No. 19A1046

In the Supreme Court of the United States

ELIM ROMANIAN PENTECOSTAL CHURCH, and LOGOS BAPTIST MINISTRIES,
PETITIONERS,
v.
JAY R. PRITZKER, in his official capacity as Governor of the State of Illinois,
RESPONDENT.

To The Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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INTRODUCTION

In accordance with this Court's order of May 27, 2020, J.B. Pritzker, Governor of the State of Illinois, hereby responds to the "Emergency Application for Writ of Injunction Relief Requested Before May 31, 2020" filed that same day by Applicants Elim Romanian Pentecostal Church and Logos Baptist Ministries.

Applicants take issue with the Governor's Executive Order 2020-32, which prohibits gatherings exceeding ten people, including for in-person religious services, to prevent the transmission of COVID-19. But EO32 will expire by its own terms on May 29, 2020, and the Governor has announced that after that date religious gatherings will no longer be subject to mandatory restrictions; instead, faith leaders will be provided with guidance from the Illinois Department of Public Health regarding best practices to prevent the transmission of COVID-19.[1] Accordingly, applicants' challenge to EO32 is moot. *See*, *e.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). This change in circumstances is reason alone to deny the

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[1] *See* Ill. Dep't of Pub. Health, May 28, 2020 COVID-19 Press Update, http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/media-publications/daily-press-briefings (Governor's May 28, 2020 COVID-19 press briefing). IDPH's guidance, which was published on May 28, 2020, is available at Ill. Dep't of Pub. Health, COVID-19 Guidance for Places of Worship and Providers of Religious Services, http://www.dph.illinois.gov/covid19/community-guidance/places-worship-guidance. This Court may take judicial notice of this information and other external sources because their "accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see also Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016) (Thomas, J., concurring) (noting public records are subject to judicial notice); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.1 (2007) (district court could take notice of published article); Fed. R. Evid. 902(6) (official documents and newspapers are self-authenticating); Fed. R. Evid. 101(b)(6) (rules on printed information apply to electronic sources of information). All websites were last visited on May 28, 2020.

Application. *See id.*; *see also*, *e.g.*, *Associated Press v. District Court*, 542 U.S. 1301 (2004) (Breyer, J.); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 543 U.S. 1304 (2004) (Souter, J.).

Mootness aside, applicants' request for an injunction should be rejected on the merits. Applicants prefer to congregate in larger groups than EO32 allows, and violated the order when conducting services on May 10, 2020, while this action was pending in the district court, and again on May 17 and May 24, 2020, after the district court denied their motion for a temporary restraining order and preliminary injunction and the Seventh Circuit denied their emergency motion for injunction pending appeal. And although applicants style their Application as an "emergency" that requires resolution before May 31, 2020 (the date on which they will celebrate Pentecost), they waited 11 days after the Seventh Circuit denied their request for an injunction pending appeal to file the Application. Applicants' delay in seeking relief is inconsistent with their claim of irreparable harm and another reason to deny the Application. *See*, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J.) (applicant's "failure to act with greater dispatch tends to blunt his claim of urgency and counsels against grant of a stay"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm.").

Applicants seek to excuse their delay in filing the Application by claiming that in a letter dated May 23, 2020, officials with the City of Chicago threatened

action, including "destruction of [applicant Elim's] property without process." App. ii.[2] But, as of the date of this filing, Chicago has not taken any enforcement action against Elim since its May 23 letter, instead preferring to work with Elim (and other non-compliant individuals and entities) to bring them into compliance with measures, including EO32, designed to protect the public health and safety. And a Chicago official has publicly stated that Chicago "'doesn't intend to demolish churches without due process or in any fashion in response to violations of the stay-at-home order.'"[3]

Applicants also suggest that "a deepening circuit split as to the constitutionality of emergency executive orders like [EO32]" prompted the Application. App. ii-iii. However, even if the circuits were divided on any question presented by this case (and they're not), to obtain the extraordinary remedy of an injunction pending appeal—which "grants judicial intervention that has been withheld by lower courts"—applicants must show that their rights are "indisputably

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[2] The emergency application is cited as "App.__." The appendix attached to that application is cited as "Appx., Ex. __ at ___," and because it is not paginated, the cited page number indicates the page's location in the exhibit. Citations to the district court docket are identified by the docket number and page number if applicable, *e.g.*, Doc. 2 at 1. Similarly, the Seventh Circuit docket is cited as 7th Cir. Doc. __ at __.

[3] Tom Shuba, *Facing fines and threat of closure, churches continue to hold services: There is not going to be a stand down*, Chicago Sun Times (May 24, 2020) https://chicago.suntimes.com/coronavirus/2020/5/24/21269156/facing-threat-closure-city-encouragement-trump-churches-hold-services.

clear." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J.) (internal quotations omitted). They cannot come close to making this showing.

As the Seventh Circuit correctly held, EO32 is constitutional under the deferential framework this Court established for government actions taken in response to public health emergencies in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). EO32 protects the residents of Illinois from an ongoing crisis, and it does not, beyond all question, violate applicants' rights to religious liberty. Applicants may avail themselves of many avenues of worship, including online, drive-in, and limited indoor in-person services.

And, as the Seventh Circuit further held, even if a more heightened form of scrutiny applied, applicants are unlikely to prevail on the merits of their constitutional claims. EO32—which prohibits comparable secular conduct, such as gatherings at schools, theaters, and concert halls—is content neutral and does not target religious practices. Furthermore, the fact that the EO32 allows more than ten people in some other types of establishments (like grocery stores) does not provide evidence of religious animus because those activities do not pose the same danger to the spread of COVID-19 as religious gatherings do. Indeed, scientific research demonstrates that when an individual speaks or sings, they project respiratory droplets to which the virus attaches. The droplets can remain suspended in the air for several minutes, travelling several feet and putting others at risk of inhaling the virus. Accordingly, the Centers for Disease Control and Prevention ("CDC") have emphasized that in-person gatherings centering around

verbal interactions pose a unique, acute risk of spreading the virus. EO32 follows this guidance and regulates activity because of the health risks posed, not the religious expression involved.

Applicants are also unlikely to prevail on their statutory claims. As the Seventh Circuit held, the Eleventh Amendment bars applicants' challenge under Illinois' Religious Freedom Restoration Act ("IRFRA"), because the State has not unequivocally consented to suit in federal court. And applicants have forfeited their claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which they did not brief in either the district court or in their motion for injunction pending appeal in the Seventh Circuit. Forfeiture aside, applicants are unlikely to succeed on the merits of this claim, as that act applies to landmarking and zoning laws, not the type of action at issue here.

Finally, applicants claim that without injunctive relief, restrictions on the size of their gatherings will be lifted "no sooner than 12 to 18 months from now, and all subject to change at any time," under the Governor's plan to restore Illinois to normal functions. App. 6 (bold deleted). But, as explained, EO32 will expire on May 29, 2020, and applicants' concern about limitations on the size of their religious gatherings after that date is speculative.

STATEMENT OF THE CASE

A. The COVID-19 pandemic

COVID-19 is a novel severe acute respiratory illness that spreads easily through respiratory transmission, including by asymptomatic individuals. *See*

Appx., Ex. C at 1; Doc. 21 at 14. The virus has infected millions of people throughout the world and claimed the lives of hundreds of thousands. Appx., Ex. C, at 1. As of May 28, 2020, Illinois ranks third among States in the highest amount of cases nationwide, with 115,833 individuals infected and 5,186 deaths.[4] Cook County, where applicants are situated, has the highest rate of infection in the country.[5] For months, millions of Americans, including Illinois residents, have fought to abate the virus by staying home, tempering the spread of the virus and reducing the estimated death toll.[6] Unfortunately, however, the threat of the virus has not passed, and there remains no vaccine or treatment available for COVID-19, or evidence that recovered individuals are immune to a second infection. *See* Docs. 1-6, 1-7; *see also* Appx., Ex. C at 1.

