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

THE BELOVED CHURCH, an Illinois Not-for-Profit Corporation, and PASTOR STEPHEN CASSELL, an individual, Plaintiffs, **v.** JAY ROBERT PRITZKER, Governor of the State of Illinois, DAVID SNYDERS, Sheriff of Stephenson County, Illinois, STEVE SCHAIBLE, Chief of Police of the Village of Lena, Illinois, and CRAIG BEINTEMA, Administrator of the Department of Public Health of Stephenson County, Illinois, in their official capacities, Defendants.	)	No. 3:20-cv-50153 **JURY TRIAL DEMANDED**

PLAINTIFF'S REPLY IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION[1]

Churches are "Essential."

When this lawsuit was filed on Thursday, Illinois was one of only 10 states to entirely prohibit Sunday church services. In response to this suit, Defendant Pritzker added a hastily drafted paragraph allowing limited exercise of religion in his new executive order, which he had announced he would sign that day. That paragraph gave individuals the right to leave their homes to exercise their religion, but it left churches twisting in the wind: apparently no longer "non-essential," but not "essential" either. Pritzker applied a hard cap of 10 people to churches that no "essential" business has to follow, and he applied that hard cap regardless of building size, congregation size, number of family units in a congregation, or spread of COVID-19 in a particular county or region. Facing this lawsuit, Defendant Pritzker reacted, but he did so knowing that his action would not allow Plaintiffs to hold in-person worship on Sunday morning, beyond the livestreaming they've been providing the past 4 weeks.

Pritzker's defense is that religious freedoms may be trampled during emergency situations. But he has no answer to Plaintiffs' citations and arguments that, while COVID-19 is certainly serious and an epidemic, we are well past the point where "emergency" restrictions of fundamental rights can be justified. People of faith in Illinois have waited patiently to be treated with the dignity and respect that the Constitution provides their religious beliefs and practices. Months into this epidemic, the time for waiting is over. It's bad enough to watch churches shuttered as liquor stores operate unabated, but when your dog groomer gets better treatment than your church, the cry for "emergency" power by the executive branch must yield to the strong guarantees of the First Amendment. If there is to be an "essential" list that governs

[1] Plaintiffs have addressed many of Defendants' arguments in their opening papers and respectfully incorporate by reference their Verified Complaint, Motion for TRO, and Memo in Support herein.

Illinois, houses of worship must be on that list, and treated equally as any "essential" place where people are gathered for commerce or manufacturing.

Just since Thursday, Defendant Pritzker has said he will "defend to the death" 1,000-person, non-socially-distanced secular gatherings to occur, in flagrant violation of EO 2020-32, while he solemnly reaffirms that religious gatherings remain tightly restricted to no more than 10 people, with strict social distancing.

Moreover, Pritzker's new order is so unreasonably restrictive that it wouldn't even allow Pastor Cassell to bring his 8-person family to The Beloved Church, because the 5 staff members necessary to put on the services only allows room for 5 more people. The Church has numerous families that have taken seriously the biblical admonition to "be fruitful and multiply,"

Plaintiffs seek that Defendant Pritzker be enjoined from enforcing his ill-considered order against The Beloved Church and Pastor Cassell, at the very least as to the 10-person limit he has arbitrarily and selectively imposed on religious gatherings held by houses of worship.

II. STATEMENT OF ADDITIONAL FACTS RELEVANT TO DEFENDANTS' RESPONSES

A. Relevant Facts Since the Filing of The Lawsuit and TRO Motion

Plaintiffs' Verified Complaint, TRO Motion, and Memo were filed and sent to the Attorney General around noon on Thursday.

At his daily 2:30 p.m. press conference, Defendant Pritzker was asked several questions about this lawsuit. His answer was to encourage pastors to continue using Zoom to stream worship services and "make sure that [parishioners are] staying home." When asked "how far will you go to enforce the stay at home" if Pastor Cassell holds services, Pritzker answered that Pastor Cassell is "an outlier" and stated that "we're gonna keep doing what we need to do to

keep people safe." See, https://capitolfax.com/2020/04/30/ezike-and-pritkzer-talk-testing-65-new-test-sites-open-pritzker-talks-about-may-1-easing/.

At 3:24 p.m., this Court entered an order instructing the parties to meet and confer to explore a standstill agreement. Defense counsel sent the Court's order to all parties and counsel by 4 p.m.

At some point early Thursday evening, Defendant Pritzker's latest executive order, EO 2020-32 was executed and filed. EO 2020-32, like its predecessors, forbids Illinoisans from leaving their homes, (sec. 2, par. 1), other than for certain "essential activities," and defines all non-profit and for-profit entities in the state as "businesses," (sec. 2, par. 11), dividing them into "essential" businesses[2] and operations that are allowed to be open and "non-essential businesses" that must close (sec. 2, par. 2).

