No. 19A1046

IN THE
SUPREME COURT OF THE UNITED STATES

ELIM ROMANIAN PENTECOSTAL CHURCH, and
LOGOS BAPTIST MINISTRIES,

Applicants,

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

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION RELIEF REQUESTED BEFORE MAY 31, 2020

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PARTIES AND DISCLOSURE STATEMENT

Applicants are Elim Romanian Pentecostal Church ("ERPC") and Logos Baptist Ministries ("Logos"), neither of which has any parent corporation or publicly held shareholder. Respondent is Jay R. Pritzker, in his official capacity as Governor of the State of Illinois.

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ARGUMENT IN REPLY

Applicants, Elim Romanian Pentecostal Church ("ERPC") and Logos Baptist Ministries ("Logos") (collectively, "Churches"), submit this argument in support of their Emergency Application for Writ of Injunction filed May 27, 2020 (their "Application"), and in reply to Governor Pritzker's Response in Opposition to Emergency Application for Writ of Injunction filed May 28, 2020 (the Governor's "Response").

INTRODUCTION

Mere hours before his Response was due in this Court, the Governor announced a sudden change in his 10-person limit on religious worship services (Resp. 1, n.1), after vigorously defending his policy in both lower courts, and having announced barely 3 weeks ago that it would be 12 to 18 months before numerical limits on worship services were lifted (App. 6). What changed? The Governor was summoned to the steps of this Court to give an account. But the Governor's sudden change has no permanency or force of law, and both his public statements and his new policy strongly signal an impending return to his old ways. Absent a pronouncement from this Circuit Justice, or the Court, there can be no reasonable expectation that the Governor will not once again infringe Churches' constitutional rights. Thus, this case is not moot, and the prayed for writ of injunction should issue on the merits to restrain enforcement of the Governor's arbitrary and discriminatory Orders restricting religious worship.

I. THE GOVERNOR'S SUDDEN CHANGE OF POLICY DOES NOT MOOT THIS CASE BECAUSE THE GOVERNOR HAS NOT CARRIED THE HEAVY BURDEN OF MAKING ABSOLUTELY CLEAR THAT HE CANNOT REVERT BACK TO THE ARBITRARY AND DISCRIMINATORY POLICIES HE HAS VIGOROUSLY DEFENDED TO THIS COURT AND THE COURTS BELOW.

A. Under the Voluntary Cessation Doctrine the Governor Faces a Heavy Burden of Making Absolutely Clear That He Cannot Revert Back to His Unconstitutional Policy.

The Governor's apathetic argument that this case is moot should be rejected. (Resp. 1, 14.) His sudden, "voluntary" shift from the 10-person limit on religious worship enshrined in Order 32[1] and his Restore Illinois plan, which he has vigorously defended in the courts below and to this Circuit Justice, is not enough to remove his conduct from review:

> **It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.** Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (emphasis added).

> We have recognized, however, that **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. Given this concern, our cases have explained that **a defendant claiming that its voluntary compliance moots a case bears the formidable burden of**

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[1] Unless otherwise indicated, capitalized terms in this reply have the same meaning as in Churches' Application.

> **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) (internal quotation marks and citation omitted).

B. The Governor Cannot Carry His Heavy Burden Because His Sudden Change in Policy Is Not Permanent.

Applying this "formidable burden," the Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that a state governor's "voluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 137 S. Ct. 2012, 2019 n.1 (2017) (modification in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Here, Governor Pritzker "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his] policy," *id.*, of imposing unique and discriminatory numerical limits on religious worship services, because his sudden change in policy is neither permanent nor irrevocable. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983).

The new guidance for worship services from the Illinois Department of Health (IDPH) (Resp. 1, n.1, the "Worship Guidance" or "WG"[2]), issued the day after Churches' Application, and mere hours before the Governor's Response was due, does

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

not satisfy the Governor's burden to show mootness because "by its terms is not permanent" and it has not "'irrevocably eradicated the effects of the alleged violation.'" *Lyons*, 461 U.S. at 101. Neither the plain language nor the regulatory context of the Worship Guidance demonstrates any authority to bind the Governor or durability against his fiat. *See id.*; *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007).

