No. 20-569

IN THE SUPREME COURT OF THE UNITED STATES

ELIM ROMANIAN PENTECOSTAL CHURCH, and LOGOS BAPTIST MINISTRIEES

Petitioners

v.

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

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
court@LC.org
Counsel for Petitioners

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The decision below directly conflicts with *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), and *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021).

In *Catholic Diocese*, this Court enjoined an **identical 10-person discriminatory restriction** on religious gatherings. 141 S. Ct. at 64. This Court mentioned numerous examples of disparate treatment, equally present here, including "acupuncture facilities, camp grounds, garages . . . plants manufacturing chemicals and microelectronics and all transportation facilities. 141 S. Ct. at 66. "The disparate treatment is even more striking in an orange zone where attendance at houses of worship is limited to 25 persons, but non-essential businesses may decide for themselves how many persons to admit." *Id.* "[A] large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id. See id.* at 69 (Gorsuch, J.,

concurring) ("hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents"); *id.* at 73 (Kavanaugh, J., concurring) (grocery store, pet store, or big-box store"). In *South Bay* and *Harvest Rock*, this Court again enjoined discriminatory restrictions on religious worship that included the similar laundry list of exemptions. *South Bay*, 141 S. Ct. at 716; *Harvest Rock*, 2021 WL 406257. *See also Gateway City*, 2021 WL 753575 (holding that the Ninth Circuit's failure to enjoin discriminatory restrictions was clearly erroneous in light of *Catholic Diocese*).

In contrast, the decision below held that comparisons to "grocery shopping . . . or warehouses," big box stores, liquor stores, banks, laundromats, meatpacking plants, offices, and a host of other exempt activities were inappropriate and did not show discriminatory treatment of religious worship. (App. 009a-010a.) The exemptions held unconstitutional in *Catholic Diocese*, *South Bay*, and *Harvest Rock* are all present here, but the Seventh Circuit upheld them. That decision cannot be reconciled with this Court's decisions. **As Justice Gorsuch said, the Seventh Circuit's decision below directly conflicts with this Court's precedents**. 141 S. Ct. at 71 ("many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers." (citing *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020)).

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE SECOND, SIXTH, AND NINTH CIRCUITS.

The decision below directly conflicts with the Second, Sixth, and Ninth Circuits. While the panel below upheld the Governor's discriminatory 10-person restriction on religious worship, other circuits have enjoined identical or more favorable restrictions on religious gatherings. *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020) (enjoining New York's 10 and 25-person discriminatory restrictions on religious gatherings); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020) (enjoining Nevada's discriminatory 50-person numerical cap on religious gatherings); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020) (same); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (enjoining California's 100 and 200-person numerical caps on religious gatherings); *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021) (same); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (enjoining Kentucky's prohibition on drive-in worship services); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (enjoining Kentucky's prohibition on in-person worship services); *Moclova Christian Acad. v. Tuledo-Lucas Cnty.*, 984 F.3d 477 (6th Cir. 2020).

While the Second, Sixth, and Ninth Circuits all enjoined discriminatory restrictions on religious worship, the Seventh Circuit permitted the Governor to impose virtually identical restrictions. Certiorari is warranted to align the Circuits with *Catholic Diocese*, *South Bay*, *Harvest Rock*, and *Gateway City*.

III. *CATHOLIC DIOCESE* DEMONSTRATES THAT THIS CASE IS NOT MOOT.

Respondent claims this case is moot because his unconstitutional orders "expired." (Opposition, "Opp'n," at 1-2.) *Catholic Diocese* compels the opposite conclusion, regardless of the Governor's temporary retreat. In *Catholic Diocese*, after the congregations applied for relief, but before their injunction was granted, the Governor removed the restrictions. 141 S. Ct. at 68.

The New York Governor argued the matter was moot, but this Court disagreed: **"It is clear that this matter is not moot."** *Id.* (emphasis added). "[I]njunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified." *Id.* "[T]here is no reason why [the congregations] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Id.* at 68–69. "[I]f we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow." *Id.* "**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 72 (emphasis added).

This same is true here, as the panel recognized. (App. 007a ("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**.") (emphasis added).) In the record below, the Governor explicitly stated that "a new strain of this virus could come by in Illinois and **more restrictions would be necessary**." (App. 141a (emphasis added).) If Petitioners' case is found moot, Petitioners could easily be in the same position again, just as in *Catholic Diocese*.

This case is also not moot under *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106 (U.S. Mar. 8, 2021), where this Court held that nominal damages claims are alone sufficient to prevent a finding of mootness with respect to redressability. Petitioners have plead a nominal damages claim that precludes mootness. (App. 094a.)

