No. 20-569

In the
Supreme Court of the United States

ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES,
***Petitioners*,**

v.

JAY ROBERT PRITZKER,
***Respondent*.**

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

BRIEF *AMICI CURIAE* OF THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, ILLINOIS FAMILY INSTITUTE, THE FAMILY FOUNDATION, FORCEY BIBLE CHURCH, CONCERNED WOMEN FOR AMERICA, THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION, THE NATIONAL LEGAL FOUNDATION, AND THE PACIFIC JUSTICE INSTITUTE

in Support of the Petition

Steven W. Fitschen
James A. Davids
The National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

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INTERESTS OF THE *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function the endorsement of chaplains who lack a denominational structure for endorsement. This method for endorsing chaplains for the military and other organizations avoids the entanglement

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[1] The parties were provided appropriate notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel, including with respect to worship services they conduct.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

Forcey Bible Church (FBC) is a Bible-believing and teaching church in Silver Spring, Maryland. Because it is nondenominational, it is self-governing, and its members meet annually to elect its leadership. Part of FBC's religious beliefs are that Christianity is not just to be exercised individually, but also communally.

Concerned Women for America (CWA) is the largest public policy organization for women in

the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its

donors and supporters, in particular those from Illinois, are vitally concerned with the outcome of this case because of its effect on the free exercise, speech, and assembly rights of religious organizations and individuals.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area. PJI often represents religious organizations whose congregations wish to worship consistently with their religious beliefs and without unconstitutional, discriminatory restrictions.

SUMMARY OF ARGUMENT

This petition raises important issues about the place of religion in our society that this Court needs to resolve, both for the current pandemic as Covid-19 rates wax and wane[2] and for future emergencies bound to come. In particular, this Court should take this opportunity to confirm the following:

1. Religion is not just an individual, subjective expression, but also, and in its essence, a communal exercise that is protected directly by

[2] As this is written, Covid-19 cases are unfortunately on the rise in many states, with restrictions on religious communal worship being tightened, including in Illinois.

the Religion Clauses and also by the Speech and Assembly Clauses of the First Amendment.

2. Health crises do not alter the fact that the practice of religion by individuals and institutions has a favored place in our constitutional order.

3. As a result, the practice of religion by individuals and institutions may not receive less favorable treatment than other individual and institutional practices and, if anything, must receive greater accommodation.

4. Even nondiscriminatory limits on religious practice and institutions must be examined closely for rationality and, at a minimum, must meet a least restrictive means test.

ARGUMENT

I. The Dominant Religions of Our Country Are Communal, Not Just Individualistic and Subjective, and Their Communal Expression Is Protected Primarily by the Religion Clauses and Secondarily by the Speech and Assembly Clauses of the First Amendment

The Seventh Circuit below brushed aside challenges to Governor Pritzker's order limiting worship assemblies to ten people with the remark that religious folks could use the internet and TV to get an adequate worship experience. (App. 010a–011a.) This shows a marked misunderstanding of how the major religions in this country are practiced,

in the process demeaning, rather than protecting, their exercise.

Those who attend religious services are called *congregations* for a reason. They congregate, and almost always in units larger than ten. The New Testament enjoins Christians not to forsake meeting together (Heb. 10:25), and the Old Testament praises the "multitude" that worships together in the house of God. (Ps. 42:4.) Theologian Dietrich Bonhoeffer affirms that "Christianity means community" and that the "physical presence of other Christians is a source of incomparable joy and strength to the believer." *Life Together* 19, 21 (John W. Doberstein, trans., Harper & Row, 1954.) This is reflected most obviously for Christians in the communal worship experiences of the sacraments of baptism and eucharist, but also in many other respects. For example, many independent churches like *Amicus* Forcey Bible Church need an in-person quorum for a meeting to elect their leadership. Congregations regularly engage in corporate singing, recitation, and prayer.

It simply does not suffice—religiously, philosophically, or legally—to say that viewing religious services over the internet or on TV is "good enough" for worshipers. It simply does not suffice to say that getting bread from the grocery store is "essential" but breaking bread together from the Lord's Table is not. It must be recognized by this Court that, if worshipers have a sincere belief that they must exercise their religion in the physical presence of others, that belief is entitled to full weight constitutionally. *See Thomas v. Review Bd.*, 450 U.S. 707 (1981); *cf. Our Lady of Guadalupe v.*

Morrissey-Berru, 140 S. Ct. 2049 (2020) (holding that courts cannot second-guess the choice of religious institutions as to application of religious tenets). A court has neither the competence nor the authority to say that a substitute experience is "good enough."