The Worship Guidance does not purport to supersede or abrogate the Governor's Order 32, which enshrines and gives the force of law to the Governor's 10-person limit on religious worship services. (App. Ex. D § 2.5.f.). Thus, to the extent the Worship Guidance is permissive towards in-person worship services of more than 10, it is inconsistent with Order 32, for as long as Order 32 is in effect.[3] Moreover, the Worship Guidance contradicts the publication of the Governor's 5-phase, long-range Restore Illinois plan (App. Ex. E) and the Governor's public statements about it. By the Governor's own admission "Illinois will enter Phase 3 in two days" (Resp. 10), but as published, Phase 3 continues a 10-person limit on gatherings (App. Ex. E). And the Governor himself is on record—this month—stating that it will be 12 to 18 months before churches reopen under the plan. (App. 6.)

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[3] Even if Order 32 expires on May 29 by its own terms as contended by the Governor (Resp. 1, 5), there is nothing to prevent the Governor from extending it or replacing it with a similar order. Indeed, Order 32 itself is a replacement of the Governor's first stay-at-home order issued March 20, 2020 and extended by executive order on April 1, 2020. (App. 3 n.3; Resp. 7.) And on April 30, 2020, the same day the Governor issued Order 32, he also issued Executive Order 2020-33 which, *inter alia*, **extended 27 prior** COVID-19 executive orders. (7th Cir. Doc. 6-5 at 139 of 363.) Thus, the Governor's extending or reinstating his 10-person worship limit is not merely "speculative." (Resp. 5.)

If, as the Governor claims, the Worship Guidance *is* consistent with Restore Illinois (Resp. 10), it is only because Restore Illinois on its face reserves absolute discretion to the Governor to implement all or none of it, or to change it, according to his schedule and whim. (App. Ex. E at 3 ("This is an initial framework that will likely be updated . . . .'); at 4 ("[J]ust as health metrics will tell us it is safe to move forward, **health metrics may also tell us to return to a prior phase** . . . ."); at 4 ("All public health criteria included in this document are subject to change. . . . [T]his plan can and will be updated . . . .") (emphasis added).) Thus, tying the Worship Guidance to Restore Illinois only proves that it has no permanence, and that it cannot advance the Governor's burden to establish Churches' claims are moot.

Moreover, 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); *see also McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) ("[W]hile a **statutory** change 'is usually enough to render a case moot,' **an executive action that is not governed by any clear or codified procedures cannot moot a claim**." (emphasis added)). To be sure, given that the Governor ostensibly plans to implement or change, or even reverse, Restore Illinois according to "health metrics" and "health criteria" which are "subject to change" (App. Ex. E at 4), the Governor has already laid the groundwork for imposing more, not fewer restrictions going forward. For example, in his Response, the Governor claims "the threat of the virus has not passed, and there remains no vaccine or treatment available for COVID-19." (Resp. 6.) Furthermore, the Governor has openly stated he

is "deeply concerned" of a COVID-19 surge in the summer or fall,[4] and that, "If you really begin to open things up, you're going to have a second wave . . . . We have to be able to address that."[5] These same concerns of recurrence were voiced by Dr. Allison Arwady, Commissioner of the Chicago Department of Public Health, who is the same official that has threatened Applicant ERPC with sanctions up to and including closure or "Summary Abatement." (App. 12–13, Ex. F.)[6] Thus, not only has the Governor not taken the position that he will not reinstate his 10-person worship limitation, but there is evidence he intends to reinstate restrictions within months under certain circumstances. He cannot demonstrate mootness in any event. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where government intends to reinstate old policy, "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 . . . .").

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[4] Kelly Bauer, *Coronavirus In Chicago: Not Staying Home, Wearing Masks Could Lead To More Surges, Pritzker Says*, Block Club Chicago (May 19, 2020, 7:28 AM CDT), https://blockclubchicago.org/2020/05/19/coronavirus-in-chicago-not-staying-home-wearing-masks-could-lead-to-more-surges-pritzker-says/.

[5] Dan Mihalopoulos, *Gov. JB Pritzker Warns Illinois Could Suffer A Second Spike In COVID-19 Cases*, WBEZ (Apr. 10, 2020, 6:09 PM EDT), https://www.wbez.org/stories/gov-jb-pritzker-warns-illinois-could-suffer-a-second-spike-in-covid-19-cases/087c24d2-eac5-4df8-aa3e-e997e22140eb; *see also* Mike Flannery, *Pritzker worried about second wave of COVID-19 infections that could be deadlier*, Fox 32 Chicago (Apr. 10, 2020), https://www.fox32chicago.com/news/pritzker-worried-about-second-wave-of-covid-19-infections-that-could-be-deadlier.