IV. THE GOVERNOR'S VOLUNTARY CESSATION OF ILLEGAL CONDUCT DOES NOT MOOT THE APPEAL.

A. The Record Does Not Demonstrate Absolutely Clarity That the Governor Will Not Return to His Unconstitutional Regime.

The Governor's temporary shift from the discriminatory restrictions on religious worship in Executive Order 32, which he vigorously defended at the Seventh Circuit and continues here, is insufficient to moot Petitioners' claims. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

> **[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued**. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. . . **[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur**.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (emphasis added). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"). The Governor "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his] policy," *id.*, of imposing discriminatory restrictions on religious worship services, because his sudden change in policy is neither permanent nor irrevocable. *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983).

The Governor has "neither asserted nor demonstrated that [he] will **never** resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (emphasis added). During argument below, the Governor explicitly refused to state he would not return to his previous orders. (App. 140a ("So is the Governor willing to make an iron-clad commitment not to rescind the current order? . . . **No, your Honor, we are not**." (emphasis added).) (App. 141a ("a new strain of this virus could come by in Illinois and more restrictions would be necessary"); (App. 151a ("THE COURT: Would you be willing . . . to say that you will not enforce or go back to the original order without coming to this Court to seek permission? [Counsel]: Your Honor, **we are not willing to do that**.") (emphasis added).)

The Governor has not disavowed reinstatement of unconstitutional restrictions, and he has explicitly preserved the right to reinstate them. This precludes any mootness argument. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where intent to reinstate, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . ."); *id* at *5–6 ("The Court is not fooled.").

B. The Governor's Executive Orders Did Not "Expire," but Were Revoked to Evade Review.

The Governor contends this case is moot because his orders expired. (Opp'n at 11-19.) This is incorrect. In fact, the timing of the Governor's removal of his restrictions evinces litigation tactics, not genuine repentance. When Petitioners sought emergency relief from this Court as to the 10-person restrictions on religious worship, the Governor only revoked his restrictions **a mere three hours before he filed a response with this Court**. (App. 128a.) This litigation-induced timing should not be countenanced. *Cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such [post-litigation] maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 871 (2005) (rejecting counties'

mere "litigating position" as evidence of actual intent). During argument below, the Governor's counsel twice refused to commit not to reimpose the restrictions. Indeed, "[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

C. The Governor Continues To Defend His Previous Regime.

A case is not moot where, as here, the Governor "did not voluntarily cease the challenged activity because he felt [it] was improper," and "has at all times continued to argue vigorously that his actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985); *Pierc*e, 2019 WL 4750138, at *5 ("[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case.").

The Governor continues to assert that his previous orders were constitutional. (Opp'n at 22 ("**To be sure, the expired executive order at issue here is distinguishable in several ways from the order at issue in *Catholic Diocese* [and] might be sustained against petitioner's challenges**") (emphasis added)). The Governor vigorously defended his orders at the Seventh Circuit and continues that here. "There is nothing in the parties' submissions or the record to demonstrate the Governor changed his mind about

the merits of Plaintiff[s'] claim." *Pierce*, 2019 WL 4750138, at *6. "The Governor did not experience a change of heart that may counsel against a mootness finding." *Id.* "Given the importance of the issues at bar . . . the public interest in having the legality of the Governor's behavior settled weighs against a mootness ruling." *Id.* at *7.

V. THIS CASE IS AN APPROPRIATE VEHICLE FOR CERTIORARI TO FINALLY RESOLVE, NATIONWIDE, THE DISCRIMINATORY TREATMENT OF RELIGIOUS WORSHIP DURING COVID-19 ON A DEVELOPED RECORD.

"Today's orders should have been needless; **the lower courts in these cases should have followed the extensive guidance that this Court already gave**." *South Bay*, 141 S. Ct. at 719 (Gorsuch, J., statement) (emphasis added). Unfortunately, the lower courts are still not following this Court's decision in *Catholic Diocese*. Indeed, post-*Catholic Diocese*, the Ninth Circuit twice refused to follow *Catholic Diocese* in *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021) and *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021), which necessitated this Court's further exercise of emergency injunctive relief in *South Bay*, 141 S. Ct. 716 and *Harvest Rock*, 2021 WL 406257. Notably, this Court's emergency injunctive relief in *Harvest Rock* came after it had already vacated the Ninth Circuit's prior denial of injunctive relief. *Harvest Rock Church v. Newsom, Gov. of CA*, No. 20A94,

2020 WL 7061630 (U.S. Dec. 3, 2020). *See also Gateway City*, 2021 WL 753575 (holding the Ninth Circuit's failure to follow *Catholic Diocese* was clearly erroneous).