Given these dangers, the CDC urges Americans to "not gather in groups" and avoid "mass gatherings," and cautions that "[e]veryone should wear a cloth face cover when they have to go out in public"[7] because "the virus can spread between people interacting in close proximity—for example, speaking, coughing, or

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[4] State of Illinois; Coronavirus (COVID-19) Response, https://coronavirus.illinois.gov/s/ (updated May 28, 2020); *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states (updated May 28, 2020).

[5] Coronavirus Resource Center, John Hopkins University & Medicine, United States Cases, https://coronavirus.jhu.edu/us-map (updated May 25, 2020).

[6] *See* Caitlin Owens, *Leading coronavirus modeling shows that social distancing is working*, Axios (Apr. 11, 2020), https://www.axios.com/coronavirus-deaths-projections-chart-f2725a44-160d-487a-87f5-7c54cad6a1b0.html.

[7] CDC, *How to Protect Yourself and Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (updated Apr. 24, 2020).

sneezing—even if those people are not exhibiting symptoms."[8] Because "gatherings present a risk for increasing the spread of COVID-19," the CDC recommends that communities of faith "limit the size of gatherings in accordance with the guidance of directives of state and local authorities."[9]

B. The Governor's measures to protect Illinois residents

Faced with this unprecedented and ongoing public health emergency, the Governor proclaimed the COVID-19 pandemic a disaster on March 9, 2020, and issued a series of executive orders to stop the spread of COVID-19 and enhance the availability of treatment. *See* Docs. 1-1, 1-2, 1-3, 1-4, 1-5. On March 20, the Governor issued a stay-at-home directive, which required Illinoisans to practice social distancing by limiting non-essential activity outside their homes, remaining at least six feet apart from others, and refraining from gathering in groups of more than ten people. *See* Doc. 1-4 at 1-4. Likewise, the order required non-essential businesses and schools to close, and essential businesses to limit their operations. *Id.* at 2. The Governor issued another stay-at-home order on April 1, which contained many of the same limitations. Doc. 1-5. at 2-5.

On April 30, 2020, the Governor issued EO32, which was the governing stay-at-home order when applicants filed this action. A2, Ex. B. He explained that

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[8] CDC, *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission* (Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

[9] CDC, *Interim Guidance for Communities of Faith* (May 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/php/faith-based.html.

the virus continues to spread globally and in Illinois; indeed, 141 Illinoisans had perished from COVID-19 just one day earlier. *See id.* at 2; Doc. 1-7 at 2. The Governor relied on modeling data showing that stay-at-home measures had proven, and continued to be, critical in inhibiting the spread of the virus and ensuring that Illinois was equipped to treat infected individuals. A2, Ex. B at 2-3. He also explained that without these measures, the mortality rate would be 10 to 20 times higher and the State would run out of hospital beds, ICU beds, and ventilators.[10] *Id.* at 2.

EO32 reflected the evolving circumstances of the COVID-19 pandemic: it allowed more personal and business activity than the previous orders, yet continued to emphasize the need to adhere to social distancing and other public health guidance. The order continued the stay-at-home directives, including the prohibition against all public and private gatherings of people who do not share a household, except for certain permitted purposes. *Id.* at 4-5. Any permitted gatherings were limited to a maximum of ten people unless otherwise noted. *Id.* Of particular import to applicants, the order expressly declared the free exercise of religion to be an essential activity by permitting Illinois residents to leave their homes for religious practice as long as they:

> comply with Social Distancing Requirements and the limit on gatherings of more than ten people in keeping with CDC guidelines for the protection of public health. Religious organizations and

[10] For example, as of April 30, 2020, Illinois had 32,010 hospital beds, with only 33% available. Doc. 1-7 at 3. Without a stay-at-home order, the State would require more than 100,000 beds. *Id.*

> houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants.

Id. at 5-6. The order continued to prohibit all gatherings at secular establishments such as museums, movie theaters, and concert clubs. *Id.* at 5.

Taking into account both the ongoing threat of COVID-19 and the State's success in limiting the spread of the virus, the Governor announced today, May 28, 2020, that he will not be renewing the ten-person limit on religious gatherings, which expires on May 29, or imposing other requirements.[11] Instead, the Illinois Department of Public Health will post "guidance, not mandatory restrictions for all faith leaders to use in their efforts to ensure the health and safety of their congregants."[12] Per the Governor's announcement today, religious organizations are no longer subject to any of the gathering restrictions in any phase.

This announcement is consistent with the Governor's intention to reopen Illinois in accordance with scientific principles and public health guidance, as

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[11] On May 28, 2020, at his daily press briefing regarding COVID-19, the Governor explained the following, regarding the expiration of EO32 as it applies to religious gatherings, specifically: "We will also be posting recommendations for houses of worship, providing more guidance for houses of worship in phase three. Having received many plans and ideas from responsible faith leaders, IDPH has reviewed many detailed proposals and has provided guidance, not mandatory restrictions for all faith leaders to use in their efforts to ensure the health and safety of their congregants. This includes suggestions on capacity limits, new cleaning protocols indoor gatherings of 10 persons or less a reduction of activities like sharing food, and the safe conduct of outdoor congregating. The safest options remain remote and driving services, but for those that want to conduct in person activities, IDPH is offering best practices." May, 2020 COVID-19 Press Update *supra* note 1.

[12] *Id.*; *see also* Ill. Dep't of Pub. Health, COVID-19 Guidance for Places of Worship and Providers of Religious Services *supra* note 1.

outlined in his five-phase Restore Illinois plan. *See* Appx., Ex. E at 3. Guided by health metrics, the plan maps out how restrictions for different regions of the State will relax as the rates of infection and hospital admissions due to COVID-19 plateau and then decline. *Id.* at 3-4. Illinois will enter Phase 3 in two days,[13] because the rates of infection and hospital admission are stable or declining. *Id.* at 8. All gatherings of ten people will be allowed, and some non-essential businesses may open with capacity limits and other safety precautions. *Id.* Phase 4, which permits gatherings of 50 people, will begin when the infection rates continue to decline. *Id.* at 9. And, finally, regions of Illinois will enter Phase 5, which does not limit gatherings, when there are "no new cases over a sustained period," or there is a vaccine or treatment. *Id.* at 10.

Indeed, the plan was always meant to be a framework to provide "a safe and deliberate path forward" for Illinois, subject to update as the situation in Illinois evolves and research develops. *Id.* at 3. The Governor has recognized that "worship is as essential as food and water" to many, and so he has been "collaborat[ing] with faith leaders to ensure that they can hold services and safe and creative ways that allow for worship."[14] And, as shown by the Governor's announcement today, he has done so.

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[13] *See* May 28, 2020 COVID-19 Press Update *supra* note 1.

[14] Ill. Dep't of Pub. Health, Daily COVID-19 Press Briefings, May 22, 2020 COVID-19, Press Update, http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/media-publications/daily-press-briefings?page=1; Matt Masterson, *Outdoor, Drive-In Religious Services Allowed in Next Phase of Illinois' Reopening Plan*, Wttw News (May 22, 2020),

C. Applicants file suit and repeatedly violate EO32

Applicants, two churches, seek to hold indoor, in-person religious services in excess of ten people. Doc. 1 at 20. On May 2, 2020, they informed the Governor that they would resume larger in-person gatherings on May 10, 2020, "irrespective of how long [the Governor] or the Courts take to vindicate our inalienable and non-negotiable rights." Doc. 1-12 at 2, 4. A few days later, on May 7, 2020, their counsel sent a letter to the Governor, threatening to take "additional action" if the Governor did not rescind the ten-person limit by that afternoon. Doc. 1-22 at 1. That same day, receiving no response, applicants filed a lawsuit, seeking a TRO and preliminary injunction enjoining the Governor from enforcing the 10-person limit against them. Doc. 1 at 40-41. They also sought a declaration that the limit on in-person religious gatherings was unconstitutional, both facially and as applied to them, and that the Governor had violated applicants' rights under RLUIPA and IRFRA. Doc. 1 at 41-42.

