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-C-50153 Honorable John Z. Lee

THE GOVERNOR'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Dated: May 1, 2020

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INTRODUCTION

Plaintiffs filed their complaint and request for an emergency temporary restraining order ("TRO") based on a premise that is now moot. Their request for a TRO should be denied on that basis alone. Plaintiffs accused Governor JB Pritzker of violating their First Amendment rights, including, primarily, their right to free exercise of religion, by issuing two executive orders, Executive Order 2020-10 and Executive Order 2020-18, referred to publicly and interchangeably as the "stay at home" order. Those orders restricted non-essential activities and travel by members of the public in an effort to combat the COVID-19 pandemic. Plaintiffs assailed the Governor and those orders as "intentionally denigrat[ing] Illinois churches and pastors and people of faith by relegating them to second-class citizenship." (Compl. ¶ 10.) The alleged basis for Plaintiffs' allegation of religious discrimination was that "[i]n many states, these [analogous] stay-at-home orders protected the constitutional rights of churches and religious believers during the coronavirus epidemic, but not so in the Land of Lincoln." (*Id.* ¶ 2.) Plaintiffs specifically faulted the prior executive orders for failing to deem "churches and church ministries" to be "essential," while simultaneously "declar[ing] a laundry list of businesses to be 'essential,' from liquor stores to lawyers to landscapers." (*Id.* ¶¶ 3, 11.)

As of April 30, 2020, however, the executive orders Plaintiffs have attacked are no longer in effect. There is a new "stay at home" order, Executive Order 2020-32 ("Current Executive Order," attached hereto as Exhibit A). The Current Executive Order expressly declares the free exercise of religion to be an essential activity by permitting Illinois residents to leave their homes to do the following:

> **To engage in the free exercise of religion**. To engage in the free exercise of religion, provided that such exercise must comply with Social Distancing Requirements and the limit on gatherings of more than ten people in keeping with CDC guidelines for the protection of public health. Religious organizations and

> houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants.

(Ex. A ¶ 5(f).) In other words, the alleged concern that motivated Plaintiffs to bring their complaint—the silence of the prior "stay at home" orders to deem religious activity to be "essential"—is now gone. The Court should therefore deny Plaintiffs request for a TRO because it is moot.

But even aside from mootness, Plaintiffs demand for a TRO was and continues to be unwarranted. Neither the prior "stay at home" orders nor the Current Executive Order violated the First Amendment, or any other constitutional provision, as applied to Plaintiffs. The purpose of these orders is to protect the public from the devastating spread of the COVID-19 pandemic. (Compl. ¶ 1.) Plaintiffs do not and cannot dispute that this is a governmental interest of the greatest magnitude (ECF No. 7 at 8), and that the COVID-19 pandemic constitutes an ongoing emergency in Illinois. (Compl. ¶ 1, 59.) Under these emergency circumstances, the sole question this Court must answer is whether the Governor acted reasonably and in good faith in implementing the restrictions reflected in the prior "stay at home" orders and the Current Executive Order. *In re Abbott*, 954 F.3d 772, 787 (5th Cir. 2020); *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); *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La*., 186 U.S. 380 (1902). He did. Plaintiffs therefore have no reasonable likelihood of success on the merits of their claims and their request for an emergency TRO must fail.

In addition to failing under the deferential standard afforded to emergency public health and safety measures taken by an executive officer, Plaintiffs' claims fail under First Amendment

analysis. The prior "stay at home" orders and the Current Executive Order are facially neutral laws of general applicability that do not offend the Free Exercise Clause of the First Amendment. *See Emp't Div. v. Smith*, 494 U.S. 872 (1990). There is no plausible allegation that the Governor issued these orders for any reason other than to protect the public's health and safety. As Plaintiffs concede, the Governor's orders substantially align with numerous analogous "stay at home" orders issued by governors across this nation to combat this public health emergency. (Compl. ¶ 1.) While Plaintiffs initially complained that the prior "stay at home" orders did not contain a religious exemption, Supreme Court precedent holds that no such exemption is required in a facially neutral law of general applicability. *Smith*, 494 U.S. 872.

