**No. _____**

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**IN THE SUPREME COURT**
**OF THE UNITED STATES**

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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

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The questions presented are:

(1) Whether the Free Exercise Clause of the First Amendment prohibits the government from discriminating against religious gatherings by restricting the size of religious gatherings while exempting or giving other preferential treatment to comparable nonreligious gatherings occurring inside the same houses of worship or to other comparable nonreligious gatherings occurring externally.

(2) Whether this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), is irreconcilable with the proper understanding of the Free Exercise Clause of the First Amendment and should be overturned.

(3) Whether this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), issued decades before the First Amendment was incorporated against the States and 60 years before strict scrutiny would become the governing standard in First Amendment cases, dictates a separate standard for determining First Amendment liberties in times of declared crisis.

(4) Whether the Establishment Clause of the First Amendment and this Court's holding in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) that "[n]either a state nor the Federal Government . . . can force or influence a person to go to or remain away from church against his will" is

violated when a State prohibits or forbids upon criminal penalty houses of worship from assembling regardless of the size of the house of worship or the religious doctrine or practice.

(5) Whether the government's prohibition of religious worship services while permitting nonreligious services in the same houses of worship and providing numerous other exemptions for nonreligious expression is a content-based restriction on speech requiring the application of strict scrutiny.

During times of declared crisis, such as the uncertainty surrounding COVID-19, "the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights." *Am. Communist Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 453 (1950). But, where the fog of public excitement is at its apex, "the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). Without doubt, "[t]herein lies the security of the Republic, the very foundation of constitutional government." *Id.* "Times of crisis take the truest measure of our commitment to constitutional values. **Constitutional values are only as strong as our willingness to reaffirm them when they seem most costly to bear**." *Hartness v. Bush*, 919 F.2d 170, 181 (D.C. Cir. 1990) (Edwards, J., dissenting) (emphasis added). A willingness to reaffirm our staunch commitment to our fundamental freedoms is imperative to the very survival of the American experiment. "**If the**

**provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be discarded**." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting) (emphasis added).

Not surprisingly, the numerous stay-at-home orders, prohibitions on religious gatherings, and preferable treatment afforded to nonreligious gatherings have given rise to significant litigation and—concomitantly—created a direct conflict among the circuit courts. Two federal appeals courts, the Fifth and Sixth Circuits, have found the discriminatory treatment of religious gatherings a violation of the First Amendment, and the Seventh and Ninth Circuits have taken a more deferential approach, as if the Constitution includes a pandemic exception to the First Amendment. Additionally, the district courts have reached inconsistent results in at least 73 cases in which decisions have been issued (with dozens more not yet decided), resulting in appeals pending in every Circuit Court in the country. (*See* First Amendment COVID-19 Litigation Addendum (listing of COVID-19 First Amendment cases in federal courts where decision has been issued)). Indeed, Justices of this Court have been divided as to the proper application of the First Amendment during times of COVID-19. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 19A1046, 2020 WL 2781671 (U.S. May 29, 2020). All these conflicts have occurred since

March 2020. Unless this Court intervenes, the conflicts will continue to mushroom.

This Court's clear pronouncement that "[n]either a state nor the Federal Government . . . can force or influence a person to go to or remain away from church against his will" is more relevant today than when it was first penned. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1,15 (1947).

## PARTIES

Petitioners are Elim Romanian Pentecostal Church and Logos Baptist Ministries.

Respondent is Jay Robert Pritzker, in his official capacity as the Governor of the State of Illinois.

## CORPORATE DISCLOSURE STATEMENT

Petitioners are not-for-profit corporations incorporated under the laws of the State of Illinois, do not issue stock, and have no parent corporations, and no publicly held corporation owns 10% or more of their respective stock.

## DIRECTLY RELATED PROCEEDINGS

ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES v. JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois, Case No. 20-1811, Final Judgement (7th Cir. June 16, 2020).

ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES v. JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois, Case No. 19A1046, Order denying application for injunctive relief (U.S. May 29, 2020).

ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES v. JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois, Case No. 20-1811, Order denying motion for injunction pending appeal (7th Cir. May 16, 2020).

ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES v. JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois, Case No. 20 C 2782, Order denying motion for preliminary injunction (N.D. Ill. May 13, 2020).

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The Seventh Circuit's denial of Petitioners' motion for rehearing en banc (App. 013a) is unreported and unavailable electronically.

This Court's denial of Petitioners' emergency application for a writ of injunction (App. 014a) is unreported and is available at *Elim Romanian Pentecostal Church v. Pritzker*, No. 19A1046, 2020 WL 2781671 (U.S. May 29, 2020).

The Seventh Circuit's order denying Petitioners' motion for injunction pending appeal (App. 015a) is unreported and is available at *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517092 (7th Cir. May 16, 2020).

The district court's decision denying Petitioners' motion for temporary restraining order and preliminary injunction (App. 018a) is unreported and is available at *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194 (N.D. Ill. May 13, 2020).

## JURISDICTION

The Seventh Circuit issued its decision affirming the denial of a preliminary injunction on June 16,

2020 and its denial of a petition for rehearing en banc on July 27, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend I.

Respondent's Executive Order 2020-32 and Restore Illinois, A Public Health Approach To Safely Reopen Our State ("Restore Illinois"), are reproduced in the Appendix at 030a and 042a, respectively.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

#### A. Order 32's Travel and Gathering Restrictions Are Subject to a Raft of Exemptions, but Not for Worship.

In response to COVID-19, the Governor has issued a series of executive orders and directives, variously restricting Illinoisans' travel and the sizes of their gatherings. (App. 060a-064a). At issue in this Petition is Executive Order 32 ("Order 32"), which maintained the requirement for "all individuals currently living within the State of Illinois . . . to stay at home or at their place of residence except as allowed in [the] Order." (App. 033a, §2.1).[1] Order 32 also maintained restrictions on, ostensibly, "[a]ll public and private gatherings of any number of people" in the State, by generally prohibiting "any gathering of more than ten people . . . unless exempted by [the] Order." (*Id.*, §2.3).

Order 32's stay-at-home and 10-person gathering restrictions, however, are accompanied by **10 pages of exceptions** for specified activities not subject to

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[1] Though the Governor has modified some restrictions in Order 32, Petitioners refer to them as imposing continuing prohibitions on religious gatherings because, as the Seventh Circuit found, "it is not absolutely clear that the terms of [Order 32] will never be restored," (App. 007a), and "the Governor could restore the approach of [Order 32] as easily as he replaced it." (*Id.*). Moreover, "the Restore Illinois Plan . . . reserves the option of doing just that." (*Id.*).

the restrictions. (App. 034a-040a). The specific exemptions, exceptions, and requirements for travel and gathering are categorized according to purpose, with an overarching category of "Essential Activities" for which Illinoisans can leave home. (*Id.*) "Essential Activities" include, *inter alia*, patronizing and working at "Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure," **and 23 additional, expansive categories** of commercial and nonreligious entities and activities.

Unlike in prior orders, "engag[ing] in the free exercise of religion" is deemed "Essential" in Order 32, but unlike other "Essential Activities" in the Order, free exercise of religion is expressly subject to "the limit on gatherings of more than ten people." (App. 034a, §2.5.f). Thus, Order 32 permits people to leave their homes to attend religious worship services, but requires Petitioners to host no more than 10 people for religious services in their respective sanctuaries. (*Id.*).

### B. Order 32 Discriminates Between Religious Worship Services and Other Nonreligious Services Provided by Petitioners in the Same Church Buildings.