The district court ordered expedited briefing, but given the time constraints, denied applicants' request for injunctive relief as to their planned services on May 10, 2020. *See* Doc. 13. Applicants still held in-person gatherings exceeding the ten-person limit that day. App. 9-11. Pictures submitted by Applicant Elim showed that many attendees did not wear face coverings, *see id.* at 10-11, contrary to CDC recommendations.

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https://news.wttw.com/2020/05/22/outdoor-drive-religious-services-allowed-next-phase-illinois-reopening-plan (quoting the Governor at press conference).

On May 13, 2020, the district court denied applicants' motion for a TRO and preliminary injunction. Appx., Ex. C. The court determined that applicants had a "less than negligible" chance of success on the merits of their claims, *id.* at 8-10, and that "[t]he harm to [applicants] if the Order is enforced pales in comparison to the dangers to society if it is not," *id.* at 11. An injunction, the court reasoned, would "risk the lives of [applicants'] congregants, as well as the lives of their family members, friends, co-workers and other members of their communities with whom they come in contact." *Id.* That same day, applicants filed a notice of appeal, Doc. 34, and sought an injunction of the district court's order pending appeal, Doc. 36, which the district court denied, Doc. 39.

On Friday, May 15, 2020, applicants sought an injunction pending appeal and expedited briefing from the Seventh Circuit, asserting that the executive orders inflicted irreparable harm on them each Sunday that they could not worship. 7th Cir. Doc. 6-1. The Governor did not object to expediting the briefing but opposed the request for an injunction pending appeal. 7th Cir. Doc. 14. The court issued its decision denying the request for an injunction on Saturday, May 16. Appx., Ex. A. The court allowed expedited briefing, which will complete on June 5, 2020, with oral argument to be held on June 12, 2020. *Id.*

Despite the Seventh Circuit's order, applicants held in-person religious services exceeding ten people the very next day, and have continued to hold such services, undeterred by two federal court orders rejecting their requests and citations. *See* App. 12-13; Appx., Ex. G. Accordingly, on May 23, 2020, the Chicago

Department of Public Health sent the pastor of applicant Elim a Notice of Abatement, urging him to cease gatherings of more than ten people, which "can result in the unintentional spread of the disease to some of [Chicago's] most vulnerable residents." Appx., Ex. F at 2-3. The Department warned that any additional gatherings in excess of ten people would be declared a public nuisance, and explained that the Department has authority to enjoin public nuisances or begin summary abatement proceedings. *Id.* at 2. A City of Chicago official has publicly explained that the city "doesn't intend to demolish churches without due process or in any fashion."[15]

[15] Shuba, *supra* note 3.

ARGUMENT

At every stage of this case, courts have acted quickly to expedite briefing and rule on applicants' requests for injunctive relief. Applicants have ignored these orders and continued to violate EO32. Now, 11 days after the Seventh Circuit denied their request for injunction pending appeal, applicants repair to this Court, seeking extraordinary relief by the weekend. Because the Governor announced today that he will not renew the ten-person limit on in-person religious gatherings, and that limit will expire on May 29, 2020, applicants' request is moot and should be denied on that basis alone. And even if the Governor had intended to continue this limit, as detailed below, applicants' request should be denied. They are unlikely to succeed on the merits of their claim, let alone show that their rights are indisputably clear, and they will not suffer irreparable harm absent an injunction.

I. Applicants Seek The Extraordinary Relief Of An Injunction Pending Appeal, Not A Stay Of A Judicial Decision.

Although applicants cite, among other things, U.S. Sup. Ct. R. 23, *see* App. i, 13—which sets forth the procedures for seeking a stay of a lower court's judgment—they are not in fact requesting such relief from this Court. Rather, what they seek is far more significant: an affirmative injunction pending appeal. *See id.* at i, 1, 40; *see also* 28 U.S.C. § 1651(a); U.S. Sup. Ct. R. 20(1). These requests are not the same; an "injunction and a stay have typically been understood to serve different purposes." *Nken v. Holder*, 556 U.S. 418, 428 (2009).

Unlike a stay, an injunction pending appeal "does not simply suspend judicial alteration of the status quo"; it alters the status quo and "grants judicial

intervention that has been withheld by lower courts." *Lux*, 561 U.S. at 1307 (internal quotations omitted). Granting such relief thus "demands a significantly higher justification" than that needed for a stay. *Ohio Citizens for Reasonable Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986). "[A]n applicant must demonstrate that the legal rights at issue are indisputably clear." *Lux*, 561 U.S. at 1307 (internal quotations omitted). Given its extraordinary nature, "injunctive power is to be used sparingly and only in the most critical and exigent circumstances." *Id.* (internal quotations omitted); *see* U.S. Sup. Ct. R. 20(1) ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."). Those circumstances are not met here, where applicants delayed for 11 days, acted in contravention of two federal court orders, and failed to carry their burden under the applicable standard.

Applicants cannot even satisfy the comparatively lower burden of a stay, which requires demonstrating four things. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). First, the applicant must show a "significant possibility" that four of the Court's Justices would grant a writ of certiorari in the case. *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (internal quotations omitted). Second, the applicant must explain why a majority of the Court would then reverse the appellate court's judgment. *Id.* Third, the applicant must illustrate that irreparable harm will likely result if such relief is not granted. *Id.* Finally, the applicant must demonstrate that the equities favor granting the relief, which

includes balancing the relative harms to the applicant and respondent, as well as the interests of the public. *Rostker*, 448 U.S. at 1308. As explained below, considering these factors, applicants have not justified the exercise of this Court's discretion to grant such rare relief in this case.

II. A Majority Of This Court Is Unlikely To Reverse The Seventh Circuit's Decision.

As noted, EO32 will expire on May 29, 2020, and the Governor does not intend to renew the 10-person restriction on in-person religious gatherings or impose other, similar restrictions. Accordingly, applicants' challenge to the validity of the Governor's restrictions on in-person religious gatherings to prevent the spread of COVID-19 is therefore moot. *Lewis*, 494 U.S. at 477-78. This Court, therefore, is unlikely to grant a writ of *certiorari* in this case, and even if it does so, it is unlikely to reverse on the merits.

In any event, the Seventh Circuit was correct on the merits. Applicants sought an injunction pending appeal from the Seventh Circuit on the bases that the ten-person limit on in-person religious gatherings allegedly violates their right to free exercise and under IRFRA. The Seventh Circuit determined that applicants are unlikely to prevail on their free exercise claims because the Governor also limited comparable secular gatherings in which "speech and singing feature prominently and raise risks of transmitting the COVID-19 virus." Appx., Ex. A at 2. The court also determined that applicants may not seek relief against state officials under IRFRA, a state statute, in federal court. This Court is likely to reject

applicants' free exercise and IRFRA claims for the same reasons, and it should not consider their remaining claims, which were forfeited.

A. The executive order does not violate applicants' right to free exercise of religion.

As detailed below, the Seventh Circuit appropriately utilized a deferential standard of review for evaluating the Governor's actions to protect the public from the COVID-19 pandemic. But even if this Court applies heightened standards of First Amendment scrutiny, applicants are unlikely to succeed on the merits of their free exercise claim. Indeed, the Seventh Circuit's decision is consistent with at least 14 decisions across the country denying requests for TROs or preliminary injunctive relief in challenges to similar emergency restrictions on gatherings.[16]

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[16] *See, e.g.*, *South Bay United Pentecostal Church v. Newsom,* No. 20-55533, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020), ECF No. 29; *Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 WL 2556496, at *8 (D. Md. May 20, 2020); *Spell v. Edwards*, No. CV 20-00282-BAJ-EWD, 2020 WL 2509078, at *1 (M.D. La. May 15, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-CV-00156-NT, 2020 WL 2310913, at *7 (D. Me. May 9, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 220-CV-00832-JAMCKD, 2020 WL 2121111, at *5 (E.D. Cal. May 5, 2020); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020), at *7; *Lighthouse Fellowship Church v. Northam*, No. 2:20-CV-204, 2020 WL 2110416 (E.D. Va. May 1, 2020), at *4; *Gish v. Newsom*, No. EDCV 20-755, 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020); *Davis v. Berke*, No. 1:20-CV-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-00683 (S.D. Cal. Apr. 10, 2020), ECF No. 9; *Tolle v. Northam*, No. 1:20-cv-00363 (E.D. Va. Apr. 1, 2020), ECF No. 5; *Nigen v. New York*, No. 1:20-cv-01576 (E.D.N.Y. Mar. 29, 2020), ECF No. 7; *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Sup. Ct. Mar. 25, 2020).

