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

ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES, Plaintiffs, v. GOVERNOR JB PRITZKER, Defendant.	No. 20-C-02782 Honorable Robert W. Gettleman

THE GOVERNOR'S OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Dated: May 9, 2020

KWAME RAOUL
Attorney General of Illinois

Christopher G. Wells
R. Douglas Rees
Sarah H. Newman
Kelly C. Bauer
Hal Dworkin
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601

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INTRODUCTION

During the unprecedented public health threat posed by the COVID-19 pandemic, Plaintiffs in this case ask for extraordinary injunctive relief that would put them and their communities at great risk by exempting them from critical public health measures. Just last week, another judge in this district rejected a nearly-identical challenge to these measures, explaining that when "[t]aking into account COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity," the public interest weighed heavily against providing the same relief Plaintiffs seek here. This Court should reach the same result and deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Last Sunday, May 3, 2020, Judge John Z. Lee rejected a request for emergency injunctive relief by a pastor and his Lena, Illinois church challenging the Governor's effort to prevent the spread of COVID-19 through Executive Order 2020-32. *Cassell et al. v. Snyder et al.*, No. 20 C 50153, ECF No. 39 (May 3, 2020 Mem. Op., "*Cassell* Opinion).[1] Executive Order 2020-32 is the current version of the so-called "stay-at-home" order ("Current Executive Order. The plaintiffs in *Cassell* sought to invalidate the Current Executive Order and its predecessors on First Amendment grounds because it temporarily restricts their ability to have in-person worship services with more than 10 people due to the well-established risk of COVID-19 transmission at large gatherings.

Judge Lee concluded, however, that the plaintiffs had a "less than negligible chance of prevailing" on their core claim that the Current Executive Order violates their right to free exercise of religion. *Cassell* Opinion, at 16. Applying Supreme Court precedent from *Jacobson*

[1] The *Cassell* Opinion is accessible on this Court's ECF system and through Westlaw at *Cassell v. Snyders*, No. 20 C 50152, 2020 WL 2112374 (N.D. Ill. May 3, 2020).

v. Commonwealth of Massachusetts, 197 U.S. 11 (1905), as well as *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), Judge Lee concluded that the Current Executive Order: (i) imposes reasonable restrictions related to combatting the current public health emergency posed by COVID-19, *Cassell* Opinion, at 14–l6 (applying *Jacobson*); and (ii) alternatively, that it is a neutral law of general applicability that easily survives rational basis scrutiny, *Cassell* Opinion, at 17–26 (applying *Smith* and *Lukumi*). Judge Lee also found no reasonable likelihood of success on the other claims on which the plaintiffs sought emergency injunctive relief, including their claim under Illinois' Religious Freedom Restoration Act ("RFRA"), 775 ILCS 35/15. *See Cassell* Opinion, at 28–31. Judge Lee also concluded that the balance of harms "weigh[ed] heavily against" granting emergency injunctive relief in light of the ongoing COVID-19 pandemic. *Cassell* Opinion, at 36. In doing so, he pointed to the risk inherent in mass gatherings, including large worship services, and highlighted multiple examples of large COVID-19 outbreaks traceable to these types of events. *Id.* at 22, 35.

Plaintiffs in this case, two churches located in Chicago and Niles, Illinois, ask this Court to disregard Judge Lee's ruling and grant them emergency injunctive relief so they can congregate immediately without regard to the 10-person limit, despite the ongoing COVID-19 pandemic. There is no reason to do so.

Plaintiffs point to no new precedent indicating that Judge Lee's ruling upholding the Current Executive Order was erroneous. Instead, Plaintiffs repeatedly point to a Kentucky district court decision and a Sixth Circuit decision they say requires a different result, but Judge Lee considered both of those cases. *Compare* ECF No. 5, at 2, 3, 4, 6, 7, 8, 9, 11, 19, 21, 26, 28, 29, 30 (citing *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249

(W.D. Ky. Apr. 11, 2020), and *Maryville Baptist Church, Inc. v. Beshear*, -- F.3d --, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020)), *with Cassell* Opinion, at 25–26. In analyzing the *Maryville Baptist* decision, Judge Lee concluded that "the Sixth Circuit's reasoning counsels in favor of upholding Governor Pritzker's Order." *Cassell* Opinion, at 25. The Sixth Circuit faulted the executive order at issue in *Maryville Baptist* because it did not permit drive-in worship services—which, as Judge Lee recognized, the Current Executive Order allows—and because it banned in-person worship services altogether, no matter the number of attendees. *Maryville Baptist*, 2020 WL 2111316 , at *1, *4. In discussing the ban on in-person worship services, the Sixth Circuit stated that "[i]f the problem is numbers, and risks that grow with great numbers, there is a straightforward remedy: limit the number of people who can attend a service at one time." *Id.* at *4. But as Judge Lee observed: "That is exactly what Governor Pritzker's latest order does" in permitting worship services with no more than 10 people.[2] *Cassell* Opinion, at 26. Judge Lee also distinguished the Kentucky district court's decision in *On Fire* because that case involved a ban on drive-in worship services, which, again, are permitted by the Current Executive Order. *Cassell* Opinion, at 25 n.6.

Plaintiffs' other principal case, *First Baptist v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020) (cited at ECF No. 5, at 2, 3, 8, 12, 14, 27), was also considered and distinguished by Judge Lee. *Cassell* Opinion, at 23–25. The problem identified by the *First Baptist* court was that the Kansas governor's COVID-19 executive order banned mass gatherings

[2] Another Kentucky district court ruled on May 8, 2020, that the Kentucky governor's order prohibiting all in-person worship services, with no numerical threshold, likely violated the First Amendment. *Tabernacle Baptist Church v. Beshear*, No. 3:20-cv-00033-GFVT, ECF No. 24 (E.D. Ky. May 8, 2020). That decision, however, is inapposite because the Current Executive Order in Illinois permits in-person worship services with fewer than 10 people.

at auditoriums, theaters, stadiums, and "churches or other religious facilities," but contained exemptions for airports, large retail stores, and restaurants where social distancing was possible. 2020 WL 1910021, at *2. This express reference to churches and other religious facilities stripped the executive order of its neutrality and triggered strict scrutiny in the eyes of the *First Baptist* court. *Id.* at *7.

Judge Lee rejected the reasoning in *First Baptist* as "difficult to square with *Lukumi*." *Cassell* Opinion, at 24. In his view, *Lukumi* requires courts to "consider how a particular stay-at-home order treats secular and religious activities that are substantially comparable to one another." *Cassell* Opinion, at 25. Applying *Lukumi*, Judge Lee found that the Current Executive Order permissibly distinguishes between large, mostly static gatherings—like those occurring at schools, movie theatres, concerts, sporting events, and worship services—and activity at retail stores selling life-sustaining goods, where shoppers "purchase necessary items and then leave as soon as possible." *Id.* at 21–23.

In this case, Plaintiffs, relying on *First Baptist*, again press the view that the Current Executive Order exhibits impermissible religious discrimination because it permits "Walmart and other 'supercenter' or 'big box' stores" to have more than 10 people in them at any one time, but not houses of worship. (ECF No. 5, at 8; *see also id.* at 10, 13.) But Plaintiffs' "big box" store argument is based on Plaintiffs' unscientific and unsupported view of the relative risk of COVID-19 transmission presented by shopping for life-sustaining goods while observing social distancing as compared to sitting or standing (and often singing and speaking) in a large group for an hour or longer. Plaintiffs' disagreement with the Governor's epidemiological risk assessment is not, however, the type of "religious gerrymander" that *Lukumi* prohibits. *See* 508 U.S. at 535. Like Judge Lee, this Court should reject the arguments Plaintiffs raise.

Plaintiffs' other attempts to distinguish Judge Lee's ruling also fail. Plaintiffs attach great weight to purported differences in the Current Executive Order and executive orders from other states to claim that the Illinois order does not adopt the least restrictive means to accomplish its compelling interest of combatting the COVID-19 pandemic. (ECF No. 5 at 25–27.) But as a matter of law, this Court need not and should not assess whether the 10-person limitation on gatherings in the Current Executive Order is the least restrictive alternative because strict scrutiny does not apply. As Judge Lee concluded, *Cassell* Opinion, at 16, the Supreme Court's decision in *Jacobson* provides the applicable standard and requires upholding governmental rules and regulations implemented to combat a pandemic as long as they are not "arbitrary" or "unreasonable." 197 U.S. at 28. Similarly, under traditional First Amendment Analysis, the Current Executive Order is subject to rational basis scrutiny because it is a neutral law of general applicability. *Cassell* Opinion, at 16–26 (applying *Smith* and *Lukumi*).