Order 32's exemption scheme internally discriminates against Petitioners' religious activities in their own church buildings by treating religious activities differently than nonreligious

activities in the same buildings. As discussed *supra*, Petitioners' in-person religious worship services are strictly limited to 10 people (App. 034a, §2.5.f), but Petitioners are not subject to a 10-person restriction if engaged in approved nonreligious activities in the same church buildings. Order 32 permits Petitioners to operate without numerical limits—in the same church buildings where they host religious worship services—if they are "providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities." (App. 037a, §2.12.c). Sheltering people overnight has no limit, but a worship service (even for the same people) is limited. A meal is permitted without numerical limitation, but not communion. Unemployment or disability benefit counseling has no limit, but a sermon or homily is limited to 10 people. If—**at any moment**—a Petitioner transitions from feeding 200 people and housing them overnight to a worship service, in the same room with the same 200 people, Order 32 automatically transforms Petitioners' activity from a permissible nonreligious gathering to an impermissible religious gathering. (App. 034a, §.2.5.f). By its plain terms, Order 32 makes value judgments as to what activities are permissible and impermissible, in the same church building and for the same people, based on whether the activities are religious or nonreligious.

### C. Order 32 Imposes Restrictions on Religious Gatherings Not Imposed on Comparable Nonreligious Gatherings.

Order 32 not only compares Petitioners' religious and nonreligious activities *internally* for restriction, it also compares Petitioners' restricted religious activities with myriad exempted nonreligious activities. While religious worship services, though "Essential," are capped at 10 people, numerous nonreligious "Essential" activities and entities are exempted from the same numerical limitation, including, *inter alia*, grocery stores, liquor stores, hardware stores, cannabis stores, gas stations, law firms and professional businesses, news and media operations, financial institutions, labor unions, hotels, laundry businesses, airlines, and funeral services, and also warehouse, supercenter, and 'big box' stores combining several categories. (App. 034a-040a). The only limitations on these exempted categories of "Essential" activities and entities are the requirements to engage in social distancing and, "where possible," "[p]rovid[e] employees with appropriate face coverings and require[e] that employees wear face coverings where maintaining a six-foot social distance is not possible at all times." (App. 040a, §2.15.a).

"Essential" retail stores are subject to a numerical limitation far less restrictive than the 10-person limit imposed on religious worship. Such stores are expressly permitted to continue operations if, "to the greatest extent possible," such

retail operations "cap occupancy at 50 percent of store capacity." (App. 032a, §1.2). **Religious worship is the only "Essential" activity singled out by Order 32 for imposition of the 10-person limit,** even if the social distancing and enhanced sanitization protocols applicable to other "Essential" activities and entities are followed. (App. 034a).

### D. Discriminatory Enforcement of Order 32 Against Petitioners' Religious Worship Services.

Petitioners initially complied with the Governor's orders, even foregoing worship on Palm Sunday and Easter Sunday, their most treasured Christian holidays. (App. 056a, V.Compl. ¶ 9). On May 2, Petitioners joined several other Romanian American churches in a letter to the Governor, challenging the legality of his arbitrary 10-person limit for religious worship services, requesting accommodation, and stating their intentions to reopen for in-person worship on May 10. (App. 098a-101a). Petitioners' Letter also reiterated their desire to protect the well-being of their congregations, and committed to exceeding the distancing and hygiene requirements applicable to other "Essential" entities by voluntarily incorporating 10 safety initiatives, including strictly enforced social distancing of non-family members, reduced seating by removal of chairs or cordoning off pews, sanitization before and after services, offering masks and gloves, discouraging hand-shaking and physical contact, placing hand sanitizer at entrances and throughout the building, enforcing one-way foot traffic, and

issuing stay-home admonitions to anyone who is COVID-19 symptomatic or in contact with someone who is, or who is at heightened risk due to age or health. (*Id.*).

Petitioners filed this action on May 7, before their intended May 10 reopening, but they more than kept their promises to exceed the hygiene and social distancing requirements applicable to other "Essential" entities that accommodate more than 10 people. (App. 102a-107a (containing photographs and video links of Petitioners' services)); (App. 108a-112a (detailing preventive and protective measures Petitioners employed at worship services)).

At its May 10 service, Petitioner Elim Romanian Pentecostal Church ("Elim") strictly complied with or surpassed each of the 10 safety initiatives promised to the Governor, hiring an industrial cleaning company to thoroughly clean and disinfect its premises, including treatment for microbial and virologic agents, and imposing social distancing even between members of the same household. (App. 102a-106a). Elim took the temperature of every person seeking admittance with contactless thermometers and turned away anyone with a temperature above 99.5 degrees (plus anyone who arrived after the church reached its self-limited capacity of 120 seats out of an available 750 (15%)). (App. 104a).

Elim held its May 10 Sunday service under threat of criminal sanction. (App. 106a-107a). Elim's concerns about being fined, arrested, jailed, or

subjected to other penalties have interfered with and diminished its collective worship experience to a much greater extent than COVID-19 or Elim's voluntary precautionary measures ever could. (App. 106a).

On May 15, 2020, the Commissioner of the Chicago Department of Public Health sent a letter to Pastor Cristian Ionescu of Elim, threatening criminal sanctions and closure of his church under the authority of Order 32. (App. 113a-114a). On Sunday, May 17, Petitioners' respective pastors received two Disorderly Conduct citations each for violation of Order 32's 10-person limit for their respective morning and evening services. (App. 115a-118a). The citations imposed monetary fines and mandatory court appearances. (*Id.*).

Finally, on May 22, 2020, the Chicago Department of Public Health issued a letter to Elim declaring it a public nuisance and threatening not only criminal penalties but also "Summary Abatement." (App. 119a). Under Illinois law, summary abatement is a process whereby the government—without due process—destroys the property claimed to be a nuisance. *See City of Kankakee v. New York Cent. R. Co.*, 55 N.E.2d 87, 90 (1944) ("Summary abatement would mean to put down or **destroy without process**. This means the inspector can, upon his own judgment, cause the alleged nuisance to stop on his own authority and effect a destruction of property at his discretion." (emphasis added)).

As a result of Order 32, Petitioners have received criminal citations and have been threatened with criminal sanctions for engaging in religious worship, and Petitioner Elim additionally has been declared a public nuisance for engaging in religious worship and threatened with the summary destruction of its church building for the "crime" of hosting a sanitized and socially distanced religious worship service for more than 10 people.

As Petitioners testified in the district court, they fled communist Romania to escape the threat of criminal sanction for engaging in religious worship and chose America because it offered refuge from the very persecution Petitioners are now suffering again under Order 32. (App. 058a-059a). Petitioners hoped to never experience such persecution in the great experiment of American freedom (App. 059a), and pray this Court renews their confidence in the promise of liberty yet again.

Moreover, despite threatening Petitioners with criminal sanctions for engaging in religious worship services and the actual criminal citations issued to Petitioners' Pastors under Order 32, the Governor has neither threatened nor taken enforcement action against protesters gathering in the streets of Illinois by the thousands in flagrant violation of his Orders. (App. 148a (questioning the Governor concerning the disparate treatment afforded to protesters)); (App. 154a (noting that "with respect to the protests . . . the Governor has decided to make exceptions")).

## II. PROCEDURAL HISTORY

Petitioners commenced this action on May 7, 2020, by filing their Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages (App. 052a-097a). Petitioners also filed a motion for temporary restraining order (TRO) and preliminary injunction, seeking to enjoin, before their impending May 10 Sunday services, the enforcement of Order 32. (App. 019a).

