IN THE CIRCUIT COURT
FOR THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS
CHANCERY DIVISION

JL Properties Group B LLC *et al.*, Plaintiffs, v. Governor JB Pritzker, Defendant.	No. 20 CH 601

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

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INTRODUCTION

The deadly and highly infectious coronavirus 2019 disease, or COVID-19, has swept across the world with astonishing speed. The resulting pandemic has touched every corner of this State and altered residents' lives in fundamental and unprecedented ways. More than three months ago, the Governor ordered Illinoisans to stay at home except to engage in essential activities. He also ordered nonessential businesses to limit their operations. And of particular relevance to this lawsuit, the Governor suspended residential evictions—a decision Plaintiffs now challenge under a host of unavailing legal theories. The Governor's actions are paying dividends. The devastating shortages of hospital beds and protective equipment that many experts feared did not materialize in Illinois. While other states have seen an alarming increase in infection rates and new cases every day, Illinois infection rates and cases have been lowered substantially from their peak and remain relatively flat.[1]

Recognizing this progress, the Governor recently relaxed—but did not eliminate—the public health measures he had ordered to fight the COVID-19 pandemic. Residents are no longer required to stay at home. Most businesses may resume operations. But life has not returned completely to "normal." Public gatherings remain limited, and for now, residential evictions remain suspended throughout the State. The threat remains ever present that Illinois—like some

[1] *Compare* Coronavirus Resource Center, John Hopkins University & Medicine, *Daily confirmed new cases (3-day moving average): Illinois*, https://coronavirus.jhu.edu/data/new-cases-50-states/illinois (showing significant decline in new COVID-19 cases in Illinois since peak in mid-May), *with id. Daily confirmed new cases (3-day moving average)*, https://coronavirus.jhu.edu/data/new-cases-50-states (showing significant increases in new COVID-19 cases in states like Arizona, Florida, South Carolina, and Texas). All internet resources were last visited on July 5, 2020. The Court may take judicial notice of this and other external information cited in this brief as they are facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201(b)(2).

of its neighbors—will also see a resurgence of the virus if it does not carefully monitor the effects of these public health measures.

Rather than wait for the Governor to take further actions with respect to residential evictions, Plaintiffs are seeking emergency relief to enjoin enforcement of the portion of the Governor's Executive Order 2020-44 that temporarily suspends residential evictions. Plaintiffs are three residential landlords who own properties in Bolingbrook, Rockford, and University Park. Complaint ¶¶ 9–20. Two of them wish to commence eviction proceedings against tenants who have fallen behind on rent, *id.* ¶¶ 9–14, while the other would like to enforce an eviction order it obtained from this Court in early March, *id.* ¶¶ 15–20.

The Court should deny Plaintiffs' motion. Their "emergency" request comes nearly 100 days after the Governor first suspended residential evictions and fails to satisfy the exacting standards governing the drastic remedy they seek. Plaintiffs are unlikely to succeed on the merits of their claims and have not shown they are suffering irreparable harm. Nor have they shown the balance of equities favors an injunction. If residential evictions were to resume, the consequences would be devastating for communities and tenants who have been hit hardest by COVID-19. Being evicted is a stressful event that can lead to poor health outcomes. The eviction process, and the search for new housing, require numerous physical interactions during which the virus has an opportunity to spread. And because many residents who rent are also employed by bars and restaurants, the hospitality industry, retail, and other nonessential businesses where large gatherings take place for an extended period of time, suspending evictions is necessary to ensure those businesses can continue to operate safely while supporting the health of their employees and customers. Further, the Governor has announced he intends to suspend residential evictions for just a few more weeks until an emergency rental assistance program begins

providing help to affected tenants (and their landlords) in August. An injunction would provide minimal benefit to Plaintiffs while threatening to reverse much of the progress Illinois has made in its fight against COVID-19. The law does not require this tragic result.

BACKGROUND

The COVID-19 Pandemic Ravages the World.

COVID-19 is a novel severe acute respiratory illness that spreads easily through respiratory transmission, including by asymptomatic individuals.[2] The virus has infected more than 10 million people all over the world and claimed the lives of hundreds of thousands.[3] As of today, 147,251 people have been infected in Illinois, and 7,020 have died.[4]

For months, millions of Americans, including Illinois residents, have fought to abate the virus by staying home, tempering its spread and reducing the estimated death toll. The pandemic has caused substantial disruption to the national economy. In May, the unemployment rate was about 15 percent in both the State as a whole and Will County, and approached 20 percent in the Rockford area and parts of southern Illinois.[5] Food insecurity levels have at least doubled since the pandemic began—meaning more families are worried about having enough food or, in the worst cases, pass a day without eating.[6] People who rent are particularly likely to suffer the

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[2] Illinois Department of Public Health, *About COVID-19*, https://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/symptoms-treatment; Centers for Disease Control ("CDC"), *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

[3] Coronavirus Resource Center, John Hopkins University & Medicine, *COVID-19 Dashboard*, https://coronavirus.jhu.edu/map.html.

[4] State of Illinois, *Coronavirus (COVID-19) Response*, https://coronavirus.illinois.gov/s/.

[5] Illinois Department of Employment Security, *Illinois Unemployment Rate by County*, https://www2.illinois.gov/ides/LMI/Local%20Area%20Unemployment%20Statistics%20LAUS/countymap.pdf.

[6] Diane Schanzenbach & Abigail Pitts, *Food Insecurity in the Census Household Pulse Survey Data Tables* (June 1, 2020), https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-1-june-2020.pdf.

harmful consequences of COVID-19: nearly 50 million Americans live in a renter household that is likely to experience an immediate job or income loss because of the pandemic, including 7.1 million who were already struggling to make ends meet.[7]

The threat of the virus has not passed, and there remains no vaccine or treatment available for COVID-19, or evidence that recovered individuals are immune to a second infection.[8] Given these dangers, the CDC urges Americans not to "gather in groups" and to "wear a cloth face cover when they have to go out in public"[9] because "the virus can spread between people interacting in close proximity—for example, speaking, coughing, or sneezing—even if those people are not exhibiting symptoms."[10]

The Governor Takes Action to Protect the State.

Faced with this unprecedented and ongoing public health emergency, on March 9 the Governor proclaimed the COVID-19 pandemic to be a "disaster" within the meaning of the Illinois Emergency Management Agency Act, 20 ILCS 3305 *et seq.* ("Emergency Management Act"). Complaint Exhibit E. Section 4 of the Emergency Management Act defines a "disaster" to be "an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause," including (as relevant here) both an "epidemic" and "public health emergencies." Section 7, in turn, provides that, "[i]n the event of a

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[7] Elizabeth Kneebone & Cecile Murray, *Estimating COVID-19's Near-Term Impact on Renters* (Apr. 24, 2020), https://ternercenter.berkeley.edu/blog/estimating-covid-19-impact-renters.

[8] CDC, *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html; CDC, *How to Protect Yourself & Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[9] CDC, *How to Protect Yourself & Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[10] CDC, *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

disaster, as defined in Section 4, the Governor may, by proclamation declare that a disaster exists" and, "[u]pon such proclamation . . . shall have and may exercise for a period not to exceed 30 days the following emergency powers." Among other things, these emergency powers authorize the Governor:

- "To utilize all available resources of the State government as reasonably necessary to cope with the disaster and of each political subdivision of the State," 20 ILCS 3305/7(2);
- "To control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein," *id.* § 7(8);
- "To make provision for the availability and use of temporary emergency housing," *id.* § 7(10); and
- "Control, restrict, and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, clothing and other commodities, materials, goods, or services; and perform and exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population," *id.* § 7(12).

After proclaiming the COVID-19 pandemic to be a disaster on March 9, the Governor exercised his powers made available under the Emergency Management Act to issue a series of executive orders to stop the spread of COVID-19, protect the public, and enhance the availability of treatment.[11] Among these was Executive Order 2020-10, issued on March 20, which provided in Section 2 that "all state, county, and local law enforcement officers in the State of Illinois are instructed to cease enforcement of orders of eviction for residential premises for the duration of the Gubernatorial Disaster Proclamation." Complaint Exhibit F. The order further provided that it should not "be construed as relieving any individual of the obligation to pay rent, to make mortgage payments, or to comply with any other obligation that an individual may have under tenancy or mortgage." *Id.*

[11] The Governor's proclamations and executive orders relating to COVID-19 are available at https://coronavirus.illinois.gov/s/resources-for-executive-orders.

On April 1, the Governor issued a proclamation declaring the COVID-19 pandemic remained a disaster within the meaning of the Emergency Management Act. Complaint Exhibit E. This authorized him to exercise emergency powers under the statute for an additional 30 days. On the same day, the Governor exercised those emergency powers to issue Executive Order 2020-18, which (among other things) extended through April 30 the provisions of Executive Order 2020-10 requiring law enforcement officers to cease enforcement of residential eviction orders. Complaint Exhibit F. On April 23, the Governor issued Executive Order 2020-30, which in Section 2 added an additional requirement applicable directly to landlords: "A person or entity may not commence a residential eviction action pursuant to or arising under 735 ILCS 5/9-101 et seq., unless a tenant poses a direct threat to the health and safety of other tenants, an immediate and severe risk to property, or a violation of any applicable building code, health ordinance, or similar regulation." *Id.*

On April 30, May 29, and June 26, the Governor issued proclamations declaring the COVID-19 pandemic a disaster. Complaint Exhibit E.[12] As a result, he was authorized to exercise powers under the Emergency Management Act for 30 days after each proclamation. On those same dates the Governor issued, respectively, Executive Order 2020-33, Executive Order 2020-39 ("EO39"), and Executive Order 2020-44 ("EO44"), each of which extended for 30 days the two provisions discussed above: one forbidding landlords to seek residential eviction orders, and the other forbidding law enforcement officers to enforce them. Complaint Exhibit F.[13] In each case, however, there is an exception where "the tenant has been found to pose a direct threat to the health and safety of other tenants, an immediate and severe risk to property, or a violation

[12] The June 26 proclamation is attached to this memorandum as Exhibit 1.

[13] EO44 is attached to this memorandum as Exhibit 2.

of any applicable building code, health ordinance, or similar regulation." *Id.*; Exhibit 2. EO44, which is currently in effect, will expire on July 26. Exhibit 2.

Suspending residential evictions has played a crucial role in the Governor's successful strategy to combat and contain the COVID-19 pandemic. Because the disease is highly contagious and can be spread by asymptomatic people who do not know they are infected, the key preventive measure is to minimize physical interactions between people who do not reside in the same household. The Governor's COVID-19 measures have implemented this public health guidance—for example, by requiring residents to remain in their homes except to engage in essential activities and limiting nonessential business operations.

The executive orders suspending residential evictions are no exception. The process of being evicted and searching for new housing requires numerous interactions with people outside one's household—law enforcement officers, courtroom personnel, realtors, landlords, movers, friends and family who agree to provide temporary housing, and so forth. Each of these interactions carries with it an unnecessary risk of spreading COVID-19. The very act of being evicted—or even having a proceeding initiated—can cause stress and lead to poor health outcomes or exacerbate existing ones. At worst, a person who is evicted may become homeless and forced to take refuge in a shelter, on the streets, or in a car—which puts that person at even greater risk of catching the virus and spreading it to others.[14] As the Governor explained in his June 26 proclamation, "the economic loss and insecurity caused by COVID-19 threatens the viability of business and the access to housing, medical care, food, and other critical resources

[14] *See generally* National Alliance to End Homelessness, *Coronavirus and Homelessness*, https://endhomelessness.org/coronavirus-and-homelessness/?gclid=EAIaIQobChMI9bLE-9Cd6gIVkcDACh16Mwt1EAAYASAAEgK16vD_BwE ("People experiencing homelessness are uniquely vulnerable to contracting COVID-19, and to experiencing harsher effects of the virus.").

that directly impact the health and safety of residents." Exhibit 1. Our communities are safer because residential evictions have not been occurring for the past three months.

Residential evictions remain suspended even though the Governor lifted his "stay at home" order on May 29, allowing residents to venture out for any purpose so long as they practice social distancing, wear a face covering, and limit the size of their gatherings. Complaint Exhibit F. That's because the Governor did not suspend residential evictions solely to allow affected tenants to "stay at home." The suspension also furthers the public health goal of limiting unnecessary physical interactions, which continues to animate the Governor's response to the COVID-19 pandemic. In addition, it furthers the public health goal of reducing the particular risks associated with homelessness. And finally, it furthers the public health goal of ensuring a smooth transition to "normalcy" for vulnerable tenants whose health or finances have been particularly affected by the pandemic. Starting in August, approximately 30,000 Illinois renters "who are disproportionately impacted by the pandemic" will be able to access a State program offering "$5,000 grants to provide emergency rental assistance." Complaint Exhibit H. To ensure these tenants—and their landlords—have an opportunity to benefit from the program, the Governor has announced residential evictions will remain suspended through July 31. *Id.*

COVID-19 cases declined from their mid-May peak in Illinois as a result of the Governor's decisive actions that reflect the consensus public health guidance. But it would be a mistake to conclude that restrictions are no longer necessary. The State's progress is tremendous yet fragile; a careless approach to reopening could spark a new outbreak and undo three months of sacrifice by residents and businesses across Illinois. As the Governor noted in his June 26 proclamation, "although the number of new COVID-19 cases has decreased in recent weeks, the virus continues to infect thousands of individuals and claim the lives of too many Illinoisans

each day"—and "while the precautions taken by Illinoisans have led to a steep decline in the number of COVID-19 cases and deaths in the State in recent weeks, other states that have resisted taking public health precautions or that lifted those precautions earlier are now experiencing exponential growth and record high numbers of cases." Exhibit 1. The current COVID-19 restrictions reflect the Governor's determination—based on science and public health guidance—that residents and businesses must resume activities safely and cautiously to ensure there is no backslide on the progress the State has made.

Plaintiffs' Challenges to the Governor's Authority.

Plaintiffs are three residential landlords who own properties in Bolingbrook, Rockford, and University Park. Complaint ¶¶ 9–20. Two of them wish to commence eviction proceedings against tenants who have fallen behind on rent, *id.* ¶¶ 9–14, while the other would like to enforce an eviction order obtained from this Court in early March, *id.* ¶¶ 15–20. The Governor's executive orders prevent them from taking these actions. *Id.* ¶ 21.

Plaintiffs assert ten claims against the Governor. Counts I through IV challenge his authority under the Emergency Management Act to suspend residential evictions. Counts V through X assert that suspending residential evictions violates the Jury Trial, Certain Remedy, Equal Protection, Due Process, Takings, and Contract clauses of the Illinois Constitution.

LEGAL STANDARD

Plaintiffs seek both a temporary restraining order ("TRO") and a preliminary injunction, which "require the same elements of proof." *Cty. of Boone v. Plote Constr., Inc.*, 2017 IL App (2d) 160184 ¶ 28; *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007); *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664 (5th Dist. 1993). A TRO is "an extraordinary remedy and the party seeking it must meet the high burden of demonstrating, through well-pled

facts, that it is entitled to the relief sought." *Capstone Fin. Advisors, Inc. v. Plywaczynski*, 2015 IL App (2d) 150957 ¶ 10. A preliminary injunction is likewise an "extraordinary" remedy that "should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction was not issued." *Clinton Landfill, Inc. v. Mahomet Valley Water Auth.*, 406 Ill. App. 3d 374, 378 (4th Dist. 2010). A party seeking either a TRO or a preliminary injunction must demonstrate (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006); *Cty. of DuPage v. Gavrilos*, 359 Ill. App. 3d 629, 634 (2d Dist. 2005).

And given that "[a] temporary restraining order issued with notice and a preliminary injunction issued with notice are the same type of relief and, whether referred to under either term, require the same elements of proof," *Jacob*, 248 Ill. App. 3d at 664, even if Plaintiffs are able to carry this tremendous burden, they must also make a fifth and final showing: "the benefits of granting the injunction outweigh the possible injury that the [State] might suffer as a result thereof," *Gannett Outdoor of Chi. v. Baise*, 163 Ill. App. 3d 717, 721 (1st Dist. 1987). "In balancing the equities, the trial court should consider the injunction's effect on the public interest." *Makindu v. Ill. High Sch. Ass'n*, 2015 IL App (2d) 141201 ¶ 47; *see Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334 ¶ 37. "It is elemental that the court is obliged to consider the injury or inconvenience which may result to the defendant (especially where the defendant is a public body) or the public in general if the injunction is granted." *G.H. Sternberg & Co. v. Cellini*, 16 Ill. App. 3d 1, 6 (5th Dist. 1973).

ARGUMENT

Plaintiffs move the Court to enjoin enforcement of the portion of EO44 that suspends residential evictions. Motion at 2.[15] The Court should deny the motion for three independent reasons. *First*, Plaintiffs are unlikely to succeed on the merits. *Second*, Plaintiffs have not shown they will suffer irreparable harm in the absence of an injunction. *Third*, in the improbable event Plaintiffs could establish a likelihood of success on the merits and irreparable harm, denying their motion is still warranted because an injunction would significantly harm the public interest.

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims.

A. *The Emergency Management Act Authorizes the Governor to Suspend Residential Evictions.*

Counts I through IV assert various claims that share a common but erroneous premise—that on June 26 the Governor lacked statutory authority to issue EO44, which suspended residential evictions through July 26. To the contrary, the Governor's powers under the Emergency Management Act are currently in effect because on June 26 he proclaimed the COVID-19 pandemic to be a disaster. Those powers undoubtedly authorize him to suspend residential evictions, regardless of whether Plaintiffs believe it to be necessary. Plaintiffs therefore have no likelihood of succeeding on the merits of these claims.

1. <u>The Governor's Authority to Issue EO44 Derives from the Emergency Management Act, not His "Stay at Home" Orders.</u>

Plaintiffs first assert in Count I that because the Governor's prior "stay at home" orders are no longer in effect, his current order suspending residential evictions is "therefore illegal and the result of *ultra vires* conduct." Complaint ¶ 59. The mistaken assumption embedded in

[15] Plaintiffs also seek to enjoin EO39, which was in effect when this suit was filed. That request is moot because EO39 expired by its own terms on June 27 and is no longer in effect. Complaint Exhibit F.

Plaintiffs' reasoning is that the suspension of residential evictions is "based upon the mandate that Illinois citizens shelter in place." *Id.* This is not true as either a legal or factual matter.

The Governor's authority to suspend residential evictions derives from his powers under the Emergency Management Act, not his "stay at home" orders. The Emergency Management Act specifies how those powers are made available to the Governor:

> In the event of a disaster, as defined in Section 4, the Governor may, by proclamation declare that a disaster exists. Upon such proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers . . . .

20 ILCS 3305/7. As the plain language makes clear, the Governor is authorized to exercise defined powers under the Emergency Management Act for 30 days each time he declares by proclamation that a disaster exists. And as numerous courts have recently confirmed, the Governor is not limited to one proclamation per disaster but rather may issue successive proclamations—and exercise powers under the Emergency Management Act for additional 30-day periods—so long as a disaster continues to exist. *See Edwardsville / Glen Carbon Chamber of Commerce v. Pritzker*, No. 20-MR-550, slip op. at 6–8 (Ill. 3d Jud. Cir. Ct. June 5, 2020), attached as Exhibit 3; *Running Central, Inc. v. Pritzker*, No. 2020 CH 105, slip op. at 4–5 (Ill. 7th Jud. Cir. Ct. May 21, 2020), attached as Exhibit 4; *Mahwikizi v. Pritzker*, No. 20 C 04089, slip op. ¶¶ 21–27 (Ill. Cook Cty. Cir. Ct. May 8, 2020), attached as Exhibit 5; *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *13–*14 (N.D. Ill. May 3, 2020), attached as Exhibit 6.[16]

[16] One judge has ruled against the Governor's position, most recently in a nonfinal summary judgment order that contains no written reasoning. *See Bailey v. Pritzker*, No. 2020-CH-06 (Ill. 4th Jud. Cir. Ct. July 2, 2020), attached as Exhibit 7. The judge did not allow the Governor to file a brief in opposition to the motion for summary judgment or follow the court's own rules regarding notice requirements. Previously, the same judge enjoined the Governor by temporary restraining orders also issued without written reasoning and promptly vacated because plaintiffs declined to defend them on appeal. *Mainer v. Pritzker*, 2020 IL App (5th) 200163-U; *Bailey v. Pritzker*, 2020 IL App (5th) 200148-U.

The Governor issued a proclamation on June 26 declaring the COVID-19 pandemic to be a disaster within the meaning of the Emergency Management Act. The statute defines "disaster" to include, among other things, both an "epidemic" and "public health emergencies." 20 ILCS 3305/4. The Governor cited numerous facts in the proclamation to justify his determination that the COVID-19 pandemic was both an epidemic and a public health emergency, *see* Exhibit 1, none of which Plaintiffs dispute, *see* Complaint ¶ 1 (recognizing COVID-19 has caused "significant loss of life and fundamental change to both world and national economies" and "has turned the world upside-down"). As a result of the June 26 proclamation, the Governor was authorized to exercise powers under the Emergency Management Act for a period of 30 days through July 26. He therefore was acting pursuant to those broad powers when he issued EO44 on June 26.

Plaintiffs suggest the Governor may not exercise his powers under the Emergency Management Act unless he first points to some "existing legal or public health reason" justifying the specific actions he proposes to take. Complaint ¶ 61. The statute contains no such limitation on the Governor's powers. "It is a cardinal rule of statutory construction that [a court] cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009). Further, courts have "nothing to do with the wisdom or expediency of the measures adopted" to protect public health, "and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review." *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 427 (1922). And even though the Act does not require the Governor to specify the "existing legal or public health reason" justifying the specific actions he proposes to take, Complaint ¶ 61, the Governor has done just that each time he has issued a disaster proclamation

and executive orders under the Act.[17] In any event, the Court should decline Plaintiffs' invitation to circumscribe the Governor's powers contrary to the General Assembly's intent.

