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

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' challenge to Executive Order 2020-32—which expired on May 29, 2020, and which established limits on in-person religious gatherings that the Governor of Illinois stated he will not renew during the duration of the COVID-19 pandemic—is moot, given that petitioners now face no restrictions on the free exercise of their religion.

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BRIEF IN OPPOSITION

Last spring, when COVID-19 first began to claim the lives of Illinois residents, the Governor of Illinois adopted a range of emergency measures to inhibit the virus's spread. Among these early actions was Executive Order 2020-32 ("EO32"), which broadly restricted in-person gatherings in Illinois, and included a limitation on religious gatherings of more than ten people. But EO32 expired on May 29, 2020, and since then every pandemic-related executive order issued by the Governor has expressly exempted the free exercise of religion from its scope. Last month, the Governor stated that he will exempt religious gatherings from all future COVID-19 mitigation measures.

Petitioners have thus been able to exercise their religious rights without any restriction for more than eight months, and there is no realistic possibility that those rights will be curtailed in the future. Their petition should be denied on this basis. Whether or not their request for a preliminary injunction presented a live case or controversy below, it does not present one today. Because petitioners may conduct worship services without restriction, granting them the injunctive relief they seek would have no effect on their legal rights. All that remains is their request that this Court issue an advisory opinion about the constitutionality of a long-expired executive order. The Court has no authority to grant that request. And even if it did, plenary review would be unwarranted for similar reasons: Any guidance the Court

could provide about the expired executive order would have no practical effect, and this case is a poor vehicle in which to offer guidance regarding the principles applicable to Free Exercise Clause challenges to pandemic-related executive orders in other States.

Because this appeal is moot, and, in any event, a poor vehicle for reviewing any legal question of significance, the Court should deny the petition. If, however, this Court concludes that its intervention is warranted, it should vacate the decision below and remand for further proceedings to allow the Seventh Circuit to consider the Court's opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020) (per curiam), which postdates the decision below.

STATEMENT

1. COVID-19 is a novel severe acute respiratory illness that spreads easily through respiratory transmission, including by asymptomatic individuals. See Pet. App. 18a; D. Ct. Doc. 21 at 13-14. The virus has infected approximately 27 million people in the United States and claimed the lives of more than 486,000.[1] In May 2020, when the challenged executive order was in place, Illinois ranked third among States with the highest number of cases nationwide, and Cook County, where petitioners are situated, had the highest rate of infection of any county in the United

[1] Coronavirus Resource Center, John Hopkins University & Medicine, Global Map, https://coronavirus.jhu.edu/map.html (updated February 16, 2021). All links were last visited on February 16, 2021.

States. 7th Cir. Doc. 14 at 3.[2] At that time, too, there was no vaccine, cure, or treatment available for COVID-19. See Pet. App. 18a; D. Ct. Docs. 1-6 at 1, 1-7 at 1.

Given these dangers, in April 2020, the Centers for Disease Control and Prevention ("CDC") urged Americans to "'avoid mass gatherings,'" and to "'wear a cloth face cover when they have to go out in public,'" 7th Cir. Doc. 49 at 5 (quoting CDC, *How to Protect Yourself and Others* (updated Apr. 24, 2020)), because "'the virus can spread between people interacting in close proximity—for example, speaking, coughing, or sneezing—even if those people are not exhibiting symptoms,'" *ibid.* (quoting CDC, *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission* (Apr. 3, 2020)). Because "'gatherings present a risk for increasing spread of COVID-19,'" the CDC also recommended that communities of faith "'limit the size of gatherings in accordance with the guidance of directives of state and local authorities.'" *Ibid.* (quoting CDC, *Interim Guidance for Communities of Faith* (May 23, 2020)).

2. Faced with this unprecedented and ongoing public health emergency, the Governor proclaimed the COVID-19 pandemic a disaster on March 9, 2020, and issued a series of executive orders to stop the spread of COVID-19 and enhance the

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[2] See also, *e.g.*, Caroline Hurley & Satchel Price, *Cook County Surpasses Queens, NY, As County With Most COVID-19 Cases In U.S.*, Chicago Sun-Times (May 14, 2020), https://chicago.suntimes.com/essential-coronavirus-news/2020/5/14/21258470/cook-county-coronavirus-cases-most-queens-new-york.

availability of treatment. See D. Ct. Docs. 1-1, 1-2, 1-3, 1-4, 1-5. On March 20, the Governor issued a stay-at-home directive, which required Illinoisans to practice social distancing by limiting non-essential activity outside their homes, remaining at least six feet apart from others, and refraining from gathering in groups outside of a single household, unless otherwise noted. D. Ct. Doc. 1-4 at 1-3. Likewise, the order required non-essential businesses and schools to close, and essential businesses to limit their operations. *Id.* at 2, 6. The Governor issued another stay-at-home order on April 1, which contained many of the same limitations. D. Ct. Doc. 1-5 at 2-4.