The district court denied a TRO prior to the May 10 Sunday services, ordered expedited briefing over the weekend, and then entered its order denying preliminary injunctive relief on May 13. (App. 018a-020a). Petitioners appealed the preliminary injunction denial to the Seventh Circuit the same day, and simultaneously sought an emergency injunction pending appeal (IPA) from the district court, which was denied. On May 15 Petitioners filed an emergency motion for IPA and to expedite appeal with the Seventh Circuit. (App. 015a). On May 16 the Seventh Circuit denied the IPA, but granted expedited briefing and consideration of Petitioners' appeal. (App. 015a-017a).

On May 27, Petitioners filed an emergency application to this Court for a writ of injunction, which Justice Kavanaugh referred to the whole Court. (App. 014a).[2] The Court directed the

[2] Though this Court denied Petitioners' request for an injunction pending appeal (App. 014a), that decision indicates nothing concerning the merits of Petitioners' claims. *Little*

Governor to file a response, but the Governor dropped the challenged restrictions three hours before his response was due. (App. 128a). During argument before the Seventh Circuit, however, the Governor unequivocally refused to state he would never reimpose the challenged restrictions. (App.140a ("THE COURT: [I]s the governor willing to make an iron-clad commitment not to rescind the current order? [COUNSEL]: No, Your Honor, we are not.")). (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 Hour, we are not willing to do that.")).

After expedited briefing, the Seventh Circuit held oral argument on June 12, and on June 16 issued its Opinion and Order affirming the district court's denial of injunctive relief. (App. 001a-012a). Petitioners now seek review of that order by writ of certiorari to the Seventh Circuit.

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*Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014) (this Court's action on an injunction pending appeal "should not be construed as an expression on the Court's view on the merits")

## REASONS FOR GRANTING THE PETITION

### I. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND DECISIONS OF THE FIFTH AND SIXTH CIRCUITS ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY MANDATED BY THE FREE EXERCISE CLAUSE.

#### A. The Seventh and Ninth Circuits Have Held That COVID-19 Orders Restricting Religious Worship Services More Than Comparable Nonreligious Gatherings Need Only Withstand Rational Basis Review.

In its decision below, the Seventh Circuit rejected Petitioners' claim that the government's restricting religious worship services to 10 people while exempting myriad comparable nonreligious gatherings requires application of strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) [hereinafter *Lukumi*]. (App. 012a ("Illinois has not discriminated against religion and so has not violated the First Amendment, as [*Employment Division*] *v. Smith* understands the constitutional requirements.")). The Seventh Circuit acknowledged that religious worship services, though designated "essential," are restricted to 10 people (App. 004a), but not other essential functions like grocery shopping "(more

than ten people at a time may be in a store)," warehouse operations "(where a substantial staff may congregate to prepare and deliver goods that retail shops sell)," or "[m]eatpacking plants and nursing homes." (App. 008a–010a). Moreover, the court acknowledged that people involved in other large-scale essential activities take on "**much the same risk**" of COVID-19 transmission "**as people who gather for large, in-person religious worship**." (App. 010a–011a (emphasis added)).

Nevertheless, despite the comparable risk—and despite the First Amendment's textual protection for religious exercise and Petitioners' unrebutted, sincerely held beliefs that assembling in person is vital to their worship—the Seventh Circuit decided free exercise is not essential *enough* to be treated the same as the essential nonreligious activities which "*must* be carried on in person." (App. 010a–011a (emphasis in original)). In the Seventh Circuit's value calculus, the large-scale nonreligious activities of comparable risk, yet exempt from numerical limitation (like operating warehouses or feeding and housing the needy), are too important to halt, while "large in-person worship services [can be replaced] by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet." (*Id.*).

Moreover, the Seventh Circuit made only a flippant reference to Order 32's irrationally differential treatment as between numerically limited religious activities and exempted nonreligious activities—for the same people in the

same building.[3] (App. 004a). Order 32 prohibits Petitioners from conducting in-person worship services of more than 10 people in their churches (App. 034a, §2.5.f), but allows them to assemble unlimited crowds—with the same people in the same building—for the provision of "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities." (App. 037a, §2.12.c). Thus, Petitioners may shelter an unlimited number of people in their facilities, but not hold worship services for more than 10 people. Petitioners may serve food to unlimited number of people, but not serve communion to more than 10. Petitioners may provide social services like unemployment or disability benefit counseling to any number of attendees, but cannot provide a sermon or homily to more than 10 attendees. If, **at any moment**, a Petitioner transitions from feeding 200 people and housing them overnight to a worship service—in the same room with the same people—Order 32 automatically transforms the activity from permissible nonreligious service to impermissible religious worship service. (App. 034a, §.2.5.f).

To be sure, these uncapped assemblies in the same buildings are the very activities the Seventh Circuit acknowledged to carry "much the same risk as people who gather for large, in-person religious

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[3] "The churches are particularly put out that their members may assemble to feed the poor but not to celebrate their faith." (App. 004a).

worship." (App. 011a ("**people who assist the poor or elderly**" (emphasis added)). While the Seventh Circuit rationalized its value judgment by parsing that churches are not "exactly" like the exempted comparably risky activities, and are "most" like non-essential activities "that occur in auditoriums" and are banned altogether (App. 010a), it is difficult to discern a difference in COVID-19 risk between providing social services counseling in Petitioners' sanctuaries for the materially needy, which is permitted without limit, and preaching sermons in their same sanctuaries for the spiritually needy, which is capped at 10 people. The virus does not discriminate between nonreligious and religious meetings, but Governor Pritzker's Order 32 does, and the Seventh Circuit applied only the barest of scrutiny to that religious discrimination. This holing is wholly irreconcilable with *Lukumi*. (*See infra* Pt. I.C.)

In two divided opinions, the Ninth Circuit held that California's restrictions imposed on religious gatherings, but not on comparable nonreligious gatherings, do not discriminate against religious exercise. *See South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) (denying IPA); *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020) (same). In *South Bay*, the Ninth Circuit considered a challenge to California's "highly reticulated patchwork of designated activities and accompanying guidelines," 959 F.3d at 945 (Collins, J., dissenting), under which, *e.g.*, "[w]arehousing and manufacturing facilities are categorically

permitted to open, so long as they follow specified guidelines," *id.* at 946, but "in-person 'religious services'—merely *because* they are 'religious services'—are categorically *not* permitted to take place *even if they follow the same guidelines*." *Id.* The majority, abating "'logic'" in favor of its own "'practical wisdom,'" *id.* at 939, forsook scrutiny of California's differential treatment of religious activity because COVID-19 is "a highly contagious and often fatal disease for which there presently is no known cure." *Id.* In *Harvest Rock*, the majority likewise concluded that California's restrictions did not "accord comparable secular activity more favorable treatment than religious activity" because the worship restrictions also applied to "lectures and movie theaters," 2020 WL 5835219, at *1, even though,

> [t]he State more freely allow[ed] an abundance of activities to take place which, on their face, share the same risk factors . . . identified as so concerning about church attendance, including . . . working in a warehouse, food-production facility, or meatpacking plant; playing, coaching, or broadcasting professional sports (including participating in games, practices, workouts, film sessions, and large team meetings); attending college classes; or washing clothes at a laundromat,

*id.* at *5 (O'Scannlain, J., dissenting), all of which "involve gatherings of people from different households for extended periods of time—in many cases, hours on end." *Id.* As both dissenting judges concluded, such disparate restrictions are neither neutral nor generally applicable, and must satisfy strict scrutiny (which they cannot). *See South Bay*, 959 F.3d at 945–946; *Harvest Rock*, 2020 WL 5835219, at *3–6.