Plaintiffs' characterization of what the least restrictive alternative test required of the Governor in this circumstance also shows a fundamental misunderstanding (or, worse, dismissal) of the severity of this pandemic. According to Plaintiffs, because some other states have not applied a 10-person limitation to religious gatherings, Illinois was required to try that approach first to see if it adequately served the government's compelling interest in preventing the spread of COVID-19. (ECF No. 5, at 26, arguing that "[t]he State has refused to consider or attempt" exempting worship services from the limitation on large gatherings.) Not so: the First Amendment does not require the Governor to first permit large gatherings, religious or otherwise, to see if more people become infected and further spread the virus. "The right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

Plaintiffs also are merely speculating that the alternative approaches employed in other states are ***effective*** alternatives to stopping the spread of COVID-19—indeed, epidemiologists are predicting significantly more deaths due to COVID-19 than previously predicted because of the more lax approaches in the states Plaintiffs laud.[3] *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (stating that the challenged regulation must be "the least restrictive means among available, ***effective*** alternatives") (emphasis added).

Plaintiffs offer nothing new or different that compels this Court to take the extraordinary step of invalidating the same executive order that another judge in this district upheld against the same essential constitutional challenges just last week. Just as it was last week, the Current Executive Order is a reasonable response to the COVID-19 pandemic under *Jacobson*, and a valid, neutral law of general applicability under *Smith* and *Lukumi*. And, as in the *Cassell* case, Plaintiffs' parallel state-law claims fail on the merits under the same basic analysis, and also because the Governor, acting in his official capacity, is entitled to sovereign immunity under the Eleventh Amendment. *Cassell* Opinion, at 26–31.

The balance of harms has also not materially changed in the last week since Judge Lee's ruling in *Cassell*. Illinois continues to confront a pandemic that regularly claims more than 100 Illinois residents' lives on a daily basis. As Illinois continues to remain on top of what appears to be a plateau of continuing death due to COVID-19, this is no time to enjoin the critical measures the Governor has taken to flatten the curve. Plaintiffs' motion should be denied because they

[3] Reuters, "Researchers Double U.S. COVID-19 Death Forecast, Citing Eased Restrictions," *N.Y. Times* (May 4, 2020), https://www.nytimes.com/reuters/2020/05/04/us/04reuters-health-coronavirus-usa.html (last visited May 9, 2020).

have no reasonable likelihood of success on the merits of their claims, no irreparable harm, and the balance of harms tips decidedly against their requested relief.

LEGAL STANDARD

The standards for deciding whether a temporary restraining order is appropriate are "analogous to the standards applicable when determining whether preliminary injunctive relief is appropriate." *YourNetDating, Inc. v. Mitchell*, 88 F.Supp.2d 870, 871 (N.D. Ill. 2000). Injunctive relief is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original); *see also Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998) (same); *see also Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 389 (7th Cir. 1984).

To obtain a preliminary injunction or TRO, a plaintiff must establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010). The court "must balance the competing claims of injury and must consider the effect on each party of granting or withholding the requested relief," paying "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

Here, Plaintiffs' burden is even greater than usual because, the interim injunction they request in their present motion (ECF No. 5, at 30) is the same as what they ultimately seek in their complaint. *See, e.g., Boucher*, 134 F.3d at 826 n. 6 ("A preliminary injunction that would give the movant substantially all the relief he seeks is disfavored, and courts have imposed a

higher burden on a movant in such cases."); *W.A. Mack v. General Motors Co.*, 260 F.2d 886, 890 (7th Cir. 1958) ("A preliminary injunction does not issue which gives to a plaintiff the actual advantage which would be obtained in a final decree.").

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits." *Winter*, 555 U.S. at 20. To meet their initial burden, Plaintiffs must show that they have a "better than negligible" chance of success on the merits. *Roland Mach. Co*., 749 F.2d at 387. Where it is more likely than not that a defendant will prevail, injunctive relief is improper, particularly where the balance of harms tips decidedly in favor of the defendant. *See Boucher*, 134 F.3d at 826-27, 829 (vacating preliminary injunction as to expelled high school student). Even if a plaintiff makes the required showing, the court must determine how likely it is that the plaintiff actually will succeed: "The 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*., 749 F.2d at 387.

In the context of an emergency, courts typically apply a more deferential standard to executive actions than it would to government regulations enacted in the ordinary course. Courts recognize that "[t]he invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected," *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971), and as a result, that "fundamental rights such as the right of travel and free speech may be temporarily limited or suspended," *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) ; *see also In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) ("[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not

"beyond all question, a plain, palpable invasion of rights secured by the fundamental law."); *United States v. Salerno*, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."); *Zemel v. Rusk*, 381 U.S. 1, 15-16 (1965) (the right to travel "does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole").

ARGUMENT

Plaintiffs' request for a temporary restraining order ("TRO") and preliminary injunction fails because they are unlikely to succeed on the merits of their claims. Neither the prior "stay at home" orders, nor the Current Executive Order impermissibly restricts their First Amendment or other constitutional rights. Plaintiffs will not suffer irreparable harm in the absence of TRO, and the balance of harms tips decidedly against them in light of the clear threat to public health and safety presented by the COVID-19 pandemic.

I. Plaintiffs Are Unlikely to Succeed on the Merits of Their Claims.

Plaintiffs' claims fail as a matter of law and do not justify a TRO because the Governor's actions do not unconstitutionally infringe the First Amendment or other of Plaintiffs' rights. In addition, Plaintiffs move to be exempted from "various COVID-19 Executive Orders and other enforcement directives," which they refer to as "Gathering Orders" in their motion. (ECF No. 5, at 1.) To the extent their claims are challenging Executive Orders 2020-10 and 2020-18, which have been superseded by Executive Order 2020-32, those portions of their claims are moot, as they were in *Cassell*. *Cassell* Opinion, at 9; *see also Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011). And to the extent Plaintiffs' claims are based on the recently announced but not-yet implemented "Restore Illinois Plan," ECF No. 5, at 1, those portions of

their claims are not yet ripe. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

A. The Current Executive Order is a Constitutional Exercise of the Governor's Emergency Powers to Combat the COVID-19 Pandemic.

Illinois, along with the rest of the world, is in the throes of an unprecedented public health crisis that has brought normal life to a halt. In response, the Governor, along with numerous other state and national officials, has proclaimed a disaster and invoked emergency powers to issue multiple executive orders to protect the health and safety of all Illinois residents. In an extraordinary public health crisis such as this, the Governor has broad emergency powers that he may exercise to protect public health, and courts must afford deference to temporary actions taken to curb the spread of a dangerous disease and mitigate its effects. Plaintiffs have not shown that the Current Executive Order impermissibly infringes their constitutional rights.

The Supreme Court has long recognized that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson*, 197 U.S. at 27 (internal quotation marks omitted)*; see also Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (recognizing the continuing vitality of *Jacobson*). In that regard, the Court has permitted states to enact "quarantine laws and health laws of every description," *Jacobson*, 197 U.S. at 27, similar to the Current Executive Order's measures to combat the COVID-19 pandemic. *See, e.g.*, *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380 (1902) (upholding quarantine law against constitutional challenges); *see also Benson v. Walker*, 274 F. 622 (4th Cir. 1921) (upholding board of health resolution that prevented carnivals and circuses from entering a certain county in response to the 1918-1919 influenza epidemic); *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (upholding quarantine of a nurse returning from treating Ebola patients in Sierra Leone).

The exercise of these emergency powers "necessarily restricts activities that would normally be constitutionally protected," and "[a]ctions which citizens are normally free to engage in [have] become subject to criminal penalty." *Chalk*, 441 F.2d at 1281. But "measures [that] would be constitutionally intolerable in ordinary times [] are recognized as appropriate and even necessary responses to the present [COVID-19 pandemic] crisis." *Abbott*, 954 F.3d at 787. Although the Constitution is not suspended during a state of emergency, the Supreme Court has recognized that "under the pressure of great dangers," constitutional rights may be reasonably restricted "as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29; *see also Prince*, 321 U.S. at 166-67 ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease."). This "settled rule" allows states facing emergencies to "restrict, for example, one's right to peaceably assemble, *to publicly worship*, to travel, and even to leave one's home." *Abbott*, 954 F.3d at 778 (emphasis added).