On April 30, the Governor issued EO32, the emergency order at issue here. Pet. App. 30a. The Governor relied on modeling data showing that stay-at-home measures had proven critical in inhibiting the spread of the virus and ensuring that Illinois was equipped to treat infected individuals. *Id.* at 31a-32a. He explained that without these measures, the mortality rate associated with COVID-19 would be 10 to 20 times higher and the State would run out of hospital beds, ICU beds, and ventilators. *Id.* at 31a.

The terms of EO32 reflected the evolving circumstances at the time it was issued, two months into the pandemic: It permitted more personal and business activity than the previous orders, but emphasized the continuing need to adhere to social distancing measures. The order generally continued the stay-at-home directives set out in the most recent order, including the prohibition on gatherings of

people who do not share a household, unless otherwise permitted. *Id.* at 33a-34a. Relevant here, EO32 allowed religious gatherings of up to ten people. *Id.* at 34a-35a. By contrast, EO32 continued to prohibit all gatherings at secular establishments such as museums, movie theaters, and concert halls. *Id.* at 34a.

Shortly thereafter, on May 5, the Governor put into place the Restore Illinois Plan, a five-phase approach to safely reopen Illinois. *Id.* at 42a. At that time, Illinois was in Phase 2, which permitted "[e]ssential gatherings, such as religious services, of 10 or fewer" people. *Id.* at 48a. Phases 3, 4, and 5, which would take effect if conditions improved, did not require any restrictions on religious gatherings. *Id.* at 49a-51a. On May 29, EO32 expired. See *id.* at 30a; 20 ILCS 3305/7. On the same day, the Governor issued Executive Order 2020-38 ("EO38"), which superseded EO32 and allowed Illinois to proceed to Phase 3.[3]

Consistent with the Restore Illinois Plan, EO38 allowed all gatherings of up to ten people unless otherwise noted. EO38 ¶ 2(d). Unlike EO32, however, EO38 included categorical exemptions from the gathering limit (and all other restrictions) for the free exercise of religion and the performance of emergency and governmental functions. *Id.* ¶ 4. In lieu of imposing restrictions on religious exercise, EO38 "encouraged" religious organizations to "follow the recommended practices and

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[3] EO38 (May 29, 2020). All cited executive orders are available at https://coronavirus.illinois.gov/s/resources-for-executive-orders.

guidelines from the Illinois Department of Public Health"—practices that included limiting indoor services to ten people or fewer. *Id.* ¶ 4(a).

During the next eight months, the Governor exempted the free exercise of religion in each of his executive orders requiring COVID-19 mitigation measures, including orders that reimposed restrictions on gatherings in other contexts.[4] Although Illinois achieved relative progress beginning in late May, and was able to move to Phase 4 of the Restore Illinois Plan in late June, the number of COVID-19 cases began to increase in certain areas of the State in August.[5] Accordingly, last fall and into the early winter, the Governor imposed a series of region-specific, and ultimately statewide, restrictions on restaurants, bars, meetings, social events, casinos and other gaming venues, and workplaces.[6] None contained any restriction on the free exercise of religion.

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[4] See EO43 ¶ 4(a) (June 26, 2020); EO48, Part 1 (July 24, 2020); EO52, Part 1 (Aug. 21, 2020); EO55, Part 1 (Sept. 18, 2020); EO59, Part 1 (Oct. 16, 2020); EO71, Part 1 (Nov. 13, 2020); EO73 ¶ 4(a) (Nov. 18, 2020); EO74, Part 1 (Dec. 11, 2020); EO1, Part 1 (Jan. 8, 2021).

[5] See EO43 ¶ 4 (June 26, 2020); *COVID-19 Statistics*, Ill. Dep't of Pub. Health, https://www.dph.illinois.gov/covid19 (graphs "Test Results Change Over Time: Cases – All Time" and "Test Results Change Over Time: Deaths – All Time").