### B. The Fifth and Sixth Circuits Have Held That COVID-19 Orders Prohibiting Religious Worship Services While Permitting Comparable Nonreligious Gatherings Must Be Subject to, and Cannot Survive, Strict Scrutiny Review.

In direct conflict with the Seventh Circuit's decision below, the Fifth and Sixth Circuits have ruled that prohibiting religious worship services, while exempting myriad comparable nonreligious gatherings, violates the First Amendment. Twice in two weeks the Sixth Circuit enjoined enforcement of executive orders like Order 32, determining that restrictions on drive-in **and in-person** worship services violated the First Amendment. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (**in-person** worship services); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (drive-in and **in-person** services). Also, in *First Pentecostal Church v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020), the Fifth Circuit granted an IPA to

a Mississippi church, enjoining enforcement of the State's orders.

In *Roberts*, the Sixth Circuit granted an IPA enjoining the Kentucky Governor from enforcing executive orders prohibiting a church's in-person worship services when "serial exemptions for secular activities pose comparable public health risks." 958 F.3d at 414. In determining the plaintiffs' likely success on the merits of their free exercise claims, the court recognized, "On one side of the line, a generally applicable law that incidentally burdens religious practice usually will be upheld." *Id.* at 413 (citing *Emp't Div. v. Smith*, 494 U.S. at 879–79). But, the court concluded the orders "likely fall on the prohibited side of the line," where "a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'" *Id.* (quoting *Lukumi*, 508 U.S. at 553).

> **Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so.** As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. At some point, **an exception-ridden policy takes on the appearance and reality of a system of individualized**

> **exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny**.

*Id.* at 413–14 (cleaned up) (emphasis added).

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers." *Id.* at 414. Thus, the court rejected the suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport," *id.* at 416, explaining,

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

*Id.*

The Sixth Circuit also rejected the rationale, accepted by the Seventh Circuit, that congregants could simply worship online, reasoning,

> 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.

*Id.* at 415 (citation omitted).

As to the appropriate comparisons and disparate treatment:

> Keep in mind that the Church and its congregants just want to be treated equally. . . . They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . .

> **The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same**.
>
> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

*Id.* at 414 (emphasis added).

In *First Pentecostal*, the Fifth Circuit issued an IPA against similar COVID-19 prohibitions on religious worship services. 959 F.3d at 670. Though the per curiam opinion was short, Judge Willett's concurrence expounded:

> Singling out houses of worship—and *only* houses of worship, it seems—**cannot possibly be squared with the First Amendment**. Given the Church's pledge "to incorporate the

> public health guidelines applicable to other entities," why can its members be trusted to adhere to social-distancing in a secular setting (a gym) but not in a sacred one (a church)?

*Id.* at 670–71 (Willett, J., concurring) (bold emphasis added).

The Sixth Circuit's decisions in *Maryville Baptist* and *Roberts*, and the Fifth Circuit's decision in *First Pentecostal*, are in direct conflict with the Seventh Circuit below and the Ninth Circuit in *South Bay* and *Harvest Rock*. The direct conflict is on a question of exceptional importance concerning the scope of First Amendment protection during a declared emergency. Certiorari is warranted to align the Circuits on this vitally important question.

### C. The Seventh Circuit's Decision Is in Direct Conflict With This Court's Decision in *Lukumi*.

While the Seventh Circuit cited *Lukumi* in passing (App. 008a), it failed to acknowledge or apply *Lukumi*'s tests for determining whether a law burdening religious exercise is subject to strict scrutiny. Under *Lukumi*, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny"—it "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests"—and it "will survive strict scrutiny only in rare cases." 508 U.S. at 546 (cleaned up).

"Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. Petitioners have demonstrated their sincerely held religious beliefs that Christians are not to forsake assembling together, especially in times of peril and crisis. (App. 072a (quoting *Hebrews* 10:25)). The threatened and actual enforcements of the Orders substantially burden Petitioners' religious exercise of assembling for worship, thus triggering *Lukumi*'s tests that the Seventh Circuit disregarded.

### 1. The Seventh Circuit's decision regarding the restrictions on religious worship that are not imposed on nonreligious gatherings conflicts with *Lukumi.*

In *Lukumi*, this Court found that a law is not generally applicable where "inequality results" from the government's "decid[ing] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with religious motivation." *Id.* at 543. Thus, a law "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

The Seventh Circuit's decision below conflicts with this holding. Under Order 32, the Governor treats religious worship services differently than all other "Essential Activities" and exempts from numerical limitations external and internal nonreligious activities that create the same or greater risk of spreading COVID-19 (or not) as religious worship. Order 32 facially imposes a 10-person limit on "Essential" religious worship but exempts a multitude of "Essential" commercial and nonreligious activities necessarily and unavoidably involving crowds (*e.g.*, shopping or working at liquor, warehouse, and supercenter stores). (App. 034a, §2.5.f). All "Essential Activities," except worship services, are permitted without numerical limit if distancing and hygiene guidelines are followed. (App. 040a, §2.15.f). But religious services of more than 10 people are prohibited—even if distancing and hygiene guidelines are followed religiously.

As shown in Part I.A, *supra*, the Seventh Circuit admitted that "warehouse workers and people who assist the poor or elderly **may be at much the same risk** as people who gather for large, in-person religious worship" (App. 011a (emphasis added)), but held that Order 32's restricting religious worship services while exempting nonreligious activities that admittedly poses the same risk does not violate *Lukumi*. (*Id.*). Its rationale: "Feeding the body requires teams of people to work together in physical spaces, but churches can feed the soul in other ways." (App. 011a). The Seventh Circuit's holding, and simultaneous admission that religious worship services and exempted nonreligious

gatherings pose the same risks, conflicts with and cannot be reconciled to *Lukumi*'s holding that the government violates the First Amendment when it "fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree." 508 U.S. at 543.

### 2. The Seventh Circuit's decision concerning the religious worship services prohibited under Order 32 and the permissible nonreligious activities permitted in the same building conflicts with *Lukumi*.

Leaving aside questions of the proper *external* comparison group, the Seventh Circuit's decision also conflicts with *Lukumi* as to the *internal* comparison of Petitioners' religious worship services (which are restricted) and nonreligious activities (which are exempt).

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or **regulates or prohibits conduct because it is undertaken for religious reasons**." *Lukumi*, 508 U.S. at 532 (emphasis added). Thus, to discriminate between Petitioners' activities undertaken for *religious reasons* and its comparable activities undertaken for *nonreligious reasons* runs afoul of *Lukumi*.

Yet, in conflict with *Lukumi*, the Seventh Circuit held that Order 32's discriminatory applied restrictions on Petitioners' own **internal** activities in the same church buildings are constitutionally permissible. (App. 011a). Under the decision below, Petitioners may, without numerical limitation, provide a meal, but not communion. They may provide shelter, but not worship. They may provide counsel for unemployment or disability benefits, but cannot gather for a sermon, a homily, or worship. (*Id.*). If—**at any moment**—Petitioners transition from providing food, shelter, social services, or other "necessities of life" for 200 people to a religious worship service in the same room with the same 200 people, Order 32 automatically transforms Petitioners' activity from a permissible nonreligious gathering to an impermissible religious gathering. (App. 034a, §.2.5.f). As to the former, the Seventh Circuit held that "[t]hose activities *must* be carried on in person" (App. 011a), and so can be exempted. But, as to Petitioners' activities undertaken for religious reasons, *i.e.*, "large in-person worship services," it held that those can be replaced by "smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet." (*Id.*). "***Feeding the body requires teams of people to work together in physical spaces, but churches can feed the soul in other ways***." (App. 011a). (emphasis added) Put simply, the Seventh Circuit held that the protections afforded by the Free Exercise Clause do not extend to religious worship services, even though Petitioners' nonreligious

activities in the same buildings are not restricted. That conflicts with *Lukumi*.

