No. 20-569

In the Supreme Court of the United States

ELIM ROMANIAN PENTECOSTAL CHURCH, AND LOGOS BAPTIST MINISTRIES,
Petitioners,

v.

JAY ROBERT PRITZKER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS,
Respondent.

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

BRIEF AMICUS CURIAE OF AMERICAN CONSTITUTONAL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus American Constitutional Rights Union respectfully restates the Questions Presented as follows:

In Illinois, as in many other states, the Governor has issued executive orders in response to the COVID-19 outbreak. Those orders include directives to stay "at home or at their place of residence" unless an exception applies and to limit "[a]ll public and private gatherings" to ten or fewer people unless exempted. Pet. App. 033a, §§ 2.1, 2.3. While the "[e]ngaging in free exercise of religion" is now deemed essential in Illinois, religious gatherings remain subject to the ten-person limit. (Pet. App. 034, § 2.5.f). The results are (1) to treat religious and nonreligious activities in the same church buildings differently, and (2) limit religious gatherings differently from numerous nonreligious activities, including such places as liquor stores, cannabis stores, and warehouse, supercenter, and big box stores. Pet. at 4-7. The differential treatment of religious and nonreligious gatherings raises a number of constitutional questions including:

Whether the government's substantial restriction of religious worship services while permitting nonreligious services in the same houses of worship without subjecting those nonreligious services to the same limitations and providing numerous other exemptions for nonreligious expression violate the First Amendment rights to Free Exercise of religion and Free Speech and require the application of strict scrutiny.

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STATEMENT OF AMICUS CURIAE[1]

The American Constitutional Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the freedom of religion protected by the First Amendment to the Constitution of the United States. It carries out this part of its mission by filing amicus briefs in cases that present issues raised by the infringement or threatened infringement of that first freedom. These

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[1] The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. R. 37.2(a). Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

cases include *The American Legion v. The American Humanist Association*, 139 S. Ct. 2067 (2019).

SUMMARY OF ARGUMENT

"Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are 'open' and which remain 'closed.' *Spell v. Edwards*, 962 F. 3d 175, 182 (5th Cir. 2020) (Ho, J., concurring). Asserting carte blanche with grudging, limited accommodation for religious worship is, however, what Illinois has mandated. The Seventh Circuit found the classifications made by Illinois to be not irrational, but the First Amendment rights of Free Exercise and Free Speech are entitled to greater respect.

"The Free Exercise Clause protects against governmental hostility which is masked as well as overt." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). It is one thing if churches choose to present their worship services over the internet or in parking lots with their congregants in cars. It is quite another for governmental bodies so require them to do either directly or indirectly by artificially capping the number of congregants who may gather for worship as Illinois has done. Illinois should trust Petitioners "who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same." *Roberts v. Neace*, 958 F. 3d 409, 414 (6th Cir. 2020).

ARGUMENT

I. Petitioners' claims warrant the application of strict scrutiny.

Petitioners raised both Free Exercise and Free Speech claims below. Both of those constitutional provisions generally require the application of strict scrutiny to any law or rule that infringes on the rights guaranteed.

For its part, the Free Exercise Clause provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const., amend 1. The Free Exercise Clause has been applied to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye*, 508 U.S. at 532 (1993). While "a law that is neutral and of general applicability need not be justified by a compelling governmental interest," those concepts are "interrelated" such that "failure to satisfy one requirement is a likely indication that the other cannot be satisfied." *Id*. In that case, strict scrutiny applies, so that the restrictions must be justified by a compelling governmental interest and be narrowly tailored to further that interest. *Id*.

In the same way, the Free Speech Clause bars Congress from enacting laws "abridging the freedom

of speech." U.S. Const., amend. 1. As a result, content-based laws, "those that target speech based on its communicative content," are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). To be upheld, content-based laws must satisfy strict—not "exacting"—scrutiny.

Content-based laws contain the subset of laws that suppress speech on the basis of the viewpoint expressed. "A law found to discriminate based on viewpoint is an 'egregious form of content discrimination' which is [also] 'presumptively unconstitutional.'" *Id.* at 2230.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court declared that the Patent and Trademark Office's disparagement clause, which barred the registration of trademarks that disparaged people, living or dead, violated the First Amendment. In his opinion announcing the judgment of the Court, Justice Alito observed that the disparagement clause swept too broadly to be narrowly drawn: "It is not an anti-discrimination clause; it is a happy talk clause. In this way, it goes much further than is necessary to serve the interest asserted." 137 S. Ct. at 1765. So, too, do the Illinois Orders.