Plaintiffs have further alleged, however, that the absence of an exemption in the prior "stay at home" orders evinced an "illegal and discriminatory to hostility to religious practice, churches, and people of faith," given the multiple exemptions for other categories of activity. (Compl. ¶¶ 3, 10.) But Plaintiffs have fallen far short of pleading plausible facts and presenting a reasonable likelihood of success that the Governor's orders, while facially neutral and generally applicable to religious and non-religious gatherings alike, have been motivated by hostility toward their religion. *Cf. Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop, LLC v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). The Current Executive Order, which expressly designates free exercise of religion as an essential activity, eviscerates Plaintiffs' ability to even insinuate that impermissible religious bias motivates the Governor's actions. Plaintiffs' attempt to invoke the strict scrutiny standard applicable to

religious animus claims therefore fails.[1] The Current Executive Order does not impermissibly infringe Plaintiffs' First Amendment right to free exercise of religion.

Plaintiffs' Free Speech and Assembly Clause claims also have no reasonable likelihood of success, because the prior "stay at home" orders and Current Executive Order constitute reasonable time, place, and manner restrictions. Indeed, Plaintiffs have been engaging in online worship during the COVID-19 pandemic and may continue to do so. Under the Current Executive Order, it is clear that they may also conduct drive-in church services and in-person services of fewer than 10 people (including having multiple such services throughout the day) that follow social distancing requirements. Federal courts around the country have upheld similar approaches to religious services in the context of this pandemic. *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"); *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); *Maryville Baptist Church, Inc. v. Beshear*, -- F. Supp. 3d --, No. 3:20 cv-278, 2020 WL 1909616 (W.D. Ky. Apr. 18, 2020). This Court should do the same and reject Plaintiffs' TRO motion.

Plaintiffs' state law claims fare no better. In addition to suffering the same flaws under constitutional free exercise and free speech analysis, Plaintiffs also ask this federal court to do something it may not do: compel state officials to follow state law. *Pennhurst State Sch. & Hosp.*

[1] Even if the Court were to apply intermediate or strict scrutiny, the "stay at home" orders are narrowly tailored to a compelling governmental interest—combating the COVID-19 pandemic and protecting the public's health and safety. Given the respiratory transmission of the virus among persons in close contact with one another, there is no safe way to permit gatherings in excess of 10 people in the manner Plaintiffs demand.

v. Halderman, 465 U.S. 89, 97 (1984). Plaintiffs' state law claims are therefore barred by the doctrine of sovereign immunity embodied in the Eleventh Amendment.

Even if the legal defects in Plaintiffs' pleadings were not dispositive (they are), Plaintiffs have shown no harm justifying an emergency TRO and the balance of harms tips decidedly against them. Plaintiffs have conducted their worship services online and in a manner consistent with the prior "stay at home" orders for the past several weeks. They offer no compelling reason why the Court should allow them to convene possibly hundreds of people this Sunday, May 3, 2020.

On the other hand, the harm from permitting Plaintiffs to flout the 10-person limitation on gatherings is likely to be substantial. In Albany, Georgia, for example, a single funeral gathering of 200 people is the source of one of the worst per capita COVID-19 outbreaks in the world—resulting in dozens of deaths in a matter of weeks.[2] The threat of that type of cascading, exponentially increasing harm is why public health guidance does not and cannot permit Plaintiffs to convene a gathering of more than 10 people this Sunday. With the good faith compliance of Plaintiffs and all residents of Illinois, however, there will hopefully soon come a day when Plaintiffs can come together with their fellow congregants to worship and celebrate the passing of this plague. We all long for that day. But Plaintiffs' request for injunctive relief, which would put them and their neighbors in harm's way, should be denied.

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

[2] Ellen Barry, N.Y. Times, "Days After a Funeral in a Georgia Town, Coronavirus 'Hit Like a Bomb'," (March 30, 2020), available at https://www.nytimes.com/2020/03/30/us/coronavirus-funeral-albany-georgia.html (last visited May 1, 2020).

