br. 33–36), it is the Governor's burden to prove the constitutionality of his 10-person restriction on worship services under strict scrutiny. *Cf. South Bay*, 2020 WL 2813056, at *2 (Kavanaugh, J., dissenting) ("What California needs is a compelling justification . . . ."). The Governor's factually deficient, anecdotal accounts of disparate church gatherings do not satisfy the constitutional standard. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (alleged harm cannot be

"mere speculation or conjecture"); *see also Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307, (E.D. Ky. May 8, 2020) ("There is ample scientific evidence that COVID-19 is exceptionally contagious. But **evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking**." (emphasis added)).

Taking the accounts in turn, neither the anonymous and unverifiable Jackson County nor the California examples (Ans. Br. 67, nn. 20–22) provide any facts about hygiene or distancing measures (if any) taken by the subject churches. The German example cites to a report of other reports, apparently relying on one anecdotal account that government distancing requirements were followed. (Ans. Br. 23, n.23.) But no information about the church building capacity and occupancy or other precautions is provided. Least helpful, however, are the accounts cited in support of the Governor's blanket statement that "outbreaks of the virus have been traced back to religious services around the world." (Resp. 23–24, n.24.)

The referenced church choir practice near Seattle is inapposite. (Ans. Br. 24 n.24.) The choir met on **March 17**—ancient history on the COVID-19 timeline—for 2 1/2 hours of singing practice, which included "members sitting close to one another, sharing snacks, and stacking chairs at the end of practice." Lea Hamner, MPH, et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69(19) MMWR 606, 606 (May

15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf. Indeed, [m]embers had an **intense and prolonged exposure, singing while sitting 6–10 inches from one another**." *Id.* at 609 (emphasis added). Moreover, one attendee "**was known to be symptomatic**." *Id.* at 606 (emphasis added). At the time of the practice, "[t]here were no closures of schools, restaurants, churches, bowling alleys, banks, libraries, theaters, or any other businesses," and "[t]he advice from the State of Washington was to limit gatherings to 250 people." Skagit Valley Chorale, *Statement re: COVID-19*, skagitvalleychorale.org (Mar. 23, 2019), https://9b3c1cdb-8ac7-42d9-bccf-4c2d13847f41.filesusr.com/ugd/3e7440_635a114fead240e1a02bc2c872a852de.pdf. Thus, the choir practice was nothing like the services desired and conducted by Churches. (Br. 9–12.) And, with respect to singing, the CDC concluded only that "[t]he act of singing, itself, **might** have contributed to transmission." Hamner, *supra*, at 606 (emphasis added).

The South Korean example is even less apposite. (Br. 24 n.24.) A "cluster" of COVID-19 infections originated with a congregant of a Daegu, South Korea church around **February 18**, 2020, when there were **only 39 known cases in the country**. Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, *How a South Korean church helped fuel the spread of the coronarvirus*, The Washington Post (Mar. 25, 2020), https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/. The South Korean government did not roll out testing and closures until

after the church cluster emerged. *Id.* Thus, the circumstances were nothing like the present reality for Churches.

Nor is the Governor's burden advanced by the similarly inapposite accounts offered in the brief of *Amici Curiae* Illinois Health and Hospital Association, et al. (Doc. 47-2, the "Meds Brief"). The supposed evidence for the proposition that "allowing gatherings larger than ten for religious purposes puts the public at a great risk" (Meds Br. 15) is, like the Governor's, inapposite. In its leading example from Arkansas, the Meds Brief completely obscures the fact that the subject church events took place on **March 6–8**, which was 8 days prior to the CDC's even issuing social distancing guidelines, and included two people who were **symptomatic** and likely responsible for the subsequent spread. *See* Allison James, DVM, PhD, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69(20) MMWR 632, 632–33 (May 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf. A repeat of such events is highly unlikely where congregations like Churches are practicing distancing and excluding symptomatic persons from in-person worship (Br. 9–12.) The Glenview, Illinois example is likewise inapposite. (Meds Br. 15.) That service took place on **March 15**, "days before the governor's stay-at-home order." Anna Kim, *Glenview church hit by COVID-19 is now streaming service online, as pastor remembers usher who died of disease*, Chicago Tribune (March 31, 2020), https://

www.chicagotribune.com/suburbs/glenview/ct-gla-life-church-coronavirus-virtual-service-tl-0402-20200331-s4twslv2ynhk3padh7sjrxy3wi-story.html. The Meds Brief offers no evidence that the Glenview service involved any distancing or sanitization measures or was in any other way like the services Churches want to conduct and have conducted.[8]