EO 2020-32 as executed differed in relevant part from the version released to the public a few days earlier, by adding subparagraph 5(f), which allows residents to leave their homes "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 . . . ." This new paragraph states that, "Religious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants." The EO, and its predecessors, allowed "religious organizations" to operate only "when providing food, shelter, and social services," etc., but not when providing worship services. *See*, par. 12(c) ("Essential Businesses and Operations"). The term "houses of worship" is new in EO 2020-32 and used only

[2] Once a business qualifies as "essential," it may generally engage in "non-essential" operations, unless otherwise restricted. For instance, because large stores may supply essentials, they can sell even non-essential products, while local smaller retailers must close. For instance, grocery stores can sell flowers, but florists must close. 7-Eleven can sell cigarettes, but tobacco shops must close. Target can sell clothes and shoes, but local clothing boutiques and shoe stores must close. See, https://www2.illinois.gov/dceo/Documents/Essential%20Business%20FAQ.pdf

once, in the last sentence of subparagraph 5(f). The status of "houses of worship" is otherwise in limbo, as "houses of worship" (and "religious organizations" when providing worship services) do not enjoy the same benefits as the laundry list of so-called "essential" businesses and operations in EO 2020-32, which includes everything from liquor stores to dog groomers.

On Friday morning, "hundreds packed the plaza in front of the Thompson Center" and "nearly 1,000 people st[ood] side-by-side" at the State Capitol in Springfield, in protest against Defendant Pritzker's executive orders. *See,* https://www.fox32chicago.com/news/protesters-statewide-demand-governor-pritzker-reopen-illinois. The protestors were in open and flagrant violation of EO 2020-32's provisions requiring "social distancing," including the 6-foot spacing and face mask requirements, and prohibiting gatherings of more than 10 people (or of anyone outside one's household). However, no order to disperse, or any enforcement action at all, was reported to have been taken against the protestors, despite the fact that they were present on State of Illinois property, outside Defendant Pritzker's offices.

Pritzker was asked about the protests at his daily 2:30 p.m. press conference at the Thompson Center. The questioner confirmed that "there's a rather large crowd they've been here all day." *See*, https://capitolfax.com/2020/05/01/pritzker-talks-contact-tracing-introduces-new-acting-chief-epidemiologist/. In his answer, Pritzker confirmed that, "they're exercising the right to free speech and we ought to defend to the death their right to exercise that right, even when they're wrong." However, Pritzker did not take such a protective view of the Free Exercise Clause when asked about this lawsuit and EO 2020-32, stating that, "we want to make it more explicit that you can worship in a group of 10 or less just as you could as long as you're socially distancing."

And on Friday, Pritzker announced the full decommissioning of the McCormick Place field hospital, which had been constructed with 3,000 beds, and previously reduced to 1,000 beds, issuing a joint statement with Chicago Mayor Lori Lightfoot that, "Today, we are pleased to report that the curve is flattening, and our local hospitals and health care systems continue to operate with capacity," Lightfoot and Pritzker said in a joint statement." *See*, https://news.wttw.com/2020/05/01/field-hospital-mccormick-place-will-close-after-treating-few-patients-curve-bends. McCormick Place treated just 29 patients. *Id.*

Then, on Friday afternoon at 5 p.m., Defendants filed their responses, which reaffirmed their stance that EO 2020-32 binds Plaintiffs and forbids them from holding Sunday worship services with more than 10 people in attendance. Despite rejecting a standstill agreement earlier on Friday, Defendants Schaible, Snyders, and Beintema[3] affirmatively stated in their filings that they will not enforce EO 2020-32 against The Beloved Church's services this Sunday. Defendant Pritzker is silent on enforcement. Pritzker also clarified that he is applying his 10-person gathering limit to drive-in services, but measuring that limit per car with an exemption for families of more than 10 people.[4]

Late last night, NBC 5 Chicago reported that deaths at long-term care facilities account for 44 percent of all coronavirus fatalities in the state. *See*, https://www.nbcchicago.com/news/local/nbc-5-investigates-44-percent-of-il-coronavirus-deaths-tied-to-nursing-homes/2265342/. According to the latest statistics from IDPH, Stephenson County has not yet experienced any COVID-19 deaths. *See*,

[3] Although Beintema has not revoked his Cease and Desist Notice or committed he would not take action in the future against Plaintiffs under the IDPH Act.
[4] None of these clarifications are even hinted at in the text of his hastily added "free exercise" paragraph in EO 2020-32.

https://coronavirus.illinois.gov/s/county-map. Cook County accounts for almost 70% of the deaths from COVID-19, despite comprising roughly 40% of Illinois' population. *Id.*

B. In-person Sunday services are an essential part of The Beloved Church's very existence. "A congregation that does not celebrate, pray, and gather in-person regularly cannot claim to be a scriptural Christian congregation."