The Illinois Orders plainly infringe on the rights guaranteed by the Free Exercise and Free Speech clauses. Petitioners' freedom to gather and worship has been cabined. They can "hold multiple ten-person services every week" or provide their services "over the internet or in parking lots while worshipers remain in cars." App. at 003a. Even so,

Petitioners' worship services remain subject to the ten-person limit even as

> businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals who need assistance as a result of this emergency, and people with disabilities

are exempt. App. at 004a (quoting Executive Order 2020-32 § 21.12(c) (Apr. 30, 2020). But for the allowed ten-person limit, Petitioners find themselves classified with "[a]ll places of public amusement, whether indoors or outdoors." *Id*. at 003a (quoting Executive Order 2020-32 § 2(3).

The Executive Order thus deems some activities to be more essential than others. This applies within Petitioners' facilities, where worship is subject to a ten-person limit, but their other activities are not. Allowing overnight shelter, meals, unemployment, disability or other counseling within the church's facilities without subjecting them to the ten-person limit while subjecting worship services to that ten-person limit, see Pet. at 5, favors those activities and the viewpoints they represent. As Petitioners explain, "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." *Id* (emphasis deleted).

That transformation can take place only by considering the content of that activity and the related speech. Likewise, choosing between disability counseling and religious worship favors the former viewpoint over the latter. Such content- and viewpoint-based discrimination requires the application of strict scrutiny.

II. The Seventh Circuit's deferential standard of review does not amount to strict scrutiny.

For its part, the Seventh Circuit essentially applied a pandemic exception to the Constitution. It stated, "[W]e do not evaluate orders issued in response to public-health emergencies by the standard that might be appropriate for years-long notice-and-comment rulemaking." App at 011a (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). Even if dealing with that public-health emergency is a compelling interest, the court was still obligated to consider whether the State's response was narrowly tailored to achieve its objective.

This the Seventh Circuit declined to do. Instead, it rejected the contention that "a state could differentiate between the maximum gathering permitted in a small church and a cathedral with seats for 3,000." App. at 011a. The court went on to deem the Governor's ad hoc, higgledy-piggledy classifications not irrational:

> [W]e do not deny 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 services. Still, movies and concerts *seem* a better comparison group.

Id. (Italics added). Even if, churches can gather with ten persons while theaters and concert halls are closed, the accommodation, if that is what it is, has been grudging. Petitioners' First Amendment rights deserve more respect. Cf. *Horvath v. City of Leander*, 946 F. 3d 787, 796 (5th Cir. 2020) (Ho., J., concurring in the judgment in part and dissenting in part) ("The Founders understood that the right to free exercise would require more than simply neutrality toward religion. Rather, when government regulation and religious liberty conflict, the right to free exercise would require that the government accommodate the religious practice, rather than the reverse.").

III. The Illinois Orders do not constitute a neutral rule of general applicability because they are riddled with exceptions.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 484 U.S. 872 (1990), the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879. A law, like that of Illinois, that is riddled with exceptions for some, but not for people of faith, cannot be considered a law of general applicability. See *Spell v. Edwards*, 962 F. 3d 175, 182 (5th Cir. 2020) (Ho, J., concurring); *Roberts v. Neace*, 958 F. 3d at 413-14 (6th Cir. 2020) (pointing to "four pages of exceptions").

In *Jacobson v. Massachusetts*, the Court rejected a challenge to a Massachusetts law requiring adults to be vaccinated for smallpox. In so doing, it rejected the contention that, because the law had been construed to provide an exception for children, it would deny equal protection not to provide such an exception to adults. The Court explained that the statute was "applicable equally to all in like condition." *Id.* at 30. That general applicability was not undercut by a limited exception "for children certified by a physician to be unfit subjects for vaccination." *Id.* The same cannot be said for the crazy-quilt of multiple exceptions in the Illinois Orders.

The Sixth Circuit explained that "restrictions inexplicably applied to one group and exempted from another do little to further the[State's] goals and do much to burden religious freedom." *Neace v. Roberts*, 958 F. 3d at 414. As that court put it, "Assuming all of the same precautions are taken, why can someone safely walk down a grocery aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Id.*

In the same way, Judge Ho of the Fifth Circuit has explained that the *Smith* rule is not applicable "where the government grants exceptions to some but not to others. Religious liberty deserves better than that—even under *Smith*." *Horvath*, 946 F. 3d at 795 (Ho. J., concurring in the judgment in part and dissenting in part).

CONCLUSION

ACRU notes that Respondent has stated that he does not intend to file a response to the Petition unless the Court requests one. At the very least, the Court should call for a response before acting on the Petition.

For the reasons stated in the Petition and this amicus brief, this Court should grant the writ of certiorari and, on review, reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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