2. The Powers Made Available to the Governor Under the Emergency Management Act Authorize Him to Suspend Residential Evictions.

Plaintiffs' second charge is that the Emergency Management Act does not authorize the Governor to suspend residential evictions. Their argument proceeds in two parts. First, they contend in Count II that suspending residential evictions does not fall within any of the powers defined in Section 7 of the statute. *See* 20 ILCS 3305/7(1)–(14). Second, and in the alternative, they contend in Count III that suspending residential evictions does not satisfy the requirements of Section 7(4), which authorizes the Governor "to take possession of and for a limited period occupy and use any real estate" but only "upon the undertaking by the State to pay just compensation." *Id.* § 7(4). Both arguments fail. The Governor's actions were authorized by Sections 7(2), (8), (10), and (12) of the Emergency Act; Section 7(4), on the other hand, does not apply because the Governor has not taken possession of Plaintiffs' properties.

The Emergency Management Act provides the Governor with expansive powers. As relevant here, during a disaster he is authorized:

- "To utilize all available resources of the State government as reasonably necessary to cope with the disaster and of each political subdivision of the State," 20 ILCS 3305/7(2);
- "To control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein," *id.* § 7(8);
- "To make provision for the availability and use of temporary emergency housing," *id.* § 7(10); and
- "Control, restrict, and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, clothing and other commodities, materials, goods, or services; and ***perform***

[17] Plaintiffs are also wrong on the facts. The background section of this brief explains why the Governor chose to continue suspending residential evictions even while lifting the "stay at home" orders.

> ***and exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population***," *id.* § 7(12) (emphasis added).

"The fundamental rule of statutory interpretation is to ascertain and give effect to the legislature's intent, and the best indicator of that intent is the statutory language, given its plain and ordinary meaning." *Dew-Becker v. Wu*, 2020 IL 124472 ¶ 12. When the General Assembly uses broad language, courts must give that language broad effect. *E.g., Christine A.T. v. H.T.*, 326 Ill. App. 3d 569, 573–74 (3d Dist. 2001); *Am. Garden Homes, Inc. v. Gelbart Fur Dressing*, 238 Ill. App. 3d 64, 67 (1st Dist. 1992). Here, the General Assembly used exceedingly broad language that specifically authorizes the Governor to control "the occupancy of premises" within a disaster area, 20 ILCS 3305/7(8), and "make provision for the availability and use of temporary emergency housing," *id.* § 7(10). In additional, the General Assembly generally authorized the Governor during disasters to employ "all available resources of the State government," *id.* § 7(2), and take all steps "necessary to promote and secure the safety and protection of the civilian population," *id.* § 7(12). These powers are sufficiently broad to allow the Governor to suspend residential evictions while a disaster exists in the State, and Plaintiffs have not developed any argument to support their conclusory assertion that the General Assembly's broad language means something other than what it plainly says. *See* Motion at 10–11.

Rather, Plaintiffs pivot to an additional argument. They contend in Count III that regardless of whether the Governor's actions were authorized by another section of the Emergency Management Act, they should be subjected to the limitations imposed on the Governor's powers under Section 7(4), which authorizes him "to take possession of and for a limited period occupy and use any real estate" but only "upon the undertaking by the State to pay just compensation." This assertion fails for two independent reasons.

First, the Governor has not possessed or occupied Plaintiffs' property. "The term 'possessor' with respect to possession of land is defined in the *Restatement* as 'a person who is in ***occupation*** of the land with intent to control it.' The two requirements under that subsection are ***occupation*** and intent to control the land, as opposed to the activities or individuals thereon." *Hanna v. Creative Designers, Inc.*, 2016 IL App (1st) 143727 ¶ 21 (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 328E (defining "possessor of land" to be "(a) a person who is in ***occupation*** of the land with intent to control it or (b) a person who has been in ***occupation*** of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate ***occupation*** of the land, if no other person is in possession under Clauses (a) and (b)") (emphasis added)); *see also* RESTATEMENT (FIRST) OF PROPERTY § 7 ("A possessory interest in land exists in a person who has (a) a ***physical relation to the land*** of a kind which gives a certain degree of ***physical control over the land***, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land; or (b) interests in the land which are substantially identical with those arising when the elements stated in Clause (a) exist."), cited approvingly in *Madden v. F.H. Paschen/S.N. Nielson, Inc.*, 395 Ill. App. 3d 362, 375–76 (1st Dist. 2009).[18]

These authorities establish that ***occupation*** of land is an essential component of possession. Occupation of land means "'***actual*** possession, residence, or tenancy'" and "'denotes whatever acts are ***done on the land*** to manifest a claim of exclusive control and to indicate to the public that the actor has appropriated the land,'" for example, "'erecting and maintaining a

[18] *See also Le Sourd v. Edwards*, 236 Ill. 169, 173 (1908) (party exercised possession over flooded property by tying 20 fish traps to trees); *Swisher v. Janes*, 239 Ill. App. 3d 786, 791–92 (4th Dist. 1992) (party acquired possession of property by obtaining keys to and cleaning house); *compare Nationwide Fin., LP v. Pobuda*, 2014 IL 116717 ¶ 29 (defining easement as "a right or privilege in the real estate of another" that is "a nonpossessory interest").

substantial enclosure.'" *O'Connell v. Turner Constr. Co.*, 409 Ill. App. 3d 819, 824 (1st Dist. 2011) (quoting BLACK'S LAW DICTIONARY). Plaintiffs do not allege the Governor or anyone acting on behalf of the State has ever set foot on their land, much less performed any acts to manifest exclusive control. This is fatal to their assertion that the Governor's suspension of residential evictions amounts to possession or occupation. Possession and occupation of land require ***physical control of***, and acts of dominion ***to be performed on***, the subject property.[19]

Plaintiffs' argument fails for a second reason: when the Governor suspended residential evictions, he did not act pursuant to Section 7(4) of the Emergency Management Act, but rather pursuant to Sections 7(2), (8), (10), and (12). What Plaintiffs ask the Court to do is rewrite the statute so the limitation the General Assembly imposed in Section 7(4) also applies to other sections where the General Assembly did not include such a limitation. "No rule of construction authorizes [a] court to declare that the legislature did not mean what the plain language of the statute imports, nor may [a court] rewrite a statute to add provisions or limitations the legislature did not include." *People v. Smith*, 2016 IL 119659 ¶ 28. "Where, as here, the legislature uses certain language in some instances and wholly different language in another, settled rules of statutory construction require [a court] to assume different meanings or results were intended." *Ill. State Treasurer v. Ill. Workers' Comp. Comm'n*, 2015 IL 117418 ¶ 28. Because Plaintiffs' argument ignores these basic principles of statutory interpretation, it has no likelihood of success.

[19] In fact, Plaintiffs' complaint makes clear it is their ***tenants*** who currently possess and occupy their properties; that is why Plaintiffs want the Court to enjoin the Governor from enforcing EO44 (so they can evict those tenants and regain possession themselves). Complaint ¶¶ 9–20.

3. There Is No Violation of the "Separation of Powers" Doctrine Because the Governor's Actions are Authorized by Statute.

Plaintiffs contend in Count IV that the Governor's suspension of residential evictions offends the "separation of powers" doctrine found in Article II, Section 1 of the Illinois Constitution. They insist "the regulation of evictions and access to the courts is solely within the province of the legislature." Motion at 11. Regardless of whether this is true (and Plaintiffs cite no authority in support of their conclusory assertion), the General Assembly possesses the "ability to pass any law on any given subject," *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 348–50 (1st Dist. 2007), and through those laws "may authorize others to do many things which it might properly but cannot understandingly or advantageously do itself," *People ex rel. Chi. Dryer Co. v. City of Chicago*, 413 Ill. 315, 320 (1952). Here, the General Assembly enacted the Emergency Management Act, which authorizes the Governor to exercise broad powers during a disaster—including the power to suspend residential evictions. "[I]t is not only the power but the duty of the Legislature to enact such laws" as the Emergency Management Act that "are reasonably necessary to the preservation and promotion of the health and welfare of the people." *People v. Anderson*, 355 Ill. 289, 296 (1934).

As for the Governor, he is constitutionally "responsible for the faithful execution" of that statute, ILL. CONST. Art. V, § 8, which he has done by proclaiming the existence of a disaster and issuing EO44. This authority was properly vested in the Governor by the General Assembly and therefore does not offend the "separation of powers" doctrine. *See, e.g., People ex rel. Henry*

Marble Co. v. Nudelman, 374 Ill. 280, 285 (1940) (no violation where General Assembly appropriated funds subject to Governor's approval of particular payments).[20]

Plaintiffs' argument reduces to the proposition that the Governor's actions exceed the authority the General Assembly granted him in the Emergency Management Act. Motion at 11 (arguing violation occurs because statute "does not grant authority to the Governor to prohibit filing of legal action"). This is simply a retread of the same arguments about the Governor's statutory authority already refuted above. It too has no likelihood of success.

B. *The Governor's Actions Are Lawful Under the Illinois Constitution*

Counts V through X assert various claims arising under the Illinois Constitution. Plaintiffs have no likelihood of succeeding on these claims for two independent reasons. *First*, their rights under the Illinois Constitution must yield to the Governor's emergency measures to address the COVID-19 public health crisis. *Second*, the Governor's suspension of residential evictions does not violate any of Plaintiffs' constitutional rights.

1. Plaintiffs' Constitutional Rights Must Yield to the State's Emergency Measures to Address a Public Health Crisis.

Because the Governor's actions are designed to promote the public health and halt the spread of a deadly disease during a global pandemic of unprecedented magnitude, any infringement of Plaintiffs' constitutional rights would not be actionable. "The state has the inherent power, which may be exercised by the Legislature by way of legislative enactment, to place such restraint upon private rights as may be deemed necessary to preserve or improve the health and comfort of the people and the welfare of society. This power is generally called the

[20] Nor did the Governor infringe on the judicial power by requiring landlords to delay commencing eviction proceedings. *See Davidson v. Davidson*, 243 Ill. App. 3d 537, 538–39 (1st Dist. 1993) (judicial power not infringed by requiring courts to give preference to senior citizens when setting trial dates).

police power. The Legislature may, in the exercise of this power, enact laws not only regulating and restraining, but also prohibiting, those things which are harmful to the well-being of the people; and ***this is true even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual***. . . . Neither the Fourteenth Amendment to the Federal Constitution ***nor any provision of our State Constitution*** was designed to interfere with the police power of the state to enact and enforce laws for the protection of the health, peace, morals, and general welfare of the people." *Anderson*, 355 Ill. at 295–96; *see Perrine v. Charles T. Bisch & Son*, 346 Ill. App. 321, 328 (3d Dist. 1952) (same). "It has been almost universally held in this country that the ***constitutional guaranties***, including the prohibition of deprivation of property without due process, ***must yield to the statutes and ordinances designed to promote the public health*** as a part of the police powers of the State." *Spalding v. Granite City*, 415 Ill. 274, 278–79 (1953) (emphasis added). Courts "will not interfere with the exercise of this power except where the regulations adopted . . . are arbitrary, oppressive and unreasonable." *Barmore*, 302 Ill. at 427.

This principle of Illinois law is mirrored in federal law. *See, e.g., In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020) ("[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail [federal] 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.'") (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). During the recent pandemic, the federal principle has been applied "repeatedly . . . to uphold stay-at-home orders meant to check the spread of COVID-19" against constitutional challenges. *Cassell*, 2020 WL 2112374, at *6 (citing cases). Three judges specifically ruled that federal constitutional rights must yield to the restrictions imposed in the Governor's prior executive orders because the pandemic is a "public

health crisis" that "continues to threaten the residents of Illinois" "and because [requiring residents to stay at home] undoubtedly advance[ ] the government's interest in protecting Illinoisans from the pandemic." *Id.* at *7; *see Ill. Republican Party v. Pritzker*, No. 20 C 3489, 2020 WL 3604106, at *3–*4 (N.D. Ill. July 2, 2020), attached as Exhibit 8 (same); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at *3 (N.D. Ill. May 13, 2020), attached as Exhibit 9 (same). Consistent with the "the 'limited lockstep' approach for interpreting cognate provisions of our state and federal constitutions," *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673 ¶ 47, the Court should follow these federal authorities and find the continued suspension of residential evictions advances the State's interest in protecting residents against the spread of a deadly disease and therefore Plaintiffs' challenges under the Illinois Constitution are not actionable.

2. The Governor Did Not Violate Plaintiffs' Rights to a Jury Trial or a Certain Remedy.

In Counts V and VI of the Complaint, Plaintiffs allege their state constitutional rights to a jury trial and a "certain remedy" have been violated by the Governor's suspending residential evictions. They insist the "right to a civil jury trial is violated when, because of a denial or suspension, an individual is not afforded, for any significant period of time, a jury trial he or she would otherwise receive." Complaint ¶ 102. They also contend the Illinois Constitution grants them a right to a remedy for their tenants' breaches. *Id.* ¶ 111. Plaintiffs are unlikely to succeed on these claims because their rights have not been diminished or abolished but rather have been suspended only ***temporarily***.

Article I, Section 12 of the Illinois Constitution provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation . . . freely, completely, and promptly." ILL. CONST. Art. I, § 12. The

Supreme Court "has repeatedly held that the remedy and justice provision of the Illinois Constitution of 1970 is merely an expression of a philosophy and ***not a mandate*** that a certain remedy be provided in any specific form." *Behrens v. Harrah's Ill. Corp.*, 366 Ill. App. 3d 1154, 1159 (3d Dist. 2006) (emphasis added). Indeed, "[t]he provision was not meant to have a substantive effect on Illinois law." *Id.* Instead, it is meant only to fill in any gaps for various causes of actions not accounted for through statute or at common law.

Here, Plaintiffs are afforded a remedy through statute. Article IX of the Code of Civil Procedure governs eviction proceedings. Plaintiffs' attempt to invoke the Certain Remedy Clause of the Illinois Constitution grasps at straws because that statute ***does*** provide a specific statutory remedy for landlords. This remedy has not been diminished or abolished but simply suspended temporarily in light of the pandemic. Accordingly, Plaintiffs cannot establish a violation of the Certain Remedy Clause. *See Teachers Ins. & Annuity Ass'n of Am. vs. LaSalle Nat'l Bank*, 295 Ill. App. 3d 61, 73 (2d Dist. 2005) (noting State has "broad discretion to determine whether [an action] that restricts or alters an existing remedy is reasonably necessary to promote the general welfare"); *see also Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444–46 (1934) (holding state legislation may impair a remedy in times of social, economic, or health crises).

As for Plaintiffs' right to a jury trial, Article I, Section 13 of the Illinois Constitution provides that right "as heretofore enjoyed shall remain inviolate." "This provision guarantees the right to a jury trial in actions that carried such a right under the common law when the Illinois Constitution was adopted." *Catania v. Local 4250/5050 of Commc'ns Workers of Am.*, 359 Ill. App. 3d 718, 722 (1st Dist. 2005). "In all other actions, there is no right to a jury trial unless the legislature specifically so provides by statute." *Id.*

Plaintiffs allege they are entitled to a jury trial both by statute and by common law. However, again, Plaintiffs cannot allege their right to a jury trial has been diminished or abolished in any way. Rather, they maintain that, for a period of three months, they have been unable to initiate an eviction action or enforce an eviction order. Motion at 12. The right to a jury trial in an eviction action has not been removed or substantially altered by the Governor's suspension orders. Rather, this particular remedy merely has been suspended. *See Town of Cheney's Grove v. VanScoyoc*, 357 Ill. 52, 60 (1934) (holding that only state action that diminishes or deprives a remedy constitutes impermissible state action). Further, because one of the Plaintiffs, Steven Cole, has already obtained an eviction order, he would not even have the ability to pursue a right to a jury trial given that, according to the Complaint, such proceedings have already appeared to have ended. *See* Complaint ¶ 16; Motion at 3. Accordingly, Plaintiffs cannot establish a violation of their constitutional right to a trial by jury.

3. The Governor Did Not Violate Plaintiffs' Rights to Equal Protection or Due Process.

Plaintiffs next contend in Count VII that the Governor violated their equal protection rights. They claim the Governor's actions implicate their fundamental rights to a certain remedy and a jury trial under Article I, Sections 12 and 13 of the Illinois Constitution. Complaint ¶ 117. They argue the Governor's suspension of residential evictions treats landlords differently than similarly situated groups like mortgagees, condominium associations, and property owners confronted by a trespasser. *Id.* ¶¶ 121–26. These claims are unlikely to succeed for three reasons.

First, the Equal Protection Clause of the Illinois Constitution is interpreted in lockstep with its federal counterpart, *Hope Clinic*, 2013 IL 112673 ¶ 92, and federal courts routinely reject equal protection claims like Plaintiffs', which merely repackage an argument the Governor violated more specific constitutional provisions set forth elsewhere, *e.g., Conyers v. Abitz*, 416

F.3d 580, 586 (7th Cir. 2005) (First Amendment free exercise); *Holman v. Page*, 95 F.3d 481, 485–86 (7th Cir. 1996) (Eighth Amendment cruel and unusual punishment), *overruled on other grounds, Owens v. United States*, 387 F.3d 607 (7th Cir. 2004); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (Takings Clause); *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984) (Fourth Amendment seizure). Equal protection claims of this nature must be evaluated under the standards applicable to the specific constitutional provisions at issue—here the rights to a jury trial and a certain remedy—and the analysis "gains nothing by [attaching] additional constitutional labels" like "equal protection." *Conyers*, 416 F.3d at 586.

Second, Plaintiffs JL Properties Group B LLC and Mark Dauenbaugh, who wish to obtain eviction orders against their tenants, are unlikely to succeed on the merits of their equal protection claims. "A threshold matter in addressing an equal protection claim is determining whether the individual claiming an equal protection violation is similarly situated to the comparison group." *In re M.A.*, 2015 IL 118049 ¶ 25. "Two classes are similarly situated only when they are in all relevant respects alike." *In re Destiny P.*, 2017 IL 120796 ¶ 15. "When a party bringing an equal protection claim fails to show that he is similarly situated to the comparison group, his equal protection challenge fails." *M.A.*, 2015 IL 118049 ¶ 26.

JL Properties and Dauenbaugh insist they are similarly situated to two other groups of property owners—mortgagors in foreclosure actions and plaintiffs in ejectment actions. Motion at 13.[21] Plaintiffs argue they alone are forbidden to obtain possession of their property under the Governor's executive orders, which bar the commencement of eviction proceedings under

[21] JL Properties and Dauenbaugh are wrong to claim EO44 does not bar mobile home obligees and condominium associations from commencing evictions. Complaint ¶¶ 125–26 (referencing 735 ILCS 5/19-129 and 765 ILCS 605/9.2). Both of the referenced statutes allow the respective property owners to maintain eviction actions but require them to follow the procedures of Article IX of the Code of Civil Procedure, which is precisely what EO44 forbids.

Article IX of the Code of Civil Procedure (applicable to landlords) but do not bar eviction proceedings under Article XV (the Illinois Mortgage Foreclosure Law) or ejectment actions under Article VI. Aside from these conclusory assertions, Plaintiffs do not even attempt to show "they are in all relevant respects alike" the comparison groups to which they point.

The best evidence that residential landlords who wish to evict a tenant are different in material respects from Plaintiffs' comparison groups is that each of these groups was ***already*** required to pursue distinct procedures, codified in different articles of the Code of Civil Procedure, in order to achieve their separate goals under unique situations. As mentioned, evictions that occur during a foreclosure are addressed as one component of the Illinois Mortgage Foreclosure Law, which is a comprehensive set of procedures designed to respond to the complex circumstances surrounding the termination of homeownership. The process to foreclose upon a mortgagor and evict that person from his or her former home is significantly more cumbersome than the process to evict a renter who has violated a lease. That the General Assembly chose to treat mortgagor–mortgagee evictions separately from landlord–tenant evictions is conclusive evidence that the two types of property owners are not similarly situated.

As for an ejectment action, it "involves the title to land" and requires "the construction of deeds." *Dagit v. Childerson*, 391 Ill. 611, 614 (1945); *see Bulatovic v. Dobritchanin*, 252 Ill. App. 3d 122, 128 (1st Dist. 1993) (ejectment determines "which party holds legal title"). The General Assembly again chose to provide a different procedure for resolving these types of property disputes than the procedure available to landlords to evict their tenants. Because evictions and ejectments involve a different process, different requirements, and different articles of the Code of Civil Procedure, these property owners are not similarly situated.

Plaintiffs do not object to these preexisting classifications or argue that landlords must be treated the same as mortgagees or ejectment plaintiffs ***in all respects***. This is fatal to their claim. "The equal protection clause does not deny the State the power to treat different classes of persons in different ways." *People v. Lovett*, 234 Ill. App. 3d 645, 646 (3d Dist. 1992); *see M.A.*, 2015 IL 118049 ¶¶ 27–34 (sex offenders and violent offenders were not similarly situated with respect to registration requirements because each was subject to a different statute that "address[es] separate groups of offenders in a manner unique to each group"). By treating landlords different from mortgagees and ejectment plaintiffs, the Governor merely recognized the General Assembly's prior determination that these are different types of property owners who are entitled to different processes to address their particular circumstances.