After he was served with the "Cease and Desist Notice" a month ago, Pastor Cassell was obedient to its command to "adhere" to the provisions of defendant Pritzker's executive orders, and he has not allowed in-person Sunday services for the last four weeks. *See*, Declaration of Pastor Cassell (submitted herewith) at ¶ 4. As a matter of doctrine, that interruption in the personal convening of the congregation, and interruption in celebrating Sunday services, is an interruption in the very existence of the The Beloved Church congregation. *Id.*, at ¶ 2 - 4. That doctrine derives from the provisions of scripture. *Id.* As Pastor Cassell says: "A congregation that does not celebrate, pray, and gather in-person regularly cannot claim to be a scriptural Christian congregation." *Id.,* at ¶ 3.

Sunday services live-streamed to congregation members, and drive-in services do not comply with scriptural command, either. *Id.*, at ¶¶ 4-5.

C. In-person Sunday services at The Beloved Church can be held without a 10-person limit as safely as the work of any Essential Business or Operation, or the Basic Minimum Functions of *non*-essential entities (which have no such restriction).

EO 2020-32 imposes a 10-person limit on gatherings for "the free exercise of religion." At sec. 2, ¶13.vi. It does not impose such a restriction on any other Essential Business or Operation, and does not impose it on the "Minimum Basic Operations" of even *non*-essential businesses. EO 2020-32 at sec. 2, ¶30.

That 10-person limit, however, does not make churches, or at least The Beloved Church, any more socially-distanced than those other essential and non-essential businesses. Cassell

Declaration, at ¶¶6-11. That is so because, even with maximum normal attendance at a Sunday service, the Lena church building has enough space to keep individuals, and households attending together as a unit, six-feet part. *Id.*, ¶¶9-11. Pastor Cassell can, and will, provide masks and hand sanitizer for everyone attending, to. *Id.*, ¶¶7-8.

Moreover, Pastor Cassell is a Christian minister, to his congregation, and to everyone he encounters. "I have a deep, genuine, heartfelt concern for every person who sets foot on the property of The Beloved Church. Because of that, I will do everything in my power that is permitted and congruent with scriptures to protect the health, safety and well being of the participants through the entirety of their being --- spirit, soul, and body." *Id.,* ¶6.

Because Pastor Cassell can exercise some control over the movement of congregation members -- unlike at some large, retail "essential businesses" where movement of customers is hard to control -- it is, in fact, more feasible for people attending in-person Sunday services at The Beloved Church to keep the six-foot distancing. *Id.,* at 11. And controlling an 80-person gathering at a small-town church is far easier than controlling the workforce of an essential business like a factory, which Pastor Cassell has confirmed with a local worker[5] at a large Stephenson County tire manufacturer. It is simply impossible -- and is not reasonably expected -- for every person to keep a 6-foot distance when one shift clocks out, and another clocks in, for instance. *Id.*, at ¶14.

III. ARGUMENT

A. Likelihood of Success on the Merits

As an initial matter, a preliminary injunction would not give Plaintiffs all the relief they seek (Pritzker Br. at 6). Defendant Pritzker has frequently extended his COVID-19-related executive orders and has given no sense of when they may end, nor any concrete public plan for

[5] Hearsay can be considered for a Preliminary Injunction or Temporary Restraining Order, *Securities and Exchange Commission v. Cherif*, 933 F.2d 403, 412 n. 8 (7th Cir. 1991)

re-opening churches. Numerous public gatherings and events have been called off well into the Summer, and it is widely reported that many fear a resurgence of coronavirus in the Fall. Considering Pritzker's hostility to religious freedom, as pled and demonstrated repeatedly in Plaintiffs' Verified Complaint, along with the erratic nature of his last-minute addition of (arbitrarily limited) "free exercise" language to EO 2020-32, no one knows when Pritzker's orders against churches will be lifted. *See Broucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998). But even so, Plaintiffs would meet this standard anyway.

1. Plaintiffs' claims are not moot.

Defendant Pritzker argues Plaintiffs' claims are now moot because the executive orders they attacked are no longer in effect. (Pritzker Br. at 1.) But Plaintiffs repeatedly cited Pritzker's upcoming announced EO, and the change made by Pritzker to the EO prior to execution still does not allow Plaintiffs to have their in-person Sunday worship services.[6] The harm remains. The fate of Plaintiffs' ability to materially exercise their constitutional rights still hangs in the balance and thus their claims are not moot.