Thus, an executive facing an emergency can temporarily restrict First Amendment protections because "although the rights of free speech and assembly are fundamental, they are not in their nature absolute." *Whitney v. California*, 274 U.S. 357, 373 (1926) (Brandeis, J., concurring); *see also Int'l Soc. for Krishna Consciousness v. Rochford*, 585 F.2d 263, 271 (7th Cir. 1978) (upholding an "emergency closure provision" for airports, noting that "[a]lthough First Amendment freedoms are precious and must be jealously guarded, they may be subject to restriction if necessary to further important governmental interests" such as "[p]ublic safety and welfare"); *In re Brooks' Estate*, 32 Ill. 2d 361, 369-70 (1965) (explaining that unlike the freedom to believe, the freedom to act under the First Amendment is not "absolute"); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 625 (1952) ("But neither rights of religion or rights of parenthood are beyond limitation.").

The exercise of First Amendment rights "is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.'" *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring); *see ACLU of W. Tennessee, Inc. v. Chandler*, 458 F. Supp. 456, 460 (W.D. Tenn. 1978) ("The ordinance at issue here permits a limitation on the exercise of [First Amendment] rights only in very unusual circumstances where extreme action is necessary to protect the public from immediate and grave danger."); *In re Brooks' Estate*, 32 Ill. 2d at 372 (free exercise "may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals").

To combat a virulently infectious disease in an emergency pandemic, the State must be able to take swift and decisive action. *Cf. Chalk*, 441 F.2d at 1281. The court's review of temporary measures during such an emergency is therefore "limited to a determination of whether the [executive's] actions were taken in good faith and whether there is some factual basis for [the Governor's] decision that the restrictions he imposed were necessary to maintain order." *Id.*; *see also Jacobson*, 197 U.S. at 29 ("reasonable regulations" may be implemented in the face of an infectious disease epidemic); *Abbott*, 954 F.3d 772 (applying a deferential standard to an executive order restricting otherwise constitutionally protected abortion access in the face of the COVID-19 crisis). This deferential standard recognizes that, in a public health crisis, "it is no part of the function of a court . . . to determine which one of two modes was likely to be the most effective for the protection of the public against disease," *Jacobson*, 197 U.S. at 30, and that "governing authorities must be granted the proper deference and wide latitude necessary for dealing with . . . emergenc[ies]." *Smith*, 91 F.3d at 109.

The Current Executive Order and the resulting temporary restrictions placed on all gatherings, including religious ones, easily satisfy the standards governing emergency measures taken to combat a public health emergency. The Governor issued the Current Executive Order and related directives in response to the imminent and deadly threat the COVID-19 pandemic poses. To date, the disease has infected over 1.2 million people and caused over 73,000 deaths in the United States.[4] Here in Illinois, more than 73,000 people have been infected and over 3,240 have died, including 1,248 in Cook County alone.[5] Medical experts have estimated that, in the worst case scenario, millions of Americans would die if governments were to do nothing to prevent the spread of COVID-19.[6] The virulently infectious nature of this disease, combined with the ability of asymptomatic individuals to unknowingly spread the virus and the absence of any vaccination or widely effective treatment, has limited the options for combatting the disease and—as similar measures by other state, local, and national officials demonstrate—made the orders' "stay at home" strategy crucial to slowing the spread of the virus.

The temporary prohibition against public gatherings of more than 10 is an indispensable part of this strategy. Large public gatherings have fueled the spread of COVID-19, including through in-person religious services. In addition to being stationary in close quarters for extended periods during such services, congregants often are speaking aloud and singing, which increases

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[4] *See* Cases in U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited May 8, 2020).

[5] *See* COVID-19 Statistics, https://www.dph.illinois.gov/covid19/covid19-statistics (last visited May 8, 2020).

[6] *See* Sheri Fink, "Worst-Case Estimates for U.S. Coronavirus Deaths" *New York Times* (March 13, 2020), available online at https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html (last accessed May 8, 2020.

the danger that infected individuals will project respiratory droplets that contain the virus and may infect others. Mass infections have been traced back to religious services, including the following:

- In South Korea, as of March 25, 2020, at least 5,080 confirmed cases of COVID-19—over half of South Korea's confirmed cases—have been traced back to one individual who attended a religious service at the Shincheonji Church of Jesus in Daegu.[7]

- Near Seattle, following a gathering for a church choir on March 10, 2020, at least forty-five individuals were diagnosed with COVID-19 and at least two died. This spread occurred even though, according to news reports, hand sanitizer was offered to the choir members at the rehearsals, the members attempted to refrain from physical contact with one another, and the members tried to maintain physical distance between one another.[8]

- And here in Illinois, after Life Church held a service on March 15, 2020, more than half of the 80 people in attendance became ill with COVID-19 symptoms, ten people had tested positive for COVID-19, and one person died.[9]

The clear and manifest need for the Current Executive Order's temporary restriction on in-person gatherings refutes any suggestion that the Governor exceeded the scope of his emergency powers. Last week, as noted, Judge Lee considered a materially identical Free Exercise claim and denied a motion for a TRO and preliminary injunction, finding the likelihood of success on that claim to be "less than negligible." *Cassell* Opinion, at 16. Additionally, courts across the country have denied requests for preliminary injunctive relief in constitutional

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[7] *See* Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, "How a South Korean church helped fuel the spread of the coronarvirus," *Washington Post* (March 25, 2020), available online at https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/ (last visited May 8, 2020).

[8] *See* Richard Read, "A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead," *Los Angeles Times* (March 29, 2020), https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak.

[9] *See* Anna Kim, "Glenview church hit by COVID-19 is now streaming service online, as pastor remembers usher who died of disease," *Chicago Tribune* (March 31, 2020) https://www.chicagotribune.com/suburbs/glenview/ct-gla-life-church-coronavirus-virtual-service-tl-0402-20200331-s4twslv2ynhk3padh7sjrxy3wi-story.html (last visited May 8, 2020).

challenges to emergency COVID-19-related measures. *See, e.g., Gish v. Newsom*, No. EDCV 20-755, 2020 WL 1979970 at *5 (C.D. Cal. April 23, 2020) (denying temporary restraining order application in Free Exercise Clause challenge to the California executive order because it is "likely a permissible exercise of executive authority during a national emergency"); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-00683 (S.D. Cal. Apr. 10, 2020) (denying temporary restraining order application in Free Exercise Clause challenge to San Diego County's COVID-19-related order); *Legacy Church, Inc. v. Kunkel*, -- F. Supp. 3d --, No. CIV 20-0327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (same, for New Mexico's COVID-19 related executive orders); *Davis v. Berke*, No. 1:20-CV-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020) (same, Chattanooga, Tennessee); *Nigen v. New York*, No. 1:20-cv-01576 (E.D.N.Y. Mar. 29, 2020) (same, New York); *Tolle v. Northam*, No. 1:20-cv-00363 (E.D. Va. Apr. 1, 2020) (same, Virginia); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Sup. Ct. March 25, 2020) (same, New Hampshire).

Judge Lee's ruling in *Cassell* is directly on point. He analyzed the Governor's powers to respond to a public health emergency under *Jacobson* and wrote:

> Today, COVID-19 threatens the lives of all Americans. The disease spreads easily, causes severe and sometimes fatal symptoms, and resists most medical interventions. When Governor Pritzker issued the amended stay-at-home rules, thousands of Illinoisans had perished due to the disease. Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crises that the Supreme Court contemplated in Jacobson and that the coronavirus continues to threaten the residents of Illinois.

Cassell Opinion, at 15-16. The fact that these restrictions have successfully flattened the curve of new cases does not mean that there is not still work to be done. Lifting precautions now would be "like throwing away your umbrella in a rainstorm because you are not getting wet." *Id.* at 16 (quoting *Shelby Cty., Ala. v. Holder*, 570, U.S. 529, 590 (2013) (Ginsburg, J., dissenting)).

Judge Lee's ruling was consistent with cases from other district courts. For example, two weeks ago, a federal district court in California denied a temporary restraining order application in a Free Exercise Clause challenge to the same kind of executive order at issue here. *Gish*, 2020 WL 1979970 at *5. Citing *Jacobson* and a recent Fifth Circuit opinion applying that decision, the Court observed that during a public emergency such as the COVID-19 pandemic, "traditional constitutional scrutiny does not apply" and "states and municipalities have greater leeway to burden constitutionally protected rights." *Id*. at *4 (citing *Abbott*, 954 F.3d at 784-85; *Jacobson*, 197 U.S. at 31). Applying the deferential standard for emergencies, the Court in *Gish* found that the state's executive order has a substantial relation to combatting the COVID-19 pandemic because it "require[s] the physical distancing that is needed to slow the spread of the virus." *Id*. It also rejected the assertion that the order was a "plain or palpable invasion of the general right to free exercise of religion" because "a wide swath of religious expression remains untouched by the Order[]." *Id*. at *5. Although large in-person gatherings are not permitted, the Court explained, congregants are free to "gather virtually or over the phone," "gather in-person with the members of their household," and "practice their religion in whatever way they see fit so long as they remain within the confines of their own homes." *Id*.; *see also id*. at *5-6 (no violation under traditional constitutional analysis).