1. A deferential standard of review applies to public health emergencies.

This Court has "long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Among other limitations, "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). Therefore, to balance constitutional liberties with the need for government action during public crises, the Court has long eschewed heightened tiers of scrutiny when analyzing government measures to protect the public during emergent circumstances. Instead, courts afford the government discretion to address the exigencies of a public health crisis, such as the COVID-19 pandemic, while respecting the core of constitutional freedoms.

These cases, which both the district court and the Seventh Circuit applied, *see* Appx., Ex. A, at 2, Ex. C at 4-6, recognize that constitutional protections may need to yield for purposes of public health and safety during epidemics of contagious disease. In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), this Court recognized that a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27 (state compulsory vaccination law enacted during smallpox epidemic did not violate Fourteenth Amendment). In such situations, "the safety of the general public may demand" regulations that restrict individual rights. *Id.* at 29. And "[t]he mode or manner in which those results are to be accomplished is within the discretion of the

state." *Id.* at 25. This means that such actions will be upheld if they (1) have "a real or substantial relation" to the public health and safety and (2) do not constitute "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. Put another way, unless the executive exercises its authority in "an arbitrary, unreasonable manner" or "go[es] so far beyond what was reasonably required for the safety of the public," this Court will not "usurp the functions of another branch of government." *Id.* at 28. Lower courts have applied similar principles in the context of emergency powers. *See, e.g.*, *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971); *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (same); *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1113 (D.V.I. 1989) (upholding curfew because aftermath of hurricane demanded "broad discretion . . . for the executive to deal with an emergency situation") (internal quotations omitted).

Because the COVID-19 crisis involves the spread of a contagious disease and calls for swift, decisive executive action during an emergency, this deferential standard applies here. And, as both lower courts held, EO32 is constitutional under this standard because it is a reasonable restriction on the free exercise of religion in an effort to protect Illinois and its residents from the COVID-19 pandemic. To begin, there is no serious dispute that the order is related to the public health. On the contrary, the order sought to "protect[] the health and safety of Illinoisans" from COVID-19, Appx., Ex. D at 2, from which more than 5,000 Illinois residents have

already died.[17] It cited data demonstrating that without a stay-at-home order, deaths would be 10 to 20 times greater, and the State would lack sufficient hospital beds and ventilators. *Id.* at 2. The restriction is also consistent with CDC guidance. *Id.* at 2.[18] Further, because the virus spreads invisibly and rapidly, including by asymptomatic individuals, the temporary prohibition on gatherings of more than ten people has been necessary to protect the public. *See Binford v. Sununu*, No. 217-2020-cv-00152 (N.H. Sup. Ct. Mar. 25, 2020), Order at 15[19] (facts set forth in executive order and in national guidance provided adequate factual basis for state restriction on gatherings).

Additionally, the order does not "beyond all question" invade the right to free exercise, *Jacobson*, 197 U.S. at 32, or "go so far beyond what was reasonably required for the safety of the public," *id.* at 28. It expressly permits online and drive-in services, as well as in-person services of ten people or less that comply with the social distancing requirements. Indeed, applicant Elim has been utilizing online platforms since long before the pandemic. Its website showcases two videos, provides links enabling users to live stream services, and contains video archives dating back to 2014. Doc. 21 at 39. In fact, its YouTube channel includes a recording of the church's May 10 service, which was held in violation of Executive Order 2020-32. Doc. 33 at 8. Thus, under the executive order, "a wide swath of

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[17] *See Coronavirus in the U.S.*, *supra* note 4.

[18] *See* CDC, *Interim Guidance*, *supra* note 9.

[19] *Available at* https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/031920Sununu-obj.pdf.

religious expression remains untouched." *Gish v. Newsom*, No. ED-CV-20755-JGBKKX, 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020). Although applicants prefer to hold larger in-person services, experience shows that such gatherings have facilitated the spread of COVID-19. During religious in-person services, people are stationary in close quarters for extended periods of time, during which they are often speaking and singing out loud, thereby increasing the risk that infected individuals will project respiratory droplets that contain the virus and infect others. Doc. 21 at 15-16. As such, the CDC has recommended limiting such gatherings.[20]

Some places of worship have ignored these recommendations (and state restrictions) and nonetheless held large in-person services in the past weeks, leading to outbreaks of the virus. In southern Illinois, a county has experienced a surge in COVID-19 cases over the past few days, most connected to a local church that had been holding in-person services in excess of ten people.[21] Similarly, in California, for example, an in-person service held on Mother's Day led to nine cases of COVID-19—40% of the county's total.[22] As another example, a church in Germany held a service in early May, that followed government guidelines and implemented social distancing measures but still led to at least 107 cases of COVID-

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[20] CDC, *Interim Guidance*, *supra* note 9.

[21] Steph Whiteside, Jackson County Experiences Surge in COVID-19 Cases, WSIU News (May 27, 2020), https://news.wsiu.org/post/jackson-county-experiences-surge-covid-19-cases#stream/0.

[22] Cnty. of Medocino, Cal., COVID-19 News, *Health Officer Update* (May 24, 2020), https://www.mendocinocounty.org/Home/Components/News/News/5135/3242.

19.[23] Unfortunately, the reality is that, given the close quarters and verbal interactions involved in such gatherings, outbreaks of the virus have been traced back to religious services around the world.[24]

Applicants advance four reasons for why this Court should ignore *Jacobson*'s framework. But because applicants did not present these arguments to either lower court when seeking a stay, they are forfeited. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016). In any event, none has merit. Initially, they contend that *Jacobson* cannot displace strict scrutiny because it predated several of this Court's cases applying heightened scrutiny in First Amendment cases. App. 30 & n.13. But *Jacobson* remains good law. The Court was aware of *Jacobson* when it established heightened tiers of scrutiny, and it did not modify or overrule *Jacobson*'s deferential framework. To the contrary, the Court has recognized *Jacobson*'s continuing vitality. *See Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (""There are manifold restraints to which every person is necessarily subject for the common good."") (quoting *Jacobson*, 197 U.S. at 26).

There is also no merit to applicants' argument that *Jacobson* sets forth a standard akin to strict scrutiny. App. 29-30. As discussed, *Jacobson* provides that actions taken in response to a public health emergency should be upheld so long as

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[23] Zeeshan Aleem, *One German church service resulted in more than 100 coronavirus infections* (May 24, 2020), https://www.vox.com/2020/5/24/21268602/germany-church-coronavirus-lockdown.

[24] *See* Doc. 21 at 14 (one infected individual's attendance at a religious service in South Korea spread COVID-19 to more than 5,000 individuals, and a church choir practice in Seattle led to the infection of 45 and the death of two).

they (1) have "a real or substantial relation" to the public health and safety and (2) do not constitute "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. This language, as numerous courts have recognized, sets forth a deferential standard. *See supra* p. 19.

Applicants' attempt to distinguish *Jacobson* because it did not involve First Amendment rights fares no better. App. 31. In *Jacobson*, this Court did not cabin its holding to the Fourteenth Amendment challenge before it. Rather, it recognized "the authority of a state to enact quarantine laws and health laws of every description," and emphasized that "'[t]he possession and enjoyment of *all rights* are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety [and] health . . . of the community.'" 197 U.S. at 26 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)) (emphasis added). This Court later cited *Jacobson* favorably in *Prince*. 321 U.S. at 166-67. Furthermore, the Court has upheld quarantine and health laws against a variety of constitutional challenges. *See, e.g.*, *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380, 387-393 (1902) (upholding quarantine law against Commerce Clause challenge); *Zucht v. King*, 260 U.S. 174, 176 (1922) (exclusion of non-vaccinated children from school district did not violate due process and equal protection rights).