Plaintiffs' Complaint indeed alleged Governor Pritzker's earlier Orders failed to include churches on the list of "essential businesses" (Pritzker Br. at 1-2), and Executive Order 2020-32 retains that deficiency. The new EO allows individuals to leave their homes for "free exercise," and it names and appears to grant some rights to "houses of worship," but EO 2020-32 casts them into limbo, apparently better than "non-essential" but still not worthy of being called "essential." None of the new language in EO 2020-32 materially alters the basis of Plaintiffs' claims. Specifically, Plaintiffs made clear that the earlier Orders prevented them from holding

[6] Obviously, Plaintiffs did not anticipate that Defendant Pritzker would read their Verified Complaint and change his EO in a way that attempts to strengthen his litigation position, while still depriving Plaintiffs of their requested relief: that they be allowed in-person worship with their congregation.

regular Sunday church services with approximately 80 attendees. Complaint at ¶¶27, 72. They noted that essential activities like going to Menards and Walmart often have gatherings of more than 10 people and thus receive better treatment than in-church services. Complaint at ¶52. They noted the lack of any "numerical constraint[s] at all on attendance at alleged 'essential businesses and operations,' such as retail businesses, including the Pritzker liquor stores and big box stores, manufacturing facilities, and the like." Memo in Supp. of TRO at 9. Their constitutional claims hinged on these inequities---all of which remain under Executive Order 2020-32.

"As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016), quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013)). And here "the parties remain[] adverse; both retain[] the same stake in the litigation they had at the outset." *Gomez*, 136 S. Ct. at 665. Plaintiffs still seek equal treatment with essential activities exempt from the 10-person rule. Governor Pritzker still seeks to limit gatherings (at least of these Plaintiffs) for the purported reason of stopping COVID-19. Like the exception to the mootness rule for cases "capable of repetition yet evading review" (which is not at play here), Plaintiffs "have a reasonable expectation of suffering from the same harm" as under the earlier orders. *Stotts v. Cmty Unit Sch. Dist. No. 1*, 230 F.3d 989, 991 (7th Cir. 2000); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (noting that a case becomes moot upon a defendant's voluntary cessation of a challenged practice only if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (quoting *United States v. Concentrated Phosphate Export Assn.*, 3939 U.S. 199, 203 (1968)).

Because the face of Executive Order 2020-32 retains the same material harms challenged in the earlier orders, Plaintiffs' claims are not moot.[7]

2. Defendant Pritzker wrongly justifies his actions under *Jacobson* before considering Plaintiffs' substantive constitutional arguments.

Defendant Pritzker argues that his authority to limit in-church services to no more than 10 people is justified under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) before ever considering the contours of Plaintiffs' federal constitutional claims. (Pritzker Br., 8-14.) But that begs the question, assuming without explaining that restricting in-church services to no more than 10 people is "*required* to protect defendant Pritzker from destruction," *Whitney v. California*, 274 U.S. 357, 373 (1927) (emphasis added) (Brandeis J., concurring) or "*necessary* to further important government interests," *Int'l Soc. For Krishna Consciousness v. Rochford*, 585 F.2d 263, 271 (7th Cir. 1978) (emphasis added). (Pritzker Br. at 10.) But Plaintiffs' constitutional claims hinge on the necessity of defendant Pritzker's restrictions (or lack thereof) on in-church services, and thus failure to consider these claims before concluding that *Jacobson* trumps all was erroneous. *See United States v. Chalk*, 441 F.2d 1277, 1280-81 (4th Cir. 1991) (reciting the traditional intermediate-scrutiny standard for incidental restrictions on speech before stating: "The limitation on the use of emergency powers by the executive is *essentially the same*," and that it actually "must appear to have been reasonably necessary for the preservation of order" (emphasis added)).

Although defendant Pritzker argues that (1) the Current Executive Order and related directives were a good-faith response to the imminent threat of COVID-19 (citing isolated

[7] Although Plaintiffs' Complaint sought injunctions against only Executive Orders 2020-10 and 2020-18, they of course also sought "such further relief as the Court may deem just and proper." Complaint at p. 32. Enjoining Executive Order 2020-32 would be just and proper here where it was adopted shortly after Plaintiffs filed their Complaint, contains materially identical harms, and re-pleading and -briefing these issues would be redundant.

incidents of church-related spread in March 2020 before medical providers were equipped to handle the influx of new cases); (2) prohibiting public gatherings of more than 10 people is "indispensable" to its strategy, particularly in-church services where speaking loudly and singing can spread the disease;[8][1] and (3) numerous other federal courts have recently denied injunctive relief to emergency suits against COVID-19-related government actions, (Pritzker Br. at 12-14), *Jacobson* requires more.