There are additional, significant differences when it comes to the diverse types of people from whom these various categories of property owner would seek to oust possession. People who rent are more likely than people who own to face hardships like food insecurity, inability to pay utilities, and unmet medical needs; renters are therefore more vulnerable to COVID-19, meaning landlords are differently situated than mortgagees in the most material aspect.[22] Because JL Properties and Dauenbaugh cannot carry their burden to show "they are in all relevant respects alike" any comparison group, their equal protection claims are likely to fail.

That remains the case even in the improbable event the Court would subject the Governor's classifications to strict scrutiny. "To survive strict scrutiny in the equal protection context," the Governor's classifications "must be necessary to advance a compelling state

[22] Corianne Payton Scally & Dulce Gonzalez, *Renters are more likely than homeowners to struggle with paying for basic needs* (Oct. 31, 2018), https://www.urban.org/urban-wire/renters-are-more-likely-homeowners-struggle-paying-basic-needs; Joint Center for Housing Studies of Harvard University, *Who Can Afford the Median-Priced Home in Their Metro?*, https://www.jchs.harvard.edu/son2017-housing-affordability-table (median renter household income in Chicago metropolitan area, including Will County, is $37,450, which is 60 percent of the median household income of $63,150).

interest" and "narrowly tailored to [its] attainment." *In re R.C.*, 195 Ill. 2d 291, 309 (2001).[23] As explained above, suspending residential evictions is necessary to stop the spread of COVID-19, which undoubtedly is a compelling state interest. *See* Complaint ¶ 1 (conceding COVID-19 "has caused catastrophic and unprecedented economic damage across the globe, and with it, significant loss of life and fundamental change to both world and national economies"). The precarious position of evicted residential tenants makes them uniquely vulnerable to the disease, and subjecting those tenants to the eviction process exposes numerous others (from court personnel to social services provides to other community members as tenants search for shelter).

But the Governor's actions are not permanent. Because his goal was to protect the most vulnerable Illinois residents and their communities from unnecessary exposure to a deadly disease during the height of a statewide pandemic, and because eviction proceedings move with

[23] *Interstate Bankers Casualty Co. v. Hernandez*, 2013 IL App (1st) 123035 ¶ 31, holds "[t]he right to a jury trial is a fundamental right guaranteed by article I, section 13, of the Illinois Constitution," which (if correct) would subject the Governor's suspension of residential evictions to strict scrutiny. But *Interstate Bankers* is wrongly decided for two reasons.

First, *Interstate Bankers* ignores the Supreme Court's rulings six months earlier in *Hope Clinic*, 2013 IL 112673 ¶ 92, that (a) the Equal Protection Clause of the Illinois Constitution must be interpreted in lockstep with its federal counterpart and (b) "[t]he standard for reviewing an equal protection claim is identical to that used for substantive due process." Federal law recognizes "only a narrow category of" fundamental rights that includes "'the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.'" *Brown v. City of Michigan City*, 462 F.3d 720, 732 (7th Cir. 2006) (cleaned up) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). The Governor has not located any federal case that recognizes the right to a jury trial as a fundamental right for purposes of an equal protection or substantive due process claim. Under *Hope Clinic*'s lockstep ruling, Illinois law should not recognize it either.

Interstate Bankers' second error is its citation to *People v. Bracey*, 213 Ill. 2d 265, 269 (2004), in support of its holding that the right to a jury trial is a fundamental right for purposes of equal protection and substantive due process. *Bracey* is a criminal case. A "fundamental right" is a term of art in criminal law used to determine whether a reviewing court may consider an objection the accused did not make before the trial court. If a right is determined to be fundamental, the reviewing court may consider objections for the first time on appeal under the "plain error doctrine." *E.g., People v. Turner*, 375 Ill. App. 3d 1101, 1108 (3d Dist. 2007) (citing *Bracey*). A "fundamental right" in criminal law for purposes of applying the plain error doctrine is not necessarily a "fundamental right" in civil law for purposes of equal protection and substantive due process. *See Destiny P.*, 2017 IL 120796 ¶ 14 n.1 (recognizing "adult criminal cases" should not cited as support for fundamental rights under Equal Protection Clause).

lighting speed for residential tenants who fall behind on their rent as compared to homeowners who fall behind on their mortgage payments, it was logical to bar commencement of the former but not the latter.[24] This produces the maximum benefit relative to the attendant cost. It is targeted to the limited category of eviction proceedings that are most likely to result in a final judgment and residents' being put out on the streets during the weeks and months immediately following COVID-19's arrival in Illinois, without causing delays to lengthy foreclosure proceedings that are unlikely to conclude anytime soon and whose suspension would therefore do little to prevent the spread of the virus. The very classification Plaintiffs deplore in fact evidences the Governor's narrow tailoring to advance a compelling State interest.

Further, the Governor has announced the suspension will remain in effect just for a few more weeks—through July 31—in order to allow 30,000 Illinois renters "who are disproportionately impacted by the pandemic" to gain access to a State program offering "$5,000 grants to provide emergency rental assistance." Complaint Exhibit H. The temporary nature of the suspension, which lasts only through the time necessary to allow a smooth transition to a

[24] A tenant who failed to pay rent on April 1 would likely have been removed from her home by some point in May had the Governor not intervened. *See* 735 ILCS 5/9-209 (once a tenant fails to pay rent landlord may demand payment within 5 days; if payment is not received within that timeframe, landlord may terminate lease and commence eviction proceedings); *id.* § 9-106 (barring tenant from raising "matters not germane" to landlord's right to possession); Lawyers' Committee for Better Housing, *Chicago Evictions*, https://eviction.lcbh.org/geography/type/ca (most eviction proceedings end with eviction orders and in one-third of cases eviction order is entered at first court hearing).

A homeowner who failed to make a mortgage payment on April 1, on the other hand, would likely not even have been subjected to foreclosure proceedings (much less eviction proceedings) by the present day. *First*, homeowners who have a mortgage backed by the federal government or a government-sponsored enterprise (about 70 percent of all loans) cannot be foreclosed on until August 31. *See* Consumer Financial Protection Bureau, *Mortgage and housing assistance*, https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/mortgage-relief/. *Second*, federal regulations forbid mortgage servicers from filing for foreclosure if the borrower is less than 120 days delinquent on a payment. *See* 12 C.F.R. § 1024.41(f)(1)(i). And once a foreclosure proceeding is initiated, it may take up to a year or longer to terminate in an eviction order. *See, e.g.,* 735 ILCS 5/15-1602 (providing 90 days to reinstate mortgage from date of service in foreclosure proceeding); *id.* § 15-1603(b)(1)(i)(A) (providing 7 months to redeem mortgage from same date).

State assistance program and to ensure maximum benefit for both affected tenants and their landlords, is additional compelling evidence that the Governor has "use[d] the least restrictive means consistent with the attainment of [his] goal." *R.C.*, 195 Ill. 2d at 303.

Third, and finally, Plaintiff Steven Cole, who has already obtained an order of eviction and merely wants to enforce it, is unlikely to succeed on the merits of his equal protection claim. His claim fails for the same threshold reasons as JL Properties' and Dauenbaugh's—he has not shown he is similarly situated to any comparison group. In addition, because his jury trial right is not implicated, and the Certain Remedy Clause of Article I, Section 12, does not create a fundamental right, *e.g., Schultz v. Lakewood Elec. Corp.*, 362 Ill. App. 3d 716, 725 (1st Dist. 2005); *Gavery v. Lake Cty.*, 160 Ill. App. 3d 761, 767 (2d Dist. 1987), Cole's claim is subject to rational basis review and the Governor merely must show his classification is "rationally related to a legitimate State goal," *People v. R.L.*, 158 Ill. 2d 432, 443 (1994). But the Governor has not created ***any classifications*** pertaining to ***enforcement*** of eviction orders: "All state, county, and local law enforcement officers in the State of Illinois are instructed to cease enforcement of orders of eviction for residential and non-residential premises, unless the tenant has been found to pose a direct threat to the health and safety of other tenants, an immediate and severe risk to property, or a violation of any applicable building code, health ordinance, or similar regulation." Complaint Exhibit F. This applies equally to eviction orders obtained under Article IX of the Code of Civil Procedure (applicable to landlords) or any other provision of Illinois law. Cole is therefore unlikely to prevail on this claim.

Plaintiffs also assert a substantive due process challenge in Count VIII. "Substantive due process bars governmental action that infringes upon a protected interest when such action is itself arbitrary." *People v. Pepitone*, 2018 IL 122034 ¶ 13. If a statute infringes on a

"fundamental" right, courts subject it to strict scrutiny and uphold it if it is narrowly tailored to a compelling governmental interest; if the statute does not infringe on a "fundamental" right, courts employ the rational basis test and will uphold the statute if it is rationally related to a legitimate state interest. *Marks v. Vanderventer*, 2015 IL 116226 ¶ 25. "The standard for reviewing an equal protection claim is identical to that used for substantive due process." *Hope Clinic*, 2013 IL 112673 ¶ 92; *see Jones v. City of Calumet City*, 2017 IL App (1st) 170236 ¶¶ 29–33 (analyzing equal protection and substantive due process claims together).[25] Plaintiffs' substantive due process claims are likely to fail for the same reasons as their equal protection claims: suspending JL Properties' and Dauenbaugh's ability to obtain residential eviction orders is narrowly tailored to a compelling governmental interest, and suspending Cole's ability to enforce a residential eviction order is rationally related to a legitimate state interest.

4. The Governor Did Not Violate the Takings Clause.

Plaintiffs allege in Count IX that suspending residential evictions denies them the economic benefit of their properties and, therefore, constitutes a taking without just compensation, in violation of Article I, Section 15 of the Illinois Constitution. Complaint ¶¶ 149–50. "[O]nly the most severe governmental regulation amounts to a taking requiring just compensation." *Forest Preserve Dist. of DuPage Cty. v. W. Suburban Bank*, 161 Ill. 2d 448, 457

[25] The substantive due process analysis under the Illinois Constitution also proceeds in lockstep with its federal counterpart, *Hope Clinic*, 2013 IL 112673 ¶ 92, and federal courts reject substantive due process claims that merely repackage an argument defendant violated more specific constitutional provisions, *e.g., Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 560 U.S. 702, 721 (2010) ("The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done. Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.") (cleaned up); *Graham v. Connor*, 490 U.S. 386, 388 (1989) (excessive force claims must be analyzed under Fourth Amendment and not substantive due process).

(1994). Plaintiffs are unlikely to prevail because the Governor's executive orders impose only a ***temporary*** restriction on the use of their properties and otherwise promote the common good.

Takings claims under the Illinois Constitution are subject to the same analysis as those under the United States Constitution. *Hampton v. Metro. Water Reclamation Dist.*, 2016 IL 119861 ¶¶ 12–16, 31. The Takings Clause may apply to (a) the actual appropriation of private property by the government (a physical taking) or (b) the imposition of a regulatory burden on the owner's property that is tantamount to a direct appropriation or ouster (a regulatory taking). *Davis v. Brown*, 221 Ill. 2d 435, 443 (2006). Here, Plaintiffs proceed under the "regulatory taking" theory only. *See Elmsford Apartment Assocs., LLC v. Cuomo*, No. 20-cv-4062 (CM), 2020 WL 3498456, at *7–*8 (S.D.N.Y. June 29, 2020), attached as Exhibit 10 (holding similar COVID-19 suspension of residential evictions by New York was not a physical taking).

To prove a *per se* regulatory taking, property owners must demonstrate that the regulation at issue "completely deprive[s]" them of "all economically beneficial use[s]" of their property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court rejected an argument that a 32-month moratorium on the development of plaintiffs' properties constituted a *per se* taking. 535 U.S. 302, 306, 334 (2002). The court reasoned that an "extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained." *Id.* The Court found that accepting the plaintiffs' argument would require compensation for "normal delays in obtaining building permits, changes in zoning ordinances, variances, . . . as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, [and] fire-damaged buildings." *Id.* at 334–35. In addition, it "would undoubtedly require changes in numerous practices that have long been considered permissible

exercises of the police power." *Id.* at 335. Accordingly, the Court refused to impose a rule that a temporary restriction on all economic use constitutes a *per se* taking. *Id*. at 341–42.

Here, Plaintiffs cannot establish a complete deprivation of all economically beneficial use of their properties. *See Elmsford Apartment*, 2020 WL 3498456, at *9 (holding New York COVID-19 eviction suspension "is clearly not a categorical regulatory taking, since Plaintiffs still enjoy many economic benefits of ownership" and therefore "their properties have not been rendered worthless or economically idle"). Residential evictions have been suspended for just over three months and will remain suspended for only a few more weeks. The Governor's orders do not relieve tenants of the obligation to pay rent. Rather, the Governor has announced an emergency rental assistance program will launch in August 2020 to help Illinois renters who have been unable to pay their rent because of the pandemic. Complaint Exhibit H. These funds will be paid directly to a property owner on behalf of the tenant. *Id.* This ***temporary*** suspension of residential evictions, issued under the State's police powers, is not a *per se* regulatory taking. *See Tahoe-Sierra*, 535 U.S. at 334–35, 342 ("the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim"); *accord Elmsford Apartment*, 2020 WL 3498456, at *9.

Where a regulation does not constitute a *per se* taking, the right to government compensation depends on a number of factors first outlined in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). These factors include (a) the economic impact of the regulation on the landowner; (b) the extent to which the regulation interferes with reasonable investment-backed expectations; and (c) the character of the government action. *Lingle*, 544 U.S. at 538 (citing *Penn Central*, 438 U.S. at 124). With respect to the third factor, if the government's action affecting the property is within a State's police power, "then the rights of

the individual which may be affected thereby must give way to the superior rights of the public, and he cannot complain that his property is taken without due process of law or without compensation first paid to him." *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 328 (1970); *see, e.g.*, *Miller v. Schoene,* 276 U.S. 272, 279–80 (1928) (upholding constitutionality of statutorily mandated destruction of plaintiffs' trees to control spread of infectious plant disease because "preferment of [public] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property"); *Vill. of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 130 (2004) (rejecting takings challenge because statute authorizing demolition of plaintiff's abandoned, dilapidated, and animal-infested property was "an exercise of police power to prevent a property owner from using his property so as to create a nuisance or a risk of harm to others"); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 893–96 (Pa. 2020) (rejecting takings challenge to Pennsylvania Governor's executive order compelling closure of non-life-sustaining business to control spread of COVID-19 because "the Governor's reason for imposing said restrictions on the use of property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to 'protect the lives, health, morals, comfort, and general welfare of the people'").

Plaintiffs cannot establish a regulatory taking under the *Penn Central* factors. *See Elmsford Apartment*, 2020 WL 3498456, at *9 ("Applying the *Penn Central* factors to this case, the Court finds that Plaintiffs have not shown that the Order inflicts 'any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking.'"). While Plaintiffs allege they have been deprived of rental income from their properties and otherwise rendered unable to use those properties as they see fit, the suspension constitutes a legitimate,

temporary exercise of the State's police power to address an unprecedented public health emergency. Governmental action should not be subject to the Takings Clause where "the interference with property rights 'arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Tahoe-Sierra*, 535 U.S. at 324 (quoting *Penn Central*, 438 U.S. at 124). Even where a state action denies owners all use of their property, that action may be "insulated as a part of the State's authority to enact safety regulations." *Id.* at 329 (internal quotation marks omitted).

The suspension of residential evictions has played a crucial role in minimizing physical interactions between people who do not reside in the same household and, in particular, the numerous in-person interactions associated with the process of being evicted and searching for new housing. In addition, it has reduced the particular public health risks associated with homelessness. And beyond limiting the spread of COVID-19, the suspension of residential evictions protects vulnerable individuals whose access to housing and other critical resources have been threatened by the widespread economic losses resulting from the pandemic. Because the suspension of residential evictions legitimately promotes the common good, the Court should reject Plaintiffs' claim under the Takings Clause.

5. The Governor Did Not Violate the Contracts Clause.

Finally, Plaintiffs argue in Count X that suspending residential evictions impairs their contracts with their tenants in violation of Article 1, Section 16 of the Illinois Constitution. To determine whether a contract has been impermissibly impaired in violation of the Contracts Clause, courts examine: (a) whether there is a contractual relationship; (b) whether the law at issue impairs that relationship; (c) whether the impairment is substantial; and (d) whether the impairment was reasonable and necessary to serve an important public purpose. *Consiglio v.*

DFPR, 2013 IL App (1st) 121142 ¶ 37. Plaintiffs are unlikely to succeed on this claim for two reasons: (1) They fail to allege that the suspension of residential evictions constitutes a ***substantial*** impairment of their contractual rights; and (2) the suspension was both reasonable and necessary to serve an important public purpose.

First, Plaintiffs cannot establish the impairment of their contractual relationships is substantial because the harm they allege—an inability to pursue and effectuate eviction orders—relates to a ***remedy*** under their leases, and not an essential term of the agreements themselves. The impairment of a right to ***enforce*** a contract does not equate to a substantial impairment of that contract within the meaning of the Contracts Clause. In *Home Building & Loan Ass'n v. Blaisdell*, the U.S. Supreme Court explained that the federal Contracts Clause permits the state to impair the ***remedy*** associated with ***enforcement*** of a contract "as the wisdom of the nation shall direct." 290 U.S. 398, 430 (1934); *accord Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198–99 (1921) (upholding statute suspending evictions during emergency against Contracts Clause challenge). The Illinois Supreme Court adopted this same reasoning as to the state Contracts Clause in *Town of Cheney's Grove v. VanScoyoc*, 357 Ill. 52 (1934). *Cheney's Grove* addressed a Depression-era statute that prohibited the initiation of any lawsuit against a treasurer or custodian of public funds for a period of two years. *Id.* at 53–54. The court held the statute did not violate the Contracts Clause because it was merely aimed at enforcement proceedings stemming from a breach of contract and did not purport to modify contractual terms. *Id.* at 58.

Here, suspending residential evictions does not deprive or diminish Plaintiffs' contractual rights by directly or materially conflicting with the terms of the original lease agreements. The Governor's orders did not excuse any tenants' obligations to abide by the terms of their contractual obligations. In fact, the orders expressly provide they must not "be construed as

relieving any individual of the obligation to pay rent, to make mortgage payments, or to comply with any other obligation that an individual may have under tenancy or mortgage." *E.g.,* Complaint Exhibit F. The Governor's orders merely put a temporary hold on one means to enforce Plaintiffs' contracts. Plaintiffs are still entitled to pursue delinquent tenants based on the breach of payment terms and may initiate eviction proceedings as soon as the suspension of evictions ends (currently anticipated to be August 1). *See Elmsford Apartment*, 2020 WL 3498456, at *15 (New York's COVID-19 eviction suspension did not violate Contracts Clause because "it merely postpones the date on which landlords may commence summary proceedings against their tenants" and "tenants are still bound to their contracts, and the landlord may obtain a judgment for unpaid rent if the tenants fail to honor their obligations"). This is not a substantial impairment of Plaintiffs' contractual rights. *See Troy Ltd. v. Renna*, 727 F.2d 287, 291, 297–98 (3d Cir. 1984) (state law extending "anti-eviction" period from eight years to forty years for certain residents of rental housing converted to condominiums was not a substantial impairment).

Second, Plaintiffs are unlikely to prevail on their Contracts Clause claim because suspending residential evictions serves an important public purpose. "All contracts are subject to the police power of the State" and, "as a result, the state may infringe on a person's contractual rights in order to safeguard the interests of its people." *Consiglio*, 2013 IL App (1st) 121142 ¶ 40. Because the State is not a party to the contract between Plaintiffs and their tenants, courts "defer to legislative judgment as to the necessity and reasonableness of the legislation." *Id.* ¶ 38 (citing *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412–13 (1983)).

There is abundant precedent on the importance of protecting renters and mortgagees from forced evictions during times of economic, social, and public health crises. In *Blaisdell*, the U.S. Supreme Court upheld a Minnesota mortgage moratorium law that temporarily extended the

redemption period for mortgages during the Great Depression. 290 U.S. at 444–46; *see also E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945) (upholding legislation that governed the *tenth* year-long extension of mortgage moratorium in New York). Further, moratoriums on residential evictions have also been upheld when the State has demonstrated, through broad remedial purposes, that such temporary suspensions are necessary to protect the mental and physical health of citizens who would suffer greatly from evictions. *See, e.g. Troy*, 727 F.2d at 298 (upholding legislation preventing evictions of elderly condominium residents that would be disruptive and costly for both residents and community). Even in nonemergency situations, the health, safety, and welfare of the public is a legitimate government purpose, especially in an area of law in which the State has already chosen to regulate. *See Energy Reserves*, 459 U.S. at 412–13 (upholding Kansas law that regulated gradual rate escalation in the natural gas market); *Consiglio*, 2013 IL App (1st) 121142 ¶ 42 (Contracts Clause not violated by statute impairing consent order between suspended doctor and state agency because purpose of such legislation was to "protect the health, safety, and welfare of the public").

Plaintiffs acknowledge "[i]t is of tremendous importance that renters in the State receive relief from eviction during these terrible times," Motion at 15, which dooms their Contracts Clause claim. Their argument that the Contracts Clause requires the Governor to address this conceded public health emergency in a different way than he chose, *id.* at 15–16, is unsupported by any authority. To the contrary, courts afford significant deference to the government when it implements a temporary suspension of evictions in times of public health crisis. *E.g., Troy*, 727 F.2d at 298. Because it is undisputed that the Governor's suspension of residential evictions was necessary "to safeguard the interests of [the State's] people," *Consiglio*, 2013 IL App (1st) 121142 ¶ 40, Plaintiffs are unlikely to prevail on the merits of their Contracts Clause claim.