And finally, applicants submit that *Jacobson* is distinguishable because it was a neutral law of general applicability. App. 31. As explained, *infra* pp. 25-27, the government action at issue here is neutral and generally applicable. But,

regardless, *Jacobson* said nothing about whether the law at issue there was neutral or generally applicable, and so it did not condition its reasoning on these aspects of the law. Instead, this Court explained, it would not second-guess the "mode or manner" in which the State acted to protect the public health and safety, *Jacobson*, 197 U.S. at 25, so long as the State did not "go so far beyond what was reasonably required for the safety of the public," *id.* at 28. That principle governs regardless of the facial neutrality or general applicability of the state action.

The Governor recognizes that constitutional rights, including the right to exercise one's religion, remain precious. But, as described above, he is not plainly invading the right to free exercise of religion. Rather, he properly limited this right to protect the public from an unprecedented danger while permitting applicants and other religious organizations many ways to continue to assemble and worship. And now that the situation in Illinois is improving, he is lifting this restriction. As such, appellants have failed to show that they have a "significant possibility" of prevailing on their free exercise claim.

2. The order does not violate applicants' right to free exercise under either rational basis or strict scrutiny.

When the deferential *Jacobson* framework is inapplicable, this Court analyzes free exercise claims under rational basis or strict scrutiny review. Rational basis review "is very deferential to the state;" the law will be upheld if it has a "rational relationship between the law and some legitimate governmental purpose." *Valenti v. Lawson*, 889 F.3d 427, 430 (7th Cir. 2018). To trigger such review, the law must be "neutral" and "generally applicable." *Emp't Div. v. Smith*,

494 U.S. 872, 879 (1990). Otherwise, the law must survive strict scrutiny by being "narrowly tailored" to advance a "compelling government interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Here, rational basis review applies, but, regardless, applicants are unlikely to succeed on the merits of their free exercise claim under either standard of review.

i. Rational basis review applies here.

Rational basis applies, and is easily met, here. To begin, EO32 is neutral. A law is not neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Courts will examine the face of the law, *id.*, as well as "the effect of a law in its real operation," *id.* at 535, and the "specific series of events leading to the enactment or official policy in question," *id.* at 540. EO32 is neutral both on its face and in effect. As the district court correctly observed, applicants "have provided no evidence that the Order targets religion." A1, Ex. A at 7. On the contrary, it expressly permits limited religious gatherings. And to the extent it imposes limitations on the manner of gatherings, its limitation are consistent with the Governor's other directives. Among other directives, EO32 limits most gatherings and directs people to stay home for non-essential activities. A2, Ex. B at 4-5. Beyond facial neutrality, applicants have set forth no evidence that the object and effect of the order is to target religion. Instead, the order was designed to prevent the spread of a highly contagious virus by minimizing in-person gatherings. Consistent with this intent, the Governor tightened the restrictions as the situation worsened, but has relaxed

restrictions as it improves, *see id.* at 1-2, as evidenced by the Governor's recent announcement that he will lift restrictions on in-person religious gatherings now that the infection rate is stabilizing in Illinois.

EO32 is also generally applicable. A law is not generally applicable if it "in a selective manner imposes burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. The relevant inquiry is whether secular conduct "that endangers the [government's] interests in a similar or greater degree" receives favorable treatment, signaling an intent to target religious practice. *Id.* Applicants have set forth no evidence that this is happening here. Instead, the order applies both to religious and comparable secular conduct at every tier of restriction: there is a blanket prohibition on all public and private gatherings, and permitted gatherings are subject to a ten-person limit regardless of whether they are religious or secular in nature. Appx., Ex. D at 4-5. Exemptions from the ten-person limit are equally applicable to secular and analogous counterparts. For example, all hospitals and all charitable and social services organizations are exempted, regardless of religious or secular affiliation. *Id.* at 6, 8.

Because EO32 is neutral and generally applicable, rational basis review applies. Applicants do not, and could not seriously, contend that the Governor's order fails rational basis review. As noted, COVID-19 is easily transmitted by respiratory droplets, and there have been several instances where infected individuals spread the disease to others by attending in-person religious services. And EO32 is consistent with CDC guidance to prevent such outbreaks. The order is

thus rationally related to the legitimate government interest in protecting the public health.

ii. Applicants' arguments for applying strict scrutiny lack merit.

Applicants, however, argue that EO32 should be subject to strict scrutiny because it is not neutral or generally applicable, given that it imposes a ten-person limit on worship, but not other essential activities. App. 22-24. This is incorrect. Applicants admit, as they must, that this Court should analyze their gatherings with respect to comparable secular conduct. App. 23. But according to applicants, religious gatherings should be compared to activities "unavoidably involving crowds"—such as "shopping or working at liquor, warehouse, and supercenter stores, *id.*—instead of conferences or concerts. Applicants cite no evidence for their argument that attending an in-person service with "other people the congregant knows and loves" is not more dangerous than shopping or working with strangers at a Walmart, *id.* at 24-25, and, in fact, the argument is incorrect.

There are numerous distinctions between these activities. When obtaining supplies like groceries or liquor, "people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete." *Gish*, 2020 WL 1979970, at *6. Similarly, people do not go to law or accounting firms "to gather in groups for hours at a time," Appx., Ex. C at 8, but rather to work at their separate stations. In contrast, religious services are not brief, and they involve communal, verbal interactions among large numbers of people. These distinctions matter because scientific research shows that the virus spreads

predominantly through respiratory transmission, not by touching surfaces containing the virus.[25] Speaking produces respiratory droplets that can be inhaled by others nearby.[26] A recent scientific study estimated that one minute of loud speaking can generate at least 1,000 droplets containing the virus, and the droplets may float in the air for eight to 14 minutes.[27] Moreover, consistent with this research and guidance, a medical expert explained in an action similar to this one that

> casual contact (briefly passing someone in the aisle of a big box store) entails a much smaller risk of contracting COVID-19 than a group congregating near one another for a longer period, because under the latter circumstance there is 'prolonged exhalation of respiratory droplets, and the increased likelihood of contacting surfaces with the virus.

Antietam Battlefield, 2020 WL 2556496, at *8 (quoting Decl. of Dr. Clifford Mitchell ¶ 23) (cleaned up). Thus, scientific evidence rebuts applicants' unsupported contention that singing and speaking with other congregants is not more dangerous than activities such as grocery shopping.

Next, for the first time in this action, applicants contest that religious in-person gatherings are instead more akin to attending school or a concert, which also involve a communal, verbal experience in an enclosed place, and are completely

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[25] CDC, *How COVID-19 Spreads* (May 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

[26] *Id.*

[27] Valentyn Stadnytsky, et al., *The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission*, Proceedings of the Nat'l Acad. of Sciences of the United States of America (May 13, 2020) https://www.pnas.org/content/early/2020/05/12/2006874117.

prohibited by EO32. *See* App. 25. They contend that religious gatherings cannot be compared to such secular gatherings, because those have not been deemed essential. *Id.* They have forfeited this argument, which is also unpersuasive. *See Kingdomware Techs.*, 136 S. Ct. at 1978. What makes the activities comparable is that they "endanger[ ] the [government's] interests in a similar . . . degree." *Lukumi*, 508 U.S. at 543. Applicants cannot avoid this comparison simply because the Governor has elevated religious gatherings to an "essential" status. Further, applicants ignore that schools have been designated essential. Appx., Ex. D at 9. But unlike places of worship, schools have been closed for classes and lectures, demonstrating that religious gatherings are not disfavored. *See id.*

Applicants' argument that EO32 is not neutral in enforcement because the Chicago police and public health officials have targeted them also lacks merit. *See* AT Br. 31. The executive order states that it may be enforced by state and local law enforcement authorities. Appx., Ex. D at 12. Because applicants violated the order, they have faced enforcement actions. Large secular gatherings have met the same fate. For example, in April, Chicago police issued 4,632 orders for groups to disperse, and arrested 17 individuals who failed to disperse.[28] Like others,

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[28] *Chicago Police Issued More Than 4,600 Dispersal Orders, Arrested 17 in Enforcing Stay-at-Home Order in April*, NBC Chicago (May 1, 2020), https://www.nbcchicago.com/news/local/chicago-police-issued-more-than-4600-dispersal-orders-arrested-17-in-enforcing-stay-at-home-order-in-april/2265076/.

applicants have faced enforcement actions because they endangered the public health.[29]

In short, EO32 is subject to rational basis review, and applicants' attempts to show otherwise falter.

iii. Alternately, the executive order satisfies strict scrutiny.