If such anecdotal reports were sufficient to justify imposing a 10-person limitation on Churches, then all Essential Activities should be subject to the same limitation, for anecdotal reports of Walmart and Essential 'big box' store infections abound. *See, e.g.*, NBC News Channel, *Two Illinois Walmart employees die days apart from COVID-19*, WOAI News 4 San Antonio (Apr. 4, 2020), https://news4sanantonio.com/news/nation-world/two-illinois-walmart-employees-die-days-apart-from-covid-19; Pamela Johnson, *Loveland Walmart Distribution Center has COVID-19 outbreak*, Loveland Reporter-Herald (May 20, 2020, 7:52 PM), https://www.reporterherald.com/2020/05/20/loveland-walmart-distribution-center-has-covid-19-outbreak/; Sonia Gutierrez, Zack Newman, *King Soopers, Walmart, City Market and Mi Pueblo Market are among the grocery stores with COVID-19 outbreaks*, KUSA-TV 9 News (May 16, 2020, 12:30 PM), https://

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[8] The one person connected to the Glenview service who died had "tested positive for COVID-19," but also had "'inoperable stage four pancreatic cancer.'" Kim, *supra*.

www.9news.com/article/news/health/coronavirus/costco-walmart-among-grocery-store-covid-19-outbreaks/73-bde0be4d-e1e3-41f1-a56d-8cf2356d6dde; Jeremy C. Fox, *Worcester Walmart shuttered by coronavirus outbreak*, Boston Globe (Apr. 30, 2020, 12:01 AM), https://www.bostonglobe.com/2020/04/30/nation/worcester-walmart-shuttered-by-coronavirus-outbreak/; Tony Keith, Lindsey Grewe, Aurora Walmart reopens following deadly COVID-19 outbreak linked to store, KKTV 11 News (Apr. 27, 2020, 10:30 AM), https://www.kktv.com/content/news/3-COVID-19-deaths-connected-to-a-Colorado-Walmart-store-closes-temporarily-in-Aurora-569911821.html.

In addition to the inapposite anecdotes, both the Governor and the Meds Brief improperly attempt to put untested evidence into the record through judicial notice. The Governor's request is implied from his Answer Brief's cherry-picked quotation of purported expert testimony from an entirely different case. (Ans. Br. 31.) In this context, Federal Rule of Evidence 201 may only be invoked for "medical facts not subject to reasonable dispute." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982). "[J]udicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." *Id.* The Med Brief's attempt is more overt, where it asks the Court to take judicial notice of a purported expert declaration filed in another case. (Meds Br. 8–9, n.8.) The cases cited in support merely stand for the unremarkable proposition that this Court can

take notice of the declaration's filing (Meds Br. 8 n.8), but they do not support this Court's taking notice of the content. *See Hardy, supra.* In any event, the entire Meds Brief argument built on the declaration opposes enjoining enforcement of the Governor's Orders altogether. (Meds Br. 8–12.) But the Meds Brief utterly fails to tell the Court what marginal difference, if any, will result from allowing worship services of more than 10 if the same distancing and hygiene measures required of other Essential Activities are followed. This is what Churches are asking for, and the Meds Brief's dire warnings about an entirely different proposition are inapposite.

D. The Governor Cannot Invoke Eleventh Amendment Immunity Over IRFRA's Clear Language and Context Consenting to Federal Jurisdiction.