[6] Bauer, *supra*, note 4.

Even the Worship Guidance itself is passively-aggressively hostile to in-person worship services of more than 10 people, revealing the longevity of its permissiveness is precarious at best. (WG at 1 (suggesting "deep respect for human life and health, which prioritizes protecting our neighbors and the vulnerable" is best expressed "through remote services and drive-in services"); at 3 ("Where the 10-person limit **cannot** be followed in places of worship, these guidelines are recommended."[7] (emphasis added)).) Thus, there is no doubt Churches are one whim away from being once again subjected to the restrictions they challenge in this case and which the Governor obviously still favors. The Worship Guidance can be revoked just as quickly as it came into being. To be sure, it is not a stretch to say the Governor's reversion to those restrictions is likely, which thwarts any claim of mootness.[8]

C. The Governor Cannot Carry His Heavy Burden Because He Has Not Changed His Mind About the 10-Person Limit and Even Now Vigorously Defends Its Constitutionality.

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

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[7] *Cf. Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313 (E.D.N.C. May 16, 2020) ("[W]ho decides whether a religious organization or group of worshipers correctly determined that their religious beliefs dictated the need to have more than 10 people inside to worship? Under [the orders], the answer is a sheriff or another local law enforcement official. This court has grave concerns about how that answer comports with the Free Exercise Clause.")

[8] The Governor's fixation on face coverings for Churches' congregants reveals even now that he wants to impose stricter rules on worshippers than others. (Resp. 11.) As shown in Churches' Application, neither the Governor's Orders nor the CDC guidances **require** face coverings when social distancing can be maintained. (App. 4–5, n.5, 10 n.6.) The photographs in Churches' Application show ERPC accomplished this well, obviating the need for masks for the distanced congregants. (App. 10–11.) Still, the Governor unfairly faults the church, and only the church. (Resp. 11.)

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 vast majority of the 47 pages of the Governor's Response is devoted to vigorous defense of his 10-person limit for worship services, and "[t]here 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.*

Moreover, the timing of the Governor's policy change—on the eve or a ruling by this Circuit Justice or the Court—is suspect, and betrays an intent to go back to his old ways. *See id.* at *5–6 ("The Court is not fooled."); *cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 871 (2005) (rejecting counties' mere "litigating position" as evidence of actual intent of county policies). Furthermore, "[g]iven 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." *Pierce*, 2019 WL 4750138, at *7.

D. The Nature and Timing of the COVID-19 Pandemic and the Governor's Orders in Response Satisfies the Mootness Exception for Disputes Capable of Repetition Yet Evading Review.

Not only can the Governor not carry his burden under the voluntary cessation doctrine (*see supra* pts. I.A–C), but this case also "fit[s] comfortably within the

established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* Both circumstances are present.

Given the rapidly changing COVID-19 landscape there is no question that the duration of the Governor's 10-person worship limit was always going to be "too short to be fully litigated prior to cessation or expiration." Indeed, according to the Governor Order 32 is expiring and "religious gatherings will no longer be subject to mandatory restrictions." (Resp. 1; *see also* Resp. 8 ("[Order 32] reflected the evolving circumstances of the "COVID-19 pandemic"); 31 ("the restriction is temporary").) Even under the Governor's recent forecast of reopening churches in 12 to 18 months under his Restore Illinois plan, the duration of his restrictions will be too short to be fully litigated. *See Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (two years is too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *Southern Pac. Terminal Co. v. ICC*, 2199 U.S. 498, 515 (1911) (18-months is too short).

Given the inherently temporary nature of the Worship Guidance, the Governor's dire predictions for the summer and fall, and the Governor's expressed preference for a 10-person limit on worship services (*see supra* pts. I.B–C), there is also a reasonable expectation that Churches will be subject to the same restrictions

again. Thus, this case satisfies the mootness exception for disputes capable of repetition yet evading review.