II. Plaintiffs Have Not Shown Irreparable Harm in the Absence of an Injunction.

Plaintiffs also fail to establish any of them will suffer irreparable harm in the absence of an injunction. "Irreparable harm occurs only where the remedy at law is inadequate, meaning that monetary damages cannot adequately compensate the injury and the injury cannot be measured by pecuniary standards." *Happy R Secs., LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509 ¶ 35 (cleaned up). "[P]reliminary injunctive relief is properly denied where damages caused by alteration of the status quo pending a final decision on the merits can be compensated adequately by monetary damages calculable with a reasonable degree of certainty." *Best Coin-Op, Inc. v. Old Willow Falls Condo. Ass'n*, 120 Ill. App. 3d 830, 835 (1st Dist. 1983).

Plaintiffs "can be compensated adequately by monetary damages calculable with a reasonable degree of certainty" because their injuries are nothing more than the contractually established rent payments their tenants allegedly owe but have not paid. *See* Complaint ¶¶ 9–20 & Exhibits A–C.[26] Illinois courts routinely decline to find irreparable harm where injuries ***related*** to real property can nevertheless be reduced to a measurable dollar amount. *E.g., Franz v. Calaco Dev. Corp.*, 322 Ill. App. 3d 941, 948 (2d Dist. 2001) (no irreparable harm to limited partner who accused general partner of selling partnerships' lots for less than agreed price because that amount "is capable of being measured and corrected by an award of money damages"); *Handy Andy Home Improvement Ctrs., Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 177 Ill. App. 3d 647, 653 (2d Dist. 1988) (no irreparable harm where evidence of lost profits and preparation costs could remedy injury suffered by lessee denied possession of store); *Shodeen v. Chi. Title & Trust Co.*, 162 Ill. App. 3d 667, 674 (2d Dist. 1987) (no irreparable harm where

[26] Plaintiffs do not allege their tenants' missed rent payments have caused them to fall behind on their mortgages or suffer in any other way. This evidences Plaintiffs' relatively privileged position compared to other landlords and further undermines their argument for the drastic remedy of an injunction.

plaintiff conceded he could calculate the amount he would lose by defendant's failure to convey 26 lots). Plaintiffs know precisely the amount of money they are owed every month they are unable to evict their tenants. Harm of this nature, which can be measured by pecuniary standards and is the only harm alleged, is not irreparable.[27]

III. The Potential Harm to the State Far Exceeds Any Harm Suffered by Plaintiffs.

To grant a TRO in favor of Plaintiffs, the Court would have to "conclude that the benefits of granting the injunction outweigh the possible injury that the [State] might suffer as a result thereof." *Gannett Outdoor*, 163 Ill. App. 3d at 721. When balancing these equities, "the court should also consider the effect of the injunction on the public." *Kalbfleisch ex rel. Kalbfleisch v. Columbia Cmty. Unit Sch. No. 4*, 396 Ill. App. 3d 1105, 1119 (5th Dist. 2009). "[E]ven when a plaintiff can raise a fair probability about the likelihood of success and the plaintiff probably will continue to endure irreparable harm, denying injunctive relief may still be appropriate to preserve the status quo. This is because courts should consider the status quo as it affects both parties, not merely the party seeking injunctive relief." *Guns Save Life*, 2019 IL App (4th) 190334 ¶ 68. Assuming Plaintiffs satisfied all four traditional requirements for injunctive relief (and they have not), their request for relief should be denied because the balance of equities tilts strongly in favor of the public's and State's interests in preserving public health for all.

The Court can be confident that the injunction requested by Plaintiffs would unleash tragic consequences. Plaintiffs' grievances must be set against the reality that the COVID-19 pandemic has upended nearly every aspect of American life. The "whereas" clauses of the Governor's June 26 proclamation tell a sobering tale: "as Illinois enters the fifth month of

[27] In addition, a preliminary injunction generally should not be used to change possession of real property, *Scholz v. Barbee*, 344 Ill. App. 630, 636 (2d Dist. 1951), which in effect is what Plaintiffs seek here.

responding to the public health disaster caused by [COVID-19], the burden on residents, healthcare providers, first responders, and governments throughout the State is unprecedented." Exhibit 1. Many thousands have died in this State because of the disease—and 20 times that number have been infected. *Id.* COVID-19 continues to evolve unpredictably, requiring a nimble response from the State. *Id.* Because of the Governor's prior executive orders, the State is now cautiously turning a corner. *Id.* But "although the number of new COVID-19 cases has decreased in recent weeks, the virus continues to infect thousands of individuals and claim the lives of too many Illinoisans each day." *Id.* While "the precautions taken by Illinoisans have led to a steep decline in the number of COVID-19 cases and deaths in the State in recent weeks, other states that have resisted taking public health precautions or that lifted those precautions earlier are now experiencing exponential growth and record high numbers of cases." *Id.* "[P]ublic health experts have warned of a 'second wave' of COVID-19 cases." *Id.* And "the State's modeling shows the tail of the COVID-19 [infection] curve extending several more weeks" and "that without extensive social distancing and other precautions, the State will face a shortage of hospital beds, ICU beds and/or ventilators." *Id.*

This is not the time for complacency or carelessness. A resurgence of the deadly virus could undo the State's hard-won progress and waste the tremendous sacrifices all residents and business have made since March to fight the pandemic. The Governor's continued suspension of residential evictions—at this point, for just a few more weeks—is a modest requirement imposed so Illinoisans can "safely and conscientiously resume activities that were paused as COVID-19 cases rose exponentially and threatened to overwhelm our healthcare system," while ensuring the State does "not backslide on the progress we have made." Executive Order 2020-43 ¶ 1 (attached as Exhibit 11). Resuming residential evictions before the State's emergency rental assistance

program commences in August would unleash an onslaught of unnecessary physical interactions between tenants and court personnel, social service providers, landlords, community members, and other essential workers. It would put countless numbers of Illinoisans at risk; after all, there are numerous examples where one person has spread COVID-19 to dozens of others.[28] It would complicate the transition to the emergency rental assistance program, which will benefit not only tenants but also landlords. All of this while the State's fragile progress hangs in the balance.

On the other hand, any harm Plaintiffs might suffer because they are unable to evict their tenants for a few more weeks is relatively slight compared to the devastation that could result if the Governor's order were enjoined. If the State continues making progress in fighting the pandemic, the suspension of residential evictions will cease at the end of July. Plaintiffs will then have an opportunity to commence eviction proceedings or enforce eviction orders. Perhaps evictions will not be necessary if Plaintiffs and their tenants are eligible for the State's emergency rental assistance program. Given Plaintiffs' minimal (if any) harm, the public interest weighs heavily against the extraordinary and drastic relief Plaintiffs seek. They concede Illinois is facing a public health emergency. Complaint ¶ 1. Under these circumstances, the balance of equities tilts decisively in favor of the Governor and the people of Illinois.[29]

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[28] Carl Zimmer, *Most People With Coronavirus Won't Spread It. Why Do a Few Infect Many?*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/science/how-coronavirus-spreads.html (explaining some epidemiologists think people become "super spreaders" of COVID-19 because they have more interactions and therefore more opportunities to infect others).

[29] Plaintiffs do not purport to seek relief on behalf of anyone other than themselves, nor would they be permitted to do so. They have not sought to certify a class pursuant to 735 ILCS 5/2-801 or even pleaded "facts sufficient to bring the claim within the statutory prerequisites." *Weiss v. Waterhouse Secs., Inc.*, 208 Ill. 2d 439, 451 (2004). Further, any nonparties Plaintiff might seek to represent in this action have neither sought to join pursuant to 735 ILCS 5/2-404 nor intervene in the proceeding pursuant to 735 ILCS 5/2-408. *See Sundance Homes, Inc. v. Cty. of DuPage*, 195 Ill. 2d 257, 274 (2001) (describing these as the exclusive means by which nonparties could be bound by Plaintiffs' suit). Therefore, the Court cannot grant relief to anyone other than Plaintiffs, and any order must apply only to them.

CONCLUSION

Plaintiffs are not likely to prevail on the merits of their claims, they have not shown they will suffer irreparable harm, and the public interest will suffer immensely if residential evictions do not remain suspended through July 31 to allow a smooth transition to the State's assistance program. The Court should deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Dated: July 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned hereby certifies the statements set forth in this certificate of service are true and correct and that he has caused an electronic copy of the foregoing to be served upon the following:

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via email at the address noted above on July 5, 2020.

By: s/ Darren Kinkead

Exhibit 1

June 26 disaster proclamation

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

Gubernatorial Disaster Proclamation

WHEREAS, since early March 2020, Illinois has faced a pandemic that has caused extraordinary sickness and loss of life, infecting over 140,000 and growing, and taking the lives of thousands of residents; and,

WHEREAS, at all times but especially during a public health crisis, protecting the health and safety of Illinoisans is among the most important functions of State government; and,

WHEREAS, it is critical that Illinoisans who become sick are able to be treated by medical professionals, including when a hospital bed, emergency room bed, or ventilator is needed; and,

WHEREAS, it is also critical that the State's health care and first responder workforce has adequate personal protective equipment (PPE) to safely treat patients, respond to public health disasters, and prevent the spread of communicable diseases; and,

WHEREAS, as Illinois enters the fifth month of responding to the public health disaster caused by Coronavirus Disease 2019 (COVID-19), a novel severe acute respiratory illness that spreads rapidly through respiratory transmissions and that continues to be without an effective treatment or vaccine, the burden on residents, healthcare providers, first responders, and governments throughout the State is unprecedented; and,

WHEREAS, the World Health Organization declared COVID-19 a Public Health Emergency of International Concern on January 30, 2020, and the United States Secretary of Health and Human Services declared that COVID-19 presents a public health emergency on January 27, 2020; and,

WHEREAS, on March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic, and has now reported more than 9 million confirmed cases of COVID-19 and 475,000 deaths attributable to COVID-19 globally; and,

WHEREAS, despite efforts to contain COVID-19, the World Health Organization and the federal Centers for Disease Control and Prevention (CDC) indicated that the virus was expected to continue spreading and it has, in fact, continued to spread rapidly, resulting in the need for federal and State governments to take significant steps; and,

WHEREAS, on March 9, 2020, I, JB Pritzker, Governor of Illinois, declared all counties in the State of Illinois as a disaster area in response to the outbreak of COVID-19; and,

WHEREAS, on March 13, 2020, the President declared a nationwide emergency pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act"), covering all states and territories, including Illinois; and,

WHEREAS, on March 26, 2020, the President declared a major disaster in Illinois pursuant to Section 401 of the Stafford Act; and,

WHEREAS, on April 1, 2020, due to the exponential spread of COVID-19 in Illinois, I declared all counties in the State of Illinois as a disaster area; and,

WHEREAS, on April 30, 2020, due to the continued spread of COVID-19 in Illinois, the threatened shortages of hospital beds, ER beds, and ventilators, and the inadequate testing capacity, I declared all counties in the State of Illinois as a disaster area; and,

WHEREAS, on May 29, 2020, due to the continued spread of COVID-19 in Illinois, and the resulting health and economic impacts of the virus, and the need to increase testing capacity, I declared all counties in the State of Illinois as a disaster area; and,

WHEREAS, as circumstances surrounding COVID-19 rapidly evolve and new evidence emerges, there have been frequent changes in information and public health guidance; and,

WHEREAS, the unprecedented nature of COVID-19, including the health consequences it has on not just the respiratory system but the heart, brain, kidneys, and the body's immune response, has made the virus's effects and its path difficult to predict; and,

WHEREAS, from the outset, data suggested that older adults and those with serious underlying health conditions are more likely to experience severe and sometimes fatal complications from COVID-19; and,

WHEREAS, emerging evidence has shown that young people, including infants and toddlers, are also at risk of such complications; and,

WHEREAS, young and middle-aged people have comprised a significant proportion of hospitalized COVID-19 patients, and there is evidence that COVID-19 causes blood clots and strokes, and has caused deadly strokes in young and middle-aged people who exhibited few symptoms; and,

WHEREAS, the understanding of spread from infected individuals who have not shown symptoms has changed and, on April 12, 2020, the CDC changed the period of exposure risk from "onset of symptoms" to "48 hours before symptom onset"; and,

WHEREAS some people infected by the virus remain asymptomatic but nonetheless may spread it to others; and,

WHEREAS, although the CDC initially recommended against wearing cloth face coverings or masks as protection, as a result of research on asymptomatic and pre-symptomatic transmission, the CDC revised its conclusions and recommends wearing cloth face coverings in public settings where social distancing measures are difficult to maintain; and,

WHEREAS, public health research and guidance increasingly supports wearing cloth face coverings in public settings where social distancing measures are difficult to maintain, and indicates that the risk of transmission outdoors is less than the risk of transmission indoors; and,

WHEREAS, as COVID-19 has spread in Illinois over the course of the Gubernatorial Disaster Proclamations, the circumstances causing a disaster throughout the State have changed and continue to change, making definitive predictions of the course the virus will take over the coming months extremely difficult; and,

WHEREAS, at the time I issued the first Gubernatorial Disaster Proclamation, there were 11 confirmed cases of COVID-19 in one Illinois county; and,

WHEREAS, as of today, June 26, 2020, there have been over 140,000 confirmed cases of COVID-19 in 101 Illinois counties; and,

WHEREAS, the first death attributed to COVID-19 in Illinois was announced on March 17, 2020; and,

WHEREAS, as of today, June 26, 2020, more than 6,800 residents of Illinois have died due to COVID-19; and,

WHEREAS, from the outset, studies have suggested that for every confirmed case there are many more unknown cases, some of which are asymptomatic individuals who can pass the virus to others without knowing; and,

WHEREAS, the CDC now estimates that for every reported case of COVID-19, there are 10 unreported infections, resulting in a number of total cases in the country that may be 10 times higher than currently reported; and,

WHEREAS, although the number of new COVID-19 cases has decreased in recent weeks, the virus continues to infect thousands of individuals and claim the lives of too many Illinoisans each day; and,

WHEREAS, while the precautions taken by Illinoisans have led to a steep decline in the number of COVID-19 cases and deaths in the State in recent weeks, other states that have resisted taking public health precautions or that lifted those precautions earlier are now experiencing exponential growth and record high numbers of cases; and,

WHEREAS, on June 25, 2020, the U.S. reported more than 40,000 new COVID-19 cases, a record number; and,

WHEREAS, public health experts have warned of a "second wave" of COVID-19 cases; and,

WHEREAS, COVID-19 has claimed the lives of and continues to impact the health of Black and Hispanic Illinoisans at a disproportionately high rate – magnifying significant health disparities and inequities; and,

WHEREAS, the Illinois Department of Public Health activated its Illinois Emergency Operations Plan and its Emergency Support Function 8 Plan to coordinate emergency response efforts by hospitals, local health departments, and emergency management systems in order to avoid a surge in the use of hospital resources and capacity; and,

WHEREAS, as the virus has progressed through Illinois, the crisis facing the State continues to develop and requires an evolving response to ensure hospitals, health care professionals and first responders are able to meet the health care needs of all Illinoisans and in a manner consistent with CDC guidance that continues to be updated; and,

WHEREAS, in order to ensure that health care professionals, first responders, hospitals and other facilities are able to meet the health care needs of all residents of Illinois, the State must have critical supplies, including PPE, such as masks, face shields, gowns, and gloves; and,

WHEREAS, the State of Illinois maintains a stockpile that supports the existing PPE supply chains and stocks at various healthcare facilities; and,

WHEREAS, while the State continues to make every effort to procure PPE, if those procurement efforts are disrupted or Illinois experiences a surge in COVID-19 cases, the State faces a life-threatening shortage of respirators, masks, protective eyewear, face shields, gloves, gowns, and other protective equipment for health care workers and first responders; and,

WHEREAS, while hospitalizations have declined, Illinois is using a significant percentage of hospital beds and ICU beds, and, if COVID-19 cases were to surge, the State could face a shortage of critical health care resources; and,

WHEREAS, the State worked with top researchers from the University of Illinois at Urbana-Champaign, the Northwestern School of Medicine, the University of Chicago, the Chicago and Illinois Departments of Public Health, along with McKinsey and Mier Consulting Group, and Civis Analytics, to analyze daily data on COVID-19 deaths and ICU usage and model potential outcomes; and,

WHEREAS, the State's modeling shows the tail of the COVID-19 epi curve extending several more weeks; and,

WHEREAS, the State's modeling continues to show that without extensive social distancing and other precautions, the State will face a shortage of hospital beds, ICU beds and/or ventilators; and,

WHEREAS, over the course of the COVID-19 crisis, the State has been constrained in the number of COVID-19 tests that can be taken and processed due to a limited number of testing sites and labs, as well as a shortage of necessary supplies, including the swabs needed to take samples; and,

WHEREAS, at the time I issued the first Gubernatorial Disaster Proclamation, Illinois had capacity to test no more than a few hundred people per day for COVID-19 at a small number of testing sites; and,

WHEREAS, the State has developed testing sites throughout Illinois and yesterday exceeded 30,000 tests in a single day, and testing capacity continues to increase; and,

WHEREAS, Illinois now has tested nearly 1.5 million total specimens for COVID-19; and,

WHEREAS, national projections adjusted for Illinois' population suggest the State must continue to increase the number of tests processed per day as part of an effective effort to permanently slow and reduce the spread of COVID-19; and,

WHEREAS, in addition to causing the tragic loss of more than 6,800 Illinoisans and wreaking havoc on the physical health of tens of thousands more, COVID-19 has caused extensive economic loss and continues to threaten the financial welfare of a significant number of individuals and businesses across the nation and the State; and,

WHEREAS, nationwide, more than 47 million people have filed unemployment claims since the start of the pandemic – representing more than one in four U.S. workers; and,

WHEREAS, the Illinois Department of Employment Security announced that the State's unemployment rate rose to 16.4% in April, with 762,000 jobs lost during that month; and,

WHEREAS, the Illinois Department of Employment Security announced that the State's unemployment rate was 15.2% in May, and that major Illinois industries such as leisure and hospitality, transportation and utilities, and educational and health services had been particularly hard-hit during the March to May period; and,

WHEREAS, the Illinois Department of Employment Security is responding to the economic crisis in a number of ways, including through the Pandemic Unemployment Assistance program; and,

WHEREAS, over 180,000 small businesses in Illinois received over $22 billion in COVID-19 related financial support through the federal Paycheck Protection Program in an effort to prevent these businesses from closing; and,

WHEREAS, the Department of Commerce and Economic Opportunity is working to address the economic crisis, including through assistance programs such as the Business Interruption Grants Program for businesses that experienced a limited ability to operate due to COVID-19 related closures; and,

WHEREAS, the economic loss and insecurity caused by COVID-19 threatens the viability of business and the access to housing, medical care, food, and other critical resources that directly impact the health and safety of residents; and,

WHEREAS, based on the foregoing facts, and considering the expected continuing spread of COVID-19 and the ongoing health and economic impacts that will be felt over the coming month by people across the State, the current circumstances in Illinois surrounding the spread of COVID-19 constitute an epidemic emergency and a public health emergency under Section 4 of the Illinois Emergency Management Agency Act; and,

WHEREAS, based on the foregoing, the continuing burden on hospital resources, the potential shortages of these resources in the event of a surge in infections, and the critical need to increase the purchase and distribution of PPE as well as to expand COVID-19 testing capacity constitute

a public health emergency under Section 4 of the Illinois Emergency Management Agency Act; and,

WHEREAS, it is the policy of the State of Illinois to be prepared to address any disasters and, therefore, it is necessary and appropriate to make additional State resources available to ensure that that our healthcare delivery system is capable of serving those who are sick and that Illinoisans remain safe and secure and able to obtain medical care; and,

WHEREAS, this proclamation will assist the State in facilitating economic recovery for individuals and businesses in an effort to prevent further devastating consequences from the economic instability COVID-19 has caused; and,

WHEREAS, this proclamation will assist Illinois agencies in coordinating State and Federal resources, including materials needed to test for COVID-19, personal protective equipment, and medicines, in an effort to support the State responses as well as the responses of local governments to the present public health emergency; and,

WHEREAS, these conditions provide legal justification under Section 7 of the Illinois Emergency Management Agency Act for the new issuance of a proclamation of disaster; and,

WHEREAS, the Illinois Constitution, in Article V, Section 8, provides that "the Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws," and states, in the Preamble, that a central purpose of the Illinois Constitution is "provide for the health, safety, and welfare of the people";

NOW, THEREFORE, in the interest of aiding the people of Illinois and the local governments responsible for ensuring public health and safety, I, JB Pritzker, Governor of the State of Illinois, hereby proclaim as follows:

Section 1. Pursuant to the provisions of Section 7 of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7, I find that a disaster exists within the State of Illinois and specifically declare all counties in the State of Illinois as a disaster area. The proclamation authorizes the exercise of all of the emergency powers provided in Section 7 of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7, including but not limited to those specific emergency powers set forth below.

Section 2. The Illinois Department of Public Health and the Illinois Emergency Management Agency are directed to coordinate with each other with respect to planning for and responding to the present public health emergency.

Section 3. The Illinois Department of Public Health is further directed to cooperate with the Governor, other State agencies and local authorities, including local public health authorities, in the development and implementation of strategies and plans to protect the public health in connection with the present public health emergency.

Section 4. The Illinois Emergency Management Agency is directed to implement the State Emergency Operations Plan to coordinate State resources to support local governments in disaster response and recovery operations.