Specifically, *Jacobson* explained that while governments can validly enact liberty-infringing restrictions (like the universal vaccine law at issue there) to stop the spread of diseases (like the Smallpox in Cambridge, Mass., at issue there), it cannot do so in "an arbitrary, unreasonable manner," or in a way that "go[es] so far beyond what was reasonably required for the safety of the public." *Jacobson*, 197 U.S. at 28. Thus, when evaluating challenges to laws "purporting to have been enacted to protect the public health, the public morals, or the public safety," courts must ask whether the law "has no real or *substantial* relation to those objects, *or* is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id*. (emphasis added). In other words, *Jacobson* is not separate from Plaintiffs' constitutional claims, but is shot through them. *See, e.g.*, *In re Abbott*, 954 F.3d 772, 790 (5th Cir. 2020) (concluding, in part, that courts considering Texas's COVID-19-related temporary restriction on elective abortions must ask whether it was "beyond all question" an undue burden under the precise undue burden test required by the Supreme Court). This court should proceed accordingly.

3. The Orders—especially the EO 2020-32—are not neutral or generally applicable.

[8] Indeed, the word "church" is derived from the word "ecclesia," which means *an assembly*. See Ecclesia, Dictionary.com, https://www.dictionary.com/browse/ecclesia (last visited May 2, 2020).

Defendant Pritzker argues the Orders are neutral and generally applicable under the Free Exercise Clause because the EO 2020-32 specifically *accommodates* church services and because church services are not like the exceptions from the 10-person rule for places like Walmart, Menards, liquor stores, and manufacturing plants. Amazingly, he also deigns to argue the restriction is not an *undue* burden on Plaintiffs' religious exercise because watching church services via Facebook while locked up in one's home is an "ample alternative means" of community worship. All of these arguments are painfully backward: A law that *burdens* churches uniquely -- even "non-essential" businesses do not have this burden for their "Minimum Basic Operation" (sec. 2, ¶30) -- simply cannot be an accommodation.

First, the EO 2020-32 specifically *targets*, not accommodates, church services because it makes them the *only* Essential Activity effectively subject to the 10-person maximum requirement. (EO 2020-32 at Sec. 5(vi).) Although the Orders generally purport to forbid "any gathering of more than ten people," the restriction applies "*unless* exempted by this Executive Order." (Id. at Sec. 2(3).) The Orders then immediately list many exempted activities that are effectively exempt from (and are inarguably not singled out as subject to) the 10-person maximum rule. (*Id*. at Sec. 2(4)-14.) Indeed, unlike the previous Orders, EO 2020-32 imposes a new restriction that "retail stores" like Walmart and Menards cap their occupancy at 50 percent of store capacity or at the occupancy limits based on store square footage set by the Department of Commerce and Economic Security. (Id. at Sec. 1(2).) This new restriction gives the lie to defendant Pritzker's argument that the EO 2020-32 "applies broadly to prohibit public gatherings of more than 10, both religious and secular." (Pritzker Br. at 16) That's because 50 percent of capacity in many retail stores will often be far more than 10 people, and because it took a

specific limitation on "retail stores" to clarify that, unlike every other exempted activity (other than churches) they are not completely free of the restrictions on gatherings sizes.

Notwithstanding Defendant Pritzker's arguments, this case is on all-fours with *First Baptist Church v. Kelley*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. April 18, 2020), where the court held that Kansas Executive Order 20-18 was non-neutral because it included "churches or other religious facilities" within a prohibition on mass gatherings and *specifically prohibited* churches from having gatherings of more than 10 congregants or parishioners. *First Baptist Church*, 2020 WL 1910021 at *2, *7. The court ruled that "while these executive orders begin with a broad prohibition against mass gatherings, they proceed to carve out broad exemptions for a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious services." *Id*. at *5; *see also id.* at *2 (noting exemptions for childcare locations, hotels, food pantries and shelters, detoxification centers, shopping malls, restaurants, bars, retail food establishments, office spaces, manufacturing, processing, distribution, and production facilities). While defendant Pritzker argues that unlike in *First Baptist Church*, here religious services are not specifically listed among "prohibited activities" but are rather granted an accommodation, (Pritzker Br. at 19), this overlooks the fact that free exercise of religion is the *only* exempted activity specifically subject to the 10-person maximum. Thus, "churches and religious activities appear to have been singled out among essential functions for stricter treatment." *First Baptist Church*, 2020 WL 1910021 at *7. It also appears that, again contrary to defendant Pritzker's argument, (Pritzker Br. at 20), the face of the EO 2020-32 pursues its restriction on gatherings of more than 10 people "only [against] conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508

U.S. 520, 545 (1993).[9] The EO 2020-32 thus targets in-church services for discriminatory treatment and is therefore "beyond all question" not neutral with respect to the free exercise of religion.