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 would give them substantially all the relief they seek through this lawsuit. *See, e.g., Boucher*, 134 F.3d at 827 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*, 260 F.2d at 890 ("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. Moreover, when there are "two equally credible versions of the facts the court should be highly cautious in granting an injunction without the benefit of a full trial." *Lawson Prods., Inc. v. Avnet, Inc*., 782 F.2d 1429, 1440 (7th Cir. 1986) (citation omitted).

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 TRO 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 have also not shown that they will suffer irreparable harm in the absence of TRO, and the balance of harms tips decidedly against them in light of the threat to public 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' state law claims fail because of Eleventh Amendment sovereign immunity.

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 citizens. 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 prior "stay at home" or 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 v. Massachusetts*, 197 U.S. 11, 27 (1905) (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 v. Massachusetts, 321 U.S. 158, 166-67 (1944) ("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 (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 good-faith response to the imminent and deadly threat the COVID-19 pandemic poses. To date, the disease has infected over one million people and caused over 60,000 deaths in the United States.[3] Here in Illinois, which fortunately took measures early on to prevent the spread of COVID-19, more than 56,000 people have been infected and over 2,450

[3]*See* Cases in U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 30, 2020).

have died.[4] 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.[5] 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 generally 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 the danger that infected individuals will project respiratory droplets that contain the virus and may infect others. It should come as no surprise then that there already are a number of identified instances in which dozens of 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.[6]

- 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

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[4] *See* COVID-19 Statistics, https://www.dph.illinois.gov/covid19/covid19-statistics (last visited April 30, 2020).
[5] *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 April 28, 2020.
[6] *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 April 30, 2020).

contact with one another, and the members tried to maintain physical distance between one another.[7]

- 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.[8]

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 by acting in bad faith or without any factual basis. Courts across the country have denied requests for preliminary injunctive relief in constitutional 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-19related executive orders); *Maryville Baptist Church, Inc. v. Beshear*, -- F. Supp. 3d --, No. 3:20cv-278, 2020 WL 1909616 (W.D. Ky. Apr. 18, 2020) (same, Kentucky); *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.

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[7] *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 .

[8] *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 April 30, 2020).

Apr. 1, 2020) (same, Virginia); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Sup. Ct. March 25, 2020) (same, New Hampshire).

For example, last week, 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).

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 restrict 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 *Emp't Div. 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 Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)). 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) (cleaned up); *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. (Ex. A, 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. (Ex. A, at 5).

Plaintiffs argue that the Governor's past stay-at-home orders demonstrated "hostility" towards religion because they did not include a carve out for religious activity in any form, including drive-in religious services. (Compl. ¶ 45). However, as Plaintiffs are now aware, the Current Executive Order (which was released after Plaintiffs filed their Complaint) *does* include a carve-out for people to engage in the free exercise of religion so long as they comply with the other neutral social distancing requirements and the limit on gatherings of more than ten people.

(Ex. A, at 5-6). Indeed, the Current Executive Order explicitly permits drive-in religious services as a way to protect the health and safety of congregants. (Ex. A, at 6). Thus, an accommodation that Plaintiffs impliedly admit would be sufficient for them to safely engage in a spiritual gathering is permitted by the Current Executive Order.

Plaintiffs also 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, as well as a snack food manufacturing plant are "*at best* arbitrary." (ECF No. 7, at 12) (emphasis in original). 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.").

Moreover, as the Western District of Kentucky pointed out, the logistics of attending a church service and shopping at a grocery or retail store are fundamentally different. "The latter is a singular and transitory experience: individuals enter the store at various times to purchase various items; they move around the store individually — subject to strict social-distancing guidelines set out by state and federal health authorities — and they leave when they have achieved their purpose. Plaintiffs' desired church service, in contrast, is by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose." *Maryville Baptist Church, Inc.*, 2020 WL 1909616 at * 2.

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." *Id.* 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.

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."[9] *C.f. Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 535 (1993). Indeed, contrary to Plaintiff's 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). Accordingly, the ordinance effectively singled out one religious practice, which subjected the law to heightened scrutiny. *Id.*

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

[9] 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).

than ten people is in place. The Current Executive Order is neutral and generally applicable. Moreover, by allowing drive-in services, the Current Executive Order explicitly grants benefits to religious services that are not allowed to secular activities.