The Governor's Answer Brief (Ans. Br. 46–48) fails to overcome the waiver of Eleventh Amendment immunity effected by IRFRA for state officials sued for declaratory or injunctive relief in federal court because both the "express language [and] overwhelming implications from the text . . . leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). (Br. 43–48.) In addition to IRFRA's text, Churches demonstrated in their Brief that a series of district court cases from Florida illustrate the correct understanding that, despite the waiver of sovereign immunity for declaratory and injunctive relief, state RFRAs like IRFRA do not waive Eleventh Amendment immunity for damages claims against the state in federal court. (Br. 47–48.)

In his Answer Brief, the Governor cites two other federal district court cases from Florida for the proposition that state RFRAs do not waive Eleventh Amendment immunity for state officials sued in federal court for only declaratory or injunctive relief. (Ans. Br. 48 n.45.) But the Governor's attempt falls far short. The first case, *Perry v. Reddish*, No. 3:09-CV-403, 2011 WL 13186523 (M.D. Fla. Jan. 14, 2011), plainly addresses only immunity from **damages** claims: "The Eleventh Amendment protects states from suit in federal court **for damages** incurred in violation of a state statute." 2011 WL 13186523, at *7 (emphasis added). Thus, *Perry* accords with the cases cited by Churches in their Brief. The second case cited by the Governor, *Gray v. Kohl*, No. 07-10024-CIV, 2007 WL 3520119 (S.D. Fla. Nov. 14, 2007), did involve a claim for prospective injunctive relief. 2007 WL 3520119, at *5. In granting a motion to dismiss the Florida RFRA claim on Eleventh Amendment grounds, however, the court's analysis is too short to be helpful: "Plaintiff does not respond to this argument nor demonstrate that the State has consented to suit under the FRFRA in federal court. Therefore, dismissal of the FRFRA claim against the State Attorney is appropriate." *Id.* at *6. Thus, the *Gray* court had no Eleventh Amendment counterargument to consider, and summarily concluded Florida RFRA does not waive immunity in federal court without engaging its text or context. The *Gray* decision is no more helpful than the Northern District of Illinois cases discussed in Churches' Brief, *Goodman v. Carter*, No. 2000 C 948,

2001 WL 755137 (N.D. Ill. July 2, 2001), and *Cassell*, where Churches demonstrated that the district court made no attempt to engage the text or context of IRFRA to determine the waiver issue. (Br. 46–47.)

Nor have Churches forfeited their Eleventh Amendment counterarguments as asserted by the Governor. (Ans. Br. 47.) Churches filed their Verified Complaint on May 7 (N.D. Ill. Doc. 1), and their TRO/PI Motion and TRO/PI Memo in support on May 8 (N.D. Ill. Docs. 4, 5), prompting a highly expedited briefing schedule from the district court (N.D. Ill. Doc. 13), which required the Governor's response on May 9 and Churches reply on May 10—just 3 days after commencement of the action. On this highly compressed schedule, and given the number and complexity of the issues involved, Churches neither had the time nor space to fit everything—even having exceeded the page limits in both its legal memoranda. (N.D. Ill. Docs. 13, 28 (granting leave to file excess pages).) Nevertheless, Churches pleaded their IRFRA claims and argued them in their TRO/PI Motion, and after the Governor asserted Eleventh Amendment immunity in response, Churches noted their opposition to the defense in their reply and sought to preserve the issue, though they were out of time and space to fully address it. (N.D. Ill. Doc. 27 at 19 n.2.) The district court, however, did not address Churches' IRFRA claims or the Governor's immunity defense—at all—in the TRO/PI Order.

Under these circumstances, penalizing Churches with the sanction of forfeiture of their Eleventh Amendment counterarguments would be inconsistent with this Court's precedent:

> Forfeiture is a sanction, and sanctions should be related to harm done or threatened. In the rare case in which failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note, we have the power and the right to permit it to be raised for the first time to us. This is a suitable case in which to exercise our power of lenity. The new ground is fully argued in the brief of the appellant[s], so that [the Governor] had—and [he] took—a full opportunity to respond. The ground rests entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review, which is plenary on matters of law. . . . The issue having been fully briefed and argued, there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now.

Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 749–50 (7th Cir. 1993) (citations omitted). The Governor does not claim Churches failed to make their IRFRA arguments at all to the district court, only that they failed to sufficiently raise their counterarguments to the Governor's Eleventh Amendment defense. Thus, Churches have an even greater entitlement to this Court's exercising its "power of lenity." *Id.*

at 749. This Court should accept Churches' disposal of the Governor's Eleventh Amendment defense and hold the Governor's Orders violate IRFRA.[9] (Br. 42–48.)

E. The Governor's Orders Violate the Establishment Clause Under the *Lemon* Test.

Contrary to the Governor's arguments (Ans. Br. 39–41), the Governor's Orders violate the Establishment Clause under each of the familiar three prongs of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). First, there can be no secular purpose in designating religious worship an Essential Activity on the one hand, but then subjecting it to a unique limitation as compared to all the other, non-religious Essential Activities. As the Governor's recent and sudden (and necessarily temporary) change of policy towards worship restrictions shows, the Governor has a low view of in-person worship, for even as the new Worship Guidelines remove numerical restrictions on in-person worship, they include the overt suggestion that in-person worship services disregard "respect for human life and health, which prioritizes protecting our neighbors and the vulnerable." (WG 1.) This kind of gratuitous and unempirical disdain for Churches' responsibly practiced and sincerely held beliefs on the critical importance of in-person worship reveals that any neutrality towards religious worship initially reflected in the Orders was,

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[9] Similar considerations apply to Churches' RLUIPA claims which were pleaded below (App'x II.A 36–38) and fully briefed to this Court (Br. 54–57), and to which the Governor has had a full opportunity to respond (Ans. Br. 49–50).

constitutionally, a sham from the start. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). Such hostility also smacks of the "clear and impermissible hostility toward . . . sincere religious beliefs" rightfully censured by the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

Second, the Orders, particularly the 10-person restriction, clearly inhibit religion for all persons, including Churches and their congregants, who value in-person worship as a matter of sincerely held belief. Third and finally, the Orders foster excessive government entanglement with religion by prescribing the Governor's preferences for how Churches should worship (*e.g.*, online and drive-up services) and reserving to police and health officials throughout the state the authority to conduct headcounts and sanction violators, which authority does not apply to other, non-religious Essential Activities not subject to numerical limits. Thus, the Governor's Orders violate Churches' Establishment Clause rights under *Lemon*. To be sure, regardless of whether the Orders' hostility and micromanagement specifically violate the Establishment Clause or the Free Exercise Clause, they violate the First Amendment and should be enjoined.

III. THE GOVERNOR'S ARGUMENTS DO NOT SHIFT THE BALANCE OF THE REMAINING PRELIMINARY INJUNCTION FACTORS TO HIS FAVOR.

As shown in Churches Brief (Br. 58–60), the preliminary injunction balancing "task is simplified here because . . . . [t]he loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). The Governor's arguments (Ans. Br. 50–52) cannot change this.

Moreover, as shown in Churches' Response to Motion to Dismiss (Doc. 53), the Governor's sudden policy change does not remove Churches' harm. The police citations issued to Churches under the Orders have not been withdrawn, and the Chicago Public Health Commissioner has not withdrawn her "public health nuisance" designation of Appellant ERPC. (*Supra* p. 2; Br. 13–14; App'x II.H–*I*, III.A–B.) Absent injunctive relief these official sanctions will continue to hang over Churches. (Resp. Mot. Dismiss 10–15.) Furthermore, even in the Governor's closing to his Answer Brief, the threat of the Governor's reinstating worship restrictions looms large, "[i]f the situation were to worsen, or another disaster unfolded in Illinois in the future." (Ans. Br. 52.) Thus, Churches are continuing to be irreparably harmed by the Governor's Orders, and they are entitled to injunctive relief.

CONCLUSION

For all of the foregoing reasons, and the reasons in Churches' initial Brief, the district court's TRO/PI Order should be reversed, and the case remanded to the district court with instructions to enter a preliminary injunction.

Respectfully submitted:

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DATED this June 5, 2020.

/s/ Roger K. Gannam
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CERTIFICATE OF SERVICE

I hereby certify that 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:

DATED this June 5, 2020.

/s/ Roger K. Gannam
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