Plaintiffs cite the Sixth Circuit's decision in *Maryville Baptist Church Inc. v. Beshear*, No. 20-5427, WL 2111316 (6th Cir. May 2, 2020). But Judge Lee considered the Sixth Circuit's opinion in *Maryville Baptist* and found it did not support entering a TRO or preliminary injunction in the context of the Illinois order. *First*, he pointed out that Kentucky's stay-at-home orders proscribed *both* drive-in and in-person services. *Cassell* Opinion, at 25 (citing *Maryville Baptist*, WL 2111316 at *1). The Sixth Circuit was specifically concerned that Kentucky's

governor offered no good reason to treat drive-in religious services and drive-in business differently and thus halted enforcement of the prohibition on drive-in services. By contrast, the Illinois order at issue here explicitly permits drive-in services as well as in-person services of 10 people or less.

Second, Judge Lee applied *Maryville Baptist* to the Governor's Current Executive Order and found that the Sixth Circuit's reasoning *favors* upholding the order:

> Unlike in *Maryville Baptist*, the [Current Executive] Order confirms that religious organizations in Illinois may hold drive-in services. To the extent that the Sixth Circuit expressed concerns about restrictions on in-person services, those doubts stemmed from the fact that the Kentucky Governor's orders prohibit in-person religious gatherings, regardless of how many worshippers attend. "[I]f the problem is numbers, and risks that grow with greater numbers," the court reasoned, "there is a straightforward remedy: limit the number of people who can attend a service at one time." *Id.* That is exactly what Governor Pritzker's latest order does.

Cassell Opinion, at 25-26 (internal citations omitted). Plaintiffs fail to address Judge Lee's application of *Maryville Baptist* to the Governor's Current Executive Order, let alone provide any reason why the Court should not follow it.

In sum, even fundamental religious rights do not include the "liberty to expose the community . . . to communicable disease," *Prince*, 321 U.S. at 166-67, especially one as contagious and deadly as COVID-19. The Governor's decision to temporarily and partially limit one aspect of those rights—the ability to conduct large in-person worship services—falls well within the scope of the Governor's emergency authority to combat the current public health crisis.

B. Plaintiffs' Free Exercise Claims Fail.

As mentioned above, even if Plaintiffs' claims are analyzed under the standard of review applied in non-emergency circumstances, Plaintiffs have failed to show a likelihood of success.

The Current Executive Order is a valid content neutral law of general applicability and therefore does not violate Plaintiffs' right to free exercise.

1. The Current Executive Order is a Valid Content Neutral Law of General Applicability.

Free exercise claims are governed by the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, 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 (citations omitted). In other words, "a neutral law of general applicability is constitutional if it is supported by a rational basis." *Ill. Bible Colleges Assoc. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017). This is true even where a law has "the incidental effect of burdening a religious practice." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 631 (7th Cir. 2007).

To determine whether a law is neutral, courts first "examine the object of the law." *Id.* "A law is not neutral if 'the object of the law is to infringe upon or restrict practices because of their religious motivation.'" *Id.* (quoting *Lukumi*, 508 U.S. at 533). Courts must also assess the "general applicability" of a law, which "forbids the government from imposing burdens only on conduct motivated by religious belief in a "selective manner." *Id.*

In the Seventh Circuit (unlike in other jurisdictions), courts are further instructed to review the law's burden on religious institutions because "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 996 (7th Cir. 2006) (citations and quotations omitted); *see also Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015).

In short, if a law is not neutral or generally applicable, or if the law unduly burdens the free exercise of religion, the law is not subject to rational basis review and instead "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Vision Church*, 468 F.3d at 996 (internal quotations omitted); *accord Gish*, 2020 WL 1979970 at *5 ("Because the orders apply to both religious and secular gatherings, they do not discriminate, and are therefore facially neutral.").

The Current Executive Order is neutral and generally applicable because it applies broadly to prohibit public gatherings of more than 10, both religious and secular. (ECF No. 1-8, at 4-5.) Consistent with public health guidance, the Current Executive Order prohibits any gathering of more than 10 people unless a specified exemption applies. The Current Executive Order gives specific examples of secular activities which are prohibited, including but not limited to museums, arcades, playgrounds, theme parks, bowling alleys, movies and other theaters, concert and music halls, and country clubs. (ECF No. 1-8, Ex. H, at 5).

Plaintiffs argue that the Current Executive Order "expressly target[s] 'faith-based' gatherings for disparaging treatment. (ECF No. 5 at 8.) This is not true. The Current Executive Order limits *all* comparable public gatherings of more than 10 people. *See Cassell* Opinion, at 19 ("[T]he Order proscribes secular and religious conduct alike.") Indeed, as explained below, the Current Executive Order treats religious gatherings *more* favorably than comparable gatherings because it explicitly permits gatherings of up to 10 people for the free exercise of religion. (ECF No. 1-8, Ex. H, at 6).

But Plaintiffs argue that the Governor's past stay-at-home orders are not generally applicable due to their carve-outs for "essential businesses." Plaintiffs argue that these carve-outs for grocery, hardware, and liquor stores, etc. (i.e., essential businesses) means that the Executive

Order is neither neutral nor generally applicable. This argument is specious. Stores like Menards and Walmart are essential because, even in a pandemic, the day-to-day infrastructural needs of a society require people be able to purchase food to eat, supplies to maintain their residences, and pharmaceuticals to stay healthy. *C.f. Legacy Church, Inc.*, 2020 WL 1905586 at *40 ("Each and every business mentioned by Legacy Church either sells items necessary for everyday life or to facilitate the mitigation of COVID-19.").

Plaintiffs' arguments here are identical to the arguments made in *Cassell*, which Judge Lee rejected. Instead, Judge Lee followed the approach in *Legacy Church* and *Gish*. As he pointed out, "retailers and food manufacturers are not comparable to religious organizations." *See Cassell* Opinion, at 21. The key distinction rests in the nature of each activity:

> Holding in-person religious services creates a higher risk of contagion than operating grocery stores or staffing manufacturing plants . . . When people buy groceries, for example, they typically enter a building, do not engage directly with others except at points of sale, and leave once the task is complete. The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible. By comparison, religious services involve sustained interactions between many people . . . Given that religious gatherings seek to promote conversation and fellowship, they 'endanger' the government's interest in fighting COVID-19 to a 'greater degree' than secular businesses Plaintiff's identify. *Lukumi*, 508 U.S. at 543.

Id. (citing *Gish*, 2020 WL 1979970 at *6) (internal quotations omitted).

Comparing church services to grocery stores and hardware stores is not the proper analogy. "A more apt comparison, then, is a restaurant or entertainment venue — where patrons are gathered simultaneously for a longer period of time to eat and socialize — or a movie, concert, or sporting event, where individuals come together in a group in the same place at the same time for a common experience." *Legacy Church, Inc.*, 2020 WL 1905586 at *40. And many of these types of gatherings—such as eating in a restaurant, going to a movie theater,

attending a sporting event—are banned entirely, whereas religious gatherings of fewer than 10 people are permitted under the Current Executive Order. Another more apt analogy is between places of worship and schools. *See Cassell* Opinion, at 22. "And here, the Order imposes the same restrictions on schools as it does not churches, synagogues, mosques, and other places of worship." *Id.*

To the extent that religious activity has been curtailed, this restriction has applied evenly to all religions, not just the evangelical Christianity that Plaintiffs practice, meaning there is not effectively a "religious gerrymander."[10] *Cf. Lukumi*, 508 U.S. at 535. Indeed, contrary to Plaintiffs' arguments, this matter is easily distinguished from *Lukumi.* There, the Supreme Court overturned the City of Hialeah's ordinance prohibiting the ritualistic sacrifice of animals. *Id.* at 521. Initially, the ordinance appeared to be facially neutral, broadly punishing whoever unnecessarily kills any animal. *Id.* at 537. However, the application of the ordinance revealed a lack of neutrality, showing that the ordinance was specifically targeted towards individuals who practiced the religion Santeria. "Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition." *Id.* (noting that the city deemed hunting, killing animals for food, eradication of insects and pests, and euthanasia as necessary). As a result, the ordinance effectively singled out one religious practice, which subjected the law to heightened scrutiny. *Id.*

[10] Plaintiffs point out that the Governor's stay-at-home order impacted the Christian holy day of Easter. The stay-at-home order *also* has impacted important holidays of other religions as well, namely the Jewish holiday of Passover (observed April 8, 2020 through April 16, 2020) and the Muslim holy month of Ramadan (observed April 23, 2020 through May 23, 2020).