Plaintiff's complaint cites 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.[10] Both, however, are distinguishable. The earlier case, *On Fire Christian Center v. Fischer*, No. 3:20-CV-264-JRW (W.D.KY Apr. 11, 2020), 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.

Plaintiff's other cited case, *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020), 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. (Ex.

[10] Technically, the complaint only cites one case, from the District of Kansas, in support of this argument. But instead of attaching this case as an exhibit, as the complaint purports to do, Plaintiffs attached a different case from the Western District of Kentucky. Both cases are addressed herein.

A, at 5-6.) Additionally, as previously discussed, Executive Order 2020-32 permits drive-in services, an issue which the court in *First Baptist* was silent on.

Respectfully, the court in *First Baptist* also misapplied *Lukumi.* 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, as discussed previously large swaths of secular gatherings are similarly prohibited.

First Baptist appears to be an outlier case. 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; *Mary Baptist Church, Inc.*, 2020 WL 1909616 at * 2; *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. This Court should follow the Central District of California, the District of New Mexico, and the Western District of Kentucky and apply rational basis scrutiny to the Current Executive Order.

The Current Executive Order easily passes rational basis. 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 obviously a legitimate governmental interest. Indeed, it is

indisputably a compelling interest "of the highest order." *On Fire*, 2020 WL 1820249 at *7. As CDC guidelines demonstrate, prohibiting mass gatherings furthers that legitimate interest.

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

The Current Executive Order is not unduly burdensome on Plaintiffs' religious practices. Plaintiffs did not argue that the any of the "stay at home" orders are unduly burdensome for the purposes of the Free Exercise Clause and thus have waived this argument. But even if Plaintiffs had not waived this argument, they would not be able to show that the Current Executive Order is unduly burdensome.

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. Public gatherings, both religious and secular, are prohibited by the Current Executive Order. While this does place some burden on religious activity, this is not an *undue* burden. Plaintiffs have ample alternative means with which to conduct religious services. Plaintiffs announced in March they would be conducting services via Facebook and Beloved Church has been consistently broadcasting religious "teachings," "healings," and bible study podcasts on the sermon.net downloadable application since 2012. These are two options Plaintiffs have to conduct religious ceremonies online. The Current Executive Order also explicitly permits religious services through drive-in services and in gatherings of ten or less people so long as they abide by social distancing guidelines—which could include multiple services throughout the day.

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 supra* at 11. 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.

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 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 that cannot presently be traced. 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 and its possible successors will only be 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

[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).

authorities to carry on their business with the least possible restriction of constitutionally guaranteed rights.").

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 ten people if they are part of an essential business. But as previously discussed, these exempted activities are not analogous to religious mass gatherings. And these activities, like grocery shopping and food manufacturing, cannot be conducted remotely. *See Legacy Church*, 2020 WL 1905586 at *37 n. 12. Moreover, those activities which are deemed essential are still subject to social distancing regulations in the Current Executive Order. (Ex. A at 3-6).

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 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. The Current Executive Order Is a Reasonable Time, Place, and Manner Restriction 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*, 723 F. Supp. at 1112-13 ("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 free speech. *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.").

Second, the Current Executive Order is narrowly tailored. As discussed below, statewide orders are necessary to prevent the spread of a communicable disease that cannot presently be traced. Furthermore, the imposition of these orders has mitigated the spread of the virus in a way

that lesser measures would not have.[12] *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 and its potential successors will only be 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.").

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. 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 do not a likelihood of success on the merits of their free speech claim.[13]

D. All State Law Claims Against the Governor in His Official Capacity Are Barred by Eleventh Amendment Sovereign Immunity.

In support of their motion for a preliminary injunction Plaintiffs' allege that the emergency orders violate state law. More specifically, Plaintiffs allege that the orders "ban

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[12] 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).

[13] Although the complaint raises the issue of freedom of assembly, this issue is not addressed in Plaintiff's Motion for a TRO. 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.