Section 5. To aid with emergency purchases necessary for response and other emergency powers as authorized by the Illinois Emergency Management Agency Act, the provisions of the Illinois Procurement Code that would in any way prevent, hinder or delay necessary action in coping with the disaster are suspended to the extent they are not required by federal law. If necessary and in accordance with Section 7(1) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(1), the Governor may take appropriate executive action to suspend additional statutes, orders, rules, and regulations.

Section 6. Pursuant to Section 7(3) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(3), this proclamation activates the Governor's authority, as necessary, to transfer the direction, personnel or functions of State departments and agencies or units thereof for the purpose of performing or facilitating emergency response programs.

Section 7. The Illinois Department of Public Health, Illinois Department of Insurance and the Illinois Department of Healthcare and Family Services are directed to recommend, and, as appropriate, take necessary actions to ensure expanded access to testing for COVID-19 and that consumers do not face financial barriers in accessing diagnostic testing and treatment services for COVID-19.

Section 8. The Illinois State Board of Education is directed to recommend, and, as appropriate, take necessary actions to address any impact to learning associated with the present public health emergency and to alleviate any barriers to the use of remote learning during the effect of this proclamation that exist in the Illinois School Code, 105 ILCS 5/1-1 et. seq.

Section 9. All State agencies are directed to cooperate with the Governor, other State agencies and local authorities in the development and implementation of strategies and plans to cope with and recover from the economic impact of the present public health emergency.

Section 10. Pursuant to Section 7(14) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(14), increases in the selling price of goods or services, including medical supplies, protective equipment, medications and other commodities intended to assist in the prevention of or treatment and recovery of COVID-19, shall be prohibited in the State of Illinois while this proclamation is in effect.

Section 11. This proclamation can facilitate requests for federal emergency and/or disaster assistance if a complete and comprehensive assessment of damage indicates that effective recovery is beyond the capabilities of the State and affected local governments.

Section 12. For purposes of Senate Bill 2135 (101st General Assembly), Article 15, section 15-5, amending the Open Meetings Act, new section 5 ILCS 120/7(e)(4), I find that the public health concerns at issue in this proclamation render in-person attendance of more than fifty people at the regular meeting location not feasible.

Section 13. This proclamation shall be effective immediately and remain in effect for 30 days.

In Witness Whereof, *I have hereunto set my hand and caused the Great Seal of the State of Illinois to be affixed.*

Done at the Capitol in the City of Springfield this 26th day of June in the Year of Our Lord two thousand and twenty, and of the State of Illinois two hundred and second.

AUG. 26TH 1818

Jesse White

SECRETARY OF STATE

JBP

GOVERNOR

FILED
INDEX DEPARTMENT
JUN 26 2020
IN THE OFFICE OF
SECRETARY OF STATE

Exhibit 2

Executive Order 2020-44

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

June 26, 2020 Executive Order 2020-44

EXECUTIVE ORDER 2020-44
(COVID-19 EXECUTIVE ORDER NO. 42)

WHEREAS, since early March 2020, Illinois has faced a pandemic that has caused extraordinary sickness and loss of life, infecting over 140,000 and growing, and taking the lives of thousands of residents; and,

WHEREAS, at all times but especially during a public health crisis, protecting the health and safety of Illinoisans is among the most important functions of State government; and,

WHEREAS, as Illinois enters the fifth month of responding to the public health disaster caused by Coronavirus Disease 2019 (COVID-19), a novel severe acute respiratory illness that spreads rapidly through respiratory transmissions and that continues to be without an effective treatment or vaccine, the burden on residents, healthcare providers, first responders, and governments throughout the State is unprecedented; and,

WHEREAS, as COVID-19 has spread in Illinois over the course of the Gubernatorial Disaster Proclamations, the circumstances causing a disaster throughout the State have changed and continue to change, making definitive predictions of the course the virus will take over the coming months extremely difficult; and,

WHEREAS, in addition to causing the tragic loss of more than 6,800 Illinoisans and wreaking havoc on the physical health of tens of thousands more, COVID-19 has caused extensive economic loss and continues to threaten the financial welfare of a significant number of individuals and businesses across the nation and the State; and,

WHEREAS, on June 26, 2020, due to the continuing burden on hospital resources, the expected continuing spread of COVID-19, and the ongoing health and economic impacts that will be felt over the coming month by people across the State, I again declared all counties in the State of Illinois as a disaster area; and,

WHEREAS, in response to the epidemic emergency and public health emergency described above, I find it necessary to re-issue Executive Orders 2020-03, 2020-04, 2020-07, 2020-08, 2020-09, 2020-11, 2020-12, 2020-13, 2020-15, 2020-16, 2020-17, 2020-20, 2020-21, 2020-22, 2020-23, 2020-24, 2020-25, 2020-26, 2020-27, 2020-28, 2020-29, 2020-30, 2020-31, 2020-34, 2020-35, 2020-36, 2020-40, 2020-41, and 2020-42 and hereby incorporate the WHEREAS clauses of those Executive Orders;

THEREFORE, by the powers vested in me as the Governor of the State of Illinois, pursuant to the Illinois Constitution and Sections 7(1), 7(2), 7(3), 7(8), 7(9), and 7(12) of the Illinois Emergency Management Agency Act, 20 ILCS 3305, and consistent with the powers in public health laws, I hereby order the following, effective June 26, 2020:

Part 1: Re-Issue of Executive Orders.

Executive Orders 2020-03, 2020-04, 2020-07, 2020-08, 2020-09, 2020-11, 2020-12, 2020-13, 2020-15, 2020-16, 2020-17, 2020-20, 2020-21, 2020-22, 2020-23, 2020-24, 2020-25, 2020-26, 2020-27, 2020-28, 2020-29, 2020-30, 2020-31, 2020-34, 2020-35, 2020-36, 2020-40, 2020-41, and 2020-42 hereby are re-issued by this Executive Order 2020-44 as follows:

Executive Order 2020-04 (Closure of James R. Thompson Center; waiver of sick leave requirement for State employees):

Sections 2 and 3 of Executive Order 2020-04 are re-issued and extended through **July 26, 2020**.

Executive Order 2020-07 (In-person meeting requirements):

Section 6 of Executive Order 2020-07, as amended by Executive Order 2020-33 and as further amended and revised below, is re-issued and extended through **July 26, 2020**.

Section 6. The provision of the Illinois Finance Authority Act that "[a]ll meetings shall be conducted at a single location within the State with a quorum of members physically present at this location," 20 ILCS 3501/801-25, is suspended through July 26, 2020. The provision of the Illinois Administrative Code that a meeting of the Concealed Carry Licensing Review Board that a requires a "quorum is in attendance at a meeting" as a condition for when "Commissioners may attend telephonically or electronically," 20 Ill. Admin. Code 2900.110(c), is suspended through July 26, 2020.

Public bodies, including those listed specifically above, are encouraged to ensure that at least one member is physically present at the location of the meeting if others are attending telephonically or electronically. Public bodies must take steps to provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting, and to update their websites and social media feeds to keep the public fully apprised of any modifications to their meeting schedules or the format of their meetings due to COVID-19, as well their activities relating to COVID-19.

Executive Order 2020-08 (Secretary of State operations):

Sections 3 and 4 of Executive Order 2020-08, as amended by Executive Order 2020-39, are re-issued and extended through **July 26, 2020**.

Executive Order 2020-08 is further amended and revised as follows:

Section 5: During the duration of and for no more than thirty days following the termination of the Gubernatorial Disaster Proclamations, the requirements setting forth the time periods in which the Secretary must conduct hearings and issue final orders pursuant to Sections 2-118, 2-118.1 and 2-118.2 of the Illinois Vehicle Code are suspended.

Executive Order 2020-09 (Telehealth):

Executive Order 2020-09 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-11 (Revisions to prior Executive Orders; Department of Corrections notification period):

Section 4 of Executive Order 2020-11 is re-issued and extended through **July 26, 2020**.

Executive Order 2020-12 (Health care worker background checks; Department of Juvenile Justice notification period; Coal Mining Act):

Sections 1, 2, and 3 of Executive Order 2020-12 are re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-13 (Suspending Illinois Department of Corrections admissions from county jails):

Executive Order 2020-13 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-15 (Suspending provisions of the Illinois School Code):

Sections 5, 6, 7, 8, and 9 of Executive Order 2020-15 are re-issued and extended through **July 26, 2020**.

Executive Order 2020-16 (Repossession of vehicles; suspension of classroom training requirement for security services):

Executive Order 2020-16 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Orders 2020-03 and 2020-17 (Cannabis deadlines and applications):

Executive Orders 2020-03 and 2020-17, as modified by Executive Order 2020-18, are re-issued and shall remain in effect as specified by Executive Order 2020-18.

Executive Order 2020-20 (Public assistance requirements):

Executive Order 2020-20 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-21 (Furlough of Illinois Department of Corrections inmates):

Executive Order 2020-21 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-22 (Township meetings; Funeral Directors and Embalmers Licensing Code; placements under the Child Care Act of 1969; fingerprint submissions under Health Care Worker Background Check Act):

Sections 2, 3, 4, 5 and the Savings Clause of Executive Order 2020-22 are re-issued and extended through **July 26, 2020**.

Executive Order 2020-23 (Actions by the Illinois Department of Financial and Professional Regulation for licensed professionals engaged in disaster response):

Executive Order 2020-23 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-24 (Illinois Department of Human Services Forensic Treatment Program; investigations of Illinois Department of Human Services employees):

Executive Order 2020-24 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-25 (Garnishment and wage deductions):

Executive Order 2020-25 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-26 (Hospital capacity):

Executive Order 2020-26 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-27 (Cadavers testing positive for COVID-19):

Executive Order 2020-27 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-28 (Industrial radiography certifications):

Executive Order 2020-28 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-29 (In-person education or exams for professional insurance licenses):

Executive Order 2020-29 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-30 (Filing of residential eviction actions; enforcement of non-residential eviction orders; expired consular identification documents; electronic filings for the Illinois Human Rights Commission):

Executive Order 2020-30, as amended by Executive Order 2020-33, is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-31 (Educator licensure and student graduation requirements):

Executive Order 2020-31 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-34 (Cannabis requirements):

Executive Order 2020-34 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-35 (IDPH regulatory activities):

Executive Order 2020-35 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-36 (Marriage licenses):

Executive Order 2020-36 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-40 (Resumption of limited in-person instruction at schools):

Executive Order 2020-40, as amended below, is re-issued in its entirety and extended through **July 26, 2020**.

Section 1. All public and nonpublic schools in Illinois serving pre-kindergarten through 12th grade students may open for in-person educational purposes, such as summer school, following the completion of the regular 2019-2020 school term. All public and nonpublic schools may continue to provide food and other non-educational services. Schools must follow IDPH guidance during Phase 4 and take proactive measures to ensure the safety of students, staff, and visitors, including, but not limited to:

a. Limiting the number of people in one space to fifty or fewer, consistent with public health guidance.
b. Ensuring compliance with social distancing requirements to the greatest extent possible. For purposes of this Executive Order, social distancing includes maintaining at least six-foot distance from other individuals and discouraging physical contact between individuals.
c. Ensuring appropriate hygienic practices, including washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), discouraging the sharing of personal items, and regularly cleaning high-touch surfaces.
d. Requiring the use of appropriate personal protective equipment, including the use of face coverings by students, staff, and visitors who are over age two and able to medically tolerate a face covering. Schools must provide face coverings to all employees who are not able to maintain a minimum six-foot social distance at all times and, to the extent possible, make disposable face coverings available for all students.

Executive Order 2020-41 (Sports wagering):

Executive Order 2020-41 is re-issued in its entirety and extended through **July 26, 2020**.

Executive Order 2020-42 (State Fairs):

Executive Order 2020-42 is re-issued in its entirety and extended through **July 26, 2020**.

Part 2: Savings Clause. If any provision of this Executive Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

JB Pritzker, Governor

Issued by the Governor June 26, 2020
Filed by the Secretary of State June 26, 2020

FILED
INDEX DEPARTMENT
JUN 26 2020
IN THE OFFICE OF
SECRETARY OF STATE

Exhibit 3

Edwardsville / Glen Carbon Chamber of Commerce v. Pritzker

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

EDWARDSVILLE / GLEN CARBON CHAMBER OF COMMERCE, an Illinois not for profit corporation,
Plaintiff
vs

GOVERNOR JAY ROBERT PRITZKER, in his official capacity
Defendant

20-MR-550

ORDER

The Court held a hearing on May 29, 2020 for the Plaintiff's Motion for a Temporary Restraining Order (TRO) and now rules as follows.

A TRO is an emergency remedy issued to maintain the status quo until a hearing can be held on an application for a preliminary injunction. (*Peoples Gas,* 117 Ill.App.3d at 355, 72 Ill.Dec. 865, 453 N.E.2d 740.) ***Passon v. TCR, Inc.***, 242 Ill. App. 3d 259, 264, 608 N.E.2d 1346, 1350 (2d Dist. 1993). The hearing is a summary proceeding, not an evidentiary hearing. The Court has reviewed the filings from both parties, the *amici* brief and arguments from counsel. Additionally the Court has not conducted any analysis on the Governor's authority to enforce his executive orders based upon any provision of the United States Constitution, such as due process, or any federal civil rights statute because Chamber of Commerce has disavowed any rights or claim for relief that it has under federal law. "Just so it is clear, The Chamber is **NOT** seeking any relief under the U.S. Constitution or under any Federal Law." (Emphasis in original) (Para. 6, Complaint).

To be entitled to temporary injunctive relief, plaintiffs must demonstrate that they (1) possess a protectable right, (2) will suffer irreparable harm without the protection of an injunction, (3) have no adequate remedy at law, and (4) are likely

to be successful on the merits of their action. *Murges v. Bowman,* 254 Ill.App.3d 1071, 1081, 194 Ill.Dec. 214, 627 N.E.2d 330 (1993). "The plaintiff is not required to make out a case which would entitle him to judgment at trial; rather, he only needs to show that he raises a 'fair question' about the existence of his right and that the court should preserve the status quo until the cause can be decided on the merits." *Stocker Hinge Manufacturing Co.,* 94 Ill.2d at 542, 69 Ill.Dec. 71, 447 N.E.2d 288. ***Bartlow v. Shannon***, 399 Ill. App. 3d 560, 567, 927 N.E.2d 88, 95 (5th Dist. 2010)

In addition, "If these elements are met, then the court must balance the hardships and consider the public interests involved...To obtain a preliminary injunction, the plaintiff must raise a "fair question" that each of the elements is satisfied. *Clinton Landfill,* 406 Ill.App.3d at 378, 348 Ill.Dec. 117, 943 N.E.2d 725." ***Makindu v. Illinois High Sch. Ass'n***, 2015 IL App (2d) 141201, ¶ 31, 40 N.E.3d 182, 190

The Defendant has not filed a verified answer to the verified complaint. "On a motion for a temporary restraining order, it has long been held that in the absence of a verified answer, the court should not receive or consider evidence or affidavits from the opposing party. *Russell v. Howe,* 293 Ill.App.3d 293, 296, 227 Ill.Dec. 894, 688 N.E.2d 375 (1997); *Carriage Way Apartments v. Pojman,* 172 Ill.App.3d 827, 836, 122 Ill.Dec. 717, 527 N.E.2d 89 (1988); *Kurle v. Evangelical Hospital Ass'n,* 89 Ill.App.3d 45, 48, 44 Ill.Dec. 357, 411 N.E.2d 326 (1980)." ***Bridgeview Bank Group v. Meyer***, 2016 IL App (1st) 160042, ¶ 11, 49 N.E.3d 916, 920. The Plaintiff did not object to the filing of an *amici* brief, but upon review by the Court a Declaration of Michael Wahl, M.D. is attached to the brief. Because *amici* filed their brief on behalf of the Defendant, the Court will not consider the Declaration of Dr. Wahl for its ruling on the TRO motion.

During oral argument counsel for both sides frequently referenced other cases bearing on the Governor's Executive Orders and his authority under our Illinois Constitution and statutory framework. The Court notes that two similar cases that were discussed are highlighted on the Illinois Supreme Court's website under the headline "High-Profile Cases Before the Illinois Appellate Courts" http://www.illinoiscourts.gov/appellatecourt/highprofile/default.asp (last visited June 5,

2020). In both of the cases listed the plaintiffs were granted TROs against Governor Pritzker. The Governor sought immediate review of the orders by filing appeals to the Appellate Court of Illinois, Fifth Judicial District, in Mt. Vernon, Illinois. Both of the plaintiffs declined to defend their TROs and instead consented to dissolving or vacating their TROs before the Appellate Court could rule.

During the course of the hearing, circumstances changed as the Governor issued a superseding order, Executive Order #38. The Plaintiff's filings on the TRO dealt with Governors Executive Order #32, which declared certain businesses either essential or non-essential. The non-essential businesses were not allowed to operate and could have been the basis for plaintiff's protectable rights being violated and irreparable harm. EO38 eliminated the distinction between essential and non-essential businesses, depriving the Plaintiff of this argument for its TRO motion.

This parties then argued the question of whether or not the Motion for TRO was moot in light of EO38. The Plaintiff believes that it still has a viable motion because it not only claims injury from the essential / non-essential issue, which is now moot for TRO purposes, but also claims injury from business premise activities being limited or severely limited by any executive order, and also requests an injunction for any future executive order, which would include EO38. Plaintiff's counsel identified general categories of bars, restaurants and gyms as suffering continuing harm. The Court finds that the Motion for TRO survives the mootness issue, at least in part.

The parties then argued whether or not the Chamber has standing to represent its members. An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt,* 432 U.S. at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394. ***Int'l Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Dept. of Employment Sec.***, 215 Ill. 2d 37, 47, 828 N.E.2d 1104, 1111 (2005). The second prong is, "at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the

association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary." *Brown Group,* 517 U.S. at 555–56, 116 S.Ct. at 1535–36, 134 L.Ed.2d at 769. ***Id.*** At 47-48, 1111. However, "Under Illinois law, a plaintiff need not allege facts establishing standing. *Wexler v. Wirtz Corp.*, 211 Ill.2d 18, 22, 284 Ill.Dec. 294, 809 N.E.2d 1240 (2004); *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago,* 189 Ill.2d 200, 206, 244 Ill.Dec. 26, 724 N.E.2d 914 (2000). Rather, it is the defendant's burden to plead and prove lack of standing. *Chicago Teachers Union,* 189 Ill.2d at 206, 244 Ill.Dec. 26, 724 N.E.2d 914; *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 494, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988)." ***Id.*** at 45, 1110.

The organizational purpose of the Chamber is not revealed on the record except in very general terms suggesting that it "represents its members in a variety of matters of importance". (Par. 2, Complaint). The Governor's argument, however, lacks any factual basis. Without a verified answer and affidavits supporting the Defendant's argument that the lawsuit does not comport with the Chamber's organizational purpose, the Court has no facts with which to engage in an analysis of that issue and will deny the Governor's challenge to standing at this stage of the proceedings.

Turning to the merits of the motion and the elements required, the plaintiff alleges a clearly ascertainable right in need of protection in paragraphs 23-25 of its Memorandum in Support of a TRO for the first element.

> 23. It should go without saying that Plaintiffs have protectable rights and interests at stake.
>
> 24. As set forth more fully above, Plaintiffs have a protectable right and interest in being free from invalid lawmaking that blatantly overreaches the authority of the Governor under his constitutional powers of office or any delegated power by the legislature in the IEMAA.
>
> 25. The Governor has unilaterally determined that certain businesses he deemed non-essential be closed without any oversight of this Court that such business premises constitute a threat to public health.

During oral argument, counsel for the Chamber argued that particular members have the right to not have restrictions on how many people they can have on their property. However, the Chamber's verified complaint has failed to identify a single member whose rights need protection or who is suffering irreparable harm.

Assuming for the moment that the Chamber has plead enough to satisfy the first element required for a TRO, it is clear that the Chamber has not plead any facts to identify a single member who is being irreparably harmed. Quoting from the Verified Complaint:

> 112. The Chamber is being irreparably harmed each and every moment in which it continues to be subjected to Pritzker's ultra vires order.
>
> 113. Among other things, The Chamber, is prevented from having private business premises opened and are subject to potential enforcement actions, which actions regarding license revocation, etc. have been expressly threatened by Pritzker in his daily press briefings, to the extent private business premises might engage in activities proscribed by EO 32.

Illinois is a fact pleading jurisdiction, and pleading conclusions without well plead facts is fatal to Plaintiff's claim for the relief of a temporary restraining order.

> Such broad, conclusory allegations are insufficient to establish a plaintiff's entitlement to temporary injunctive relief. See Capstone Financial Advisors, Inc. v. Plywaczynski, 2015 IL App (2d) 150957, ¶ 11, 2015 WL 9437987 (plaintiff's failure to identify single client whom defendant solicited, or whose confidential information defendant used, fatal to motion for temporary restraining order); Office Electronics, Inc. v. Adell, 228 Ill.App.3d 814, 820, 170 Ill.Dec. 843, 593 N.E.2d 732 (1992) (conclusory allegations regarding plaintiff's irreparable injury and lack of adequate legal remedy do not support issuance of preliminary injunction); Schlicksup Drug Co. v. Schlicksup, 129 Ill.App.2d 181, 188, 262 N.E.2d 713 (1970) (finding allegation that defendant's conduct had and "will continue to cause irreparable injury to the plaintiff for which plaintiff has no adequate remedy at law" was a conclusion and not an allegation of fact (internal

quotation marks omitted)). ***Bridgeview Bank Group v. Meyer***, 2016 IL App (1st) 160042, ¶¶ 14-15, 49 N.E.3d 916, 920–21.