Here, in contrast, in-person religious services are not being singled out for separate treatment. They are one of many types of public gatherings of which a restriction of no more than ten people is in place. The Current Executive Order is neutral and generally applicable.

Plaintiffs cite two recent cases in support of the proposition that the Governor's stay-at-home order is not neutral and generally applicable and thus subject to heightened scrutiny. Both, however, are distinguishable. The earlier case, *On Fire*, 2020 WL 1820249, focused primarily on Kentucky's prohibition of drive-in services for Easter in granting the plaintiff's request for a TRO. Here, as previously discussed, the Current Executive Order explicitly allows for drive-in church services to occur. The District Court of New Mexico found New Mexico's permitting of drive-in services to be a meaningful distinction from Kentucky's ban on drive-in services in applying rational basis for New Mexico's stay-at-home order and denying Plaintiff's request for a TRO in *Legacy Church, Inc.*, 2020 WL 1905586 at *35.

Plaintiffs' other cited case, *First Baptist*, 2020 WL 1910021, is also distinguishable. There, Kansas's stay-at-home order explicitly included church services in groups of people greater than ten people in its list of prohibited activities. *Id.* at *7. Here, religious services are not listed in the group of prohibited activities in the Current Executive Order. Instead, gatherings for the free exercise of religion are carved out from the general prohibition on social gatherings so as to *permit* them, so long as the gathering can otherwise abide by social distancing guidelines and is limited to ten people. (ECF 1-8, Ex. H, at 5-6.) Additionally, as previously discussed, the Current Executive Order permits drive-in services, an issue on which the court in *First Baptist* was silent.

The court in *First Baptist* also misapplied *Lukumi*. *Cf. Cassell* Opinion, at 24 ("The approach in *First Baptist* is difficult to square with *Lukumi*."). As Judge Lee observed: "*Lukumi*

embraced a functional assessment of how the challenged law operates in practice. In engaging in that analysis, courts must consider how a particular stay-at-home order treats secular and religious activities that are substantially comparable to one another. *First Baptist* overlooked that step." *Id.*

The reason why the ordinance in *Lukumi* was not neutral was not merely because it contained *some* exceptions for the non-religious and other religious slaughtering of animals. The ordinance's problem was that it contained so many exceptions that it became apparent that Santeria's ritualistic sacrifice of animals was the only practice which was effectively prohibited and was thus singled out. *Lukumi,* 508 U.S. at 537. The Supreme Court concluded that "each of Hialeah's ordinances pursues the city's governmental interests *only against conduct motivated by religious belief.*" *Id.* at 545. Here, the Current Executive Order clearly does not pursue the State's interest only against conduct motivated by religious belief, because comparable secular gatherings are similarly prohibited.

First Baptist is also an outlier. Other district courts evaluating stay-at-home orders in the context of free-exercise challenges have found that the orders are neutral and generally applicable. *See, e.g.*, *Gish*, 2020 WL 1979970 at *5; *Cassell*, 2020 WL 2112374 at * 26; *Legacy Church, Inc.*, 2020 WL 1905586 at *35. Accordingly, the courts in these cases applied rational basis to the stay-at-home orders and denied the TROs requested in those cases.

The Current Executive Order easily passes rational basis. *Cassell* Opinion, at 26. The world is currently in the grip of a global pandemic. Illinois in particular has had a high number of cases of COVID-19. Stopping the spread of the disease is a compelling interest "of the highest order." *On Fire*, 2020 WL 1820249 at *7. Prohibiting large gatherings, secular and religious, furthers that legitimate interest.

2. The Current Executive Order is not Unduly Burdensome on Plaintiffs' Religious Practices.

Despite Plaintiffs' argument to the contrary (ECF No. 5, at 19), the Current Executive Order is not unduly burdensome on Plaintiffs' religious practices. Because of the ongoing and unprecedented public health crisis, public gatherings, both religious and secular, are prohibited by the Current Executive Order. While this size restriction on gathering does place some burden on religious activity, it is not an *undue* burden. Plaintiffs have ample alternative means with which to conduct religious services. The Current Executive Order explicitly permits religious services through drive-in services and in-person gatherings of 10 people or less so long as they abide by social distancing guidelines—which could include multiple services throughout the day. Plaintiffs may also conduct religious services over the internet, which allows for an unlimited amount of people to gather virtually for religious purposes.

As previously discussed, there have already been a number of identified instances in which dozens of infections have been traced back to religious services. *See Cassell* Opinion, at 22. Allowing gatherings of greater than 10 people for any purpose significantly increases the risk of further spread of COVID-19. The Current Executive Order allows for Plaintiffs to practice religious services in several manners which do not have as high a risk of spreading the virus as in-person gatherings of more than ten people. Whatever burden the Current Executive Order places on Plaintiffs is not undue in the midst of this pandemic.

3. The Current Executive Order Satisfies Strict Scrutiny.

As discussed above, strict scrutiny does not apply here. But even if this Court applied strict scrutiny, the Current Executive Order passes that test. *First*, the State has a compelling interest in protecting the health of its citizens by preventing the spread of a deadly, global pandemic which threatens to overwhelm its healthcare systems. Every court which has

considered whether various states' stay-at-home orders further a compelling state interest has agreed that they do. *See, e.g.*, *On Fire*, 2020 WL 1820249 at *7; *Gish*, 2020 WL 1979970 at *8; *Legacy Church, Inc.*, 2020 WL 1905586, at *44.

The Current Executive Order is narrowly tailored to further this compelling interest. As previously discussed, statewide orders are necessary to prevent the spread of a communicable disease for which there is no effective treatment or vaccine. Furthermore, the imposition of these orders has mitigated the spread of the virus in a way that lesser measures would not have.[11] *See, e.g.*, *Menotti*, 409 F.3d at 1137 (concluding that an executive order was narrowly tailored because "[t]here is no question that the governmental interest here (security of the core downtown area) would have been achieved less effectively absent Order No. 3"). And finally, the Current Executive Order is only in place for the duration of the declared emergency. *Int'l Soc. for Krishna Consciousness*, 585 F.2d at 271 ("The restriction of activities lasts only for the duration of the emergency and is narrowly enough drawn to allow the airport authorities to carry on their business with the least possible restriction of constitutionally guaranteed rights."). Indeed, although Plaintiffs take issue with the Restore Illinois Plan, it clearly reflects the Governor's intent to roll back the restrictions currently in place as public health conditions allow going forward.

Plaintiffs argue that the "stay at home" measures are overbroad and underinclusive because they ban religious gatherings of more than ten people while also permitting gatherings of more than 10 people if they are part of an essential business. But as previously discussed, these

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[11] Lisa Schencker, Chicago Tribune, *Illinois Might Have 19,000 Cases A Week from Now, According To One Analysis. But It Could Have Been Worse* (Apr. 1, 2020) available at http://www.chicagotribune.com/coronavirus/ct-coronavirus-forecasts-hospitals-rush-20200331-v5vcjb3kyvdtjme32of6tt2j64-story.html (last visited May 9, 2020).

exempted activities are not analogous to religious mass gatherings. And these activities, like providing healthcare treatment and food processing, cannot be conducted remotely. *See Legacy Church*, 2020 WL 1905586 at *37 n. 12.

Plaintiffs contend that the fact that other states have not applied a 10-person limitation to religious gatherings means that Illinois had to try that approach first. (ECF No. 5, at 26 (arguing that "[t]he State has refused to consider or attempt" exempting worship services from the limitation on large gatherings). This proposition has no application to an emergency situation like the current pandemic, where each day and every gathering poses the risk of exponential spread of the disease. The First Amendment does mandate that the Governor experiment with the lives of Illinois residents in order to permit Plaintiffs to worship in a manner that carries significant epidemiological risk until that risk is realized with more avoidable deaths. "The right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

Plaintiffs also have no idea whether the measures they tout that were adopted in Texas, Florida, Indiana, Arizona, and Ohio will be sufficient to control the spread of COVID-19. (ECF No. 5 at 32.) *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (stating that the challenged regulation must be "the least restrictive means among available, ***effective*** alternatives") (emphasis added). Indeed, an influential epidemiological model recently ***doubled*** the number of forecasted COVID-19 deaths in the United States precisely because of the more lax approaches in the states Plaintiffs reference.[12] The least restrictive alternative component of

[12] Reuters, "Researchers Double U.S. COVID-19 Death Forecast, Citing Eased Restrictions," *N.Y. Times* (May 4, 2020), https://www.nytimes.com/reuters/2020/05/04/us/04reuters-health-coronavirus-usa.html (last visited May 9, 2020).

the strict scrutiny standard has never required a governor to knowingly accept the inevitable illness and death of residents in the midst of a pandemic.

