UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

ELIM ROMANIAN PENTECOSTAL CHURCH, and LOGOS BAPTIST MINISTRIES,	)	
Plaintiffs,	)	Case No. 1:20-cv-02782
v.	)	
JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Pursuant to this Court's May 20th Order (dkt. 69), Plaintiffs, Elim Romanian Pentecostal Church and Logos Baptist Ministries ("Plaintiffs"), by and through the undersigned counsel, hereby submit their Response in Opposition to the Governor's Motion to Dismiss (dkt. 67) and Memorandum in Law in Support of his Motion to Dismiss (dkt. 68, "MTD").

INTRODUCTION

As the Supreme Court has made clear, "**even in a pandemic, the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*Catholic Diocese*) (emphasis added). Yet this absolute principle of First Amendment law was not merely stated in isolation but has been reiterated by the Supreme Court at least **10 times**. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. 63; *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289(2021); *Harvest Rock Church, Inc. v. Newsom,* 141 S. Ct. 889 (2020); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *High Plains Harvest Church v. Polis*,

141 S. Ct. 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020). In each of those instances, the Court either granted an emergency writ of injunction or granted certiorari, vacated the lower court's erroneous decision, and remanded with instructions to follow the Court's clear guidance.

And, in nearly every instance – as here – the restriction being challenged has been modified, revised, revoked, or changed during the pendency of the litigants' claims. Nevertheless, in each instance, the Supreme Court still held that the plaintiffs' challenges were justiciable and ripe for injunctive relief despite those changed circumstances. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. 68-69 (holding that injunctive relief was still appropriate despite the fact the Governor changed the restrictions during the pendency of the motion); *Augudath Israel*, 141 S. Ct. 8899 (same); *Tandon*, 141 S Ct. at 1297 (same); *South Bay*, 141 S. Ct. at 720 (Gorsuch, J., concurring); *Gateway City*, 141 S. Ct. 1460 (same). And, **in each of these instances, the Supreme Court issued injunctive relief against the unconstitutional restrictions**. The same should be true here.

"As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, **if it ever could**" *South Bay*, 141 S. Ct. at 720 (Gorsuch, J.) (emphasis added). The fact that the Governor rescinded his unconstitutional edicts on the eve of being called to account before the Supreme Court does not remove the threat posed by his **still ongoing** emergency declaration or his continued authority to impose new restrictions at any moment. The retention of that authority is fatal to the Governor's claims of mootness here, and his Motion must be denied.

Moreover, the Governor ignores the fact that Plaintiffs have challenged the entire scheme under which the Governor commenced his unconstitutional tyranny in the first place. (*See, e.g.*, dkt. 1, Verified Complaint, at 13, ¶50 (challenging Executive Order 2020-04, Executive Order 2020-07, Executive Order 2020-10, Executive Order 2020-18, Executive Order 2020-32,

Executive Order 2020-33, the relevant disaster declaration, and the authority under which the Governor issued them all as the "Gathering Orders" and requested **permanent** injunctive relief against the entire regime under which the Governor purported to issue his orders); *id.* at 40-41 (requesting permanent injunctive relief against the entire scheme of the Governor's Gathering Orders and the authority under which they were issued); *id.* at 41-43 (requesting declaration that the Gathering Orders and the authority under which they were issued are unconstitutional).) Thus, while the Governor contends that Plaintiffs' claims are moot because the only question at issue is Executive Order 2020-32 (*see* MTD at 4-5), that contention ignores the allegations of Plaintiffs' Verified Complaint and attempts to evade the broader challenge to the underlying authority at issue in the instant litigation. (*See* dkt. 1, V. Compl. at 40-43.)

LEGAL ARGUMENT

I. DECISIONS OF THE SUPREME COURT, THE SEVENTH CIRCUIT, AND EVERY OTHER CIRCUIT, THE LAW OF THE CASE, AND A RECENT DISTRICT COURT DECISION DEMONSTRATE THAT PLAINTIFFS' CLAIMS ARE NOT MOOT.

A. The Supreme Court's Decisions In *Tandon*, *South Bay*, And *Catholic Diocese* Confirm That Plaintiffs' Claims Are Not Moot Because The Governor Retains The Power To Reinstate His Unconstitutional Orders At Any Time.