The Ninth Circuit is not alone in ignoring *Catholic Diocese*. The First Circuit, too, cast doubt on its belief that *Catholic Diocese* compelled invalidating discriminatory restrictions on religious worship. *Calvary Chapel of Bangor v. Mills*, 984 F.3d 21 (1st Cir. 2020). Despite *Catholic Diocese*, the First Circuit noted that imposing discriminatory restrictions on religious worship "will not cause serious harm," and that "public officials be accorded considerable latitude" when imposing discriminatory restrictions. *Id.* at 29.

And, as Respondent's Supplemental Authorities demonstrates, the Seventh Circuit again refused to apply *Catholic Diocese* just two days ago. *Cassell v. Snyders*, No. 20-1757, 2020 WL 852227 (7th Cir. Mar. 8, 2021). There, the court said that while the "Illinois restrictions at issue here" are the same as those enjoined in *Catholic Diocese*, *id.* at *5, "[t]he similarities do not necessarily mean that the plaintiffs here will succeed on the merits of their free-exercise claims." *Id.* Thus, the Seventh Circuit has refused to apply *Catholic Diocese* despite this Court's clear holdings in numerous cases since that decision.

Regardless of the erroneous rationale giving rise to this disturbing trend of ignoring this Court, one thing is clear: granting certiorari in a case with

a fully developed record not in an emergency writ of injunction will give this Court the opportune vehicle to address these discriminatory restrictions on religious worship that "strike at the very heart of the First Amendment's guarantee of religious liberty." *Catholic Diocese*, 141 S. Ct. at 68.

VI. BECAUSE THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS, SUMMARY REVERSAL IS ALSO APPROPRIATE.

The instant Petition is an appropriate and warranted vehicle to finally resolve the discriminatory restrictions on religious worship in the COVID-19 era. Without a final ruling, lower courts will continue to disregard and/or wrongfully distinguish this Court's clear rulings. Absent a final decision on the merits, this Court will continue to be burdened with ongoing emergency injunctions pending appeal. This Court can bring closure, and this case is an appropriate vehicle to do so.

While much less satisfactory, this Court may also summarily reverse the lower court's decision based on its clear holdings in *Catholic Diocese*, *South Bay*, *Harvest Rock*, and *Gateway*. Summary reversal is appropriate when the lower court "egregiously misapplied settled law." *Weary v. Cain*, 136 S. Ct. 1002, 1007 (2016) (collecting cases)). When a lower court "disregard[s] our other constitutional decisions," summary reversal is appropriate. *See, e.g.*, *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449-50 (2015) (Thomas, J., dissenting).

Summary reversal is appropriate even when the case involves "intensely factual questions without full briefing and argument," *Weary*, 136 S. Ct. at 1007, where the decision is "understandable" but "runs directly counter to our precedents." *Martinez v. Illinois*, 572 U.S. 833, 843 (2014).

As this Court held in *Catholic Diocese*: "**even in a pandemic, the Constitution cannot be put away and forgotten**." 141 S. Ct. at 68 (emphasis added). Where government regulations "single out houses of worship for especially harsh treatment," Petitioners "have clearly established their entitlement to relief." *Id.* at 66. Indeed, "there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Id.* at 72 (Gorsuch, J., concurring).

After positing that "[i]t would be foolish to pretend that worship services are exactly like any of the possible comparisons" this Court found constitutionally relevant in *Catholic Diocese*, (App. 010a), the Seventh Circuit reached back to Chief Justice Roberts' concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) to claim that *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) "sustains a public-health order against a constitutional challenge." (App. 010a.) But, *Catholic Diocese* put that argument to rest. "The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." 141 S. Ct. at 68. And, "we have a

duty to conduct a serious examination of the need for such a drastic measure." *Id.* The Seventh Circuit's reliance on a single concurrence cannot be reconciled with *Catholic Diocese*.

> As Justice Gorsuch's stated:
>
> > Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain**.**

Id. at 70 (Gorsuch, J., concurring). As Justice Gorsuch noted in *Danville Christian Academy v. Beshear*, "**this Court made clear that it would no longer tolerate such departures from the Constitution**." 141 S. Ct. 527, 530 (2020) (Gorsuch, J., dissenting) (emphasis added). Because the Seventh Circuit's decision cannot be reconciled with *Catholic Diocese*, *South Bay*, and *Harvest Rock*, summary reversal is appropriate.

While summary reversal is technically available, certiorari and a full resolution of the matter is the more appropriate course. Since the imposition of discriminatory restrictions on religious worship services beginning in March 2020, this Court has been bombarded with emergency petitions and continual requests for injunctive relief. Such a flood of unnecessary applications will continue unless this Court issues a dispositive resolution putting the final nail in the coffin of these

unconstitutional orders. Certiorari should therefore be granted.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated this March 10, 2021.

Respectfully submitted,

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
Counsel for Petitioners