Judge Lee already considered this same basic argument in *Cassell* and rejected it. As he explained, the least restrictive alternative assessment "turns on 'whether [the government] could have achieved, *to the same degree*, its compelling interest" without interfering with religious activity." *Cassell* Opinion, at 12 (quoting *Affordable Recovery Hous. v. City. of Blue Island*, No. 12 C 4241, 2016 WL 5171765, at *8 (N.D. Ill. Sept. 21, 2016)). Thus, the issue is whether allowing Plaintiffs to hold services without limits on its congregation size would advance the Governor's interest in curtailing the spread of COVID-19 to the same degree as the 10-person limit. *Id.* It plainly would not.

Even with social distancing measures in place, a full congregation poses significantly greater health risks than limiting public gatherings to 10 people or fewer, or holding drive-in services. *See id.* For instance, in the church choir practice in Seattle where forty-five members contracted COVID-19 and two died, the members actually used hand sanitizer and practiced social distancing. *Id.* at 13.[13] "As that example illustrates, large gatherings magnify the risk of contagion even when participants practice preventative measures." *Id.*

At the end of the day, "[t]he government need not choose between doing nothing in the face of a pandemic and closing all of society. It may choose a middle ground, provided that it does so 'without reference to the content of the regulated activity.'" *Id.* (quoting *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986)). Here, large gatherings that are comparable to

[13] Citing Richard Read, "A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead," *Los Angeles Times* (March 29, 2020), https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak).

religious services in form and function are similarly prohibited. In fact, by permitting gatherings of 10 people or less for the free exercise of religion, the Current Executive Order actually gives religious activity *better* treatment than comparable non-religious activities. Thus, the Current Executive Order is not overbroad or underinclusive so as to discriminate against religious activity as compared to similar secular activities. The Current Executive Order satisfies strict scrutiny.

C. Plaintiffs' Establishment Clause Claim Fails.

Plaintiffs bring an Establishment Clause claim in addition to their Free Exercise Claim, but the Current Executive Order does not violate the Establishment Clause. (ECF No. 5, at 11–14.)

The Establishment Clause of the First Amendment prohibits any laws "respecting an establishment of religion." U.S. Const. Amend. 1. The "central purpose" of the Establishment Clause is "governmental neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971). In other words, "the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Id.* at 450. Thus, the Establishment Clause is not offended where the government does not take action which favors one religion over others or treats certain religions as less than others. *See id.* ("The critical weakness of petitioners' establishment claim arises from the fact that [section] 6(j) [of the Military Selective Service Act of 1967], on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war."). Here, the Current Executive Order plainly does not discriminate on the basis of religious affiliation or religious belief because it facially treats all religions equally.

Additionally, Plaintiffs fail to cite the leading Establishment Clause case, *Lemon v. Kurtzman*, 403 U.S. 602 (1972). *Lemon* provides the standard through which Establishment Clause claims are evaluated. It established that to comply with the Establishment Clause, the government action at issue must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion. *Id.* at 612-13.

The Current Executive Order easily satisfies the *Lemon* test. *First*, it has the plainly secular purpose of preventing the spread of a deadly pandemic. *Second*, the Current Executive Order does not inhibit religion because, as explained above in the Free Exercise clause analysis and in Judge Lee's opinion, *see Cassell* Opinion, at 31, the Current Executive Order does not place an undue burden on religious activity. Plaintiffs still have ample alternatives to have in-person gatherings with no more than 10 people. They may hold services online, conduct drive-in services, or hold multiple services of 10 people or less. *Finally*, the Current Executive Order plainly does not foster any government entanglement with religion, let alone excessive entanglement. The Current Executive Order regulates religious institutions the same as other secular establishments where mass gatherings occur. In this respect, the Current Executive Order creates no more entanglement than a generally applicable fire code regulating the number of people who may be in a building.

Plaintiffs' attempt to conjure an Establishment Clause violation from the Governor's prior stay-at-home orders has no basis in fact or Establishment Clause jurisprudence. (ECF No. 5 at 11–14.) Plaintiffs purport to look to "the progression of the government's actions"—in this case, the addition in the third version of the stay-at-home order of a provision expressly recognizing the "free exercise of religion" as an "essential activity" (*id.* at 13)—and assert that

the Governor's actions restricting large gatherings are a "sham" and a "pretext" concealing anti-religious bias that violates the requirement of governmental neutrality in matters of religion. (*Id.* at 14.) Plaintiffs' argument is simply illogical. It makes no sense to treat the insertion of a provision that expressly invites the free exercise of religion as a "gotcha" exposing alleged anti-religious animosity. But that is Plaintiffs' argument. (*Id.* at 13–14.) And it is both wrong and facially implausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2008) (only "plausible" claims survive a motion to dismiss, and the plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"). In actuality, as Plaintiffs' own recitation demonstrates (ECF No. 5, at 12), the numerical limitation on gatherings, both secular and religious, which progressed from 1,000 to 250 to 50 to 10 as the pandemic worsened, has only ever been about one thing: mitigating the risk of COVID-19 transmission. The accusation that this limitation evinces the Governor's lack of neutrality on religious matters can and should be rejected as implausible and unsupported.

D. Plaintiffs' Free Speech and Assembly Claims Fail.

While the core of Plaintiffs' motion focuses on their Free Exercise Clause claim, Plaintiffs also contend that the Current Executive Order violates their rights under the Free Speech and Free Assembly clauses of the First Amendment. (ECF No. 5, at 14–19.) But the 10-person limitation on gatherings, both secular and religious, that Plaintiffs challenge is a content-neutral time, place, and manner regulation. Federal courts around the country have upheld similar regulations in the midst of the COVID-19 pandemic. Plaintiffs' attempts to shoehorn the Current Executive Order into case law regarding prior restraints and standard-less discretion also fail as a matter of law.

1. The Current Executive Order is a Reasonable Time, Place, and Manner Regulation that Does Not Violate the First Amendment.

Under the First Amendment, the government "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (quoting *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

Although "'[c]ontent-based regulations are presumptively invalid,'" the State "is given much more leeway when its content-neutral regulations happen to limit some speech." *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827 (7th Cir. 1999) (quoting *R.A.V.*, 505 U.S. at 382). Thus, if a regulation restricts the time, place, and manner of speech, those restrictions are reasonable "if they (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." *Id.* at 828 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove, Illinois*, 939 F.3d 859, 862 (7th Cir. 2019).

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Ward*, 491 U.S. at 791. The restrictions here govern conduct—prohibiting in-person gatherings for the duration of the emergency—not speech. This is significant because "[i]n most cases, the government may regulate conduct without regard to the First Amendment because most conduct

carries no expressive meaning of First Amendment significance." *Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000) (excluding expressive conduct).

For this reason, the Current Executive Order is more similar to an executive order implementing a curfew or otherwise limiting public gatherings. Cases addressing such orders have concluded that the challenged restrictions at issue did not regulate speech. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1128-29 (9th Cir. 2005) ("As a matter of law, Order No. 3 was not a regulation of speech content, but rather was 'a regulation of the places where some speech may occur.'") (quoting *Hill v. Colorado*, 530 U.S. 703, 719 (2000)); *ACLU of W. Tennessee, Inc.*, 458 F. Supp. at 460 (emergency ordinance at issue "is a regulation of conduct, not designed to limit or control the expression of ideas, which unfortunately has an incidental impact on the exercise of first amendment rights"); *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1112-13 (9th Cir. 1989)("The statute is not designed to regulate in any way, nor does it have the effect of regulating, the content of speech or other form of expression.").