Astoundingly, the Governor ignores a host of Supreme Court precedent explaining why his mootness contentions are fundamentally without merit. But, examination of the relevant Supreme Court decisions concerning virtually identical COVID orders as those at issue here demonstrates that the Governor cannot escape this binding precedent. In *Tandon*, the Supreme Court unequivocally stated held that "**even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case."** *Tandon*, 141 S. Ct. at 1297 (emphasis added). The reasons 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*, 141 S. Ct. at 716 (Gorsuch, J., statement), and Plaintiffs should hardly be thought to bear the burden of constitutional injury where "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 (emphasis added). Indeed, **it is the Governor's retention of authority that negates mootness** – despite suspending his unconstitutional regime on the eve of being held to account by the Supreme Court. And, litigants entitled to injunctive relief from unconstitutional restrictions "**remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions**." *Id.* (emphasis added).

The Supreme Court's decision in *Catholic Diocese* makes this abundantly clear. In addition to constitutionally invalidating the Governor's discriminatory restrictions, *Catholic Diocese* also compels the conclusion that the issues raised in this lawsuit are not moot, regardless of the fact that the Governor has changed some of his COVID restrictions. Here, much like in *Catholic Diocese*, the Governor contends that his change in the numerical restrictions on religious gatherings moots the instant litigation. (MTD at 5-11) There, the dissenting Justices requested that the Court stay its hand because the Governor of New York had changed his restrictions. 141 S. Ct. at 68 ("The dissenting opinions argue that we should withhold relief because the relevant circumstances have changed [because] the Governor reclassified the areas in question."). Additionally, the dissenting Justices argued – much like the Governor here – that plaintiffs could simply "renew their requests if this recent reclassification is reversed." *Id.*

But, fatally for the Governor's mootness assertion, the majority unequivocally rejected that proposition. Indeed, the majority held that "**[t]here is no justification for that proposed course of action**," **and that "[i]t is clear the matter is not moot**." *Id.* (emphasis added). The reason for

this was simple: "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified." *Id.* Much like here, *Catholic Diocese* noted that "[t]he Governor regularly changes the classification of particular areas without prior notice," which the Court noted would harm the applicants "before judicial relief can be obtained." *Id.* Put simply, the Court held 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**." *Id.* at 68-69 (emphasis added).

> Justice Gorsuch explained the reason the issue was not moot despite the reclassification.
>
> > Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. **So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.**
> >
> > **To my mind, this reply only advances the case for intervention**. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. **So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.**

Id. at 71-72 (Gorsuch, J., concurring) (emphasis added).

As is equally true here, "[i]t is easy enough to say it would be a small thing to require the parties to refile their applications later." *Id.* at 72. "But none of us are rabbis wondering whether

future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. **Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services.**" *Id.* (emphasis added). It was for that reason Justice Gorsuch thought a finding of mootness would impose the precise harm from which the Churches were seeking relief. Justice Kavanaugh elaborated even further, succinctly stating that "**[t]here is no good reason to delay issuance of the injunctions**" **despite the changed restrictions**." *Id.* at 74 (Kavanaugh, J., concurring) (emphasis added). Moreover, even the dissenting Justices did not believe the matter was moot merely because the challenged restrictions had changed. *Id.* at 72 (Gorsuch, J., concurring) ("**Even our dissenting colleagues do not suggest this case is moot or otherwise outside our power to decide**. . . . **On anyone's account, then, it seems inevitable this dispute will require the Court's attention**." (emphasis added)).

Here, from the beginning of the Governor's unconstitutional regime, he has retained the sole authority to impose whatever restrictions he deems fit for his Restore Illinois Plan – including restricting the constitutionally protected free exercise of Plaintiffs' religious worship. (*See* dkt. 1-10, V. Compl. Ex. J, at 4 ("Until COVID-19 is defeated . . . **health metrics may also tell us to return to a prior phase**" (emphasis added)); *id.* at 7, 8, 9 (noting that the Governor retains the authority to reinstate prior restrictions at any time if certain health metrics are met).) And, the Restore Illinois plan is still the operative framework to this day. (*See* Executive Order 2021-03 (Jan. 19, 2021), https://www2.illinois.gov/Documents/ExecOrders/2021/ExecutiveOrder-2021-03.pdf (last visited May 27, 2021).) And, under the currently operative framework of the Restore Illinois plan, the Governor unquestionably retains the authority to reinstate his restrictions at any time. **Indeed, the Governor even admits that he maintains authority to return Illinois to any prior restrictions at any time**. (*Id.* (noting that the Governor retains authority and has laid out

specific steps to "**[m]ove to more restrictive mitigation measures**" if certain circumstances are present (cited in MTD at n.4) (emphasis added).) Under *Tandon*, *South Bay*, and *Catholic Diocese* the Governor's retention of authority to reinstate unconstitutional restrictions negates mootness.