As Judge O'Scannlain observed in his *Harvest Rock* dissent, "even non-worship activities conducted by or within a place of worship are not subject to the attendance parameters." 2020 WL 58352199, at *3. "[T]he restrictions on religious worship services . . . apply because—and *only* because—the activities they wish to host and partake in have been identified, substantively, as 'religious' or 'worship' services." *Id.* Judge O'Scannlain's dissent highlights the incompatibility of the Governor's Orders with *Lukumi* and applies with equal force here.

### D. The Conflict Between the Circuit Courts Has Exacerbated a Substantial Conflict Among the District Courts.

There is also substantial conflict among the district courts as to the constitutionality of restricting religious services while exempting myriad comparable nonreligious activities.

In *Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313 (E.D.N.C. May 16, 2020), the Eastern District of North Carolina enjoined the North Carolina Governor from enforcing a 10-person limit on religious worship because it violated the Free Exercise Clause. It stated, "**There is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of**

**the First Amendment**." 2020 WL 2514313, at *1 (emphasis added). The court observed that the uniquely restrictive 10-person limit for worship gatherings "represent[s] precisely the sort of 'subtle departures from neutrality' that the Free Exercise Clause is designed to prevent." *Id.* at *6 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

The court observed,

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

*Id.* at *8 (quoting *Roberts*, 958 F.3d at 414). "These **glaring inconsistencies** between the treatment of religious entities and individuals and nonreligious entities and individuals take [the orders] outside the 'safe harbor for generally applicable laws.'" *Id.* (quoting *Roberts*, 958 F.3d at 413).

In *First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, *6–7 (D. Kan. Apr. 18, 2020), the court enjoined similar prohibitions on religious gatherings. The court noted that government's disparate treatment of religious

gatherings violated the Free Exercise Clause because "**religious activities were specifically targeted for more onerous restrictions than comparable secular activities**." *Id.* at *7 (emphasis added). "[I]t goes without saying that the government **could not lawfully expressly prohibit individuals from meeting together for religious services**." *Id.* at *6 (emphasis added).

The Eastern District of Kentucky issued a statewide TRO enjoining enforcement of the Kentucky Governor's prohibition on in-person religious gatherings. *Tabernacle Baptist Church, Inc. of Nicholasville, Ky. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307, *1, 6 (W.D. Ky. May 8, 2020). It held that the First Amendment does not "mean something different because society is desperate for a cure or prescription," *id.* at *1, and that "'**even under *Jacobson*** [*v. Massachusetts*, 197 U.S. 11 (1905)], **constitutional rights still exist**.'" *Id.* at *4 (emphasis added) (quoting *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820248, *15 (W.D. Ky. Apr. 11, 2020)).

> It follows that the prohibition on **in-person** services should be enjoined . . . 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. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person**

> **religious services, which, unlike the foregoing, *benefit from constitutional protection***.

2020 WL 2305307, at *5 (emphasis added).

However, other district courts have reached conflicting conclusions. *See, e.g.*, *Harvest Rock Church v. Newsom*, No. LACV 20-6414 JCB(KKx), 2020 WL 5265564 (E.D. Ca. Sept. 2, 2020) (applying rational basis scrutiny to similar COVID-19 orders); *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-204, 2020 WL 2110416 (E.D. Va. May 1, 2020) (same).

**The direct conflict among the circuit courts is amplified by conflicting rulings in at least 73 cases at the district court level (excluding state court decisions and undecided matters) since April 2020**. (*See* Addendum 1). This Court's determination of the questions of exceptional constitutional importance is required to bring the lower courts into alignment. Certiorari is warranted.

## II. SUBSTANTIAL CONFUSION AS TO WHETHER *JACOBSON V. MASSACHUSETTS* APPLIES IN FIRST AMENDMENT CASES, WHERE STRICT SCRUTINY IS NOW THE STANDARD, EXACERBATES THE CONFLICT AMONG THE LOWER COURTS.

### A. *Jacobson* Did Not Involve the First Amendment, and Was Decided Decades Before the First Amendment Was Incorporated Against the States and Sixty Years Before Strict Scrutiny Would Become the Governing Standard.

This Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is a significant contributing factor to the direct and substantial conflict among the circuit and district courts reviewing COVID-19 restrictions. Can it be that a 115-year-old due process opinion, with minimal progeny and substantial jurisprudential developments since its issuance, provides any rule of decision in a contemporary First Amendment case? It is a question of exceptional importance that only this Court can answer.

The majority of Petitioners' claims arise under the First Amendment. (App, 072a-079a, V. Compl. ¶¶82-144). *Jacobson*—importantly—did not involve such claims. Yet, the Seventh Circuit and the district court before it placed great emphasis on the *Jacobson* standard that was articulated long before

the First Amendment even applied to the States and decades before this Court would introduce tiers of scrutiny. Indeed, it would not be until 1940 that this Court would first articulate the notion that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). *See also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (incorporating the Establishment Clause).

Importantly, it would not be for another quarter century that "exacting judicial scrutiny" would even enter the First Amendment lexicon in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), another 50 years before the phrase "compelling interest" would be introduced to First Amendment jurisprudence in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 65 (1957) (Frankfurter, J., concurring), and another 60 years before strict scrutiny would be applied in its current form in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also* Stephen Siegel, *The Origins of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal History 355 (2008).

Moreover, in recent years this Court has effectuated a monumental shift in how and when strict scrutiny is mandated in First Amendment cases. *See, e.g.*, *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017) ("*Reed v. Town of*

*Gilbert*[, 135 S. Ct. 2218 (2015)] then **worked a sea change in First Amendment law**." (emphasis added)); *see also Wollschlaeger v. Florida*, 848 F.3d 1293, 1332 (11th Cir. 2017) (Tjoflat, J., dissenting) (same); *Norton v. City of Springfield*, 806 F3d 411, 412 (7th Cir. 2015) (Easterbrook, J.) ("*Reed* understands content discrimination differently.").

*Jacobson* preceded these developments, did not involve the First Amendment, and could not foresee that First Amendment jurisprudence would require that restrictions on religious exercise survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 US. 507, 534 (1997). *Jacobson*, on the other hand, involved the extraordinarily deferential standard that state regulations during an emergency must be "beyond all question, a plain, palpable invasion of rights." 197 U.S. at 31. *Jacobsen* cannot be reconciled with First Amendment jurisprudence. The frequency of courts' citation to *Jacobson* in COVID-19 litigation around the country therefore raises a question of exceptional importance that only this Court can answer.

### B. The Conflict Among the Lower Courts Is a Result of the Confusion as to Whether *Jacobson* Applies in First Amendment Cases, Which Is a Question of Exceptional Importance Requiring Direction From This Court.

The primary conflict among the lower courts resulting from *Jacobson* concerns the appropriate level of scrutiny to apply in First Amendment challenges to executive orders in times of declared emergency. This Court's precedents demonstrate that certiorari is the appropriate vehicle to address this exceptionally important question. *See, e.g.*, *Nat'l Inst. Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2370 (2018) (granting certiorari to determine whether Ninth Circuit applied appropriate level of scrutiny to California's regulation of speech); *McCullen v. Coakley*, 573 U.S. 464, 485 (2014) (granting certiorari to consider whether strict scrutiny was appropriate level of scrutiny); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (granting certiorari to determine whether lower court applied appropriate level of scrutiny); *Emp't Div. v. Smith*, 494 U.S. 872, 884–85 (1990) (discussing long history of this Court's cases where certiorari granted to determine appropriate level of scrutiny).