The Governor also challenges the Chamber's likelihood of success on the merits. "To demonstrate a likelihood of success on the merits, a party need not make out a case that would necessarily require relief at the final hearing. *Williams Brothers Construction, Inc.*, 243 Ill.App.3d at 956, 184 Ill.Dec. 14, 612 N.E.2d at 894. A party need only raise a "'fair question as to the existence of the rights claimed, [and] lead the court to believe that it will probably be entitled to the relief sought if the proof sustains the allegations.'" *Williams Brothers Construction, Inc.*, 243 Ill.App.3d at 956, 184 Ill.Dec. 14, 612 N.E.2d at 894–95." ***Keefe-Shea Joint Venture v. City of Evanston***, 332 Ill. App. 3d 163, 174, 773 N.E.2d 1155, 1164 (1st Dist. 2002). The Plaintiff seeks a declaration in Count 1 that no disaster existed in the State within the meaning of Section 4 of the Emergency Management Act (IEMAA), 20 ILCS 3305/4. Count 2 seeks a declaration that due to the absence of a disaster on April 30, 2020 the Governor does not possess any emergency powers pursuant to Section 7 of the IEMAA, 20 ILCS 3305/7 to issue EO #32. Count 3 seeks a declaration that the Illinois Department of Health Act (IDHA), 20 ILCS 2305 governs the conduct of "State Actors" in the context of the lawsuit.

The Court finds that the Plaintiff is unlikely to succeed on its statutory interpretation. The Chamber alleges that the prerequisite for declaring a disaster under the IEMAA required an occurrence or threat requiring emergency action to avert, *inter alia*, a public health emergency. (Para. 65, Complaint). The statute defines a disaster as follows:

> "Disaster" means an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including but not limited to fire, flood, earthquake, wind, storm, hazardous materials spill or other water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, extended periods of severe and inclement weather, drought, infestation, critical shortages of essential fuels and energy, explosion, riot, hostile military or paramilitary action, public health emergencies, or acts of domestic terrorism. 20 ILCS 3305/4

The Governor upon proclaiming a disaster exists is authorized by statute to exercise emergency powers as defined in Section 7. "Emergency Powers of the Governor. In the event of a disaster, as defined in Section 4, the Governor may, by proclamation declare that a disaster exists. Upon such proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers;" On March 9, 2020, Governor Pritzker issued a proclamation declaring a disaster related to the COVID-19 pandemic invoking Section 7. On April 1, 2020, Governor Pritzker issued a similar proclamation, again, finding that a continuing disaster existed and on April 30, 2020 he again signed a proclamation finding under Section 7 that a disaster existed. The proclamations are attached to the Plaintiff's complaint, and each proclamation makes dozens of factual findings supporting the proclamation. The Chamber does not contest a single one of those facts.

The Chamber alleges that "reissuing a disaster proclamation for the same COVID-19 virus due to an unnecessary self-serving termination date placed in a previous proclamation of disaster is not a threat or occurrence satisfying the definition of a disaster in Section 4 of the IEMAA." (Para. 74, Complaint). The Plaintiff is incorrect that the termination date is unnecessary as Section 7 mandates that the proclamations are only valid for 30 days. The 30 days mandated by statute require the Governor to issue a new proclamation on or before the end of the preceding proclamation, assuming that the disaster is continuing, such as in the case of flooding. Over the past 40 years Governors of the State of Illinois have issued successive disaster declarations in 21 of those years. Over 2009 and 2010 four successive disasters were declared after the original declaration regarding the H1N1 virus. The language makes clear that the 30 day period is triggered by the Governor's proclamation declaring a disaster, not by the date on which the disaster initially arises. In addition, the Governor is not required to seek approval from the General Assembly to continue a disaster proclamation beyond 30 days. The General Assembly demonstrated it was capable of creating limits on successive disaster declarations when it believed they were appropriate. Local disaster declarations have these limitations. "(a) A local disaster may be declared only by the principal executive officer of a political subdivision, or his or her interim emergency successor, as provided in Section 7 of the "Emergency Interim Executive Succession

Act". It shall not be continued or renewed for a period in excess of 7 days except by or with the consent of the governing board of the political subdivision." 20 ILCS 3305/11. Unlike local executive authorities whose emergency powers are limited in time, the Governor is not required to seek approval for proclamations under the IEMAA after 30 days.

The General Assembly also wrote into law that other statutes cannot limit the emergency powers of the Governor under the IEMAA. "Limitations. Nothing in this Act shall be construed to: (d) Limit, modify, or abridge the authority of the Governor to proclaim martial law or exercise any other powers vested in the Governor under the constitution, statutes, or common law of this State, independent of or in conjunction with any provisions of this Act;" 20 ILCS 3305/3. The Plaintiff's claim that the Governor cannot proclaim successive disasters over COVID-19 finds no support in the plain reading of the statute.

The Plaintiff's claim in Count 3 that the Public Health Act is the only source of the Governor's authority to prevent the spread of COVID-19 and that Executive Order #32 under the IEMAA is therefore invalid also fails at the TRO stage of these proceedings. Because EO32 has been superseded by EO38 the Plaintiff's claim in Count 3 is moot.

The Court is aware of the economic devastation in Illinois and Madison County as a result of the Governor's executive orders and is not saying that the Governor's authority to exercise his emergency powers is without restraint. As the Act outlines, he must identify an occurrence to support each proclamation, and if the occurrence is non-existent, then those affected can petition for redress. The Plaintiff here has not challenged the factual basis for the Governor's proclamations.

The Plaintiff's Motion for a Temporary Restraining Order is DENIED.

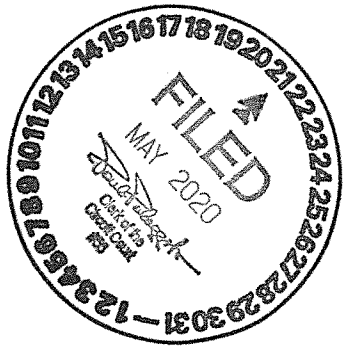
6/5/2020

Judge Christopher Threlkeld

Exhibit 4

Running Central, Inc. v. Pritzker

IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS



RUNNING CENTRAL, INC., d/b/a RC Outfitters,

Plaintiff,

v.

GOVERNOR JAY ROBERT PRITZKER, in his official capacity,

Defendant.

Case No. 2020-CH-105

Judge Raylene Grischow

OPINION AND ORDER

The cause is before the Court on plaintiff Running Central, Inc.'s ("Running Central") Motion for Temporary Restraining Order, and defendant Governor Jay Robert Pritzker's ("Governor") oral motion to dismiss Running Central's Verified Complaint for Declaratory and Injunctive Relief. The Court has considered the parties' written submissions and those of amici The Illinois Health and Hospital Association, the Illinois State Medical Society, the American Nurses Association-Illinois, and the Illinois Society for Advanced Practice Nursing, as well as the parties' oral arguments on the motions. For the reasons set forth below, the Court denies Running Central's motion for temporary restraining order and denies the Governor's motion to dismiss as premature.

Background and Procedural Posture

Faced with the unprecedented and ongoing COVID-19 public health emergency, the Governor, citing his legal authority under the Illinois Emergency Management Agency Act, 20 ILCS 3305/1 *et seq.* ("Act"), and the Illinois Constitution, issued emergency disaster proclamations on March 9, 2020, April 1, 2020, and April 30, 2020, along with several accompanying executive orders to combat COVID-19 and protect Illinois residents throughout the State. The Illinois General Assembly passed the Act to grant the Governor authority to implement

emergency actions to ensure the State is prepared to protect the health and safety of the people of Illinois in the event of a disaster. *See* 20 ILCS 3305/2(a). Among the executive orders issued by the Governor is Executive Order 2020-32, issued on April 30, 2020 immediately after the Governor's April 30, 2020 disaster proclamation. Executive Order 2020-32 includes within it the current "stay-at-home" order, which, among other things, did not classify certain retail operations, like Running Central, as "essential," thus limiting operations to on-line and curbside retail activities, as well as authorizing other limited non-sales related business operations.

Running Central, a retail store in Peoria, Illinois, filed this action seeking declaratory and injunctive relief, asserting that, under the plain language of the Act, the Governor's emergency powers are limited to one 30-day period per disaster, no matter how long the disaster endures. Running Central does not dispute that as a result of the COVID-19 pandemic, a "disaster" exists in Illinois pursuant to the relevant provisions of the Act, and has existed during all times relevant to these proceedings. Indeed, Running Central has conceded as much on the record. *See* May 7, 2020 Transcript of Proceedings at 50, ln. 16-20. Regardless, Running Central seeks a declaratory judgment, *inter alia*, that "[t]he emergency powers granted [the Governor] under the Act as a result of the March 9 Disaster Proclamation lapsed on April 09, 2020," 30 days after issuance of the Governor's initial disaster proclamation, and that "[t]here is no authority granted to [the Governor] under the Illinois Constitution or [the Act] to support the issuance of Executive Order 2020-32" on April 30, 2020, and that "Executive Order 2020-32 is unenforceable by the State of Illinois as a matter of law." (Running Central Complaint, Count I, Request for Relief, paragraphs C, F, and G). Through its motion for temporary restraining order Running Central seeks an immediate injunction against the Governor to enjoin him from enforcing Executive Order 2020-32 against Running Central and enjoining him from issuing any further Executive Orders which in any way restrict "the lawful business operations of" Running Central. *See* Running Central's May 18, 2020 Proposed Temporary Restraining Order With Notice.

Running Central filed this action on May 1, 2020 in the Circuit Court of Peoria County. The Governor moved to transfer the matter to Sangamon County. On May 12, 2020, Peoria County Judge Derek Asbury entered an Order granting the Governor's motion to transfer venue to Sangamon County. Upon transfer, the matter was scheduled for hearing on May 19, 2020 regarding Running Central's motion for temporary restraining order.

The Governor's Motion to Dismiss

While reviewing the parties' submissions in preparation for the May 19 hearing, the Court became aware of information leading it to believe that Running Central may be operating its business in contravention to Executive Order 2020-32. As a result, at the opening of the May 19 hearing, the Court inquired of Running Central whether that was in fact the case, and, if so, was the case moot given that Running Central was not operating under the restrictions that formed the basis of its complaint. Counsel for Running Central confirmed that Running Central was indeed operating its business. After hearing that admission, the Governor made an oral motion to dismiss Running Central's complaint based upon the grounds of mootness, ripeness, and/or lack of standing. After considering the parties' arguments related to that motion the Court took the motion to dismiss under advisement. The Court now denies the motion to dismiss as premature, without prejudice to the Governor raising those defenses in response to Running Central's complaint.

Running Central's Motion for Temporary Restraining Order

"A temporary restraining order is an emergency remedy issued to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue." *Delgado v. Bd. of Election Comm'rs*, 224 Ill. 2d 481, 483 (2007). It is "an extraordinary remedy applicable only to situations where an extreme emergency exists and serious harm would result if it were not issued." *Boltz v. Estate of Bryant*, 175 Ill. App. 3d 1056, 1066 (1st Dist. 1988). To obtain this "extraordinary remedy," Running Central "must demonstrate (1) an ascertainable right in need of protection, (2) a likelihood of success on the merits, (3) irreparable harm in the absence of injunctive relief, and (4) the lack of an adequate remedy at law." *Bridgeview Bank Grp. v. Meyer*, 2016 IL App (1st) 160042 ¶ 12. If Running Central is able to satisfy this burden, it must also make a fifth and final showing: "the benefits of granting the injunction outweigh the possible injury that the [State] might suffer as a result thereof." *Gannett Outdoor of Chi. v. Baise*, 163 Ill. App. 3d 717, 721 (1st Dist. 1987). "In balancing the equities, the court should also consider the effect of the injunction on the public." *Kalbfleisch ex rel. Kalbfleisch v. Columbia Cmty. Unit Sch. No. 4*, 396 Ill. App. 3d 1105, 1119 (5th Dist. 2009). "It is elemental that the court is obliged to consider the injury or inconvenience which may result to the defendant (especially where the defendant is a public body) or the public in general if the injunction is granted." *G.H. Sternberg & Co. v. Cellini*, 16 Ill. App. 3d 1, 6 (5th Dist. 1973).

After considering the parties' submissions and arguments, the Court concludes that Running Central has demonstrated neither a likelihood of success on the merits of its claims, nor that it will suffer irreparable injury if the emergency injunctive relief it seeks is not granted.

As to the likelihood of success on the merits of its claims, the Court finds that Running Central's statutory interpretation of the Act is not likely to succeed. "When we interpret a statute, the fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent." *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill.2d 559, 567, 315 Ill.Dec. 762, 877 N.E.2d 1091 (2007). "The language of the statute is the best indication of legislative intent, and we give that language its plain and ordinary meaning." *Id.* (*citing People v. Pack*, 224 Ill.2d 144, 147, 308 Ill.Dec. 735, 862 N.E.2d 938 (2007)). "We may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103, 117, 310 Ill.Dec. 416, 866 N.E.2d 227 (2007).

Section 7 of the Act provides that "[i]n the event of a disaster" the Governor may "by proclamation declare that a disaster exists." The Act then provides that "[u]pon such proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers...." Section 7 then goes on to delineate certain emergency powers the Governor may exercise for 30 days following "such proclamation." The Court is persuaded by the plain reading of the statute.

Here, the Governor issued three separate statewide disaster proclamations relating to COVID-19—on March 9, April 1, and April 30. Under the plain reading of the Act, "[u]pon such proclamation[s], the Governor shall have and may exercise" Section 7 emergency powers "for a period not to exceed 30 days" after each "such proclamation."

This language makes is clear that the 30-day period during which the Governor may exercise the emergency powers is triggered by the Governor's proclamation declaring a disaster, not by the date on which the disaster initially arises. If a disaster still "exists," Section 7 of the Act permits the Governor to continue declaring its existence by proclamation and utilizing the emergency powers conferred on him for the 30-day period following each such proclamation. As a result, the April 30, 2020 disaster proclamation statutorily authorized the Governor's Section 7 emergency powers implemented in Executive Order 2020-32 on April 30, 2020. Running Central's assertion that Section 7 emergency powers were statutorily permitted for only one single 30-day

period after the initial March 9, 2020 disaster proclamation is, thus, contrary to the plain reading of the Act. Running Central's narrow interpretation reads a limitation into the Act that does not exist.

The General Assembly demonstrated it was capable of creating limits on renewing disaster declarations when it believed such limitations were appropriate. Specifically, although Section 11 of the Act permits the principal executive officer of a political subdivision to declare a "local disaster," 20 ILCS 3305/11, such a local disaster declaration "shall not be *continued or renewed* for a period in excess of 7 days *except by or with the consent of the governing board of the political subdivision.*" *Id.* § 11(a) (emphasis added). Thus, while the General Assembly permitted the Governor to declare a disaster with no limitation on subsequent declarations and the renewed triggering of emergency powers under Section 7, it explicitly precluded local executive officials from "continu[ing] or renew[ing]" such declarations without the intervention of the local legislative body. *Id.*

The Court is not saying the Governor's authority to exercise his emergency powers is without restraint. As the Act outlines, he must identify an occurrence to support each emergency declaration. Once the emergency has been abated, the Governor's authority to issue Executive Orders will cease.

Because the interpretation of the Act upon which Running Central bases its claims cannot be squared with either the plain reading of Section 7 of the Act or an examination of the Act as a whole, there is no likelihood that Running Central will succeed on the merits, an essential element for a temporary restraining order. Having decided the statutory construction issue in the Governor's favor, the Court does not reach the issue of whether the Governor had separate and independent constitutional authority to issue Executive Order 2020-32.

In addition to having no likelihood of success on the merits of its claims, in light of Running Central's admission that it is operating its business in contravention to the restrictions placed upon it through Executive Order 2020-32, it has not sustained its burden of showing that it will suffer irreparable injury in the event the requested emergency injunctive relief is not granted. Because of these two failings (no likelihood of success and no irreparable injury), Running Central's motion for temporary restraining order must be denied.

Finally, though Running Central has not met the requirements of emergency injunctive relief, Running Central's plight is not lost upon this Court. The Court understands the economic impact the Executive Order brings. While Running Central's interest in continuing to operate its business is important to it, it does not outweigh the Governor's interest in protecting the citizens of the State of Illinois.

IT IS ORDERED: (1) defendant Governor JB Pritzker's motion to dismiss plaintiff Running Central, Inc.'s Verified Complaint for Declaratory and Injunctive Relief is denied without prejudice to raising any and all defenses in its response to plaintiff's Verified Complaint, and (2) plaintiff Running Central, Inc.'s Motion for Temporary Restraining Order is denied.

ENTERED: May 21, 2020

Raylene Grischow

Raylene Grischow, *Circuit Court Judge*

Exhibit 5

Mahwikizi v. Pritzker

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

JUSTIN MAHWIKIZI,

Plaintiff,

v.

GOVERNOR JAY ROBERT PRITZKER,
in his official capacity,

Defendant.

Case No. 20 CH 04089
Judge Celia Gamrath

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

This matter came to be heard on Plaintiff Justin Mahwikizi's Emergency Motion for Temporary Restraining Order and Verified Complaint for Declaratory Judgment and Injunctive Relief; due notice having been given to Defendant Governor Jay Robert Pritzker; Plaintiff appeared self-represented and Defendant appeared through the Office of the Attorney General; the Court having considered the Emergency Motion for Temporary Restraining Order, Defendant's Opposition Brief, and Plaintiff's Response, and having conducted oral argument via Zoom video conference on May 7, 2020; the Court being fully advised in the premises, THE COURT FINDS:

1. On March 9, 2020, Governor Jay Robert Pritzker ("Governor Pritzker") issued a proclamation declaring a disaster exists within Illinois due to the national and world-wide COVID-19 pandemic. COVID-19 is a "novel severe acute respiratory illness" that spreads rapidly "through respiratory transmission." To date, there have been more than 70,000 confirmed cases of COVID-19 in Illinois and approximately 3,000 deaths. What makes response efforts particularly formidable is that asymptomatic individuals may carry and spread the virus unknowingly, and there is no vaccine or effective treatment yet.

2. On March 9, 2020, to slow the spread of COVID-19, Governor Pritzker issued a proclamation pursuant to the authority granted him under the Illinois Emergency Management Agency Act (the "Act"), 20 ILCS 3305 *et seq.* The Act provides, "In the event of a disaster, as defined in Section 4, the Governor may by proclamation declare that a disaster exists." 20 ILCS 3305/7.

3. Section 4 of the Act defines a disaster as follows:

"Disaster" means an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including but not limited to fire, flood, earthquake, wind, storm, hazardous materials spill or other water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, extended periods of severe and inclement weather, drought, infestation, critical shortages of essential fuels and energy, explosion, riot, hostile military or paramilitary action, public health emergencies, or acts of domestic terrorism. 20 ILCS 3305/4.

4. On March 20, 2020, Governor Pritzker issued a stay-at-home order, which he has since extended and modified before issuing his latest directive modifying existing restrictions at the end of April. Governor Pritzker's Executive Order of April 30, 2020 (Executive Order 2020-32) extends the stay-at-home order through May 30, 2020, as the State moves into its "Restore Illinois" plan, which is a five-phase plan to re-open Illinois, guided by health metrics and with distinct business, education, and recreation activities characterizing each phase.

5. In essence, the stay-at-home orders direct Illinoisans to practice what experts call "social distancing," or limiting activity outside the home, staying at least six feet apart from others, and refraining from congregating in groups of more than ten. As part of these efforts, "non-essential" businesses have been required to shutter their doors and schools have been forced to go remote and commence e-learning. Governor Pritzker, on the advice and counsel of the Illinois Department of Public Health, has determined that these orders were necessary to avoid fatality rates that would have been "between ten to twenty times higher."

6. Part of Executive Order 2020-32 requires individuals to wear face-coverings in public places or when working. Specifically, Section 1.1 of Executive Order 2020-32 states, "Any individual who is over age two and able to medically tolerate a face-covering (a mask or cloth face-covering) shall be required to cover their nose and mouth with a face-covering when in a public place and unable to maintain a six-foot social distance. Face-coverings are required in public indoor spaces such as stores."

7. Plaintiff Justin Mahwikizi ("Mahwikizi") is a resident of Cook County, Illinois. Mahwakizi qualifies as an "essential worker" by providing rideshare services to the general public and other essential workers. Section 1.1 of Executive Order 2020-32 requires Mahwikizi to wear a mask within his vehicle when another person is present and requires passengers to wear a mask while in his car so long as they can medically tolerate it.

8. Mahwikizi seeks a temporary restraining order to enjoin Governor Pritzker, his officers, agents, employees, and all persons in active concert or participation with him from enforcing Executive Order 2020-32 as it pertains to forcing individuals to wear face-coverings in their cars, which he alleges places himself and citizens at great risk of bodily harm.

9. A temporary restraining order is a drastic, emergency remedy which may issue only in exceptional circumstances and for a brief duration. *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 416 (2d Dist. 1987). The purpose of a temporary restraining order is to allow the Court to preserve the status quo and prevent a threatened wrong or a continuing injury pending a hearing to determine whether it should grant a preliminary injunction. *Id.*

10. "The status quo to be preserved is the last actual, peaceable, uncontested status which preceded the pending controversy." *Martin v. Eggert,* 174 Ill. App. 3d 71, 77 (2d Dist. 1988). While the term status quo has been the subject of often inconsistent interpretations, "'[preliminary injunctive relief] is designed to prevent a threatened wrong or the further perpetration of an injurious act.'" *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4*, 396 Ill. App. 3d 1105, 1118 (5th Dist. 2009). Sometimes the status quo is "not a condition of rest but, rather, . . . a condition of action that [is] necessary to prevent irreparable harm." *Id.* at 1117.