The Governor's only retort to the avalanche of the Supreme Court's precedent is to claim that the denial of certiorari in this matter proves the Supreme Court believes this case is moot. (MTD at 10-11.) Balderdash. "The variety of considerations that underlie denials of the writ counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 389 U.S. 288, 296 (1989) (cleaned up). Thus, the notion that the Supreme Court's denial of certiorari was tantamount to finding the case moot because the Governor had argued mootness to the Court is nonsensical. As Mark Twain once opined, "saying so don't make it so." Mark Twain, *The Adventure of Tom Sawyer* 4 (1876).

B. The Seventh Circuit Confirms That Plaintiffs' Claims Are Not Moot.

The Seventh Circuit's decision in the instant matter also demonstrates that the Governor's mootness contentions are without merit. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020). There, seeing the proverbial writing on the wall the Governor completely revoked all restrictions on religious gatherings just hours before having to justify those restrictions at the Supreme Court, and claimed that his benevolent act mooted all claims for relief. 962 F.3d at 344 ("Illinois contends that Executive Order 2020-38 makes this suit moot, because it gives the churches all of the relief they wanted from a judge."). But, as is still true to this day, "Plaintiffs observe, however, that the Governor could restore the approach of Executive Order 2020-32 as easily as he replaced it—**and that the Restore Illinois plan (May 5, 2020) reserves the option of doing just this if conditions deteriorate**." *Id.* (emphasis added). The Seventh Circuit noted that because the Restore Illinois Plan and the executive order scheme permitted the Governor to

reinstate previous restrictions, the action was not moot. *Id.* at 345 ("The list of criteria for moving back to Phase 2 (that is, replacing the current rules with older ones) shows that it is not absolutely clear that the terms of Executive Order 2020-32 will never be restored."). "**It follows that the dispute is not moot and that we must address the merits of plaintiff's challenge to Executive Order 2020-32 even though it is no longer in effect**." *Id.* (emphasis added).

Contrary to the Governor's contentions (MTD at 4-5), the passage of time does nothing to this conclusion. As noted *supra*, the Governor's Restore Illinois plan is still the operative framework, still provides the Governor with the option to reinstate his prior restrictions at any time, and still provide the Governor with express authority to reinstate his prior restrictions at any time. And, the Restore Illinois plan still provides that progress through the staged approach or "moving back to the previous phase is based on the following factors:" "[s]ustained rise in positivity [of COVID-19 test results]," "[s]ustained increase in hospital admissions for COVID-19 like illness," "[r]eduction in hospital capacity threatening surge capabilities," and "[s]ignificant outbreak in the region that threatens the health of the region." *Compare* 962 F.3d at 345, *with* (E.O. 2021-03, https://www2.illinois.gov/Documents/ExecOrders/2021/ExecutiveOrder-2021-03.pdf. The precise factors the Seventh Circuit found dispositive of the Governor's previous mootness contentions are equally applicable now, and the decision binds this Court

C. The Seventh Circuit's Decision In This Case Constitutes The Law Of The Case And Precludes A Finding Of Mootness In The Instant Matter.

Not only does the Seventh Circuit's previous analysis in this case still apply with equal force, its analysis is more fatal for the Governor's contentions because the Seventh Circuit's previous decisions constitute the law of the case in this matter and thus bind this Court concerning the mootness considerations. "It is well established that under the doctrine, 'matters decided on appeal become the law of the case to be followed in all subsequent proceedings in the trial court

and, on second appeal, in the appellate court, unless there is plain error of law in the original decision.'"' *Jarrard v. CDI Telecom., Inc.*, 408 F.3d 905, 912 (7th Cir. 2005) (quoting *Evans v. City of Chicago*, 873 F.3d 1007, 1014 (7th Cir. 1989)). Indeed, "[a]ccording to the law of the case doctrine, after 'an appellate court either expressly or by necessary implication decides an issue, the decision is binding upon **all subsequent proceedings in the same case**.'" *Surprise v. Saul*, 968 F.3d 658, 663 (7th Cir. 2020) (quoting *Dobbs v. DePuy Othopaedics, Inc.*, 885 F.3d 455, 458 (7th Cir. 2019)) (emphasis added). The law of the case doctrine is simple: "a rule of practice, based on sound policy that, when an issue is litigated and decided, that should be the end of the matter." *Evans*, 873 F.3d at 1014.