Given the contradictory determinations on this issue, this Court's intervention is necessary to bring harmony among the lower courts and conclusively establish the standard to which all First

Amendment claims must be subjected during times of perceived exigency.

## III. THE SEVENTH CIRCUIT'S DECISION RAISED A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE CONTINUED VIABILITY OF THIS COURT'S DECISION IN *EMPLOYMENT DIVISION V. SMITH*, BROUGHT ABOUT BY THIS COURT'S INVITATION FOR IT TO BE RECONSIDERED.

The Seventh Circuit's decision below also raises a question of exceptional importance concerning whether this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), should be revisited. Despite Order 32's treating religious worship services differently than other "Essential Activities" that are exempted from the 10-person gathering limitation, the Seventh Circuit held that "Illinois has not discriminated against religion and so has not violated the First Amendment, as *Smith* understands the constitutional requirements." (App. 012a).

If the restrictions imposed by Order 32, which are facially discriminatory against religious worship services, presents no constitutional problem under *Smith*, then *Smith* should be revisited and overruled. And, axiomatically, that is a question of exceptional importance only this Court can answer. *See, e.g.*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("**Needless to say, only**

**this Court may overrule one of its precedents**." (emphasis added)).

If, despite their inherent selectivity, Order 32 is considered neutral and generally applicable with respect to Petitioners' religious worship, then *Smith* is incompatible with the Free Exercise Clause, and cannot continue in First Amendment jurisprudence. *Cf. Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring) (in concurrence with denial of certiorari, joined by Justices Thomas, Gorsuch, and Kavanaugh, lamenting *Smith*'s "drastic[] cut back on the protection provided by the Free Exercise Clause" and indicating willingness to revisit the decision); *Fulton v. Philadelphia, Pa.*, No. 19-123 (cert. granted Feb. 24, 2020), Question Presented ("Whether *Employment Division v. Smith* should be revisited?"); *Ricks v. Id. Contractors Bd.*, S. Ct. No. 19-66, Brief of *Amici Curiae* Ten Legal Scholars in Support of Petitioner, https://www.supremecourt.gov/DocketPDF/19/1966/112058/20190812162931642_Ricks%20%20Amici%20Brief%20for%20Ten%20Legal%20Scholars%20TO%20FILE.pdf.

## IV. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING WHETHER THE ESTABLISHMENT CLAUSE PERMITS THE GOVERNMENT TO PROHIBIT PEOPLE FROM ATTENDING CHURCH.

In their Verified Complaint and motion for preliminary injunction challenging Order 32 and the Governor's other orders and directives, Petitioners challenged the 10-person cap on religious worship as a violation the Establishment Clause. (App. 078a-079a). The district court addressed the merits of the claim, but held that Petitioners "have a less than negligible change of success on their Establishment Clause claim." (App. 026a). Though given a full presentation of the issues and merits of Petitioners' claim, the Seventh Circuit below ignored the issue. Its only discussion was to note that "Plaintiffs present some additional arguments, which have been considered but need not be discussed separately." (App. 012a).

That decision is in conflict with this Court's Establishment Clause decisions. Most notably, in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947), this Court unequivocally held that **"[t]he establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . Neither can force nor influence a person to go to or remain away from church**

**against his will**." *Id.* at 15 (emphasis added). Also, this Court's precedents make clear that "[a]n attack founded on disparate treatment of religious claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring government neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971). Finally, in *Lynch v. Donnelly*, this Court held that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, **and forbids hostility towards any**. 465 U.S. 668, 674 (1984) (emphasis added).

The *Everson*, *Gillette*, and *Lynch* triumvirate dictate that Order 32's disparate treatment of religious worship services as compared to nonreligious gatherings at myriad other locations or nonreligious gatherings in Petitioners' own Churches violates the Establishment Clause. Put simply, Order 32 forces Petitioners' congregants to remain away from Church against their will. The Seventh Circuit's decision upholding Order 32's constitutionality under the Establishment Clause conflicts with this Court's precedent.

## V. THE CIRCUIT COURTS CONFLICT ON THE QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING WHETHER THE GOVERNMENT MAY PROHIBIT RELIGIOUS WORSHIP SERVICES WHILE PERMITTING OTHER EXPRESSIVE ACTIVITIES OF NONRELIGIOUS GATHERINGS.

### A. The Seventh Circuit Ignored the Question of Exceptional Importance Under Petitioner's Free Speech Challenge.

As part of their Verified Complaint and request for a preliminary injunction, Petitioners challenged Order 32 and the Governor's other orders and directives as a content-based restriction on speech requiring strict scrutiny. (App. 076a-077a). The district court held that Petitioner did not "have even a negligible chance of success on the Free Speech and Assembly claim." (App. 026a). Petitioners pressed this claim on appeal and gave the Seventh Circuit a full presentation of the issues to decide the question of whether Order 32 violated their free speech rights under the First Amendment. Not only did the Seventh Circuit not address this issue, **it completely ignored the fact that the question was fully before the Court**. (App. 001a (acknowledging only Petitioners' Free Exercise Claim). The entirety of the Seventh Circuit's acknowledgement of this claim was to say: "Plaintiffs present some additional arguments,

which have been considered but need not be discussed separately." (App. 012a).

Other federal courts have likewise denied injunctive relief for free speech claims during COVID-19, despite the discriminatory application of the various orders to religious speech. The Central District of California denied injunctive relief based on a free speech claim similar to that presented by Petitioners here. In *Harvest Rock Church v. Newsom*, No. LACV 20-6414 JCB (KKx), 2020 WL 5265564 (C.D. Cal. Sept. 2, 2020), the court held that the Governor of California's similar COVID-19 orders were not content based because they did not restrict the church plaintiffs' ability to speak. 2020 WL 5265564, *3. There, much like Order 32 here, California completely prohibited indoor religious worship services throughout most of the state and permitted religious worship services in a small minority of jurisdictions only if there was no singing or chanting and the capacity was limited to 25 percent. *Id.* Yet, as occurred throughout Illinois and raised at oral argument in the Seventh Circuit below, the Governor exempted and permitted hundreds of thousands of protesters to gather without restriction or threat of criminal sanction. *Id.* at *2. (*See also* App. 148a).

The district court held that such disparate treatment was perfectly permissible because the restriction was not a content-based prohibition on speech. *Id.* at *3. Instead, the district court held that because protesters were engaged in their activities outdoors, and religious worship services took place

indoors, the restrictions were merely a restriction "based on the location and nature of the gathering." *Id.* That decision exacerbates the conflict among the lower courts as to whether COVID-19 restrictions on religious worship constitute impermissible prohibitions on speech.

Both the Seventh Circuit decision below and the Central District of California's *Harvest Rock* decision are in direct conflict with the decisions of other federal courts.

### B. Other Lower Courts Have Held That the Government Violates the First Amendment When It Prohibits Religious Expression in Worship Services While Permitting Significant Expression in Nonreligious Gatherings.

The conflict among the lower courts is also exacerbated by the fact that many of the same COVID-19 restrictions on religious worship services have been completely ignored when applied to the speech of protesters. The Illinois Governor and Chicago Mayor both encourage nonreligious protests while restricting religious gatherings. While the Seventh Circuit ignored the question of Petitioners' free speech claims, other federal courts have noted that such disparate treatment violates the First Amendment. As Judge Ho noted in *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020), there is a constitutional incongruity where religious worship services are prohibited but massive crowds of

protesters are permitted to gather without restriction or threat of criminal sanction.

