IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE BELOVED CHURCH, an Illinois not-for-profit corporation, and PASTOR STEPHEN CASSELL, an individual, Plaintiffs, v. GOVERNOR JB PRITZKER, *et al.*, Defendants.	No. 20-cv-50153 Honorable John Z. Lee

THE GOVERNOR'S OPPOSITION TO PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

Plaintiffs once again ask this Court to intercede on their behalf on an emergency basis. But Plaintiffs have shown they have no interest in respecting this Court's decisions unless the Court rules in their favor. On Saturday evening, Plaintiffs lost their motion for a temporary restraining order and preliminary injunction against Governor Pritzker's stay-at-home order. Then, the next morning, Plaintiffs went ahead anyway and convened several dozen people in close quarters. By the estimation of their counsel's spokesperson, 60 to 80 people were in attendance[1] at Plaintiffs' in-person worship service, in direct violation of the executive order and the public health guidelines that are designed to protect Plaintiffs' congregants and all who might come into contact with them from the spread of COVID-19. Having disregarded this Court's expedited judgment, Plaintiffs now again turn to this Court for another "emergency" determination—which they

[1] Jeremy Gorner, "Northwest Illinois church holds services days after filing lawsuit against Gov. J.B. Pritzker over stay-at-home order," *Chicago Tribune* (May 4, 2020), https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-church-holds-services-lawsuit-20200503-ghvy3ob265etnegcccqyo6q3rq-story.html (last visited May 6, 2020).

apparently will respect only if it is in their favor. Their motion for an injunction pending an appeal should be denied.

Plaintiffs note that parties seeking a stay or an injunction pending appeal must satisfy the test for a preliminary injunction, which Plaintiffs acknowledge they have already lost. (ECF No. 47 at 2.) Plaintiffs appropriately cite *Cavel Int'l Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007), and *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), for the test. But as Judge Easterbrook pointed out in his dissent in *Cavel*, the Supreme Court's holding in *Hilton* requires a party seeking an injunction pending appeal—especially a party that has already lost—to make a "strong showing" it is likely to prevail on appeal. *Cavel*, 500 F.3d at 549. Here, Plaintiffs simply incorporate their prior briefs and do not even try to make any new showing, let alone a strong one, that they are likely to prevail on appeal. They do not because they cannot.

A. Plaintiffs Are Not Likely to Succeed on the Merits.

On May 3, 2020—four days after Plaintiffs filed this lawsuit—the Court issued a 37-page opinion ("Opinion," ECF No. 39), explaining its denial the previous evening of Plaintiffs' emergency motion for a temporary restraining order and preliminary injunction ("TRO-PI Motion") on their nine-count complaint. The same reasoning articulated in the Court's Opinion now requires denial of Plaintiffs' motion for an injunction pending appeal.

Plaintiffs filed their complaint and TRO-PI Motion on Thursday, April 30, 2020. Plaintiffs' motion challenged the constitutionality of the Governor's "stay-at-home" orders related to the COVID-19 pandemic: Executive Orders 2020-10 and 2020-18, and then, through their reply brief, Executive Order 2020-32 (even though it expressly recognizes the free exercise of religion as an "essential activity"). Plaintiffs alleged that these orders violate their free exercise and free speech rights under the First Amendment to the U.S. Constitution and analogous provisions in the Illinois

Constitution. Plaintiffs demanded immediate adjudication by this Court of their TRO-PI Motion, but after losing went ahead and held their large, in-person Sunday service in violation of the current executive order.

Plaintiffs do not have even a "negligible" chance of success on any of their claims. *See Cavel*, 500 F.3d at 548. This Court has already concluded that Plaintiffs "have a less than negligible chance of prevailing" on their First Amendment Free Exercise claim. (ECF No. 39 at 16.) Applying the Supreme Court's long-established precedent in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1906), the Court determined that the current executive order satisfies the reasonableness standard applicable to assessing the constitutionality of government action taken in response to an emergency such as the current COVID-19 pandemic. (ECF No. 39 at 14–16.)

The Court also applied traditional Free Exercise analysis to conclude that the current executive order is a "neutral, generally applicable law" subject to rational basis scrutiny consistent with *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). (ECF No. 39 at 16–26.) Applying rational basis scrutiny, the Court concluded: "Given the importance of slowing the spread of COVID-19 in Illinois, the Order satisfies [rational basis] scrutiny, and Plaintiffs do not seriously argue otherwise." (ECF No. 39 at 26.) The Court's application of *Jacobson* also shows Plaintiffs have no chance of success on their Free Speech and Free Assembly claims under the First Amendment and the Illinois Constitution (Counts III–VI).

Although Plaintiffs did not press their under-developed substantive due process claim in Count VII in their TRO-PI Motion, it also has no chance of success. That claim is duplicative of Plaintiffs' First Amendment claims and fails for the same reasons. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) ("Where a particular Amendment provides an explicit source of

constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.")

The Court also correctly recognized that "the Eleventh Amendment almost certainly forecloses plaintiffs' state law claims here." (ECF 39 at 28.) Under the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), Plaintiffs' claims seeking injunctive relief to compel the Governor to comply with state law (Counts II, IV, VI, VIII, and IX) are barred by sovereign immunity under the Eleventh Amendment. Plaintiffs' state statutory claims also are likely to fail on their substantive merits, as the Court concluded in the Opinion regarding the TRO-PI Motion. (ECF No. 39 at 28–35.)

Based on this Court's reasoning in the Opinion, it should conclude that Plaintiffs have no plausible chance of succeeding on the merits on an appeal. Plaintiffs' request for an injunction pending appeal should be denied on this basis.

B. The Balancing of the Harms Does Not Justify an Injunction.

In deciding whether to grant or deny an injunction pending appeal, the Court also must consider the balance of harms and apply the sliding scale where "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984); *see also Cavel*, 500 F.3d at 547. Given the public health emergency affecting Illinois, the Court has already found that this scale tilts decidedly in Defendants' favor (ECF No. 39 at 35–36), and Plaintiffs again offer nothing new in their motion to cause the Court to decide otherwise.

The Court should deny Plaintiffs' motion for an additional reason noted above: Plaintiffs disregarded this Court's May 2, 2020 ruling by proceeding with an in-person gathering of 60 to 80 people on Sunday, May 3, 2020, that exceeded the 10-person limitation in the current executive order. Instead of respecting the Court's decision, complying with the current executive order, and pursuing their right to appeal the Court's decision, Plaintiffs treated the Court's decision as meaningless. Plaintiffs do not need this Court's expedited ruling when they have shown their intention to hold their large in-person services in any manner they choose, despite the recognized threat to public health.

The Court should deny Plaintiffs' motion because they do not and cannot meet the standards discussed above. Their disregard for the judicial process provides an additional reason for the Court to deny their motion.

For each of these reasons, Governor JB Pritzker requests that the Court deny Plaintiffs' motion for an injunction pending appeal.

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Respectfully submitted,

/s/ Christopher G. Wells

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