And, the law of the case doctrine is equally applicable to questions of mootness. *See, e.g.*, *In re Memorial Estates, Inc.*, 9950 F.2d 1364, 1367 (7th Cir. 1991) (law of the case doctrine is equally applicable to subject-matter jurisdiction claims such as mootness); *Gen. Ry. Signal Co. v. Corcoran*, No. 89 C 9360, 1992 WL 220604 (N.D. Ill. Sept. 4, 1992); *Johnson v. Contra Costa Cnty. Sherriff's Dep't*, 152 F.3d 926, (9th Cir. 1998) (holding that law of the case doctrine is equally applicable to mootness questions decided by an earlier appeal in the same case); *S. Pac. Transp. Co. v. Voluntary Purchasing Grps., Inc.*, 246 B.R. 532, 536 (E.D. Tex. 2000) (court of appeals decision on mootness issue is law of the case for district court in the same matter). This Court's decision in *Corcoran* succinctly explained: "Application of the doctrine here would preclude this Court's consideration of the merits of the Superintendent's motion because the Court of Appeals' motions panel expressly rejected the same mootness argument when it denied the Superintendent's motion to dismiss the SBA's appeal." 1992 WL 220604, at *2.

The same is true here. The Seventh Circuit rejected the Governor's mootness contentions concerning his unconstitutional restrictions on religious worship, *Elim*, 962 F.3d at 345, the criteria

at issue in that decision are precisely the same criteria at issue here, *supra* Section I.C, and the Restore Illinois plan continues to give the Governor the precise authority he previously possessed to reinstate his restrictions on religious exercise. Because the Seventh Circuit decided the mootness issue already, and because the Restore Illinois plan continues to give the Governor the authority he possessed in the earlier appeal, nothing material has changed, and "this Court is not at liberty to reconsider that decision." *Corcoran*, 1992 WL 220604, *3 (emphasis added).

D. The Decisions Of Every Other Circuit To Consider The Issue Have Likewise Found Changed Restrictions Do Not Moot Plaintiffs' Claims.

If the binding decisions of the Supreme Court and Seventh Circuit did not overwhelmingly dictate the outcome of the Governor's erroneous contentions, which they do, and even if the Seventh Circuit's decision in the instant matter did not constitute the law of the case, which it does, the universal decisions of every other circuit to address this issue compels a finding that Plaintiffs' claims are not moot. *See, e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020); *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021). In each of those cases, though the challenged restrictions had been rescinded, amended, or even revoked altogether, the circuit courts held that such challenges were not moot because the Governors retained authority to reinstate prior restrictions.

In *Calvary Chapel Dayton Valley*, the Ninth Circuit encountered a restriction on religious worship services that was no longer in effect. 982 F.3d at 1230 n.1 ("Although the Directive is no longer in effect, we held in an order denying the State's motion to dismiss that Calvary Chapel's case is not moot."). The reasoning for the holding applies squarely here: "**Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions**." *Id.* (emphasis added). And, also like here, the Ninth Circuit noted that the

frequency and numerosity of the Governor's executive actions counseled in favor of a finding that the matter was not moot. *Id.* ("In fact, Governor Sisolak has issued numerous emergency directives [and] all subsequent directives are subject to the same principles outlined in this opinion, as many of the issues we identify in the Directive persist."). *See also Calvary Chapel Lone Mountain*, 831 F. App'x at 318 n.2 (holding that although the challenged restriction was "no longer in effect," "Calvary Chapel's case is not moot").

In *Agudath Israel*, the Governor of New York likewise argued that a change in the challenged restrictions mooted appellant's claims for relief. 983 F.3d at 631 n.16. In fact, just like the Governor here (MTD at 5-11), the Governor of New York argued that "the case was moot due to his modification of zone boundaries to remove the applicants' churches and synagogues from [the challenged restrictions.]" *Id.* Noting the Supreme Court's decision in *Catholic Diocese*, 141 S. Ct. at 68, the Second Circuit stated that "**[t]he Supreme Court squarely rejected that argument, as do we.**" *Id.* (emphasis added).