[6] EO51 (Aug. 18, 2020); EO53 (Aug. 26, 2020); EO54 (Sept. 2, 2020); EO56 (Oct. 2, 2020); EO60 (Oct. 21, 2020); EO61 (Oct 21, 2020); EO62 (Oct. 23, 2020); EO63 (Oct. 27, 2020); EO64 (Oct. 29, 2020); EO65 (Oct. 29, 2020); EO66 (Oct. 29, 2020); EO67 (Oct. 30, 2020); EO69 (Nov. 2, 2020); EO70 (Nov. 10, 2020).

Then, last month, the Governor issued an executive order in which he explained that Illinois will remain in Phase 4 until a widely available vaccine or highly effective treatment allows it to reach Phase 5, and he outlined the metrics by which he would evaluate the necessity of continued mitigation measures within Phase 4.[7] In that order, the Governor stated that he does not intend to rescind the exemptions on the free exercise of religion or the performance of emergency and governmental functions "during the disaster proclamations issued due to COVID-19."[8] Earlier this month, the Governor reissued that order, including its exemption for the free exercise of religion, along with several other orders implementing COVID-19 mitigation measures.[9]

3. On May 7, 2020, petitioners filed this lawsuit challenging EO32's ten-person limit on religious gatherings. Pet. App. 52a. They claimed that the limit violated their rights under the free exercise, free speech, free assembly, and Establishment Clause protections of the First Amendment and parallel protections of the Illinois Constitution, as well as their rights under the Equal Protection Clause, the Guarantee Clause, the Religious Land Use and Institutionalized Persons Act, and the Illinois Religious Freedom Restoration Act. *Id.* at 72a-90a. Relying on their

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[7] EO3 (Jan. 19, 2021).

[8] *Id.* § 3.

[9] EO4, Part 1 (Feb. 5, 2021).

claims that the limit violated the First Amendment and the Illinois Religious Freedom Restoration Act, petitioners sought a temporary restraining order enjoining the Governor from enforcing the limit against them for their services on May 10, as well as a preliminary injunction pending trial. D. Ct. Docs. 4, 5; see Pet. App. 91a-92a. They also sought a permanent injunction, nominal damages, and a declaration that the limit was invalid, both facially and as applied. Pet. App. 91a-94a.

The district court ordered expedited briefing on petitioners' request for injunctive relief, and, on May 8, denied their request as to their planned services on May 10. *Id.* at 20a; D. Ct. Doc. 13. Petitioners still held in-person gatherings exceeding the ten-person limit that day. Pet. App. 20a, 102a.

Shortly thereafter, on May 13, the district court denied petitioners' request for a temporary restraining order and preliminary injunction. *Id.* at 29a. The court determined that petitioners were not likely to succeed on the merits of their claims and that the balance of equities and public interest weighed in favor of the Governor. *Id.* at 27a-28a. That same day, petitioners filed a notice of appeal, D. Ct. Doc. 34, and sought an injunction of the district court's order pending appeal, D. Ct. Doc. 36, which both the district court and the Seventh Circuit denied, D. Ct. Doc. 39; Pet. App. 15a. Despite these denials, petitioners continued to hold in-person religious services exceeding ten people. See Pet. 8-9.

On May 27, petitioners filed an emergency application for injunctive relief

with Justice Kavanaugh. See Application, *Elim Romanian Pentecostal Church v. Pritzker*, No. 19A1046 (U.S. May 27, 2020). In response, the Governor explained that EO32 would expire on May 29 and, as of that date, religious gatherings would no longer be subject to mandatory restrictions. See Response 1 & n.1, *Elim Romanian Pentecostal Church*, No. 19A1046 (U.S. May 28, 2020). Instead, places of worship would be encouraged to follow the Illinois Department of Public Health's guidance. *Ibid.* On May 29, the Court denied petitioners' application for emergency relief, citing the new guidance for religious gatherings. Pet. App. 14a.