Even if strict scrutiny were to apply, EO32 is constitutional because it is "narrowly tailored" to serve a "compelling state interest." *See Lukumi*, 508 U.S. at 531. Applicants do not dispute that the Governor's "efforts to contain the spread of a deadly disease are compelling interests of the highest order." App. 26-27 (internal quotations omitted). Nor could they; every court to consider this issue—including those upon which applicants rely—has found that the government has a compelling interest in protecting its residents from the rapid spread of COVID-19. *See, e.g.*, *Roberts v. Neace*, No. 20-5465, 2020 WL 2316679 (6th Cir. May 9, 2020), at *4; *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 WL 2514313, at *9 (E.D.N.C. May 16, 2020). Instead, applicants argue that this interest is less compelling here because the Governor has not limited gatherings to ten people "for commercial and non-religious purposes." App. 26. But as explained, this description of EO32 is inaccurate; the Governor has placed limitations on secular

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[29] Applicants have also not made a hybrid claim deserving of strict scrutiny. *See* App. 22 n.10. Their "free exercise claim [is] unconnected with any communicative activity," *Smith*, 494 U.S. at 882, because gatherings are not inherently expressive conduct, *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (Conduct that is "expressive only because [the actor] accompanied their conduct with speech explaining it" is not "inherently expressive.").

gatherings that share similar attributes to worship services.

Further, EO32 is narrowly tailored to serve this compelling interest in ensuring the health and safety of the public. As explained, the Governor relied on CDC recommendations and modeling data showing the necessity of stay-at-home directives. *See* Appx., Ex. D at 2. These measures have slowed the spread of COVID-19, enabling Illinois to ensure that infected individuals (and others in need of hospitalization) receive medical treatment that could not otherwise be made available: without the stay-at-home directives, the death rate in Illinois would have been (and would be) ten to 20 times greater; and the State would require more than 100,000 hospital beds (when it had only 33% of 32,010 beds available as of April 30, 2020, the date on which EO32 was issued), more than 25,000 ICU beds (when it had only 25% of 3,631 available), and more than 20,000 ventilators (when it had only 3,378). *See* Appx., Ex. D at 2; Doc. 1-7 at 3. Moreover, the restriction is temporary, and will not be renewed when it expires tomorrow, in light of the evolving situation. And it has been crucial in ensuring that Illinois could reach a stage in which greater activity can be safely allowed.[30]

Applicants do not meaningfully address these facts, and respond instead by asserting that the Governor has not considered less restrictive alternatives employed by several other States. App. 28-29. This is inaccurate. As an initial

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[30] Applicants posit that under the Restore Illinois plan, they may not be able to hold unlimited gatherings for another 12 to 18 months. App. 6. Their speculation has already proven untrue. And that plan is merely a framework, so any challenge to it is speculative and thus not ripe for judicial review. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003).

matter, the Governor has collaborated with faith leaders throughout this process to find ways for worship services to proceed in a safe manner consistent with the advice of health experts.[31] Furthermore, applicants offer no evidence that measures undertaken in other States have proven effective, and in fact, experience proves otherwise. In two of those States, Georgia and Texas, two churches have again closed their doors following COVID-19 outbreaks caused by in-person services.[32] Holy Ghost Catholic Church opened on May 2 and closed 16 days later.[33] Located in a county with the highest number of COVID-19 cases in Texas, the church limited attendance to 179 congregants in its 900-seat building.[34] But three churchgoers and two priests contracted the virus after a service, with one of the priests dying.[35] Likewise, Catoosa Baptist Tabernacle closed within a month of opening even though only 25% of its congregation attended services—it, too, employed social distancing measures, such as spacing seating six feet apart and leaving doors open to prevent touching of doorknobs, but nonetheless several families contracted the virus.[36] To avoid a similar fate, it has been critical for Illinois to maintain restrictions on religious gatherings over the past months.

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[31] Daily COVID-19 Press Briefings, May 22, 2020, *supra* note 25.

[32] Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, Wash. Post (May 22, 2020), https://www.washingtonpost.com/religion/2020/05/19/two-churches-reclose-after-faith-leaders-congregants-get-coronavirus/.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

And even assuming that these other measures were sufficient to protect the residents of those States, heightened protections have been required in Illinois, which ranks third among States with the highest rate of infections, and in Cook County, Illinois, where applicants are located, because it suffers from the highest rate of infection of any county in the country. Thus, EO32 is narrowly tailored to the dire situation in Illinois. Indeed, now that the situation is improving in Illinois, the Governor will be adopting less stringent measures.

B. The Eleventh Amendment bars applicants' IRFRA claim, which is, in any event, unpersuasive.

The Eleventh Amendment bars actions in federal courts against a State, including state officials acting in an official capacity. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019) (States' sovereign immunity derives from Constitution and is confirmed by Eleventh Amendment). This jurisdictional bar applies to pendent state law claims even where the court has jurisdiction over the plaintiff's federal claims. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 919 (1984). Eleventh Amendment immunity will not apply, however, if (1) Congress abrogates the State's immunity; (2) the State consents to suit; or (3) the plaintiff seeks prospective injunctive relief against a state official for an ongoing violation of federal law under the doctrine announced in *Ex parte Young*, 209 U.S. 123, 160 (1908). None of the exceptions applies here.

To begin, there is no indication that Congress has unequivocally abrogated the State's immunity (on the contrary, IRFRA is a state statute). *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001).

Moreover, the State has not consented to suit. A State's waiver of Eleventh Amendment immunity "stated by the most express language or by such overwhelming implications from the text" as to leave no doubt. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974 (internal quotations omitted)). Put another way, consent must be "unequivocally expressed" so the court is "certain that the State in fact consents to suit." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (internal quotations omitted). A State does not "consent to suit in federal court merely by stating its intention to sue and be sued . . . or even by authorizing suits against it in any court of competent jurisdiction." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (internal quotations omitted). Accordingly, "a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court." *Sossamon*, 563 U.S. at 285.

In the IRFRA, the State did not unequivocally consent to suit in federal court. To be sure, the State has consented to suit in its state courts. But nowhere in the statute does Illinois clearly declare that it also consents to suit in federal court. *See Sossamon*, 563 U.S. at 285. The State's authorization of suits in "all cases" is insufficient, as even consent to suit "in any court of competent jurisdiction" does not waive Eleventh Amendment immunity. *Coll. Sav. Bank*, 527 U.S. at 676. Applicants also insist that waiver is present because the language in the IRFRA follows the federal version. App. 34-35. But this Court need not read between the lines as applicants ask. The State knows how to consent clearly to suit in federal court. It did so in Illinois's State Lawsuit Immunity Act, which provides that "[a]n

employee . . . may bring an action under the Age Discrimination in Employment Act of 1967 against the State in State circuit court or federal court." 745 ILCS 5/1.5. It has not consented to suit in federal court here.[37]

And finally, the *Ex Parte Young* exception does not apply here, because it does not extend to alleged violations of state law. *Pennhurst*, 465 U.S. at 106. Allowing a federal court to grant "relief against state officials on the basis of state law" would contravene the "principles of federalism that underlie the Eleventh Amendment" by intruding on state sovereignty. *Id.* Here, applicants ask this court to "instruct[ ] state officials on how to conform their conduct to state law," and thus the *Ex Parte Young* exception does not apply. *Id.* And because their claims for injunctive relief are barred by the Eleventh Amendment, so, too, are their claims for declaratory relief. *See MSA Realty Corp. v. State of Ill.*, 990 F.2d 288, 295 (7th Cir. 1993) (citing *Green v. Mansour*, 474 U.S. 64, 72 (1985)).