Even if the Current Executive Order governed speech or expression, it nonetheless does not violate Plaintiffs' free speech rights. *First*, the restrictions are not based on viewpoint or content. The order applies equally to both religious services and similar secular events like concerts and conferences. To the extent that it provides exceptions for essential businesses, those are based on public health and safety factors, not the content of the message or the viewpoint of the speaker. *See Menotti*, 409 F.3d at 1128-29 ("The purpose of enacting Order No. 3 had everything to do with the need to restore and maintain civic order, and nothing to do with the content of Appellants' message."); *see also Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Cassell* Opinion, at 9–11 (concluding,

for purposes of the free exercise claim, that the Current Executive Order was a neutral regulation, and that the distinction made between in-person religious services and grocery stores and other essential stores was based on legitimate public health factors).

Second, the Current Executive Order is narrowly tailored. As discussed below, statewide orders are necessary to prevent the spread of a communicable disease for which there is no known effective treatment or vaccine. Furthermore, the imposition of these orders has mitigated the spread of the virus in a way that lesser measures would not have.[14] *See, e.g.*, *Cassell* Opinion, at 12–13 (concluding that the Current Executive Order is the "least restrictive means" of furthering the State's compelling interest in mitigating the spread of the virus); *Menotti*, 409 F.3d at 1137 (concluding that an executive order was narrowly tailored because "[t]here is no question that the governmental interest here (security of the core downtown area) would have been achieved less effectively absent Order No. 3"). And finally, the Current Executive Order and its potential successors will be in place only for the duration of the declared emergency, and as reflected in the Restore Illinois Plan, will be phased out as public health conditions allow. *Int'l Soc. for Krishna Consciousness*, 585 F.2d at 271 ("The restriction of activities lasts only for the duration of the emergency and is narrowly enough drawn to allow the airport authorities to carry on their business with the least possible restriction of constitutionally guaranteed rights.").

Third, as discussed, there are ample alternative channels for Plaintiffs to communicate with their congregants through holding online and drive-in religious services, or repeated in-person services in small groups. *See Cassell* Opinion, at 8. As Judge Lee observed, the Current

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[14] Lisa Schencker, Chicago Tribune, *Illinois Might Have 19,000 Cases A Week from Now, According To One Analysis. But It Could Have Been Worse* (Apr. 1, 2020), https://www.chicagotribune.com/coronavirus/ct-coronavirus-forecasts-hospitals-rush-20200331-v5vcjb3kyvdtjme32of6tt2j64-story.html (last visited April 30, 2020).

Executive Order also allows "small group meetings, bible study meetings, and prayer gatherings at the church or in private homes," "communion in small groups," as well as authorizing "individual congregants to go to the church to obtain spiritual help and guidance from their pastor and/or other church staff members." *Id.* at 13. This is not a situation where a certain category of speech has been prohibited. Accordingly, because the Current Executive Order is a reasonable time, place, and manner regulation, Plaintiffs have no likelihood of success on their free speech claim.[15]

2. The Current Executive Order is Not a Prior Restraint.

Plaintiffs argue that the Current Executive Order constitutes a prior restraint (ECF No. 5 at 16–17), although the basis for that argument is not entirely clear. As discussed above, the Current Executive Order does not restrain any speech—Plaintiffs are free to say whatever they want in online gatherings, drive-in services, or in-person gatherings of 10 or fewer people. As another court observed in a church's challenge to a zoning ordinance, "nothing in the pleadings establishes that the [Executive Order] prevent[s Plaintiffs] from worshipping, coerce[s] them to modify the content of their message, or restrict[s] the content of their speech or religious practices." *Light of World Gospel Ministries, Inc. v. Vill. of Walthill, Nebraska*, No. 8:18-CV-312, 2019 WL 7454714, at *5 (D. Neb. Feb. 7, 2019). Rather, as discussed above, the Current Executive Order is a content-neutral time, place, or manner regulation. *Id.* at *5–6; *see also Gish*,

[15] Although the complaint raises the issue of freedom of assembly, this issue is not separately analyzed in Plaintiffs' motion. In any event, the right of freedom of assembly has largely been subsumed by the right of freedom of association. *Legacy Church*, 2020 WL 1905586 at *25. The right to associate includes the engage in activities protected by the First Amendment, such as speech, and exercise of religion. *Marshall v. Allen*, 984 F.2d 787, 800 (7th Cir. 1993). Thus, because the Current Executive Order does not violate the Free Exercise Clause nor the Free Speech Clause, it does not violate the Free Assembly Clause.

2020 WL 1979970, at *7 (finding that plaintiffs would "likely fail" on their claim that the California governor's executive order was an unconstitutional prior restraint on speech).

3. The Governor's Current Executive Order Does Not Give the Governor Standard-less Discretion.

Plaintiffs argue that the Current Executive Order unconstitutionally vests "unbridled discretion" in the hands of the Governor "not only. . . because there are no checks on the State, but [it] is even worse because the State has actually exercised its unchecked discretion to prohibit religious gatherings of more than 10 people while not prohibiting similar non-religious gatherings." (ECF No. 5 at 18). But this argument misunderstands the nature of the "unbridled discretion" doctrine. The doctrine applies where a government imposes "content-neutral prohibitions on a particular manner of speech" (for example, requiring a permit for the use of a sound truck), but gives a government official full discretion as to whether or not to grant a permit to any particular individual or group. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 (1988). Here, in contrast, the Current Executive Order does not give any official the discretion to decide whether to allow a particular gathering to occur; rather, it unequivocally bans all comparable gatherings of more than 10 people.

E. Plaintiffs' State Law Claim Against the Governor in His Official Capacity is Barred by Eleventh Amendment Sovereign Immunity.

In support of their motion for a preliminary injunction and TRO, Plaintiffs allege that the Current Executive Order violates the free exercise and free speech provisions in the Illinois Constitution (Compl., Counts VII & VIII), but those claims fail for the same reasons as their federal counterparts. Plaintiffs also bring a state statutory claim alleging that the Current Executive Order violates the Illinois RFRA by "forsak[ing] the assembling of themselves together" and "substantially burden[ing] Plaintiffs' exercise of religion" by "compel[ling] Plaintiffs to either change those beliefs or to act in contradiction to them," and "forc[ing]

Plaintiffs to choose between the teachings and requirements of their . . . beliefs." (ECF No. 5, at 19-20 (citing 775 ILCS 35/5).[16] Plaintiffs cannot succeed on their RFRA claim because it is barred by the Eleventh Amendment and the doctrine of sovereign immunity, and it also fails on the merits as a matter of law. *See Cassell* Opinion, at 26–31.

Under *Pennhurst*, sovereign immunity bars suits against a state by its own citizens, as well as citizens of other states, because federal jurisdiction over suits against nonconsenting states was not contemplated when establishing the judicial power of the United States. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97 (1984); *see also Hans v. Louisiana*, 134 U.S. 1 (1890). The sovereign immunity bar also prevents claims against state officials in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citing *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" and further, "[i]t is *not* a suit against the official personally, for the real party in interest is the entity"); *Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000).

There are three exceptions to sovereign immunity: (1) When Congress has abrogated the state's immunity from suit through an unequivocal expression of its intent to do so through a valid exercise of congressional power; (2) when a state has waived its immunity and consented to the suit; and (3) when the suit is one for prospective injunctive relief pursuant to *Ex parte Young*, 209 U.S. 123 (1908). *Sonnleitner v. York*, 304 F.3d 704, 717 (7th Cir. 2002). None of these exceptions apply here.

[16] Plaintiffs also bring a federal statutory claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (ECF No. 1, Count IX), but do not cite it as a basis for their motion.

To abrogate Eleventh Amendment immunity, either Congress or the state must unequivocally express a clear legislative statement confirming its intent to abrogate a state's immunity and must act pursuant to a valid exercise of legislative power. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996); *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000). Congress has taken no action to abrogate the State's Eleventh Amendment immunity to Plaintiffs' claims under state law.

Although the Eleventh Amendment does not bar claims for injunctive relief against state officials to stop an ongoing violation of *federal* law, *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), this exception does not extend to allowing claims based on alleged violations of state law. "A federal Court's grant of relief against state officials on the basis of state law … does not vindicate the supreme authority of federal law." *Id*. at 107. In holding that the Eleventh Amendment bars suits against state officials to compel them to conform their conduct to state law, the *Pennhurst* Court noted that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* The Eleventh Amendment similarly bars state-law claims for declaratory relief. *Watkins v. Blinzinger*, 789 F.2d 474, 483–84 (7th Cir. 1986); *Benning v. Bd. of Regents*, 928 F.2d 775, 778 (7th Cir. 1991). A declaratory judgment cannot be used to avoid the Eleventh Amendment when monetary and injunctive relief would be barred. *Council 31 of AFSCME. v. Quinn*, 680 F.3d 875, 884 (7th Cir. 2012).