11. To obtain a temporary restraining order, Mahwikizi must establish: (1) a clearly ascertainable right in need of protection; (2) irreparable harm by the defendant's conduct if an injunction does not issue; (3) there is no adequate remedy at law; and (4) likelihood of success on the merits. *Chi. Sch. Reform Bd. of Trs. v. Martin,* 309 Ill. App. 3d 924, 939 (1st Dist. 1999). Additionally, the Court may balance the equities or the relative hardships. *Scheffel & Co. v. Fessler,* 356 Ill.App.3d 308, 313 (5th Dist. 2005).

12. Injunctive relief is an extraordinary remedy, and the Court finds Mahwikizi has not carried his burden of proving the elements of irreparable injury and likelihood of success required for injunctive relief. While the Court sympathizes with Mahwikizi's concerns and fear about COVID-19 safety measures and restrictions, an injunction will not issue to allay mere fears. Moreover, the balance of hardships weighs considerably against issuing an injunction, and weighs in favor of Governor Pritzker and his effort to protect the public at large.

13. The elements of irreparable injury and inadequate remedy at law required for a temporary restraining order are closely related. *Happy R. Sec., LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 36. An irreparable injury is one which cannot be adequately compensated in damages or be measured by any certain pecuniary standard. *Diamond Sav. & Loan Co. v. Royal Glen Condo. Ass'n*, 173 Ill. App. 3d 431, 435 (2d Dist. 1988). Irreparable injury does not necessarily mean injury that is great or beyond the possibility of repair or compensation in damages, but is the type of harm of such constant or frequent recurrence that no fair or reasonable redress can be had in a Court of law. *Bally Mfg. Corp. v. JS&A Group, Inc.*, 88 Ill. App. 3d 87, 94 (1st Dist. 1980).

14. Mahwikizi alleges he suffers irreparable harm and danger each day by wearing a face-covering as required by Executive Order 2020-32. He alleges he is at great risk of bodily harm of: (1) losing consciousness while wearing the mask and potentially

colliding with pedestrians or other drivers; (2) being harmed by a belligerent or hostile rideshare client who objects to his attempts at enforcing the mask or face covering requirement; and (3) being severely harmed, or otherwise targeted, by self-organizing entities in the metropolitan areas of Cook County for wearing a mask or face-covering associated with a rival entity. Mahwikizi also complains that costs and logistics of purchasing hard-to-get masks give rise to irreparable harm.

15. The Court is not persuaded by Mahwikizi's perceived harms. First, Mahwikizi provides no support for his contention that requiring rideshare drivers to wear masks or face-coverings while driving results in driver fatigue or loss of consciousness. He points to a single incident in New Jersey where a driver lost consciousness while driving and wearing a heavy-duty N95 mask for hours. However, Executive Order 2020-32 does not require N95 masks or medical-grade face masks. In fact, Governor Pritzker has made clear N95 masks should be reserved for medical professionals. The New Jersey case is an isolated event unique to the facts of the particular case, including the age and health of the individual, number of hours he wore the N95 mask, and the heavy-duty nature of N95 masks. The risk of Mahwikizi falling prey to the same fate is purely speculative and unsupported by any specific facts.

16. Further, Executive Order 2020-32 carves out exceptions for people under two years of age and those unable to medically tolerate a face-covering. The face-covering requirement is also limited to public places and when working and unable to maintain a six-foot social distance. Thus, if Mahwikizi is alone in his vehicle or able to maintain a six-foot distance, or if he is medically unable to wear face-coverings, he is excused from the face-coverings requirement and runs no risk of the remote harm he fears.

17. Second, the Court is aware of the tragic incident in Michigan in which a security guard was shot over his refusal to permit a family to enter a store without wearing a face-covering. However, this isolated incident bears no relation to Mahwikizi's factual situation as a rideshare driver. Gun violence is a long-standing concern, but there is no acute reason to suspect that requiring a rideshare driver or passengers to wear face-coverings will result in an increase in gun violence. If Mahwikizi truly fears for his safety, he may cease operating as a rideshare driver while Executive Order 2020-32 remains in place. He is also under no obligation to serve passengers who refuse to wear a face-covering, nor is he required to enforce the law by demanding a passenger wear a mask. Mahwikizi's fear that a police officer may pull him over and cause an altercation if a passenger does not wear a mask is much too speculative to support injunctive relief.

18. Third, the Court is unpersuaded by Mahwikizi's portrayal of the risk of driving through metropolitan Cook County wearing a mask or face covering representing the colors of various "self-organizing entities." Again, Mahwikizi fails to provide any factual support for this contention or point to any instances in which a self-organizing entity has targeted a rideshare driver or passenger wearing a particular color of mask or face-covering. Mahwikizi's irreparable harm must be substantial and imminent, but this claim is purely speculative. Rideshare drivers are free to operate their services in the areas and

neighborhoods of their choice. Mahwikizi is certainly able to tailor his geographic area of service to avoid the areas in which he feels his safety is at risk. This holds true in times of COVID-19 and non-COVID-19. While this may impact his rideshare route, the damage if any is monetary; it is far too remote and not irreparable to justify extraordinary injunctive relief on an emergency basis.

19. Fourth, Mahwikizi is not in danger of irreparable harm by allegedly being forced to destroy his clothing to make a mask or wear specialized or one-time-use masks that are difficult to obtain. Governor Pritzker, along with the CDC, has expressly advised non-healthcare workers against the use of surgical masks and N95 respirators. Executive Order 2020-32 allows for masks or face-coverings "fashioned from household items or made at home from common materials at low cost," as described by the CDC. PPE and single-use masks sold by pharmacies are not required by Executive Order 2020-32. Homemade face coverings from old sheets, clothes, rags, bandanas, and the like may be worn and reused at little cost and effort, negating Plaintiff's argument of irreparable harm.

20. In addition to failing to prove irreparable harm that is reasonable and imminent, Plaintiff has failed to show a likelihood of success on the merits to justify entry of an injunction. To show a likelihood of success on the merits, Plaintiff must: (1) raise a fair question as to the existence of the right claimed, (2) lead the Court to believe that she will probably be entitled to the relief prayed for if the proof sustains her allegations, and (3) make it appear advisable that the positions of the parties stay as they are until the Court has an opportunity to consider the merits of the case. *Abdulhafedh*, 161 Ill. App. 3d at 417. An element of the likelihood of success on the merits is whether the complaint states a cause of action sufficient to withstand a 2-615 motion to strike. *See Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054 (1st Dist. 2000).

21. Mahwikizi argues a likelihood of success on the merits of his claim based on the notion Governor Pritzker's emergency powers have already ceased and he was without authority to enact Executive Order 2020-32. Plaintiff contends that Governor Pritzker's March 9, 2020 proclamation declaring a state of disaster in Illinois limited his use of the emergency powers under the Act to a period of 30 days from the date of the proclamation declaring a disaster exists. *See* 20 ILCS 3305/7. As such, Mahwikizi contends, any Executive Orders issued after the first 30 days are without authority and unconstitutionally deprive Mahwikizi of his rights. The Court disagrees. A reasonable interpretation of the Act grants Governor Pritzker the authority to extend his power beyond an initial 30-day period where, as here, the disaster is ongoing and has not abated.

22. Mahwikizi correctly notes that the limit of 30 days in the Act encompasses the occurrence of a discrete event - one that stops and starts in a relatively short amount of time, necessitating implementation of emergency powers for 30 days. However, the Act also contemplates more, and is not to be read so narrowly.

23. COVID-19 is not a discrete or isolated disaster. It is a dynamic pandemic, still ongoing. This continuing disaster poses a threat that is underway and has not abated as quickly as a more typical natural disaster like an earthquake or tornado. When an emergency epidemic of disease occurs and a pandemic ensues, the Governor has authority under the Act to utilize emergency powers beyond a single 30-day period to protect the community and residents of the State.

24. The Court is persuaded by the well-reasoned (albeit non-binding) opinion of Judge Lee in *Stephen Cassell & The Beloved Church v. Snyders et al.*, 20 C 50153 (May 3, 2020). In *Cassell,* the Court addressed the interplay between Sections 4 and 7 of the Act and rejected the same argument Mahwikizi raises here, that the Governor exceeded his authority under the Act.

25. As explained in *Cassell*, in order to invoke the Act's emergency powers, the Governor must issue a proclamation declaring that a disaster exists. 20 ILCS 3305/7. Section 4 of the Act defines a disaster as "an occurrence or threat of widespread or severe damage, injury or loss of life...resulting from...[an] epidemic." 20 ILCS 3305/4. The unrefuted facts and objective data show that COVID-19 continues to infect and kill Illinois residents at a high rate. "[T]herefore, a 'threat of widespread or severe damage, injury or loss of life' continues to exist." *Cassell*, 20 C 50153 at 32.

26. In issuing the most recent disaster proclamation on April 30, 2020, Governor Pritzker references numerous facts to warrant the need for face-coverings, social distancing, and other measures designed as cornerstones of a statewide effort to slow the spread of COVID-19. Mahwikizi does not refute these factual underpinnings in his pleadings, but challenges only the Governor's authority to issue the April 30 emergency proclamation based on the same disaster identified on March 9. However, this argument ignores the disaster proclamation Governor Pritzker made on April 30. On April 30, Governor Pritzker determined and proclaimed a disaster still exists. Based on this proclamation, Governor Pritzker had the authority under the Act to continue to exercise his emergency powers for an additional 30 days and issue Executive Order 2020-32. *See* 20 ILCS 3305/7.

27. As aptly noted in *Cassell*, the Act does not give the Governor unfettered power. "To support each successive emergency declaration, the Governor must identify an 'occurrence or threat of widespread or severe damage, injury or loss of life.' [20 ILCS 3305/4.] Once an emergency has abated, the facts on the ground will no longer justify such findings, and the Governor's emergency powers will cease." *Cassell,* 20 C 50153 at 33. Unfortunately, Illinois is not yet at this stage, nor does Plaintiff claim it is. The risk of COVID-19 is still real for Illinoisans and continues to be fatal. Thus, Mahwikizi has not shown a likelihood of success on the merits of his claim that Governor Pritzker exceeded his power in issuing Executive Order 2020-32 under these exceptional circumstances.

28. Finally, the Court has balanced the equities and relative hardships of the parties and finds the balance weighs in favor of preventing the spread of this virulent and deadly virus

through the recommended social distancing guidelines and the wearing of face-coverings. Face-coverings are designed to protect those who come into contact with a person infected with the coronavirus. Because some people are asymptomatic, this makes wearing of masks even more essential in attempting to slow the spread. The Court recognizes the discomfort of wearing face-coverings and appreciates Mahwikizi's stated concerns for his safety and welfare as a rideshare driver, but the science is clear. COVID-19 has already resulted in thousands of deaths in America and the State of Illinois, and it is poised to threaten thousands more people if proper precautions are not taken. Enjoining enforcement of Executive Order 2020-32 would place at risk the many Illinoisans, including essential workers such as Mahwikizi and rideshare passengers. It would also affect critical funding for Illinois and limit implementation of additional necessary measures that are necessary components of the State's efforts to combat COVID-19.

29. In sum, the Court finds Mahwikizi has not met his burden of proof for issuance of an emergency temporary restraining order. He has not shown a likelihood of prevailing on his claim that Governor Pritzker exceeded his emergency powers under the Act by issuing Executive Order 2020-32 on April 30, 2020. Nor has he established he will suffer imminent irreparable harm or that the balance of hardships weigh in his favor.

30. This Court does not discount Mahwikizi's personal concerns and fears. However, Executive Order 2020-32 is a legitimate exercise of the Governor's power to protect the public health and safety of Illinoisans. Sometimes individual rights have to give way to the health safety and protection of the public at large. This dates back to the early 1900's. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Governor Pritzker's effort to slow the spread of COVID-19 by requiring face-coverings as recommended by the CDC is within his executive emergency powers and neither unreasonable nor arbitrarily imposed.

IT IS ORDERED: Plaintiff Justin Mahwikizi's Motion for Temporary Restraining Order against Defendant Governor Jay Robert Pritzker is denied.

Judge Celia G. Gamrath

MAY 08 2020

Circuit Court - 2031

ENTERED: MAY 8, 2020

Judge Celia Gamrath, No. 2031
Chancery Division
Circuit Court of Cook County

Exhibit 6

Cassell v. Snyders


KeyCite Blue Flag – Appeal Notification
Appeal Filed by STEPHEN CASSELL, ET AL v. DAVID SNYDERS, ET AL, 7th Cir., May 6, 2020

2020 WL 2112374
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Western Division.

Stephen CASSELL and The Beloved Church, an Illinois not-for-profit corporation, Plaintiffs,
v.
David SNYDERS, Sheriff of Stephenson County, Jay Robert Pritzker, Governor of Illinois, Craig Beintema, Administrator of the Department of Public Health of Stephenson County, Steve Schaible, Chief of Police of the Village of Lena, Illinois, Defendants.

20 C 50153
|
Signed May 3, 2020

Synopsis

Background: Evangelical Christian church and its pastor brought action against Illinois Governor, sheriff, county's public health administrator, and police chief under § 1983 and state law, alleging stay-at-home orders issued during COVID-19 pandemic violated First Amendment's Free Exercise Clause, Illinois's Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and the Illinois Department of Health Act (DHA). Church and pastor moved for temporary restraining order (TRO) and preliminary injunction preventing enforcement of the stay-at-home orders.

Holdings: The District Court, John Z. Lee, J., held that:

[1] plaintiffs' claims for declaratory and injunctive relief with respect to orders that had been superseded were moot;

[2] plaintiffs' residual claims that applied to superseding order were not moot;

[3] plaintiffs faced credible threat of prosecution for violating stay-at-home order, and thus had -in-fact required for Article III standing;

[4] plaintiffs had less than negligible chance of prevailing on claim that the order violated Free Exercise Clause;

[5] stay-at-home order was neutral, generally applicable law, and thus rational basis test applied to claim that order violated Free Exercise Clause;

[6] Eleventh Amendment barred plaintiffs' state law claims;

[7] no equally effective but less restrictive alternatives were available to promote Illinois's compelling interest in controlling spread of COVID-19, as required for order to satisfy RFRA; and

[8] Governor had authority under EMAA to declare more than one emergency related to the ongoing COVID-19 pandemic.

Motion denied.

West Headnotes (44)

[1] **Injunction** Findings and conclusions

The district judge, in considering a motion for preliminary injunction, must make factual determinations on the basis of a fair interpretation of the evidence before the court.

[2] **Injunction** Extraordinary or unusual nature of remedy

Injunction Presumptions and burden of proof

Injunction Clear showing or proof

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.

[3] **Injunction** Grounds in general; multiple factors

A party seeking a preliminary injunction must show that (1) its case has some likelihood of success on the merits, (2) it has no adequate

remedy at law, and (3) without relief it will suffer irreparable harm.

[4] **Injunction** Likelihood of success on merits

As part of the preliminary-injunction analysis, a district court may consider a nonmovant's defenses in determining the movant's likelihood of success on the merits.

[5] **Injunction** Balancing or weighing factors; sliding scale

Injunction Balancing or weighing hardship or injury

If the moving party meets the threshold requirements for obtaining a preliminary injunction, namely some likelihood of success on the merits, no adequate remedy at law, and irreparable harm, the district court weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.

[6] **Injunction** Relation or conversion to preliminary injunction

The standards for granting a temporary restraining order (TRO) and a preliminary injunction are the same.

[7] **Declaratory Judgment** State officers and boards

Declaratory Judgment Counties and municipalities and their officers

Claims brought under First Amendment and Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA) by evangelical Christian church and its pastor with respect to Illinois Governor's prior stay-at-home orders issued in response to COVID-19 pandemic were moot to the extent they sought declaratory and injunctive relief with respect to those orders, without regard to new provisions in subsequent order that allowed worshippers to engage in free exercise of religion in gatherings of no more than ten people so long as they complied with social distancing requirements. U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[8] **Civil Rights** Preliminary Injunction

Constitutional Law Mootness

Injunction Mootness and ripeness; ineffectual remedy

Injunction Health

Claims for preliminary injunctive relief brought under First Amendment and Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA) by evangelical Christian church and its pastor with respect to Illinois Governor's prior stay-at-home orders issued in response to COVID-19 pandemic were not mooted by subsequent order that allowed worshippers to engage in free exercise of religion in gatherings of no more than ten people so long as they complied with social distancing requirements, to the extent that church and pastor asserted residual claims that applied equally to the subsequent order; church and pastor took umbrage at restrictions on religious gatherings imposed by the subsequent order, including the ten-attendee limit. U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[9] **Federal Courts** Rights and interests at stake

A case does not become moot as long as the parties have a concrete interest, however small, in the litigation.

[10] **Declaratory Judgment** Subjects of relief in general

Evangelical Christian church and its pastor faced credible threat of prosecution arising from their alleged intent to hold church services despite Illinois Governor's stay-at-home orders issued in response to COVID-19 pandemic, which imposed ten-attendee limit on worship services, and thus, church and pastor alleged an injury-in-fact, as required to have Article III standing to bring suit for declaratory and injunctive relief alleging the orders violated First Amendment's Free Exercise Clause, Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA); orders were enforceable by State and local law enforcement, violators were subject to civil fines and criminal penalties, and sheriff did not provide assurance the orders would not be enforced. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[11] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

As a general rule, an injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** In general; injury or interest

An allegation of future injury may suffice to satisfy Article III standing requirements if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur. U.S. Const. art. 3, § 2, cl. 1.

[14] **Constitutional Law** Criminal Law

For Article III standing purposes, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. U.S. Const. art. 3, § 2, cl. 1.

[15] **Civil Rights** Preliminary Injunction

Constitutional Law Ripeness; prematurity

Injunction Mootness and ripeness; ineffectual remedy

Injunction Health

Ripeness, an Article III requirement, was satisfied for claims for preliminary injunctive relief brought under First Amendment, Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA) by evangelical Christian church and its pastor challenging Illinois Governor's stay-at-home order issued in response to COVID-19, which included ten-attendee limit on services and social distancing requirements; the claims raised purely legal questions typically fit for judicial review, further factual development would provide little clarification, and denying judicial review imposed not-insignificant hardship by forcing choice between refraining from congregating and engaging in assembly while risking civil fines and criminal penalties. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[16] **Federal Courts** Fitness and hardship

To determine ripeness, an Article III requirement, courts examine (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. U.S. Const. art. 3, § 2, cl. 1.

[17] **Health** Contagious and Infectious Diseases

Courts only overturn rules issued by the government in response to an epidemic which lack a real or substantial relation to public health or that amount to plain, palpable invasions of constitutional rights.

1 Cases that cite this headnote

[18] **Constitutional Law** Health

The judiciary has authority to strike down laws that use public health emergencies as a pretext for infringing individual liberties protected by the Constitution.

[19] **Health** Contagious and Infectious Diseases

When an epidemic ceases, government restrictions on constitutional rights must meet traditionally recognized tests.

[20] **Civil Rights** Preliminary Injunction

Evangelical Christian church and its pastor, which sought preliminary injunction enjoining enforcement of Illinois Governor's stay-at-home order issued in response to COVID-19, had less than negligible chance of prevailing on their claim that the order, which imposed ten-attendee limit on worship services and social distancing requirements, violated First Amendment's Free Exercise Clause; COVID-19 was public health crisis that threatened lives of all Americans, as it spread easily, caused severe and sometimes fatal symptoms, and resisted most medical interventions, and church and pastor did not credibly challenge Governor's estimate that ten to 20 times as many Illinoisans would have died without the stay-at-home restrictions. U.S. Const. Amend. 1.

[21] **Constitutional Law** Religious Organizations in General

Illinois Governor's stay-at-home order issued in response to COVID-19, which included ten-attendee limit on worship services and social distancing requirements, was neutral, generally applicable law, and thus rational basis test applied to claim that the order violated First Amendment's Free Exercise Clause; there was no evidence Governor had history of animus towards religion or religious people, order proscribed secular and religious conduct alike and expressly preserved various avenues for religious expression, including drive-in services, holding in-person religious services created higher risk of contagion than operating grocery stores or staffing manufacturing plants due to sustained interactions between many people, and order imposed same restrictions on schools. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[22] **Constitutional Law** Burden on religion

The First Amendment's Free Exercise Clause prevents the government from placing a substantial burden on the observation of a central religious belief or practice unless it demonstrates a compelling government interest that justifies the burden. U.S. Const. Amend. 1.

[23] **Constitutional Law** Neutrality; general applicability

Neutral, generally applicable laws may be applied to religious practice, consistent with the First Amendment's Free Exercise Clause, even when not supported by a compelling government interest. U.S. Const. Amend. 1.

[24] **Constitutional Law** Neutrality; general applicability

A neutral law of general applicability is constitutional, under the First Amendment's Free Exercise Clause, if it is supported by a rational basis. U.S. Const. Amend. 1.

[25] **Constitutional Law** Neutrality; general applicability

The neutrality element for applying the rational basis test to a neutral and generally applicable law challenged under the First Amendment's Free Exercise Clause asks whether the object of the law is to infringe upon or restrict practices because of their religious motivation. U.S. Const. Amend. 1.

[26] **Constitutional Law** Neutrality; general applicability

The general applicability element for applying the rational basis test to a neutral and generally applicable law challenged under the First Amendment's Free Exercise Clause forbids the government from imposing burdens only on conduct motivated by religious belief in a selective manner. U.S. Const. Amend. 1.