But even if this court finds that the Eleventh Amendment does not apply, applicants cannot prevail on the merits of their IRFRA claim. Under IRFRA, the "[g]overnment may not substantially burden a person's exercise of religion, even if the rule results from a rule of general applicability, unless it demonstrates that

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[37] Applicants rely on a series of Florida district court cases, *see* App. 34 n.14, but none of those addressed this Court's requirement that a state's waiver must be expressed unequivocally. And several district courts in Florida have determined, to the contrary, that the State did not waive its immunity to claims for declaratory or injunctive relief brought under RFRA. *See, e.g.*, *Perry v. Reddish*, No. 3:09-CV-403, 2011 WL 13186523, at *7 (M.D. Fla. Jan. 14, 2011); *Gray v. Kohl*, No. 07-10024-CIV, 2007 WL 3520119, at *6 (S.D. Fla. Nov. 14, 2007).

application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling government interest." 775 ILCS 35/15. Applicants cannot prevail on their IRFRA claim for the same reasons that they lose under strict scrutiny on their free exercise challenge. *See supra* pp. 30-33.

C. Applicants forfeited their claims under the Establishment Clause and RLUIPA.

Applicants did not raise their Establishment Clause and RLUIPA arguments in their motion for an injunction pending appeal before the Seventh Circuit. *See generally* 7th Cir. Docs. 6-1, 15. In fact, they did not even brief their RLUIPA argument before the district court in their motion for a TRO and preliminary injunction. *See generally* Docs. 5, 27, 31. This Court, therefore, should decline to review these forfeited arguments in the first instance, *see Kingdomware Techs.*, 136 S. Ct. at 1978, particularly at this stage of the matter, when the Seventh Circuit appeal is ongoing. Even if it does reach the merits of these arguments, however, it should reject them.

1. The executive order does not violate the Establishment Clause.

As discussed, *supra* pp. 17-24, the deferential *Jacobson* standard applies to the constitutional claims presented here. But even if traditional constitutional analysis were invoked, applicants would still not prevail on their Establishment Clause claim.

The Establishment Clause "ensur[es] government neutrality in matters of religion. *Gillette v. United States*, 401 U.S. 437, 449 (1971). It "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Id.* at 450. Against the backdrop of these principles, this Court has announced a variety of frameworks for analyzing Establishment Clause challenges, including the *Lemon* and coercion tests. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000). Regardless of the test employed, the executive order does not violate the Establishment Clause.

First, EO32 passes the test announced in *Lemon*, 403 U.S. at 612-13, under which a government action is consistent with the Establishment Clause if (1) it has a secular purpose, (2) its primary effect "neither advances nor inhibits religion," and (3) it does not "foster an excessive entanglement with religion."

Under this test, a government's "stated reasons will generally get deference" unless they are a "sham." *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). Here, the Governor promulgated EO32 for a secular purpose, to protect Illinoisans from the spread of COVID-19, *see* Appx., Ex. D at 1-2; not to "effectively ban[ ]" worship, App. 36. Ignoring that the order is rooted in scientific guidance and consistent with CDC recommendations, applicants claim that the progression of events demonstrates that this reason is a sham. *See* App. 36. To the contrary, the Governor followed research findings and CDC guidance in tightening restrictions as

the spread of the virus accelerated, and, as announced today, plans to relax restrictions given the success in containing the virus.

EO32 also does not have the effect of inhibiting applicants' religion. It applies to all religious gatherings while permitting several avenues of worship, and it does not disfavor religion compared to analogous secular activities, such as lectures, choir practice, theatrical performances, and concerts, which are prohibited.[38]

And EO 32 does not create an "excessive entanglement" in religion. "Entanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). Generally, "to constitute excessive entanglement, the government action must involve intrusive government participation in, supervision of, or inquiry into religious affairs." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (internal quotations omitted). EO32 does not arise to this level of intrusion: it limits the amount of people who can attend an indoor service at one time, similar to how a fire code limits the number of people who can be present in buildings.

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[38] For the same reasons, the Governor's order passes the endorsement test, which analyzes the purpose of the government action and asks whether the action "conveys a message of endorsement or disapproval" to a reasonable observer. *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 302 (7th Cir. 2000) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)(O'Connor, J., concurring)). A reasonable observer would not perceive the Governor's order, which is based on medical and national guidance, as disapproving of applicants' religion, or religion in general.

Second, EO32 passes the coercion test. In two school prayer cases, this Court has evaluated whether the government action "applied coercive pressure to support or participate in religion." *Freedom from Religion Found.*, 885 F.3d 1038, 1048 (7th Cir. 2018) (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992) and *Santa Fe*, 530 U.S. at 312). But the Court has never applied this test in a situation comparable to the instant circumstance, where the government has allegedly coerced a plaintiff to refrain from, rather than participate in, religion. Regardless, far from coercing applicants to refrain from religion, the order designates religious gatherings as an essential activity and permits individuals to avail themselves of drive-in, online, and limited in-person religious services.

2. RLUIPA is inapplicable.

Forfeiture aside, appellants' RLUIPA claim must be rejected because EO32 falls outside the scope of that statute, which restricts States' ability to "impose or implement land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc(a)(1). RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law." 42 U.S.C. § 2000cc-5(5). Although the executive order is not zoning or landmarking laws, applicants do not even acknowledge this threshold obstacle, which is fatal to their RLUIPA claim. *See* App. 36-39.

Moreover, interpreting RLUIPA to cover a restriction on in-person religious gatherings "'would raise constitutional questions about the law's congruence and proportionality.'" *Cross Culture Christian*, No. 220-CV-00832-JAMCKD, 2020 WL

2121111, at *7 (quoting *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006)). RLUIPA replaced the portions of the federal RFRA that this Court found unconstitutional as to the States in the *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997). "To avoid RFRA's fate, Congress wrote that RLUIPA would apply only to regulations regarding land use and prison conditions." *Guru Nanak*, 456 F.3d at 986 (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)). It should not be stretched to apply here.

III. The Decisions From Other Circuits Do Not Justify An Injunction.

Applicants insist that this Court's intervention is necessary to address a "deepening circuit split" as to the constitutionality of orders like EO32, because the Seventh and Ninth Circuits have denied injunctions pending appeal in such cases, while the Fifth and Sixth Circuits have granted them. App. ii. As an initial matter, the existence of a split, if any, weighs against granting an injunction. Where "courts of appeals appear to be reaching divergent results," an applicant's rights are not "indisputably clear." *Lux*, 561 U.S. at 1308. This is particularly true where, as here, "lower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J.). The courts of appeals that have considered similar issues have all done so in the context of motions for injunction pending appeal, and none of them "has issued a final decision granting permanent relief with respect to such claims." *Id.* As such, even assuming applicants' analysis of these decisions is correct—and, it is not—any split would

merely demonstrate that applicants' rights are not indisputably clear. Further, these decisions do not justify an injunction because the Fifth and Sixth Circuit decisions upon which applicants rely do not show that they are likely to prevail on the merits; as now explained, they are inapposite or largely distinguishable. And to the extent that certain aspects of these decisions cannot be reconciled with the decisions of the Seventh and Ninth Circuits, the latter decisions are correct.