II. CHURCHES ARE IRREPARABLY HARMED BY ONGOING AND ESCALATING THREATS OF ENFORCEMENT UNDER THE AUTHORITY OF THE GOVERNOR'S ORDERS.

The Governor's disingenuous argument that Churches have not been irreparably harmed by the Governor's Orders should be rejected. (Resp. 45–46.) First, as shown in Churches' Application (App. 39–40), "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There is no dispute that Churches have not only endured the threat of enforcement of the Governor's Orders while exercising in-person worship, but also have been subjected to actual enforcement. (App. 12–13.) Just the threat, however, is enough. "'**The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands**.'" *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (emphasis added); *see also Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one."); *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[I]t is not necessary that a person expose herself to arrest or prosecution under a statute in order to challenge that statute in a federal court" because the "threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement.").

Nor does the Governor's allowing Churches to worship the way *he* thinks is best avoid Churches' irreparable injury from being deprived of the right to worship according to their consciences. (Resp. 45–46.) "**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). As the Sixth Circuit taught in *Roberts v. Neace*,

> Who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25.
>
> **[T]he Free Exercise Clause does not protect sympathetic religious practices alone. And that's exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it.**

958 F.3d 409, 415–16 (6th Cir. 2020) (emphasis added)(citation omitted). (App. 16–17.) It is not for the Governor to say what kind of worship should be acceptable to Churches.

Finally, Churches' establishment of irreparable harm is not diminished in the least by the timing of their Application. (Resp. 2–3.) Churches applied to this Circuit Justice for relief on May 27, just 2 business days after the Chicago Public Health Commissioner escalated her enforcement threat against Applicant ERPC to

"Summary Abatement," and just 1 business day after the latest round of police citations were issued to Applicant Logos. (App. 12–13.) Prior to their Application, Churches diligently sought emergency relief at every level. (App. 8–13.) Churches progressed from commencing this action in the district court on May 7 to the Seventh Circuit's denial of an injunction pending appeal on May 16—just 9 days. At that point, Churches had obtained expedited merits briefing and argument in the Seventh Circuit and pressed their claims—including irreparable harm—in their merits brief. (App. 12.) The next day, however, the Chicago Public Health Commissioner declared Applicant ERPC a "public health nuisance" and threatened enforcement up to and including "Summary Abatement," and the day after that police issued Logos new citations. (App. 12–13.) Under the substantially changed circumstances, when it became clear that injunctive relief was needed to forestall further enforcement and irreparable harm prior to the Seventh Circuit's decision following its June 12 oral argument, Churches quickly applied to this Circuit Justice for emergency relief. And regardless of what a different Chicago official may have said to the press (Resp. 3), the Public Health Commissioner has not withdrawn or rescinded either her May 15 warnings or her May 23 "Summary Abatement" enforcement threats, and the police have not canceled their citations. Instead, as noted above, the Public Health Commissioner has voiced concerns that the situation could worsen, and that new responsive actions would have to be implemented. Churches have been and continue to be irreparably harmed, and the writ of injunction should issue.

Conversely, issuing the writ of injunction can bring no harm to the Governor if, as he claims, he has no intention of reinstituting his 10-person limit on worship services. And, "[t]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute . . . ." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). Thus, any balancing of potential harms which may result from issuance of the injunction tips decidedly in favor of Churches.

III. THE GOVERNOR'S ANECDOTAL ACCOUNTS OF CHURCH GATHERINGS DO NOT ADVANCE HIS BURDEN TO JUSTIFY THE RESTRICTIONS ON WORSHIP IN HIS ORDERS.

As shown in Churches' Application, it is the Governor's burden to prove the constitutionality of his 10-person restriction on worship services under strict scrutiny. (App. 27–29.) The Governor's factually deficient, anecdotal accounts of disparate church gatherings do not satisfy the constitutional standard. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (alleged harm cannot be "mere speculation or conjecture"); *see also Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307, (E.D. Ky. May 8, 2020) ("There is ample scientific evidence that COVID-19 is exceptionally contagious. But **evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking**." (emphasis added)).