The Order is also clearly not generally applicable. Defendant Pritzker misses the point (and looks down his nose at religion) when he says that unlike churches, stores like Walmart and Menards are essential to the "day-to-day infrastructural needs of a society." (Pritzker Br. at 17.) No one denies that secular stores are important. But the Supreme Court's precedent requires evaluating whether the EO 2020-32 "fail[s] to prohibit nonreligious conduct that endangers" its interest of protecting the community from COVID-19 "in a similar or greater degree than [in-church services] do[]." *Lukumi*, 508 U.S. at 543; *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (holding that medical exemption from police department's no-beard policy rendered the policy substantially underinclusive as to its purpose of achieving police uniformity and thus non-generally applicable as to claimant seeking exemption to grow religious beard). If so, the Order is *substantially* underinclusive and thus non-generally applicable. *Lukumi*, 508 U.S. at 543. And even in the quotation he uses from *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 at *40 (D. N.M. Apr.

[9] This aspect of EO 2020-32 distinguishes it from other orders cited by defendant Pritzker's Br. (at 20) where courts have rejected free-exercise claims based on in-person church restrictions, which did not single out religious gatherings for disparate treatment. *See Gish v. Newsom*, 2020 WL 1979970 at *2 (C.D. Cal. April 23, 2020) (churches subject to the same prohibition on "All public or private gatherings," to the same extent, as auditoriums or "any other indoor or outdoor space used for any non-essential purpose"); *Maryville Baptist Church, Inc. v. Beshear*, 2020 WL 1909616 at *1 (W.D. Kent. April 18, 2020) (churches subject to the same prohibition on "mass gatherings," to the same extent, as "community, civic, public, leisure, faith-based, or sporting events . . . or other similar activities"); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 at *7 (D. N.M. Apr. 17, 2020) (churches eventually singled out for the purpose of being made subject to general prohibition on "any public or private gathering that brings together five (5) or more individuals in a single room or connected space, confined outdoor space or an open outdoor space where individuals are within six (6) feet of each other"). And Plaintiffs here have provided unassailable factual support, in both their Verified Complaint and Declaration, as to why their church and its services are similar to, or less likely to spread infection, than other so-called "essential" businesses that do not have the 10-person gathering limit.

17, 2020), Pritzker cannot credibly claim that liquor stores and pet groomers are so "necessary to everyday life or to facilitate the mitigation of COVID-19"--much less more necessary than churches--as to justify shredding the Constitution.

Defendant Pritzker argues that church services are a "communal experience" and thus "fundamentally different" from shopping at retail or grocery store. (Pritzker Br. at 18.) In *Maryville Baptist Church, Inc. v. Andy Beshear*, No. 20-5427 (6th Cir. May 2, 2020), the Sixth Circuit held that the church and its pastor were likely to succeed on the merits of their claim for a TRO against Kentucky executive orders restricting drive-in and in-person church services. The court held that plaintiffs were likely to succeed on their Free Exercise of Religion claim under the First Amendment because "many of the serial exemptions for secular activities pose comparable public health risks to worship services." Slip. Op. at 8. As the Sixth Circuit said: "Why can someone safely walk down a grocery store aisle but not a pew?" So, too, here.

But even if true, it doesn't render their "logistics" substantially different in slowing the spread of COVID-19. At stores, people are generally in frequent movement in and around fellow shoppers, and they necessarily physically handle and pick up items that have been stocked on the shelves by other potential COVID-19 carriers.[10] Often they push shopping carts and use baskets that have been handled by others, and frequently they use touch screens at automatic check-out counters that are not necessarily de-sanitized between users. In contrast, the church services do not inherently involve any touching and people often sit and stand in stationary locations for the duration of the service. Pastor Cassell plans to follow and promote EO 2020-32's Social

[10] These harms still exist under Executive Order 2020-32's new requirement that retail stores set up conspicuously marked one-way aisles to increase traffic flow and social distancing. See EO 2020-32 at Sec. 1(2). Customers are presumably still free to stop in aisles while others walk or stop close by to pick up similar items, etc. In short, movement about the store and among other customers is still allowed, whereas Plaintiffs' parishioners generally remain stationary in their positions throughout his church services.

Distancing Guidelines to his congregation, including seating arrangements that ensure all family units are separated by at least six feet. (Cassell Dec. at ¶¶ 7, 10.) He will provide face coverings and masks to every person in his church who doesn't have one. (Cassell Dec. at ¶ 8.) He will have hand sanitizer at all entrances and exits and throughout the building in sufficient quantities for everyone to use. (Cassell Dec. at ¶ 9.) He has instructed his congregation that anyone with various contacts with those exposed to COVID-19, or anyone who is particularly susceptible to the virus, should stay home. (Cassell Dec. at ¶ 11.) He also notes that the main sanctuary of his church is 3,600 square feet and can hold up to 200 people, even though only 60 to 80 people usually show up for his Sunday service, and additional seating is available in the balcony. (Cassell Dec. at ¶ 14.)