To determine that Plaintiffs' state law arguments are barred by the Eleventh Amendment the Court need only conduct the straightforward inquiry mandated by *Verizon Maryland* and ask whether their state law arguments seek prospective relief to stop an ongoing violation of *federal* law. The answer is no. It is irrelevant that Plaintiffs other arguments allege violations of federal

law. The limits on federal jurisdiction over state law claims cannot be evaded by making those claims pendant to federal claims. *Pennhurst*, 465 U.S. at 119–21. Applying this logic, federal courts have routinely dismissed claims based on the Illinois Religious Freedom Restoration Act and the Illinois Constitution. *See, e.g.*, *Goodman v. Carter*, No. 2000 CV 948, 2001 WL 755137, at *9-10 (N.D. Ill. Jul. 2, 2001) (Illinois RFRA claim barred by Eleventh Amendment); *Illinois Clean Energy Community Foundation v. Filan*, No. 03 CV 7596, 2004 WL 1093711, at *1, 3 (N.D. Ill. Apr. 30, 2004) (claims under Illinois Constitution barred by Eleventh Amendment). Judge Lee also considered this exact issue in *Cassell* and held that an identical claim under the Illinois Religious Freedom Restoration Act was expressly prohibited under the *Pennhurst* doctrine. *Cassell*, 2020 2020 WL 2112374 at *26-28 ("[T]he Eleventh Amendment almost certainly forecloses Plaintiffs' state law claims here.").

Because Plaintiffs seek relief based on state law, which is expressly prohibited by *Pennhurst*, such claims are barred by the Eleventh Amendment and must be dismissed.[17] The Court need not address the merits of Plaintiffs' requested relief under state law. In any event, Plaintiffs' claim under the Illinois RFRA would still fail. Assuming, for the sake of argument, that the Current Executive Order does place a burden on Plaintiffs' religious beliefs, this is not an undue burden, as previously explained. And even if the Court were to apply strict scrutiny in analyzing the RFRA claim, the Current Executive Order would pass strict scrutiny, as Judge Lee found in analyzing it under that standard. *Cassell* Opinion, at 26–31.

[17] Plaintiffs cite (ECF No. 5 at 20) to what they refer to as "binding precedent" of the Seventh Circuit when interpreting the Illinois RFRA. However, neither of these cases interpreted the Illinois State law, but instead analyzed the federal Religious Freedom Restoration Act and the federal Religious Land Use and Institutionalized Persons Act. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F. 3d 752, 758 (7th Cir. 2003); *Kroger v. Bryan*, 523 F. 3d 789, 798-99 (7th Cir. 2008).

II. Plaintiffs Have Not Demonstrated Irreparable Harm to Warrant a TRO or Preliminary Injunction.

Plaintiffs' motion should also be denied because they cannot establish irreparable harm. *Winter*, 555 U.S. at 2 ("possibility" of irreparable harm is not enough; plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction") (emphasis in original). Plaintiffs contend that claiming their First Amendment rights have been violated is sufficient to demonstrate irreparable harm. (ECF No. 5, at 27–28.) They fail to actually describe what harm they would incur absent an injunction, given the alternative forms of worship in which they have been engaged since the onset of the COVID-19 pandemic and the issuance of the prior stay-at-home orders.

While in-person services of more than 10 people have been restricted to curtail the spread of COVID-19, the practice of religion has not been. This is further evidenced by Plaintiff Elim Church's homepage, which showcases two videos (one of which is titled "May 7, 2020 Prayer Message"), along with links to "video," "live," and "youtube."[18] The video link directs the user to video archives that date as far back as 2014, while the "youtube" link directs the user to a plethora of "live stream[s] "by the Church and multiple pastors.[19] The Church has been utilizing on-line platforms since long before the international pandemic. While perhaps not their preference, as cited above, on-line services remain meaningful in religious practice. The Church's homepage provides a link to donate as well.[20] In sum, Plaintiffs have provided insufficient conclusions in the place of the requisite showing of irreparable harm.

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[18] Elim Church, https://elimro.com/ (last visited May 8, 2020).

[19] Elim Church, https://elimro.com/index.php/media-resorces/vide (last visited May 8, 2020); *see also* Elim Church, https://www.youtube.com/user/ElimRoChicago/videos (last visited May 8, 2020).

[20] Elim Church, https://elimro.com/ (last visited May 8, 2020).

III. The Harm to the State and the Public from a TRO Substantially Outweighs any Interim Harm to Plaintiffs Absent a TRO.

The hardships to the public due to the COVID-19 pandemic are dire. Those hardships outweigh any hardship to Plaintiffs in this case, especially considering that the Current Executive Order allows for religious services and the exercise of freedom of religion as long as social distancing is observed and gatherings do not exceed 10 people. (*See* ECF No. 1, Ex. H, at ¶ 5(f).) The public continues to be in grave danger, as Illinois reported 2,887 more cases of COVID-19 just yesterday.[21] The national total number of deaths has climbed to 77,179 lives taken.[22] Illinois reports 3,241total deaths.[23] The courts have described the pandemic unambiguously as a highly-unusual circumstance "the likes of which has not been seen in over a century." *Doe v. Barr*, No. 20-CV-02263-RMI, 2020 WL 1984266, at *6 (N.D. Cal. Apr. 27, 2020).

Under the "balance of harms" portion of the analysis, Plaintiffs must establish that "the harm they would suffer without the injunction is greater than the harm that preliminary relief would inflict on the defendants." *Mich. v. U.S. Army Corps of Eng'g*, 667 F.3d 765, 769 (7th Cir. 2011). Because a movant need not establish that it is more likely than not that they will succeed on the merits to obtain injunctive relief, a movant "must compensate for the lesser likelihood of prevailing by showing the balance of harms tips *decidedly* in favor of the movant." *Boucher*, 134 F.3d at 826 n. 5 (emphasis in original). The court also should consider whether a preliminary

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[21] Illinois Department of Public Health, "Public Health of Officials Announce 2,887 New Cases of Coronavirus Disease," Department of Public Health, (May 8, 2020) http://www.dph.illinois.gov/news/public-health-officials-announce-2887-new-cases-coronavirus-disease (last accessed May 8, 2020).

[22] Johns Hopkins University & Medicine, "COVID-19 World Map Dashboard," Center for Systems Science and Engineering (CSSE) at Johns Hopkins University & Medicine, (May 1, 2020) https://coronavirus.jhu.edu/map.html (last accessed May 8, 2020).

[23] State of Illinois, "State of Illinois Coronavirus (COVID-19) Response," https://coronavirus.illinois.gov/s/ (last accessed May 8, 2020).

injunction would cause harm to the public interest. *Platinum Home Mort. Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 726 (7th Cir. 1998).

When this Court balances the hardships where "the Government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge." *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018); *Trump v. Int'l Refugee Assistance*, 138 U.S. 353 (2017) ("As the district court did, we consider the balance of the equities and the public interest factors together."); *see also Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("The government's interest *is* the public interest.") (emphasis in original).

The federal courts recognize that public health is a significant public interest. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005). It is with that significant public health interest in mind that this Court should balance the public's interest in avoiding being unknowingly exposed to a virus, where many are asymptomatic, with Plaintiffs' interest in continuing to hold church services for gatherings over ten people. As noted above, Plaintiffs may already conduct worship services online, in drive-in gatherings, or in person with 10 parishioners at a time.

Balancing these same harms, Judge Lee explained that "[e]njoining the Order would not only risk the lives of the [church]'s members, it also would increase the risk of infections among their families, friends, co-workers, neighbors, and surrounding communities." Op. at 35. He noted that the allowances in the Order made for the continued practice of religion "go a long way towards mitigating the harms Plaintiffs identify." Op. at 36. He concluded that, "[t]aking into account COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity … equitable considerations, including the promotion of the public interest,

weigh heavily against the entry of the temporary restraining order and preliminary injunction that Plaintiffs seek." *Id*. "Coupled with the relative weakness of Plaintiffs' legal arguments, this is fatal to their motion." *Id.*

CONCLUSION

For all of these reasons, the Court should deny Plaintiffs' motion for a temporary restraining order or a preliminary injunction.

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Respectfully Submitted,

/s/ Christopher G. Wells

KWAME RAOUL
Attorney General of Illinois

R. Douglas Rees
Christopher G. Wells
Sarah H. Newman
Kelly C. Bauer
Hal Dworkin
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601

Christopher G. Wells
Chief, Public Interest Division
Office of the Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-1134
cwells@atg.state.il.us