On June 16, the Seventh Circuit affirmed the district court's denial of a preliminary injunction. *Id.* at 12a. The court first held that the appeal was not moot. *Id.* at 7a. Although the court agreed that EO32 had expired, and petitioners no longer faced any restrictions on religious gatherings, it reasoned that it was not "absolutely clear that [its] terms . . . will never be restored." *Id.* at 6a-7a (internal quotations omitted). The court noted that the then-governing executive order, EO38, stated that Illinois could move back to Phase 2—thus potentially reinstating the challenged restriction—if there were a sustained rise in the positivity rate, a sustained increase in hospital admissions, or a significant outbreak. *Ibid.* The court concluded, however, that petitioners were unlikely to succeed on the merits of their claims, and denied injunctive relief on that basis. Pet. App. 7a-12a. Petitioners' statutory claim, the court held, was barred by sovereign immunity. *Id.* at 7a-8a. The court further held

that petitioners could not succeed on their Free Exercise Clause claim because the restriction on in-person religious gatherings did not discriminate against religion. *Id.* at 8a-12a. Finally, the court rejected, without elaboration, petitioners' other First Amendment claims. *Id.* at 12a.

On July 10, petitioners filed a petition for rehearing en banc, 7th Cir. Doc. 78, which the Seventh Circuit denied on July 27, Pet. App. 13a. Petitioners filed a petition for a writ of certiorari on October 22.

REASONS FOR DENYING THE PETITION

Petitioners' challenge to the expired executive order is moot. Petitioners already have the relief that they seek: the ability to gather without restriction for religious purposes during the pandemic. And there is no reasonable expectation that the challenged limitation will be reimposed, as the Governor has not only exempted religious gatherings from his mitigation measures for more than eight months, but also stated that he will not reimpose any limitations on religious exercise. And even if this appeal were not moot, the case would be a poor vehicle for this Court's review, for similar reasons. There would be no practical significance to any decision that the Court could enter in this case, given that the executive order at issue expired eight months ago and the limitation on in-person religious gatherings that it imposed has not been, and will not be, renewed. And this case is an unlikely candidate for the Court to provide broader guidance on Free Exercise Clause challenges to pandemic-

related health measures, as the executive order here was issued during the early days of the pandemic and the decision below predates the Court's decision in *Roman Catholic Diocese*.

Thus, this Court should deny review. But if the Court concludes that its intervention is warranted, it should grant the petition, vacate the decision below, and remand for further proceedings in light of *Roman Catholic Diocese*.

I. This Appeal Is Moot Or, At Minimum, A Poor Vehicle For Resolving Any Significant Legal Question.

A. The appeal is moot because the challenged limitation has expired and will not be renewed.

Article III of the Constitution permits federal courts to "adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). This basic rule "require[s] that a case embody a genuine, live dispute between adverse parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). Article III thus "denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them," including by "advising what the law would be upon a hypothetical state of facts." *Lewis*, 494 U.S. at 477 (internal quotations omitted). "No principle is more fundamental to the judiciary's proper role in our system of government." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotations and alteration omitted).

As relevant here, moreover, "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC v.*

Nike, Inc., 568 U.S. 85, 90-91 (2013) (internal quotations omitted). That is, "throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (internal quotations and alteration omitted). If, at any stage, "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," the "case becomes moot." *Already*, 568 U.S. at 91 (internal quotations omitted). When the case is moot, a court cannot hear it, "[n]o matter how vehemently the [petitioners] continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Ibid.* Accordingly, regardless of whether this appeal was live before the Seventh Circuit, see Pet. App. 6a-7a, it must remain live at this stage of review for this Court to exercise jurisdiction, see *Lewis*, 494 U.S. at 476-480 (case mooted while on certiorari to this Court).

Here, no live case or controversy remains before the Court because the limitation petitioners challenge has not been in effect for more than eight months and there is no reasonable prospect that it will be reimposed. *Supra* pp. 5-7. Generally, when an intervening change in law provides the plaintiffs with the very relief they seek while a case is on appeal, the case is moot. See, *e.g.*, *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1187-1188 (2018) (per curiam) (challenged statute amended on appeal); *Lewis*, 494 U.S. at 476, 478 (same); *Burke v. Barnes*, 479 U.S. 361, 363-

364 (1987) (same for expiration of bill); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (same for regulation). This principle applies with equal force to the expiration of executive orders. See *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (per curiam) (expiration of executive order mooted appeal); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (per curiam) (same). That is because the Court "review[s] the judgment below in light of the [law] as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