It's clear the in-church services contemplated by Pastor Cassell do no more harm to the government's interests than people roaming about and touching things at big box stores—not to mention the voluminous list of other activities exempted from the 10-person limit. (See Cassell TRO Memo at 9 (noting exemption for liquor stores which are often smaller and require patrons to be in close proximity to one another)); (See Complaint at ¶ 53 (noting Pastor Cassell observes that Snak King, one of the largest snack food manufacturers in the country, operates a plant in Stephenson County that routinely has dozens if not hundreds of persons on site).) *See also First Baptist Church*, 2020 WL 1910021 at *7 ("The legitimate health and safety concerns arising from people attending religious services inside a church would logically be present with respect to most if not all these other essential activities."). Thus, the Orders are "beyond all question" substantially underinclusive and therefore non-generally applicable.

Finally, Defendant Pritzker gratuitously (and shockingly) argues that forbidding Pastor Cassell's church to gather with more than 10 people is not a *serious* burden on Plaintiffs'

religious beliefs because, in recent months and years, Pastor Cassell has offered online religious services or *podcasts* (as Defendant Pritzker digs up), which are presumed to be "ample alternatives." (Pritzker Br. at 21.) This argument "in effect tell[s] the plaintiffs that their beliefs are flawed," which is a step the Supreme Court "has repeatedly refused to take." *Burwell v Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Defendant Pritzker offers no evidence undermining the sincerity of Pastor Cassell's belief that "[a] congregation that does not celebrate, pray, and gather in-person *regularly* cannot claim to be a scriptural Christian congregation," Cassell Declaration at ¶ 3, particularly at this stage in the fight against COVID-19. *See, e.g.,* Complaint at ¶ 69 ("[T]he epidemic is in a much different place today than it was on March 9, 2020. At this point, it is widely reported that the coronavirus epidemic 'curve' has been substantially "flattened" statewide."). It is thus "not for [this court] to say that [Pastor Cassell's] religious beliefs are mistaken or insubstantial," but merely "to determine whether the line drawn [by Plaintiffs] reflects an honest conviction, and there is no dispute that it does." *Burwell*, at 725 (internal quotations and citations omitted). Indeed, Defendant Pritzker's logic would force Christians back to the underground catacombs—as long as worship therefrom could be adequately livestreamed. While these are strange and singular times indeed, it is baffling that Defendant Pritzker would have the gall to make such an argument. This court should reject it out of hand.

As to strict scrutiny, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. Such a law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id*. (internal quotations omitted). Executive Order 2020-32 does neither. It comes nowhere close to advancing an interest "of the highest order" at this stage in the fight

against COVID-19. "Flattening the curve" to preserve hospital capacity was the principal reason for Defendant Pritzer's original restriction on churches, and that aim has now been achieved. Yet Defendant Pritzker's orders continue to prohibit churches from gathering in numbers greater than 10 within social distancing consistent with their fundamental constitutional rights. Additionally, Executive Order 2020-32 remains entirely untailored to geographical or individual circumstances, while allowing voluminous exemptions from the 10-person rule for all manner of activities that often involve more person-to-person interaction, and thus greater risk of spreading COVID-19, than Plaintiffs' socially distant in-church services. "A law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id*. at 547. Executive Order 2020-32 thus easily fails strict scrutiny.

4. Defendant Pritzker's Orders Continue to Violate the Freedom of Speech and Assembly.

Executive Order 2020-32 is clearly a content-based regulation because it regulates religious speech and assembly based on content. And, like its predecessors, it is not a reasonable time, place, or manner restriction on Plaintiffs' speech.

Defendant Pritzker woefully fails to conjure the proper standard for determining content neutrality. He states that "[t]he principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," even though the Supreme Court recently declared "this analysis" is based on a misinterpretation of *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) and "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015). A facial distinction defining regulated speech by its subject matter, function, or purpose is content based and subject to strict scrutiny. Id. at 2227.

Here, Executive Order 2020-32 limits "the free exercise of religion" and thus the religious expression inherent therein to gatherings of no more than 10 people, without specifically requiring any other exempted activity to adhere to the 10-person requirement. Religious speech (as opposed to lawyers' speech, doctors' speech, media's speech, and others) is thus singled out because of its religious subject matter for a special restriction. The cases cited by Defendant Pritzker which held that laws not regulating speech by reference to content are indeed content neutral, (Pritzker Br. at 24-25) are thus plainly inapposite. Executive Order 2020-32 is plainly a content-based regulation of speech triggering strict scrutiny.