Plaintiffs' free exercise [of religion] outright" in violation of the Illinois Religious Freedom Restoration Act, codified as 775 Ill. Comp. Stat. 35/10(b)(1). (ECF No. 7, at 6-9.) Plaintiffs allege that in entering these orders, the Governor has exceeded his authority under the Illinois Emergency Management Act, 20 Ill. Comp. Stat. 2305/2(c) and "commandeer[ed]" the Illinois Department of Public Health Act, 20 Ill. Comp. Stat. 2305/2(a), which alone allows "quarantine, isolation, and closures." (ECF No. 7, at 13-14). Plaintiffs briefly claim that because the Governor has "commandeered" the Illinois Department of Public Health Act, due process afforded under that act has also been stunted. (ECF No. 7, at 13-14). However, as a matter of law, Plaintiffs cannot succeed on any of these alleged state law violations because such actions are barred by the Eleventh Amendment to the Constitution of the United States.

The Eleventh Amendment provides that the judicial power of federal courts shall not extend to suits against a state by citizens of another state. The Eleventh Amendment is an "affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III [of the Constitution]." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97 (1984). 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. *Id.*; *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.

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' arguments 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, the 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 C 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 C 7596, 2004 WL 1093711, at *1, 3 (N.D. Ill. April 30, 2004) (claims under Illinois Constitution barred by Eleventh Amendment).

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. The Court need not address the merits Plaintiffs' requested relief under state law.

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 solely assert that harm is "actual and immediate" as "all of their in-person religious services and ministries shut down," but fail to actually describe the harm that has been done to the congregation. This sparse description itself demonstrates that any potential harm to

Plaintiffs is minor, let alone meeting the requisite burden of irreparable. While in-person services of more than 10 people have been restricted, the practice of religion has not been. As Plaintiffs themselves have reported to the media, they intend to hold services on-line via Facebook without restriction. While perhaps not their preference, as cited above, any argument that on-line services are not useful, effective, or meaningful in religious practice is called into question by the fact that Plaintiffs have been offering on-line podcasts since 2012. To the extent Plaintiffs allege decreased donations have resulted in damages, the Beloved Church's webpage provides a link to donate as well. *See* Beloved Church, (May 1, 2020) https://belovedchurchillinois.com (last visited May 1, 2020). While religious services might have been taken on-line, they have not been stopped or prevented by the emergency orders.

As Plaintiffs are now aware, the Current Executive Order clarified that there is accommodation for in-person worship, including drive-in services or multiple small services, as long as social distancing is maintained and the gatherings are limited to ten people. (Ex. A ¶ 5(f).) As a result, Plaintiffs' assertion that they cannot worship in person together has become moot, along with any harm stemming from the inability to physically meet. In summation, Plaintiffs have solely provided insufficient conclusions in the place of requisite real damages, which fall far from any irreparable harm. The fact that Plaintiffs chose to abide by the prior "stay at home" order for several weeks—only now claiming imminent harm if they had to conduct another week of services online—further underscores that there is no irreparable harm.

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

Hardships to the public due to COVID-19 do not strain imagination and are dire. Those hardships outweigh any hardship to Plaintiffs in this case, especially so considering 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* Ex. A ¶ 5(f).) The public continues to be in grave danger, as Illinois recently reported 3,137 more cases of COVID-19 just on today alone.[14] The national total number of deaths has climbed to 62,996 lives taken.[15] Illinois reports 2,457 total deaths.[16] The federal 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 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

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[14] Illinois Department of Public Health, "Public Health of Officials Announce 2,563 New Cases of Coronavirus Disease," Department of Public Health, (April 30, 2020) http://www.dph.illinois.gov/news/public-health-officials-announce-2563-new-cases-coronavirus-disease (last accessed May 1 2020).

[15] 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 1, 2020).

[16] State of Illinois, "State of Illinois Coronavirus (COVID-19) Response," https://coronavirus.illinois.gov/s/ (last accessed May 1, 2020).

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).

A Plaintiff must show that the balance of equities tips in her favor. *Winter*, 555 U.S. at 20. An injunction is a drastic remedy and "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id. at* 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) (internal quotation marks omitted).