In *Bayley's Campground*, plaintiffs requested injunctive relief against the Governor's COVID-19 executive orders, which were subsequently superseded by a different order. 985 F.3d at 157 ("The plaintiffs contend that, even though EO 34 has been superseded by EO 57, their request for injunctive relief from the self-quarantine requirement is not moot because it pertains to an executive action that the Governor voluntarily rescinded and could unilaterally reimpose. . . . **We agree**." (emphasis added)). "The Governor has not denied that a spike in the spread of the virus in Maine could lead her to impose a self-quarantine requirement just as strict as EO 34's." *Id.* The same is true here. (*See supra* Section I.A.)

Because the Governor retains the authority to reinstate his restrictions at any time, and his currently operative COVID regime explicitly reserves that authority for the Governor, Plaintiffs'

claims are not moot. Indeed, as the universal precedent among the Supreme Court, the Seventh Circuit, and the other circuits to address the issue have all concluded, gubernatorial games of cat-and-mouse with constitutionally protected liberties are insufficient to moot the claims for relief that Plaintiffs have raised before this Court. The Governor attempts to avoid the consequences of his retention of authority by claiming that he does not intend to reinstate the policy (even though he explicitly refused to state such intentions before the Seventh Circuit) and that his intentions govern. That is incorrect. As the Supreme Court made clear, **it is the retention of authority that matters for purposes of mootness in COVID restriction cases**. And the reason for that conclusion is simple: good intentions and informal assurances are plainly insufficient to cure constitutional deficiencies. *See, e.g.*, *Milwaukee Police Ass'n v. Jones,* 192 F.3d 742, 748 (7th Cir. 1999) (permanent injunction may still be appropriate, despite change in conduct where the government's "good intentions cannot vitiate that constitutional defect" challenged by the plaintiff); *Freedom From Religion Found. v. Concord Cmty. Schs.,* 204 F. Supp. 3d 914, 919 (N.D. Ind. 2017) ("informal assurances" of a commitment not to reinstate the policy is insufficient to moot a case). The retention of authority is fatal for the Governor's mootness contentions.

E. Permanent Injunctive Relief Has Been Issued After Revised Restrictions.

In *Harvest Rock Church v. Newsom*, No. EDCV 20-6414 (C.D. Cal. May 14, 2021), the district court entered a permanent injunction against the Governor of California's COVID restrictions on religious worship services, enjoining him from reinstating any restrictions on religious worship that are inconsistent with the Supreme Court's *Tandon*, *South Bay*, *Harvest Rock*, and *Catholic Diocese* decisions. (*See* Exhibit A.) And, the district court entered that permanent injunction despite the Governor's having rescinded those restrictions prior to final judgment. *See* Robert Jablon, *California lifts COVID-19 limits on indoor worship services,* (Apr.

12, 2021), https://abcnews.go.com/Health/wireStory/california-lifts-covid-19-limits-indoor-worship-services-77032913 (last visited May 21, 2021).

II. PLAINTIFFS' CLAIMS FOR A PERMANENT INJUNCTION ARE NOT MOOT.

Plaintiffs' claims for declaratory relief and a permanent injunction preventing the Governor from reinstating his prior restrictions are not moot. As the binding precedent of the Seventh Circuit has recognized time and again, "**[t]he 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) (emphasis added). *See also Scotch Whisky Ass'n v. Barton Distilling Co*., 4899 F.2d 809, 13 (7th Cir. 1973) (holding that district court did not abuse its discretion when entering an injunction against unlawful conduct that "had ceased before the trial takes place"). Indeed,

> **While the preliminary injunction diminished the *immediate* threat of prosecution, it is important not to confuse the threat of enforcement that existed relative to Hatchett's immediate advocacy, with the broader threat of enforcement that must be considered by this Court with respect to Hatchett's requests for declaratory and permanent injunctive relief.**

Hatchett v. Barland, 816 F. Supp. 2d 583, 593 (E.D. Wis. 2011) (emphasis added). And, though preliminary injunctive relief claims may become moot in circumstances unlike those at issue here, "**[t]he case itself is not moot, because a request for a permanent injunction was pending**" and where plaintiff was subject to potential illegal conduct in the future. *Certified Grocers of Ill., Inc. v. Produce, Fresh, & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florist, Nursery, Landscaping & Allied Emps., Drivers, Chauffeurs, Warehouseman & Helpers Union, Chicago & Vicinity, Ill., Local 703*, 816 F.3d 329, 331 (7th Cir. 1987) (emphasis added).