Even if Executive Order 2020-32 is content neutral, it is, like its predecessors, an unreasonable restriction on speech and assembly and thus still unconstitutional. Defendant Pritzker bizarrely cites cases holding that regulations of conduct are not regulations of speech for the idea that the Free Speech Clause is not even at issue here. (Pritzker Br. at 25.) But even those cases involved incidental speech restrictions that still had to undergo intermediate scrutiny. *See, e.g., Menotti v. City of Seattle*, 409 F.3d 1113, 1130 (9th Cir. 2005).) Content-neutral restrictions on speech and assembly must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). Defendant Pritzker's Orders easily fail this test.

The Orders are not narrowly tailored because they completely forbid churches from having in-church services with more than 10 people despite allowing, as discussed above, numerous other activities to have gatherings of more than 10 people as long as they comply with social distancing guidelines. These voluminous exemptions show that restricting Plaintiffs' gatherings to no more than 10 people, even though they too promise to abide by social distancing guidelines, "burden[s] substantially more speech than is necessary to further the government's

legitimate interests," *McCullen*, 573 U.S. at 486 (alteration added) (quoting Ward, 491 U.S. at 799). This by definition means the order is not narrowly tailored. Nor does it leave open "ample alternatives" channels of communication, given Plaintiffs' religiously compelled need to assemble in order to adequately carry out their religious expression—particularly at this stage when Defendant Pritzker has declared that his efforts have "bent the curve" of COVID-19. Defendant Pritzker's Orders thus fail intermediate scrutiny and are not, under Jacobson, in "substantial relation" to furthering the government's end goals. *Jacobson*, 197 U.S. at 28. They are thus not justified exercises of government power, in plain and palpable contravention of Plaintiffs' First Amendment rights.

B. Irreparable Harm

Defendant Pritzker doubles down on his position that forbidding Plaintiffs from holding in-church worship services is not a *serious*, and thus irreparable, harm. (Pritzker Br. at 29.) He argues that "[w]hile in-person services of more than 10 people have been restricted, the practice of religion has not been," and that in-person services are merely a "preference" and easily substituted by online livestreaming, podcasts, and the like. (Pritzker Br. at 30.) Once again Governor Pritzker is shockingly tone deaf to the requirements of the U.S. Constitution and the limits of the federal judiciary. To repeat, the Supreme Court has made crystal clear that courts have no right to "to say that the line [Pastor Cassell] drew was an unreasonable one." *Thomas v. Review Bd. Of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981). And here there is no doubt Pastor Cassell sincerely believes that regular in-person church services are "scripturally mandated." Cassell Dec. at ¶¶2, 3. Contrary to Governor Pritzker's argument, Pastor Cassell has also made clear that it is not feasible for his church to hold drive-in church services. Cassell Dec. at ¶5. Furthermore, Plaintiffs abided by the previous orders for several weeks before it was

widely reported that the coronavirus epidemic "curve" has been substantially "flattened" statewide. Complaint at ¶69. Yet they still remain restricted, while Menards, Walmarts, and all manner of other businesses can have far more than 10 people roaming about and gathering in their confines. This substantial underinclusiveness and lack of narrow tailoring effects a "loss of First Amendment freedoms for even minimal periods of time, unquestionably constitute[ing] irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. Balance of Harms

Defendant Pritzker argues the balance of harms tips in his favor because of the number of new reported COVID-19 cases reported in Illinois and the national total number of deaths. (Pritzker Br. at 30-31.) But Governor Pritzker has declared "[w]e have bent the curve," *supra* n. 4 and accompanying text, and early predictions of "millions" of dead Americans as a result of COVID-19, (Pritzker Br. at 12) have been realized as wildly inaccurate. Plaintiffs promise to maintain social distancing and to wear and handout facemasks. The harm in allowing them to have in-person church services within these restrictions is thus no greater than the harm in allowing other exempted activities to operate within these same restrictions. It again doesn't help Defendant Pritzker to double down on his belief that Plaintiffs "will not suffer irreparable harm because technology allows" livestreaming and remote church services via Zoom and other online platforms. (Pritzker Br. at 31-32.) These are no remedy for in-person church services or for the irreparable harm done to Plaintiffs' constitutional rights, as shown above. The harm Plaintiffs "would suffer without the injunction is greater than the harm" Governor Pritzker would suffer with the injunction, *Mich. v. U.S. Army Corps of Eng'g*, 667 F.3d 765, 769 (7th Cir. 2011), thus tilting the balance in their favor.

D. **Public Interest**

Here, Plaintiffs have shown a substantial likelihood of success on the merits of their constitutional claims, and, once again, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). The public interest is thus furthered by entry of an injunction for Plaintiffs.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a Temporary Restraining Order against Defendants from enforcing Executive Order 2020-32 against Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs certifies that on May 2, 2020, I served Plaintiffs' Reply in Support of Their Motion for Temporary Restraining Order and Preliminary Injunction by filing it with the CM/ECF system, which shall provide electronic notice to the following lead counsel of record:

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