II. If Other Entities and Practices Are Considered Essential and Are Excepted from Generally Applicable Health or Safety Requirements, Religious Organizations and Practices Must Be, Too

The multitude of state and local orders related to Covid-19 restrictions all make exceptions for various institutions, allowing those institutions to stay operational and for individuals to congregate there. That being so, congregating for religious services must be allowed as well.

This follows directly from the truism that the Religion Clauses give explicit favor and protection to religious expression and organizations. The Framers of the First Amendment rejected Madison's initial draft that protected "conscience" and its potential focus only on the individual. They insisted instead on protection for the free exercise of *religion*, which was then, as now, basically communal. *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, nn.184-307 & accompanying text. Of course, the free expression of religion frequently also involves assembly and speech, which rights reinforce and supplement the Religion Clauses in those circumstances, although the protections of those ancillary rights neither supersede nor make

the Religion Clauses redundant. *See Hosanna-Tabor Evan. Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012); *Ill. Rep. Party v. Pritzker*, 973 F.3d 760, 764 (7th Cir. 2020) (describing speech that accompanies religion as "speech plus"); *see also De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (noting that First Amendment freedoms reinforce each other). Thus, if exceptions to generally applicable restrictions are allowed, they must also be allowed for the free exercise of religion.

III. In Setting Out Exceptions, the State Must Treat Religious Practice and Organizations No Worse Than Comparable, Secular Practices and Organizations

This case also presents a good vehicle for the Court to emphasize that, when exceptions are made, religious practices and expression cannot be given a second-class status. In this case, the same building had different capacity caps for different uses, with the religious uses having the *lowest* cap. This anti-religion discrimination is explicit, right on the face of the challenged order. (App. 033a.) No resort to legislative history is needed to divine the discriminatory intent, as was required in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

The facts of this case do not require comparison of the churches to theatre halls and concert halls or to casino parlors and beauty parlors. Use of the same church building is regulated in different ways depending on whether the speech and assembly are for a religious worship event or for

some other purpose. That discrimination requires strict scrutiny review and cannot stand. *Id.* at 546-47; *see Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

IV. Limits on Religious Practice and Institutions Must Be Examined Closely for Rationality and, at a Minimum, Must Meet a Least Restrictive Means Test

This Court's last review of health-related restrictions was in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). But that case did not involve restrictions on religious organizations and the free exercise of religion, and it is important to update and conform that precedent to later decisions of this Court.[3]

Jacobson applied only a rational basis test. Even without discriminatory intent, a regulation affecting religious practices requires a greater level of scrutiny than *Jacobson* applied, as religious practices are specifically protected under the First Amendment. And even if strict scrutiny is not applied, due to the favored status of religious exercise, the regulation should be the least restrictive in the circumstances.

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[3] This Court currently is considering in *Fulton v. Philadelphia* (No. 19-123) whether to reconsider its decision in *Employment Division v.* Smith, 494 U.S. 872 (1990). Any reformulation of the *Smith* test for generally applicable regulations that affect the free exercise of religion will have to be applied to Covid-19 restrictions on religious gatherings, whether or not they are applied on a nondiscriminatory basis.

Here, the ten-person cap cannot even pass the rationality bar, because it is applied no matter the size of the building. Obviously, the health risks for the same number of people are not as great in a large cathedral as they are in a small, storefront church. And if masks and social distancing are adequate for indoor businesses considered essential, then they also set a floor for the least restrictive regulation in a worship scenario. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (under RFRA, holding that regulation could not be the least restrictive when the government established an alternative method for others). This Court's non-precedential opinions on stay petitions have to date not considered this aspect of the legal situation, but it is important that the Court do so.

CONCLUSION

This case provides a good vehicle to decide important constitutional issues related to the regulation of religious exercise and organizations in health crises, both for the current crisis and those that will undoubtedly follow. The petition should be granted.

Respectfully submitted
this 30th day of November 2020,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833; Rick@Claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904