This basic principle is dispositive here. Although petitioners characterize the challenged limitation as "continuing," Pet. 3 n.1, in reality, any limit on petitioners' ability to hold religious gatherings ended eight months ago with the expiration of EO32. And since EO32 expired, the Governor has not imposed *any* restriction on religious gatherings, despite issuing numerous executive orders implementing social distancing guidelines and other public-health measures designed to curb the spread of COVID-19. Instead, he has continuously exempted religious exercise from the reach of his pandemic-related regulations and stated that he will continue this exemption. See *supra* pp. 5-7. Given that the challenged limitation "expired by its own terms" and has not since been replaced, "the appeal no longer presents a live case or controversy." *Int'l Refugee Assistance*, 138 S. Ct. at 353 (internal quotations omitted); accord, *e.g.*, *Spell v. Edwards*, 962 F.3d 175, 179-180 (5th Cir. 2020)

(expiration of executive orders restricting religious gathering mooted claims for injunctive relief).

There is thus no relief that the Court could conceivably order that would affect petitioners' legal rights. This appeal concerns only petitioners' request for preliminary injunctive relief—that is, prospective relief. See Pet. 1-2; Pet. App. 4a.[10] However, because religious gatherings are exempt from all pandemic-related restrictions, petitioners no longer need an injunction to conduct their services. See *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559 (1986) (request to enjoin statute moot following statute's amendment because plaintiff could "no longer . . . contend[] that" he was prohibited from taking desired action). All that remains, then, is petitioners' request that the Court decide whether the executive order issued by the Governor last April was constitutional when it was in force more than eight months ago. But Article III prevents this Court from issuing advisory opinions on academic questions of this sort. See *Lewis*, 494 U.S. at 477; *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70-71 (1983) (case moot where resolution of dispute would not redress petitioner's grievance).[11]

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[10] Petitioners also sought permanent injunctive relief, a declaratory judgment, and nominal damages in their complaint. Pet. App. 91a-94a. But because the petition arises only from the lower courts' rejection of petitioners' request for preliminary injunctive relief, petitioners' entitlement, if any, to these other forms of relief is not before the Court in this interlocutory posture.

[11] Mootness aside, to the extent the Court believes petitioners are entitled to an answer to the question whether the expired executive order violated the Free Exercise

These factual circumstances distinguish this appeal from this Court's decision in *Roman Catholic Diocese*, which resolved a challenge to New York's pandemic-related limitations on religious gatherings notwithstanding that the applicants there were not subject to the challenged limitations at the time. 141 S. Ct. at 68. But the fact that the applicants there were not then subject to the limitations was a matter of chance. New York had not "withdrawn or amended the relevant Executive Order" imposing the challenged limits. *Id.* at 74 (Kavanaugh, J., concurring). Instead, following a decrease in infection rates, the applicants' regions had been reclassified into "zones" subject to less strict measures. *Id.* at 66, 68. Nor had New York argued that "the[] cases [we]re moot"; on the contrary, it did not "deny that some houses of worship, including the applicants," would again face the challenged limitations in the "very near future." *Id.* at 74 (Kavanaugh, J., concurring). On remand, the Second Circuit likewise determined that the case was not moot, noting that New York had renewed the executive order imposing the challenged limitations after this Court's decision. *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 631 n.16 (2d Cir. 2020). By contrast, here, the challenged executive order has not been in force for more than

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Clause during the month it was in force, a pending case in the Seventh Circuit, *Cassell v. Snyders*, No. 20-1757 (7th Cir.), may offer them that answer. The plaintiffs in *Cassell*, like petitioners here, are religious organizations and congregants who claim that their Free Exercise Clause rights were violated by EO32. 7th Cir. Doc. No. 24 at 7-8, *Cassell*, No. 20-1757 (Aug. 7, 2020). They argue, among other things, that the decision below should be revisited in light of *Roman Catholic Diocese*. 7th Cir. Doc. No. 54, *Cassell*, No. 20-1757 (Nov. 30, 2020).

eight months, and the Governor has stated that he will continue the exemption for religious exercise for the duration of the pandemic, while the State progresses from Phase 4 to 5. See *supra* p. 7. Thus, unlike in *Roman Catholic Diocese*, where the applicants faced a "constant threat" of ongoing limits, 141 S. Ct. at 68, there is no reasonable basis to conclude that petitioners will face a restriction on religious gatherings again.[12]

Petitioners' sole argument against mootness is that the so-called "voluntary cessation" exception applies. Pet. 3 n.1. That doctrine holds that a party may not "evade judicial review, or . . . defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). But the doctrine does not apply here, for several reasons.