Taking the accounts in turn, neither the Jackson County nor the California examples (Resp. 21, nn.21, 22) provide any facts about hygiene or distancing measures (if any) taken by the subject churches. The German example cites to a

report of other reports, apparently relying on one anecdotal account that government distancing requirements were followed. (Resp. 21–22, n.23.) But no information about the church building capacity and occupancy or other precautions is provided. Least helpful, however, are the accounts cited in support of the Governor's blanket statement that "outbreaks of the virus have been traced back to religious services around the world." (Resp. 22, n.24.)

The referenced church choir practice near Seattle is inapposite. (Resp. 22 n.24.) The choir met on **March 17**, 2020—ancient history on the COVID-19 timeline—for 2 1/2 hours of singing practice, which included "members sitting close to one another, sharing snacks, and stacking chairs at the end of practice." Lea Hamner, MPH, et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69(19) MMWR 606, 606 (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf. Indeed, [m]embers had an **intense and prolonged exposure, singing while sitting 6–10 inches from one another**." *Id.* at 609 (emphasis added). Moreover, one attendee "**was known to be symptomatic**." *Id.* at 606 (emphasis added). At the time of the practice, there were no reported cases of COVID-19 in the community, "[t]here were no closures of schools, restaurants, churches, bowling alleys, banks, libraries, theaters, or any other businesses," and "[t]he advice from the State of Washington was to limit gatherings to 250 people." Skagit Valley Chorale, *Statement re: COVID-19*, skagitvalleychorale.org (Mar. 23, 2019), https://9b3c1cdb-8ac7-42d9-bccf-4c2d13847f41.filesusr.com/ugd/3e7440_635a114fead240e1a02bc2c872a852de.pdf.

Thus, the choir practice was nothing like the services desired and conducted by Churches. (App. 7–13.) And, with respect to singing, the CDC concluded only that "[t]he act of singing, itself, **might** have contributed to transmission." Hamner, at 606 (emphasis added).

The South Korean example is even less apposite. (Resp. 22 n.24.) A "cluster" of COVID-19 infections originated with a congregant of a Daegu, South Korea church around **February 18**, 2020, when there were **only 39 known cases in the country**. Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, *How a South Korean church helped fuel the spread of the coronarvirus*, The Washington Post (Mar. 25, 2020), https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/. The South Korean government did not roll out testing and closures until after the church cluster emerged. *Id.* Thus, the circumstances were nothing like the present reality for Churches, and do not justify Governor Pritzker's arbitrary 10-person limit.

Beyond the inapposite anecdotes, the Governor's concern about spreading contagion by "speaking" and "singing" at properly distanced, responsibly held church services is puzzling. (Resp. 21–22.) The Governor has not banned speaking, whistling, or singing at Walmart, Home Depot, law firm meetings, or at any of the numerous other permitted "Essential" gatherings. How is a church attendee, speaking six feet or more from another, more likely to be infected than a Walmart customer speaking with the cashier or other shoppers? How is a meeting of 20 properly-distanced attorneys speaking together less dangerous than a worship service attended by 20

properly-distanced people, who are listening to a sermon delivered by the Pastor who is still farther away? The Governor does not and cannot explain.

IV. CHURCHES HAVE NOT FORFEITED THEIR ESTABLISHMENT CLAUSE AND RLUIPA ARGUMENTS.

Contrary to the Governor's Response, Churches have not forfeited their Establishment Clause and RLUIPA arguments.[9] (Resp. 36, 39.) Churches' Application is not an appeal from the Seventh Circuit's denial of an injunction pending appeal. Rather, it is an application for a writ of injunction in aid of this Court's jurisdiction. *See* 28 U.S.C. § 1651(a). Churches fully briefed their Establishment Clause and RLUIPA claims in their merits brief to the Seventh Circuit (7th Cir. Doc. 24 at 49–51, 54–57.) This Circuit Justice, or the Court, may issue a writ of injunction in aid of the Court's jurisdiction on the merits.

[9] Nor have Churches forfeited arguments as to the applicability of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), to their free exercise claims, or which activities are actually comparable to religious worship for purposes of showing the Governor's 10-person limit is neither neutral nor generally applicable. (Resp. 22, 29.) Churches made these arguments in their Application specifically in response to the Seventh Circuit's order denying Churches' motion for injunction pending appeal.

CONCLUSION

For all of the foregoing reasons, and the reasons in Churches Application, this Circuit Justice should grant the requested writ of injunction or refer this application to the Court.

Respectfully submitted:

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