In *Spell*, the Fifth Circuit found an appeal moot after the challenged orders expired by their own terms, but noted a change in circumstances arising during the COVID-19 pandemic. 962 F.3d at 177. Judge Ho first recounted,

> At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest

*Id.* at 180–81 (Ho., J., concurring).

Then, he observed, "But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them . . ." *Id.* at 181.

> For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? **The answer is that they can't. Government does not have carte blanche, even in a**

> **pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."**

*Id.* (emphasis added).

Judge Ho continued, "It is common knowledge, and easily proved, that protesters do not comply with social distancing requirements. But instead of enforcing the Governor's orders, officials are encouraging the protests—out of an admirable, if belated, respect for First Amendment rights." *Id.* He concluded, "**If protests are exempt from social distancing requirements, then worship must be too.**" *Id.* (emphasis added). "**[P]ublic officials cannot devalue people of faith while elevating certain protesters**. **That would offend the First Amendment—not to mention the principle of equality for which the protests stand**." *Id.* at 183 (emphasis added).

Similarly, as recounted in *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020), the Governor of New York and the New York City Mayor openly encouraged protesters gathering in large numbers in New York, 2020 WL 3488742, *4–5, while continuing to prohibit in-person religious gatherings. *Id.* at *5-6. The court issued a preliminary injunction enjoining the enforcement of the discriminatory orders.

> Governor Cuomo and Mayor de Blasio could have just as easily discouraged protests, short of condemning their

> message, in the name of public health and exercised discretion to suspend enforcement for public safety reasons instead of encouraging what they knew was a flagrant disregard of the outdoor limits and social distancing rules. They could have also been silent. **But, by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of special treatment.**

*Id.* at *12 (emphasis added).

These decisions are in direct conflict with the Seventh Circuit's decision below, which wholly ignored Petitioners' free speech challenge despite being presented with a full record and presentation of the issues involving that claim. The Seventh Circuit's decision cannot be reconciled with Judge Ho's reasoned concurrence in *Spell* and the district court's preliminary injunction in *Soos*. Certiorari is necessary to bring harmony to the decisions of the lower courts and provide a uniform framework for First Amendment speech challenges arising during times of a declared public emergency.

## CONCLUSION

The Seventh Circuit's decision below conflicts with the precedent of this Court and that of the Fifth and Sixth Circuits on whether the disparate treatment of religious worship services as compared to similar nonreligious gatherings violates the First

Amendment. The Seventh Circuit's decision also conflicts with this Court's precedent concerning whether the Governor may impose restrictions on activities undertaken solely for a religious purpose as compared to those undertaken for charitable purposes. The conflicts among the Circuits have since resulted scores of conflicts among Article III District Courts.

This Petition also raises important questions as to whether certain of this Court's precedent should be revisited and overturned, which involves issues of exceptional importance that only this Court can address. Petitioners pray unto this Court to grant certiorari and prevent Petitioners' cherished religious liberties from becoming another tragic casualty of COVID-19.

Dated this October 22, 2020.

Respectfully submitted,

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## FIRST AMENDMENT COVID-19 LITIGATION ADDENDUM

### SUPREME COURT DECISIONS

(1) *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)

(2) *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020)

(3) *Elim Romanian Pentecostal Church v. Pritzker*, No. 19A1046, 2020 WL 2781671 (U.S. May 29, 2020)

### COURT OF APPEALS DECISIONS

(1) *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020)

(2) *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020)

(3) *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020)

(4) *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (6th Cir. 2020)

(5) *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020)

(6) *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901 (9th Cir. July 2, 2020)

(7) *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020)

(8) *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020)

(9) *Miller v. Thurston*, 967 F.3d 727 (8th Cir. 2020)

(10) *Esshaki v. Whitmer*, 813 F. App'x 170 (6th Cir. 2020)

(11) *Kishore v. Whitmore*, No. 20-1661, 2020 WL 4932749 (6th Cir. Aug. 24, 2020)

(12) *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020)

(13) *People Not Politicians Or. v. Clarno*, No. 20-35630, 2020 WL 5202078 (9th Cir. Sept. 1, 2020)

**DISTRICT COURT DECISIONS**

(1) *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496 (D. Md. May 20, 2020) – appeal No. 20-1579 (4th Cir. 2020)

(2) *Cassell v. Snyders*, 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020) – appeal No. 20-1757 (7th Cir. 2020)

(3) *Legacy Church, Inc. v. Kunkel*, No. Civ. 20-0327 JB/SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) – appeal No. 20-2117 (10th Cir. 2020)

(4) *Givens v. Newsom*, No. 2:20-cv-0852-JAM-CKD, 2020 WL 2307224 (E.D. Cal. May 8, 2020) – appeal No. 20-159949 (9th Cir. 2020)

(5) *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-156-NT, 2020 WL 2310913 (D. Me. May 9, 2020) – appeal No. 20-1507 (1st Cir. 2020)

(6) *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020)

(7) *Ass'n of Jewish Camp Operators v. Cuomo*, No. 1:20-cv-0687 (GTS/DJS), 2020 WL 3766496 (N.D.N.Y. July 6, 2020)

(8) *Geller v. de Blasio*, No. 20cv3566 (DLC), 2020 WL 2520711 (S.D.N.Y. May 18, 2020) – appeal No. 20-1592 (2d Cir. 2020)

(9) *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416 (E.D. Va. May 1, 2020) – appeal No. 20-1515 (4th Cir. 2020)

(10) *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 246819 (N.D. Ill. May 13, 2020) – appeal No. 20-1811 (7th Cir. 2020)

(11) *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH, 2020 WL 1909616 (W.D. Ky. Apr. 18, 2020) – appeal No. 20-5427 (6th Cir. 2020)

(12) *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-cv-33-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020)

(13) *Tigges v. Northam*, No. 3:20-cv-410, 2020 WL 4197610 (E.D. Va. July 21, 2020)

(14) *SH3 Health Consulting, LLC v. Page*, No. 4:20-cv-605 SRC, 2020 WL 2308444 (E.D. Mo. May 8, 2020)

(15) *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-cv-33-GFT, 2020 WL 2305307 (E.D. Ky. May 8, 2020)

(16) *Roberts v. Neace*, No. 2:20cv054(WOB-CJS), 2020 WL 2115358 (E.D. Ky. May 4, 2020) – appeal No. 20-5465 (6th Cir. 2020)

(17) *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 WL 251313 (E.D.N.C. May 16, 2020)

(18) *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 WL 3051207 ((E.D.N.C. June 8, 2020)

(19) *Benner v. Wolf*, No. 20-cv-775, 2020 WL 2564920 (M.D. Pa. May 21, 2020)

(20) *Garbet v. Herbert*, No 2:20-cv-245-RJS, 2020 WL 2064101 (D. Ut. Apr. 29, 2020)

(21) *Esshaki v. Whitmerr*, No. 2:20-CV010831-TGB, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020)

(22) *Kishore v. Whitmer*, No. 20-11605, 2020 WL 3819125 (E.D. Mich. July 8, 2020)

(23) *Thompson v. DeWine*, No. 2:20-CV-2129, 2020 WL 2557064 (S.D. Ohio May 19, 2020) – appeal No. 20-3526 (6th Cir. 2020)

(24) *Amato v. Elicker*, No. 3:20-cv-464 (MPS), 2020 WL 2542788 (D. Conn. May 19, 2020)

(26) *Martin v. Warren*, No. 20-CV-6538 CJS, 2020 WL 5035612 (W.D.N.Y. Aug. 26, 2020)