For starters, the voluntary cessation doctrine is not implicated where, as here, a law "expires by its own terms." *Spell*, 962 F.3d at 179 (citing *Hawaii*, 138 S. Ct. at 377, and *Burke*, 479 U.S. at 363-364). In such a case, where the expiration of a law is "predetermined" or "automatic," there is nothing voluntary about the cessation, and so no risk that that the defendant is attempting to evade review by temporarily ceasing the challenged conduct. *Ibid.* This Court has concluded that the expiration

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[12] Petitioners may submit that they require an injunction because they faced enforcement actions from the City of Chicago and the City of Niles for violating the limitation when it was in force. See Pet. 9-10. But those actions were brought by local actors who are not party to this case, not the State, and so any challenges to those actions do not present a live case or controversy within the scope of this matter.

of executive orders mooted challenges to those orders without applying the voluntary cessation exception. See *Hawaii*, 138 S. Ct. at 377; *Int'l Refugee Assistance*, 138 S. Ct. at 353. The same result should obtain here.

In any event, the exception does not apply for the additional reason that it is "absolutely clear" that the challenged limitation cannot "reasonably be expected" to be reimposed. *Already*, 568 U.S. at 91 (internal quotations omitted). Since May 29, 2020, the Governor has refrained from imposing restrictions on religious gatherings even when COVID-19 infection rates rose in Illinois, including when the State experienced an increase in infection rates that warranted a return to more stringent measures. See *supra* p. 6. And the Governor more recently announced that he will exempt religious exercise from regulations for the duration of the COVID-19 pandemic. See *supra* p. 7. This Court, therefore, has "before [it] more than a '[m]ere voluntary cessation of allegedly illegal conduct.'" *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)); see *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 632 (1979) (case moot where "no reason to believe" that city would revert to challenged hiring practices).

Relatedly, there is no reasonable expectation that the Governor will reimpose the challenged limitation because it was a temporary measure imposed in a different context—the "dawn of [the] emergency," *Calvary Chapel Dayton Valley v. Sisolak*,

140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting), when governmental actors were grappling with an unprecedented pandemic and taking aggressive steps to curb the spread of COVID-19. The Governor restricted religious gatherings only until May 29, 2020, when little was known about the virus, which was rapidly spreading throughout Illinois and had no vaccine, cure, or treatment. See *supra* pp. 3-5. But as the pandemic continued to affect Illinois residents' daily lives, the Governor's response to the pandemic evolved, too. He continued to protect public health and safety by restricting activity throughout the State, but he also balanced the need for these restrictions with other significant state interests, including the free exercise of religion. See *supra* pp. 5-7.

Petitioners assert without elaboration that the Governor might reverse course and reimpose the challenged limit. Pet. 3 n.1. But "[s]uch speculative contingencies afford no basis for [the Court's] passing on the substantive issues" that petitioners present. *Preiser*, 422 U.S. at 403 (internal quotations omitted). And the record here, unlike in prior cases in which this Court has applied the voluntary cessation exception to mootness, "discloses no threat or probability of resumption" of the challenged conduct. *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 334 (1952); cf. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (defendant had already re-enacted similar law); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (defendant had previously

responded to litigation by repealing legislation and then later reenacting it). Here, the Governor did not reimpose the challenged limitation on religious gatherings even after the Seventh Circuit determined that petitioners were unlikely to succeed on the merits, or when COVID-19 infection rates reached new heights in Illinois.

Finally, although the Seventh Circuit relied on the voluntary cessation exception in finding that the appeal was not moot, Pet. App. 6a-7a, the passage of time has undermined the basis for the court's conclusion. The court reasoned that petitioners could plausibly reencounter the challenged limitation because, if COVID-19 infection rates worsened, Illinois could reenter Phase 2 of the Governor's plan, which outlined restrictions on religious gatherings. *Ibid.* But—setting aside whether this conclusion was correct—it is now "absolutely clear," *Already*, 568 U.S. at 91 (internal quotations omitted), that the limitation will not be reimposed. Since the Seventh Circuit issued its decision in June, no other restrictions on religious gatherings have been imposed, and the Governor modified his plan for combatting COVID-19—which at the time "reserve[d] the option" of restricting religious gatherings, Pet. App. 6a—and stated that he will continue the exemption for religious exercise for the duration of the pandemic, see *supra* p. 7. There is thus no basis to apply the voluntary cessation doctrine here.