Here, Plaintiffs have sought a permanent injunction against the entirety of the Governor's COVID regime, against the underlying authority for him to even issue restrictions on the

constitutionally protected exercise of religion, and against the currently operative framework under which the Governor retains the authority to impose restrictions on Plaintiffs' religious worship services at any time. Indeed, while the free exercise component of Plaintiffs' claims has been litigated before this Court and others, there are many other aspects to Plaintiffs' Verified Complaint that have not been adjudicated and are not moot. Plaintiffs' sought declaratory relief and a permanent injunction against the Governor's authority to issue restrictions on religious worship under the Guarantee Clause. (Dkt. 1, V. Compl. ¶¶158-165.) That claim, which challenges the Governor's "exercise of exclusive and unaccountable executive authority" as to the entirety of his regime, and therefore cannot be mooted by his changed restrictions issued under the challenged authority. Plaintiffs challenge the Governor's authority on its face and **as-applied**

III. PLAINTIFFS' AS-APPLIED CHALLENGES LOOK TO PAST CONDUCT, AND THEREFORE ARE NOT MOOT.

The Governor also ignores the fact that Plaintiffs have challenged each of his Executive Actions and the underlying authority under which he took such actions both facially and as-applied. (*See* dkt. 1, V. Compl. ¶¶86-97, 101-112, 116-127, 137-143, 147-156 (alleging that the Governor's Orders and the authority under which he issued them are unconstitutional as-applied to Plaintiffs' religious worship services).) As the Seventh Circuit has recognized, an as-applied challenge "examine[s] the facts of the case before [it] exclusively, and not any set of hypothetical facts under which the statute might be constitutional." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012). And, changes or modifications to challenged government regulations do not moot as-applied challenges. *See, e.g.*, *Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008) ("amendments to the picketing ordinances do not moot Green's as-applied challenges to the original ordinances"); *Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 263 (3d Cir. 2002) ("although facial challenge were mooted by the amendment, the as-applied challenges were not

because relief was still available for these claim, which the amendment had not redressed"); *id.* at 263 n.5 (noting that the declaratory and injunctive relief is still available for as-applied challenges even after amendment to the challenged regulation); *Parker v. Judicial Inquiry Comm'n of Ala.*, No. 2:16-CV-442-WKW, 2017 WL 3820958, *8 (M.D. Ala. Aug. 31, 2017) (holding that government actions cannot moot an as-applied challenge where plaintiff remains subject to the authority under which the allegedly offending government action was instituted)

This Court's decision in *D'Acquisto v. Washington*, 750 F. Supp. 342 (N.D. Ill. 1990), is instructive on this point. There, though the particular challenged activity may have concluded, the plaintiff challenged the deprivation of his constitutional rights by the government's past actions as-applied to him. *Id.* at 346. The government contended that because the challenged actions had already been completed, the case was moot. *Id.* This Court disagreed. "**To hold that the claims of plaintiffs and those similarly situated were mooted by completion of the procedures they challenge would effectively eliminate the possibility of any 'as applied' challenge to those procedures. Dismissal of this action on grounds of mootness would be inappropriate under the circumstances**." *Id.* (emphasis added). The same is true here.

IV. SHOULD THIS COURT DISMISS PLAINTIFFS' CLAIMS, THE COURT SHOULD GRANT PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT.

Though binding precedent compels the conclusion that Plaintiffs' claims are not moot, this Court should nevertheless grant leave to amend should it find otherwise. Indeed, leave to amend should be "freely given," *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 687 (7th Cir. 2004) (quoting Fed. R. Civ. P. 15(a)), and "the district court should grant leave to amend after granting a motion to dismiss." *Id. See also Rohler v. TRW, Inc.*, 576 F.2d 1260, 1266-67 (7th Cir. 1978) (it is an abuse of discretion to fail to grant leave to amend unless "it appears to a certainty that the plaintiff cannot state a claim upon which relief can be granted").

CONCLUSION

For the foregoing reasons, the Governor's Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2021, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Daniel J. Schmid
Daniel J. Schmid