(27) *Sinner v. Jaeger*, No. 3:20-cv-76, 2020 WL 3244143 (D.N.D. Jun 15, 2020)

(28) *Arizonans for Fair Elections v. Hobbs*, No. CV-20-658-PHX-DWL, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020)

(29) *Fair Maps Nev. V. Cegavske*, No. 3:20-cv-271-MMD-WGC, 2020 WL 2798018 (D. Nev. May 29, 2020)

(30) *Whitfield v. Thurston*, No. 4:20-cv-466-KGB, 2020 WL 34516992 (E.D. Ark. June 24, 2020)

(31) *Hawkins v. DeWine*, No. 2:20-cv-2781, 2020 WL 3448228 (S.D. Ohio June 24, 2020)

(32) *Libertarian Party of N.H. v. Sununu*, No. 20-cv-688-JL, 2020 WL 4340308 (D.N.H. July 28, 2020)

(33) *Sawarimedia LLC v. Whitmer*, No. 20-cv-11246, 2020 WL 3097266 (E.D. Mich. June 11, 2020)

(34) *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-374, 2020 WL 5412126 (M.D. Tenn. Sept. 9, 2020)

(35) *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020)

(36) *First Pentecostal Church of Holly Springs v. City of Holly Springs*, No. 3:20CV119 M-P, 2020 1978381 (N.D. Miss. Apr. 24, 2020)

(37) *Dwelling Place Network v. Murphy*, No. 20-6281 (RBK/AMD), 2020 WL 3056305 (D.N.J. June 9, 2020)

(38) *Ramsek v. Beshear*, No. 3:20-cv-36-GFVT, 2020 WL 34462499 (E.D. Ky. June 24, 2020) – appeal No. 20-5749 (6th Cir. 2020)

(39) *Fight for Nevada v. Cegavaske*, No. 2:20-cv-837-RFB-EJY, 2020 WL 2614634 (D. Nev. May 15, 2020)

(40) *Lewis v. Hughs*, No. 5:20-cv-577-OLG, 2020 WL 4344432 (W.D. Tex. July 28, 2020) – appeal No. 20-50654 (5th Cir. 2020)

(41) *CH Royal Oak, LLC v. Whitmer*, No. 1:20-cv-570, 2020 WL 4033315 (W.D. Mich. July 16, 2020)

(42) *High Plains Harvest Church v. Polis*, No. 1:20-cv-1480-RM-MEH, 2020 WL 4582720 (D. Colo. Aug. 10, 2020) – appeal No. 20-1280 (10th Cir. 2020)

(43) *Libertarian Party of Conn. v. Merrill*, No. 3:20-cv-0467 (JCH), 2020 WL 3526922 (D. Conn. June 27, 2020)

(44) *Common Sense Party v. Padilla*, No. 2:20-cv-01091-MCE-EFB, 2020 WL 3491041 (E.D. Cal. June 26, 2020)

(45) *Acosta v. Pablo Restrepo*, No. 1:20-CV-262-MSM-LDA, 2020 WL 3495777 (D.R.I. June 25, 2020)

(46) *Bambenek v. White*, No. 3:20-cv-3107, 2020 WL 21239951 (C.D. Ill. May 1, 2020)

(47) *Pharaohs GC, Inc. v. U.S. Small Bus. Admin.*, No. 20-CV-665, 2020 WL 3489404 (W.D.N.Y. June 26, 2020) – appeal No. 20-2170 (2d Cir. 2020)

(48) *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 19951687 (N.D. Ill. Apr. 23, 2020)

(49) *Morgan v. White*, No. 20 C 2189, 2020 WL 2526484 (N.D. Ill. May 18, 2020)

(50) *Lyons v. City of Columbus*, No. 2:20-cv-3070, 2020 WL 3396319 (S.D. Ohio June 19, 2020)

(51) *People Not Politicians Or. v. Clarno*, No. 6:20-cv-01053, 2020 WL 3960440 (D. Or. July 13, 2020) – appeal No. 20-35630 (9th Cir. 2020)

(52) *Am. Ass'n of Political Consultants v. U.S. Small Bus. Admin.*, No. 20-970, 2020 WL 1935525 (D.D.C. Apr. 21, 2020)

(53) *Black Lives Matters Seattle-King Cnty. v. City of Seattle*, No. 2:20-cv-887-RAJ, 2020 WL 3128299 (W.D. Wash. June 12, 2020)

(54) *Conn. Citizens Def. League, Inc. v. Lamont*, No. 3:20-cv-646 (JAM), 2020 WL 3055983 (D. Conn. June 8, 2020) – appeal No. 20-2078 (2d Cir. 2020)

(55) *Gottlieb v. Lamont*, No. 3:20-CV-0623 (JCH), 2020 WL 2046205 (D. Conn. June 8, 2020)

(56) *Denton v. City of El Paso*, No. EP-20-CV-85-KC, 2020 WL 4344187 (W.D. Tex. July 28, 2020) – appeal No. 20-50702 (5th Cir. 2020)

(57) *New Georgia Project v. Raffensperger*, No. 1:20-CV-01986-ELR, 2020 WL 5200930 (N.D. Ga. Aug. 31, 2020) – appeal No. 20-13360 (11th Cir. 2020)

(58) *On Fire Christian Ctr, Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)

(59) *Abiding Place Ministries v. Newsom*, No. 20-cv-683-BAS-AHG, 2020 WL 2991467 (S.D. Cal. June 4, 2020)

(60) *Tolle v. Northam*, No. 1:20-cv-363 (LMB/MSN), 2020 WL 1955281 (E.D. Va. Apr. 8, 2020)

(61) *Calvary Chapel Lone Mtn. v. Sisolak*, No. 2:20-cv-907-RFB-VCF, 2020 WL 3108716 (D. Nev. June 11, 2020) – appeal No. 20-16274 (9th Cir. 2020)

(62) *Solid Rock Baptist Church v. Murphy*, No. 20-6805(RMB/JS), 2020 WL 4882604 (D.N.J. Aug. 20, 2020)

(63) *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020)

(64) *Bellwether Music Festical, LLC v. Acton*, No. 2:20-CV-3279, 2020 WL 3869479 (S.D. Ohio July 9, 2020)

(65) *People First of Alabama v. Merrill*, No. 2:20-cv-619-AKK, 2020 WL 3207824 (N.D. Ala. June 15, 2020) – appeal No. 20-12184 (11th Cir. 2020)

(66) *Harvest Rock Church, Inc. v. Newsom*, No. LACV 20-6414 JCB (KKx), 2020 WL 5265564 (Sept. 2, 2020) – appeal No.

(67) *Christian Cathedral v. Pan*, No. 20-cv-03554-CRB, 2020 WL 3078072 (N.D. Cal. June 10, 2020)

(68) *Nigen v. New York*, No. 20-CV-1576 (EK)(PK), 2020 19950775 (E.D.N.Y. Mar. 29, 2020)

(69) *Gish v. Newsom*, No. EDCV 20-755 JCB (KKx), 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) – appeal No. 20-55445 (9th Cir. 2020)

(70) *MacEwen v. Inslee*, No. C20-5423, 2020 WL 4261323 (W.D. Wash. July 24, 2020)

(71) *Spell v. Edwards*, No. 220-00282-BAJ-EWD, 2020 WL 2509078 (M.D. La. May 15, 2020)

(72) *Calvary Chapel Loan Mountain v. Sisolak*, No. 2:20-cv-9907-RFB-VCF, 2020 WL 3108716 (D. Nev. June 11, 2020) – appeal No. 20-16274 (9th Cir. 2020)