B. The case is a poor vehicle to resolve the questions presented.

Even if there were some doubt about this appeal's mootness—and there is not—many similar factors make this case a poor candidate for certiorari review.

To start, and most obviously, petitioners and other religious organizations in Illinois can already meet in unlimited numbers for religious exercise, and so any injunction against the enforcement of the long-expired order would be "hypothetical, and to no effect." *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006) (Kennedy, J., concurring in denial of certiorari). "Whatever the ultimate merits of the parties' mootness arguments," there is thus a "strong prudential consideration[] disfavoring the exercise of the Court's certiorari power." *Ibid.*

Moreover, even if the Court were inclined to grant certiorari to provide guidance about the constitutionality of *other* pandemic-related executive orders, this case would be an extremely poor vehicle for such a project. For one, although petitioners identify five questions presented, Pet. i-ii, the decision below meaningfully addresses only one of them, see Pet. App. 12a, and petitioners themselves focus almost exclusively on that question—the applicable standard of review in a Free Exercise Clause challenge to a state order regulating both religious and nonreligious gatherings, see Pet. 13-32. And petitioners dramatically overstate the need for the Court's guidance on this question: Most of the cases they identify do not involve

restrictions on religious activities, and several of those that do have been fully resolved. See *id.* (addendum).

But even if further guidance were needed on the questions presented by Free Exercise Clause challenges to COVID-19 restrictions on religious gatherings, this case would still be a poor vehicle to decide them. To begin, it predates *Roman Catholic Diocese*, and so neither the Seventh Circuit nor the district court below had an opportunity to consider the constitutionality of the expired executive order under the standard set out in that opinion. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Furthermore, there would be little value in reviewing an executive order issued during the early days of the pandemic. The record in this case is confined to the limited scientific and medical knowledge about COVID-19 that existed in May 2020, when the district court's decision was issued. See Pet. App. 29a. But knowledge about the pandemic has changed dramatically since that time. See *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting). And because the case was litigated on an expedited basis, the record compiled is not robust, complicating any effort to provide meaningful guidance on the questions presented. "Constitutional questions are not to be dealt with abstractly" but rather "only as they are appropriately raised upon a record before [the Court]." *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Missouri*, 361 U.S. 363, 370 (1960) (internal quotations omitted).

II. At Most, The Court Should Grant, Vacate, And Remand In Light Of *Roman Catholic Diocese*.

Because the appeal is moot or, at the very least, a poor vehicle to address any legal question of significance, the Court should deny review. If, however, the Court believes that its intervention is warranted, notwithstanding the substantial vehicle issues discussed above, it should grant the petition, vacate the decision below, and remand for further proceedings in light of its decision in *Roman Catholic Diocese*.

This Court grants, vacates, and remands where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Greene v. Fisher*, 565 U.S. 34, 41 (2011) (internal quotations omitted). It is conceivable that the Seventh Circuit would reconsider the decision below in light of this Court's opinion in *Roman Catholic Diocese*, which postdates it. *Roman Catholic Diocese*, like this case, considered a Free Exercise Clause challenge to a State's order restricting indoor religious gatherings during the pandemic. See 141 S. Ct. at 66. And there, as here, the lower court upheld the order in part on the ground that it did not impermissibly discriminate against religious institutions. *Id.* at 67.

To be sure, the expired executive order at issue here is distinguishable in several ways from the order at issue in *Roman Catholic Diocese*, and so, even if the case were not moot, the order might be sustained against petitioners' challenges. But the Seventh Circuit should have the opportunity to make this determination in the

first instance. Indeed, this Court has granted, vacated, and remanded three cases presenting Free Exercise Clause challenges to other state orders after *Roman Catholic Diocese*. See *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (per curiam); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (per curiam); *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (per curiam). Such an order would be appropriate here, if the Court determines that its intervention is warranted at all. Again, this Court is "a court of review, not of first view," *Cutter*, 544 U.S. at 718 n.7, and the Seventh Circuit should be afforded an opportunity to decide in the first instance whether *Roman Catholic Diocese* merits a different outcome.

Because this appeal is moot or, at the very least, a poor vehicle for resolving any significant legal question, the petition should be denied. If the Court concludes that its intervention is appropriate, however, it should grant, vacate, and remand in light of *Roman Catholic Diocese*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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