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 hold church service with ten parishioners at a time.

In arguing that the balance of harms falls against the government, Plaintiffs boldly assert they have suffered irreparable harm to their fundamental constitutional rights and that "Defendants will incur no real harm to any legitimate government interest . . . ." (ECF No. 7, at 14.) The Governor's interest *is* the public interest. *Pursuing America's Greatness v. FEC,* 831 F.3d at 511. It is Plaintiffs who will not suffer irreparable harm because technology allows parishioners of the church to attend church service *and* even have spiritual counseling via video

conference. Indeed, churches in Illinois have become experts at this.[17] One option is for Plaintiffs to hold church service in person with no more than ten parishioners, while the other parishioners may join via video conferencing technology like Zoom. Many litigants during this unprecedented time have had to use Zoom for the first time in recent weeks. Plaintiffs' assertion that no real harm will come to Defendant is unrealistic and flies in the face of science, especially considering many individuals who carry, and subsequently spread, COVID-19 are asymptomatic.[18] COVID-19 presents an unprecedented circumstance that shows the balance of harms does not favor Plaintiffs, where Plaintiffs can both hold a small church service and also allow parishioners to participate via video conference.

This Court must also analyze the public interest when considering whether to order an injunction in this case. Plaintiff primarily relies on the fact of the alleged violations of the First Amendment as commanding that an injunction in this case is in the public interest. In support, Plaintiff cites to *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). However, *Walker* provides no basis of support whatsoever for Plaintiff when analyzing the public interest because it involved a law school effectively kicking out a Christian student organization because they refused to allow gay individuals to be voting members. *Id.* at 858 (7th Cir. 2006). *Walker's* TRO was about protecting against the snuffing out of particular speech targeted at gay

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[17] *See, e.g.*, Rob Stroud, *Coles County Churches Carry On with Online Services During Coronavirus Pandemic*, https://jg-tc.com/news/local/coles-county-churches-carry-on-with-online-services-during-coronavirus/article_04ec9b1b-847c-5ac6-a443-b6bf8bf9e424.html; Valerie Wells, *Online Mass Available During Coronavirus Shutdown of Churches*, https://herald-review.com/lifestyles/faith-and-values/online-mass-available-during-coronavirus-shutdown-of-churches/article_32d8e31a-6978-54e7-811c-6a294558c9f4.html

[18] *See, e.g.*, Apoorva Mandavilli, The New York Times, *Infected But Feeling Fine* (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html; Tom Schuba, Chicago Sun-Times, *Coronavirus Test Sites Added in Illinois, but Pritzker Says Limited Capacity Still 'An Enormous Problem,'* (Mar. 20, 2020), https://chicago.suntimes.com/coronavirus/2020/3/30/21200135/coronavirus-test-sites-map-illinois-pritzker.

individuals and provides little support for imposing an injunction during a global pandemic. Plaintiffs' argument here seems really only to be because they believe the constitutional violation is happening, that fact alone shows it is in the public interest to employ the extraordinary remedy of an injunction. Not so. The United States District Court for the District of New Mexico, just a few weeks ago, encountered this same argument from a church in their state. The District Court found the right to gather did not outweigh limiting a COVID-19 outbreak and wrote:

> Legacy Church relies on vindicating its constitutional rights as the interest at stake. Had it demonstrated likely success on the merits of its constitutional claims, Legacy Church could point to weighty public interests that could overcome the public's interests in enforcing social distancing. It has not demonstrated likely success, however. Without a constitutional right to rely on, Legacy Church must therefore rely on the public interest inherent in bringing together members and staff within its doors, and in this light, the law views Legacy Church's Easter service as just another gathering with as much right to protection as any other. The public's interest in limiting the COVID-19 outbreak in the state, a compelling interest, outweighs the right to gather.

Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *44 (D.N.M. Apr. 17, 2020) (internal citation omitted). This Court should also find that, under the circumstances presented in this case, the right to gather in large groups does not outweigh the right of the Governor to protect the people of Illinois from COVID-19.

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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