To begin, both Sixth Circuit decisions involved more extensive bans on religious services than Illinois's and are thus are distinguishable. As such, rather than supporting applicants, they confirm that applicants are unlikely to succeed on the merits of their claims. In *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam), the Governor of Kentucky prohibited both in-person and drive-in religious services, regardless of the number of congregants. *Id.* at 611. The Sixth Circuit enjoined the ban on drive-in services pending appeal because comparable, secular drive-in services were permitted, but allowed the ban on in-person services to continue in light of the undeveloped record. *Id.* at 616. In Illinois, drive-in religious services are permitted under EO32. And in *Roberts*, No. 20-5465, 2020 WL 2316679, the plaintiffs again challenged the total ban on in-person religious services. *Id.* at *1. This time, the court enjoined the prohibition pending appeal, explaining that, in lieu of a total ban, the State could employ a numerical limitation. *See id.* ("[i]f the problem is numbers, and risks that grow with greater numbers, then there is a straightforward remedy: limit the number of people who can attend a service at one time") (internal quotations omitted). The

Governor of Illinois did exactly this with EO32, which limits in-person religious gatherings to ten people or less, and he will not continue even this regulation beyond May 29, 2020.

To the extent that the Sixth Circuit concluded that Kentucky's executive order burdened religious exercise because religious organizations are comparable to the secular organizations that are not subject to the ten-person limitations in Illinois, the court's reasoning was incorrect. *See id.*; *Maryville Baptist*, No. 20-5427, 2020 WL 2111316, at *4. As explained, scientific data and the analysis of medical experts confirms that religious gatherings are not comparable to secular activities such as grocery shopping (where people enter to pick up supplies and leave) or to working in an office (where people can work in separate spaces with minimum verbal interaction).[39]

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[39] Three of the district court decisions that plaintiffs cite—*Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-CV-278-DJH-RSE, 2020 WL 2393359, at *3 (W.D. Ky. May 8, 2020); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-CV-00033-GFVT, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020); and *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *6-7 (D. Kan. Apr. 18, 2020)—are not persuasive for the same reason: these courts incorrectly compared religious services to grocery and other stores selling essential supplies. And the district court in *First Baptist* made an additional legal error by finding that the State's orders were not neutral because they "expressly restrict religious activity." 2020 WL 1910021, at *4. But a restriction's express reference to a religious activity is not evidence that its "object or purpose" is to burden religious activity. *Lukumi*, 508 U.S. at 533; *see Maryville Baptist*, 957 F.3d at 614 (mentioning religious organizations "by name" does not by itself show "disparate treatment"). Additionally, *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820248, at *15, (W.D. Ky. Apr. 11, 2020), is distinguishable because it involved a ban on religious drive-in services while permitting secular drive-in services; again, drive-in services are permitted in Illinois. *See Legacy Church*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *35 (denying TRO request for limits on gatherings and distinguishing *On Fire*). Finally, *Berean Baptist*, No.

Likewise, the Fifth Circuit decision in *First Pentecostal Church v. City of Holly Springs, Miss.*, No. 20-60399, 2020 WL 2616687 (5th Cir. May 22, 2019), is inapposite. The district court there denied a request for expedited relief while it was considering the plaintiff's request for a preliminary injunction. *First Pentecostal Church of Holly Springs v. City of Holly Springs Mississippi*, No. 3:20CV119 M-P, 2020 WL 2495128, at *6 (N.D. Miss. May 14, 2020). The court explained that it was "unclear" regarding the preemptive effect of the executive orders at issue and what those orders permitted. *Id.* at *2. The court denied the request for expedited relief because it needed additional briefing on this issue and because the plaintiff had "been proceeding in an excessively reckless and cavalier manner" that endangered their community. *Id.* at *5-*6. On appeal, the Fifth Circuit recognized that the Governor of Mississippi had since issued new guidance, which the plaintiff appeared willing to follow, so it remanded the matter to the district court. *See First Pentecostal Church*, No. 20-60399, 2020 WL 2616687, at *1. It enjoined the challenged executive orders in the meantime because the "temporary deferral" of its decision could "effectively be a permanent denial" given the rapidly shifting regulatory scheme, but it also referred the plaintiff to the Governor's new

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4:20-CV-81-D, 2020 WL 2514313, at *7-*8, is inapposite because, there, the order allowed indoor gatherings of more than 10 people if the gathering could not practicably be held outdoors, thereby favoring secular establishments like malls, and it also allowed 50 people to attend funerals without providing any public health rationale for doing so. And, in any event, many courts have upheld executive orders like EO32 against constitutional challenges, *see supra* note 17, so at most applicants' cited cases establish that applicants' rights are not "indisputably clear," and thus they are not entitled to an injunction, *see supra* p. 15.

guidance. *Id.* As a result, the Fifth Circuit neither addressed the merits of the plaintiff's constitutional claims, nor did it clarify whether it was enjoining the executive orders on constitutional, statutory, or preemption grounds. This decision, therefore, does not indicate a "deepening" circuit split or bear on the merits of applicants' claim here.

And finally, applicants' contention that "serious confusion" exists among the federal courts as to what standard of review to apply in this emergent circumstance is overstated. App. iii. The Sixth Circuit appeared to conclude that a total ban on in-person services failed the *Jacobson* framework, *see Roberts*, No. 20-5465, 2020 WL 2316679, at *4, whereas the Seventh Circuit addressed the separate question of a less restrictive, ten-person limit, and determined that this limit likely passes the *Jacobson* framework, Appx., Ex. A at 2. And neither the Fifth Circuit nor the Ninth Circuit's decision opined on whether *Jacobson* applies. Moreover, all of these circuit decisions were on injunctions pending appeal. These courts should be allowed to develop the issues in the scope of their ongoing appeals before this Court becomes involved, especially because this action is now moot.

In short, the out-of-circuit cases on which applicants rely are either distinguishable or ignore the differences between religious gatherings and the non-analogous secular activities permitted by EO32. And even if these decisions could be fairly characterized as inconsistent, they would merely demonstrate that applicants' entitlement to relief is not indisputably clear.

IV. Applicants Will Not Suffer Irreparable Harm Absent An Injunction.

Applicants argue that they will be irreparably harmed absent an injunction. App. 39-40. To the extent irreparable harm is even relevant to their request for an injunction, *but see Hobby Lobby*, 568 U.S. at 1403, applicants are incorrect. Applicants must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (emphasis in original). A "possibility of irreparable harm" is insufficient. *Id.* Applicants have not carried, and cannot carry, this heavy burden. The restriction of which they complain will expire shortly, on May 29, 2020, and the Governor has announced that he will not reimpose it or any similar restriction. Applicants will be free to gather in person in large numbers on Sunday for Pentecost, and they do not need relief from this Court.

And even if the restriction continued, applicants would not suffer irreparable harm. They claim that they are harmed because they cannot exercise "their sincerely held religious beliefs of assembling themselves together to worship God." App. 39. But applicants have not suffered the loss of their right to free exercise. They resumed indoor in-person services on May 10, 2020, while the case was pending in the district court, and continued to conduct such services even after the Seventh Circuit denied their motion for an injunction pending appeal. Applicants do not need the extraordinary relief of an injunction pending appeal when they will hold in-person services of more than ten people regardless. And, as explained, EO32 reasonably and constitutionally restricted applicants' right to free exercise, and so they have maintained their right to free exercise.

Moreover, applicants' insistence that they must either violate their religious beliefs or face civil or criminal penalties is untrue. App. 39-40. As noted, the Governor's order expressly permits online and drive-in services. Applicants cannot argue that online services do not constitute the exercise of religion: they have been providing spiritual guidance online for years before the pandemic began. And, to the extent that their beliefs require in-person assembly inside the church, applicants have not been barred from conducting such services—they may congregate ten individuals at a time, multiple times per day. While applicants have faced enforcement actions, that is because they chose not to adhere to the permitted avenues for services.

For months now, Illinois residents have limited gatherings and activity outside their homes with resolve, protecting themselves, their loved ones, their communities, and essential workers with whom they interact. As a result, the number of infections and deaths is far lower than would have otherwise occurred. And, in mere days, applicants will be able to hold larger in-person services. In the meantime, EO32 has not irreparably harmed them, because they do not, and cannot, dispute that "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince*, 321 U.S. at 166.

CONCLUSION

For these reasons, the Court should deny the application.

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MAY 2020