[27] **Constitutional Law** Neutrality; general applicability

In evaluating whether a law challenged under the First Amendment's Free Exercise Clause is both neutral and generally applicable, and thus subject to the rational basis test, courts draw on principles developed in the context of the Fourteenth Amendment's Equal Protection Clause. U.S. Const. Amends. 1, 14.

[28] **Constitutional Law** Intentional or purposeful action requirement

At its core, equal protection analysis hinges on whether the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon a particular group. U.S. Const. Amend. 14.

[29] **Constitutional Law** Neutrality; general applicability

Courts apply the rational basis test to Free Exercise Clause claims, unless the challenged rule fails to prohibit nonreligious conduct that endangers the government's interests in a similar or greater degree than religious conduct. U.S. Const. Amend. 1.

[30] **Constitutional Law** Neutrality; general applicability

Different treatment for religious conduct signals that the government's object is to target religious practices, in violation of the First Amendment's Free Exercise Clause, only if secular conduct that endangers the government's interests in a similar or greater degree receives favorable treatment. U.S. Const. Amend. 1.

[31] **Constitutional Law** Neutrality; general applicability

The fact that a government restriction refers to religious activity (while at the same time listing others) cannot be sufficient to show that its object or purpose is to target religious practices for harsher treatment, in violation of First Amendment's Free Exercise Clause. U.S. Const. Amend. 1.

[32] **Constitutional Law** Neutrality; general applicability

In engaging in a functional assessment of how the challenged law operates in practice, for purposes of a claim alleging a violation of First Amendment's Free Exercise Clause, courts must consider how a particular law treats secular and religious activities that are substantially comparable to one another. U.S. Const. Amend. 1.

[33] **Constitutional Law** Religious Organizations in General

Health Quarantine

Religious Societies Religious services and ordinances

Given the importance of slowing the spread of COVID-19 in Illinois, Illinois Governor's stay-

at-home order issued in response to COVID-19 pandemic, which included ten-attendee limit on worship services and social distancing requirements, satisfied rational basis scrutiny on claim of Christian church and its pastor that the order violated First Amendment's Free Exercise Clause. U.S. Const. Amend. 1.

[34] **Federal Courts** Law Enforcement

Federal Courts Sheriffs and deputies

Federal Courts Other particular entities and individuals

Eleventh Amendment barred claims brought by evangelical Christian church and its pastor against Illinois Governor, sheriff, county's public health administrator, and police chief alleging stay-at-home orders issued during COVID-19 pandemic violated Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and the Illinois Department of Health Act (DHA); the defendants were state officials who were sued in their official capacities and raised sovereign immunity. U.S. Const. Amend. 11; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[35] **Federal Courts** Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts Waiver by State; Consent

Although not explicit in the text, the Eleventh Amendment guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens. U.S. Const. Amend. 11.

[36] **Federal Courts** Agencies, officers, and public employees

If properly raised, the Eleventh Amendment bars actions in federal court against state officials acting in their official capacities. U.S. Const. Amend. 11.

[37] **Federal Courts** Agencies, officers, and public employees

Individual state officials may be sued personally for federal constitutional violations committed in their official capacities, but, pursuant to the Eleventh Amendment, that principle does not extend to claims that officials violated state law in carrying out their official responsibilities. U.S. Const. Amend. 11.

[38] **Civil Rights** Particular cases and contexts

Even if stay-at-home order issued by Illinois Governor during COVID-19 pandemic, which prohibited in-person religious gatherings of more than ten people, was a substantial burden on religious exercise of evangelical Christian church and its pastor, no equally effective but less restrictive alternatives were available to promote Illinois's compelling interest in controlling the spread of COVID-19, as required for order to satisfy Illinois Religious Freedom Restoration Act (RFRA); there existed threat of additional infections in the context of large gatherings, and order allowed avenues for religious worship, prayer, celebration, and fellowship such as small group meetings, bible study meetings, and prayer gatherings. 775 Ill. Comp. Stat. Ann. 35/15.

[39] **Civil Rights** Particular cases and contexts

The least restrictive means element of a claim brought under the Illinois Religious Freedom Restoration Act (RFRA) turns on whether the government could have achieved, to the same degree, its compelling interest without interfering with religious activity. 775 Ill. Comp. Stat. Ann. 35/15.

[40] **Health** Quarantine

Illinois Governor had authority under State's Emergency Management Agency Act (EMAA) to declare more than one emergency related to the ongoing COVID-19 pandemic and was not limited to issuing a single 30-day disaster proclamation, so long as the Governor made

new findings of fact to determine that a state of emergency still existed. 20 Ill. Comp. Stat. Ann. 3305/4, 3305/7.

[41] **Health** Quarantine

Religious Societies Religious services and ordinances

Stay-at-home order issued by Illinois Governor in response to COVID-19 pandemic, which included ten-attendee limit on worship services and social distancing requirements, was not a "quarantine" within the meaning of Illinois's Department of Health Act, and thus was not subject to the Act's provision that Illinois Department of Public Health had supreme authority in matters of quarantine and isolation; while the order curtailed ability of individuals to gather in large groups, it empowered religious leaders to, among other things, worship and pray with small groups of parishioners, visit them in their homes while observing social distancing, and lead drive-in sermons. 20 Ill. Comp. Stat. Ann. 2305/2(a).

[42] **Injunction** Balancing or weighing factors; sliding scale

Under the sliding scale approach for issuing preliminary injunctions, the less likely a claimant is to win, the more that the balance of harms must weigh in his favor.

[43] **Civil Rights** Preliminary Injunction

Injunction Health

Balance of hardships tilted markedly against granting temporary restraining order (TRO) and preliminary injunction preventing enforcement of stay-at-home order issued by Illinois Governor during COVID-19 pandemic, which evangelical Christian church and its pastor alleged violated First Amendment's Free Exercise Clause and state law due to order's ten-attendee limit on worship services; preventing order's enforcement would pose serious risks to public health, as COVID-19 was virulent and deadly disease that had killed thousands of Americans, places where people congregated, like churches, often acted as vectors for the disease, and church and pastor's interest in holding large, communal in-person worship services did not outweigh government's interest in protecting Illinois residents. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[44] **Civil Rights** Preliminary Injunction

Injunction Health

The promotion of the public interest weighed heavily against entry of temporary restraining order (TRO) and preliminary injunction preventing enforcement of stay-at-home order issued by Illinois Governor during COVID-19 pandemic, which evangelical Christian church and its pastor alleged violated First Amendment's Free Exercise Clause and state law due to order's ten-attendee limit on worship services, given COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity. U.S. Const. Amend. 1.

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MEMORANDUM OPINION AND ORDER

John Z. Lee, United States District Judge

***1** So far, over 60,000 Americans have died from contracting COVID-19. That is more than the number of people who perished during the 9/11 terrorist attacks, Pearl Harbor, and the Battle of Gettysburg combined. Hoping to slow the pathogen's spread, governors and mayors across the country have implemented stay-at-home orders. While those orders have already saved thousands of lives, they come at a considerable cost. In Illinois, as in other states, the orders have interfered with the ability of residents to work, learn, and worship.

This case is about whether those restrictions are consistent with the religious freedoms enshrined in the Federal Constitution and in Illinois law. Every Sunday for the past five years, members of the Beloved Church have gathered with their pastor, Stephen Cassell, to pray, worship, and sing. Since Governor Pritzker's first stay-at-home order went into effect, however, the Beloved Church has been forced to move those services online. And, in the intervening weeks, the Governor has issued additional orders, extending the restrictions.

Convinced that these orders impermissibly infringe on their religious practices, Cassell and the Beloved Church have sued Pritzker, Stephenson County Sheriff David Snyders, Stephenson County Public Health Administrator Craig Beintema, and Village of Lena Police Chief Steve Schaible. In particular, Plaintiffs allege that the stay-at-home orders violate the First Amendment's Free Exercise Clause, Illinois's Religious Freedom Restoration Act ("RFRA"), 775 Ill. Comp. Stat 35/15, the Emergency Management Agency Act ("EMAA"), 20 Ill. Comp. Stat. 3305/7, and the Illinois Department of Health Act ("DHA"), 20 Ill. Comp. Stat. 2305/2(a).

Plaintiffs hope to return to their church on May 3, 2020, to worship without limitations. To that end, on April 30, 2020, they filed a motion asking the Court to enter a temporary restraining order and a preliminary injunction preventing Defendants from enforcing the stay-at-home orders. Given the time constraints, the Court ordered expedited briefing; Defendants filed their responses to the motion on May 1, 2020, and Plaintiffs submitted their reply on May 2, 2020.

The Court understands Plaintiffs' desire to come together for prayer and fellowship, particularly in these trying times. It is not by accident that the right to exercise one's religious beliefs is one of the core rights guaranteed by our Constitution. And whether it be the Apostles and Jesus gathering together to break bread and share wine on the night before his crucifixion (Luke 22:7-23), or Peter addressing the many at Pentecost and forming the first church (Acts 2:14-47), Christian tradition has long cherished communal fellowship, prayer, and worship.

But even the foundational rights secured by the First Amendment are not without limits; they are subject to restriction if necessary to further compelling government interests—and, certainly, the prevention of mass infections and deaths qualifies. After all, without life, there can be no liberty or pursuit of happiness.

***2** Recently, after this lawsuit was filed, Governor Pritzker issued a new order, recognizing the free exercise of religion as an "essential activity." April 30 Order § 2, ¶ 5(f), ECF No. 26-1. The order now states that worshippers may "engage in the free exercise of religion" so long as they "comply with Social Distancing Requirements" and refrain from "gatherings of more than ten people." *Id.* Furthermore, "[r]eligious organizations and houses of worship are encouraged to use online or drive-in services [which are not limited to ten people] to protect the health and safety of their congregants." *Id.*

The Court is mindful that the religious activities permitted by the April 30 Order are imperfect substitutes for an in-person service where all eighty members of Beloved Church can stand together, side-by-side, to sing, pray, and engage in communal fellowship. Still, given the continuing threat posed by COVID-19, the Order preserves relatively robust avenues for praise, prayer and fellowship and passes constitutional muster. Until testing data signals that it is safe to engage more fully in exercising our spiritual beliefs (whatever they might be), Plaintiffs, as Christians, can take comfort in the promise of Matthew 18:20—"For where two or three come together in my name, there am I with them."

For the reasons below, Plaintiffs' motion for a temporary restraining order and preliminary injunction is denied.

I. Preliminary Factual Findings [1]

A. The Pandemic

[1] COVID-19 is "a novel severe acute respiratory illness" that spreads rapidly "through respiratory transmission." April 30 Order at 1, ECF No. 26-1 ("April 30 Order" or "Order"). Making response efforts particularly daunting, asymptomatic individuals may carry and spread the virus, and there is

currently no known vaccine or effective treatment. *Id.*; Pritzker Resp. Br. at 12, ECF No. 26. The virus has killed hundreds of thousands, infected millions, and disrupted the lives of nearly everyone on the planet. April 30 Order at 1–2. In Illinois alone, at least 2,350 individuals have perished from the pathogen, with more than 50,000 infected. *Id.* at 2.

B. The Stay-at-Home Orders

To slow the spread of COVID-19, Governor Jay R. Pritzker issued a stay-at-home order on March 20, 2020. ECF No. 1-1. He extended that order two weeks later, before issuing a new directive with modified restrictions at the end of April. *See* April 30 Order. In substance, these orders direct Illinoisans to practice what experts call "social distancing." That means limiting activity outside the home, staying at least six feet apart from others, and refraining from congregating in groups of more than ten. *Id.* § 1. To facilitate these efforts, businesses deemed non-essential have been required to cease operations, and schools have been forced to close their doors. The Governor has determined that, if the orders were not in effect, "the number of deaths from COVID-19 would be between ten to twenty times higher." April 30 Order at 2.

At the same time, the stay-at-home orders have resulted in significant hardships for many individuals and their families. With schools closed, families have had to care for their children and oversee their education on a full-time basis. With businesses shuttered, many Illinoisans now find themselves furloughed or fired. And with large gatherings prohibited, religious groups have had to refrain from their usual activities.

***3** In an effort to alleviate some of those concerns, the April 30 Order, which is effective until the end of May, provides that Illinoisans may leave their homes to perform certain "Essential Activities." April 30 Order § 1, ¶ 5. Though the Order did not initially include religious events in its list of Essential Activities, it was amended shortly after Plaintiffs filed this lawsuit and their associated request for a temporary restraining order. *Compare* ECF No. 1-3, *with* ECF No. 26-1. As amended, the Order clarifies that worshippers may "engage in the free exercise of religion" so long as they "comply with Social Distancing Requirements" and refrain from "gatherings of more than ten people." April 30 Order § 2, ¶ 5(f). In doing so, "[r]eligious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants." *Id.*

C. The Beloved Church

Pastor Stephen Cassell formed the Beloved Church, an evangelical Christian organization, to promote "the truths of God's unconditional Love, amazing Grace, and majestic Restoration." Compl. ¶ 24, ECF No. 1. Cassell is passionate about "shar[ing] the love of God with [his] congregants, who form what [he] believe[s] is [a] Church family." *Id.* ¶ 25.

To that end, Cassell leads Sunday services at the Church's building in Lena, Illinois. *Id.* ¶ 27. On a typical Sunday, about eighty worshippers attend. *Id.* During each service, Cassell reads from scripture, delivers a sermon, and leads the congregation in prayer and song. *Id.* ¶ 28. After the ceremony, he encourages worshippers to engage in informal conversation with each other, building fellowship and community. *Id.* ¶ 29. Plaintiffs view Sunday prayer services as "the central religious rites of the Church congregation." *Id.* ¶ 31.

In late March, the Stephenson County Department of Public Health served Cassell with a cease-and-desist notice. *Id.* ¶ 48. It declared that the Beloved Church was required to adhere to the guidelines elaborated in the stay-at-home orders. *Id.* ¶ 49. For example, the notice stated that religious gatherings of over ten people would not be permitted. *Id.* ¶ 49. It went on to warn that violators "may be subject to additional civil and criminal penalties." *Id.* ¶ 49. Fearing fines and prosecution, the Beloved Church has refrained from holding Sunday services in person, *id.* ¶ 50, and, like many religious organizations, Cassell has instead held services online on various forums, including Facebook Live and YouTube. [2]

Viewing these remote services as "a violation of the Church's existence as a Christian congregation," Plaintiffs take aim at Governor Pritzker's most recent Order. Cassell Decl. ¶ 3, ECF No. 34. To support this challenge, Plaintiffs have submitted with their reply brief a declaration by Cassell stating that the Beloved Church's parking lot cannot accommodate drive-in services; that typically 10 to 15 family units attend a service, most of which consist of many members; that the church's facility can seat 15 family units with six feet of distance between each unit; and that Cassell will supply all attendees with masks (or other face coverings) and hand sanitizer. *Id.* ¶¶ 5, 8–10, 16.

II. Legal Standard

***4** **[2]** **[3]** **[4]** "[A] preliminary injunction 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, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (internal quotation marks omitted). A party seeking a preliminary injunction must show that (1) its case has "some likelihood of success on the merits," (2) it has "no adequate remedy at law", and (3) "without relief it will suffer irreparable harm." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). As part of the preliminary-injunction analysis, a district court may consider a nonmovant's defenses in determining the movant's likelihood of success on the merits. *See Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010).

[5] **[6]** If the moving party meets these threshold requirements, the district court "weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied." *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011). "The standards for granting a temporary restraining order and a preliminary injunction are the same." *USA-Halal Chamber of Commerce, Inc. v. Best Choice Meats, Inc.*, 402 F. Supp. 3d 427, 433 (N.D. Ill. 2019) (citation omitted).

III. Mootness, Standing, and Ripeness

As a threshold matter, Defendants question whether Article III authorizes this Court to adjudicate Plaintiffs' claims. In doing so, they articulate three distinct theories. First, Governor Pritzker says that Plaintiffs' motion is moot in light of the new provisions in the April 30 Order relating to religious activities. Second, Sheriff Snyders, Public Health Administrator Beintema, and Police Chief Schaible ("County and Village Defendants") submit that Plaintiffs lack standing to sue. Finally, the same group of Defendants argues that this case is not ripe for review.

A. Mootness

[7] To begin with, Governor Pritzker contends that Plaintiffs' claims have been mooted by the post-complaint issuance of the April 30 Order, which supersedes EO 2020-10 and EO 2020-18, and provides a new framework for religious organizations starting May 1, 2020. To the extent that Plaintiffs seek declaratory and injunctive relief with respect to EO 2020-10 and EO 2020-18, without regard to the new provisions in the April 30 Order, their claims are indeed moot. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, No. 18-280, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 1978708, at *1 (U.S. Apr. 27, 2020) (holding that a request for declaratory and injunctive relief was mooted by amendment of the statute).

[8] **[9]** But to the extent that Plaintiffs assert residual claims that apply equally to the April 30 Order, those claims are not moot. *Cf. id.* (remanding residual claims based on the new statute for further proceedings); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (same). "[A] case does not become moot as long as the parties have a concrete interest, however small, in the litigation[ ]...." *Campbell-Ewald Co. v. Gomez*, —— U.S. ——, 136 S. Ct. 663, 665, 193 L.Ed.2d 571 (2016). And it is clear that Plaintiffs take umbrage at the restrictions on religious gatherings imposed by the April 30 Order, including the ten-attendee limit. *See* Compl. ¶¶ 27–31. Accordingly, Governor Pritzker's argument that the case is moot fails.

B. Standing

[10] **[11]** Next, the County and Village Defendants contend that Plaintiffs lack standing. To establish standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendants focus their fire on the first element.

***5** **[12]** **[13]** **[14]** As a general rule, "[a]n injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (internal quotation marks omitted). But an "allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (emphasis deleted and internal quotation marks omitted). "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights" *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *see MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 640 (7th Cir. 1990) (recognizing that "special flexibility, or 'breathing room,'...attaches to standing doctrine in the First Amendment context") (citation omitted).

Babbitt v. United Farm Workers National Union is instructive. 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). In that case, the Supreme Court held that the plaintiffs could bring a pre-enforcement action because they alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exist[ed] a credible threat of prosecution thereunder." *Id.*, 442 U.S. at 298, 99 S.Ct. 2301. The statute at issue made it illegal to encourage consumers to boycott an "agricultural product .... by the use of dishonest, untruthful and deceptive publicity." *Id.* at 295, 99 S.Ct. 2301. And the plaintiffs pleaded they had "actively engaged in consumer publicity campaigns in the past" and "inten[ded] to continue to engage in boycott activities" in the future. *Id.* Even though the plaintiffs did not "plan to propagate untruths," they maintained that " 'erroneous statement is inevitable in free debate,' " and this was sufficient to establish standing. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

As in *Babbitt*, Plaintiffs have alleged an Article III injury. According to Plaintiffs, Beintema issued and Snyders' deputy sheriff served a cease-and-desist notice on March 31, 2020, advising Plaintiffs that the Department of Public Health could issue a closure order if they did not adhere to Governor Pritzker's Executive Order 2020-10. Compl. ¶ 47. Although the notice references Executive Order 2020-10, the allegations create a reasonable inference that the notice also would apply to the April 30 Order, which prohibits "gatherings of more than ten people." April 30 Order § 2, ¶ 5(f).

Moreover, the notice stated that "police officers, sheriffs and all other officers in Illinois are authorized to enforce such orders. In addition to such an order of closure...you may be subject to additional civil and criminal penalties." *Id.*, Ex. C, Cease and Desist Notice, ECF No. 1-3. Along the same lines, the April 30 Order expressly warns that "[t]his Executive Order may be enforced by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 15, Section 18, and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305." April 30 Order § 2, ¶ 17.

For their part, Plaintiffs state that, for the past five years, they have held church services with eighty people in attendance, and they intend to hold a service on Sunday, May 3, 2020. *Id.* ¶¶ 11, 27. Plaintiffs further assert that, based on the cease-and-desist notice, they fear arrest, prosecution, fines, and jail time if the full congregation attends the service. *Id.* ¶ 50. And, although Snyders states that he does not intend to enforce the April 30 Order against Plaintiffs if they go through with their plans to gather on May 3, 2020, he does not provide any assurance that the Order will not be enforced thereafter. Therefore, based on the record, the Court finds that Plaintiffs face "a credible threat of prosecution," *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301, and the allegations in the complaint are sufficient to state an injury-in-fact.

C. Ripeness

*6 **[15]** In the alternative, the County and Village Defendants argue that Plaintiffs' claims do not satisfy the Article III requirement of ripeness. But when a court has determined that a plaintiff has sufficiently alleged an Article III injury, a request to decline adjudication of a claim based on prudential ripeness grounds is in "some tension" with the Supreme Court's "reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (internal quotation marks omitted); *see Susan B. Anthony List*, 573 U.S. at 167, 134 S.Ct. 2334.

[16] Be that as it may, ripeness is satisfied here. To determine ripeness, courts examine (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879, 882 (7th Cir. 2003). First, Plaintiffs' claims raise purely legal questions that are typically fit for judicial review, and further factual development will provide little clarification as to these issues. *See Susan B. Anthony List*, 573 U.S. at 167, 134 S.Ct. 2334; *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879, 882 (7th Cir. 2003).

Second, denying judicial review imposes a not-insignificant hardship on Plaintiffs by forcing them to choose between refraining from congregating at their church and engaging in assembly while risking civil fines and criminal penalties. Accordingly, the County and Village Defendants' argument that the Plaintiffs claims are unripe are unavailing. With that, the Court turns to the merits of Plaintiffs' motion.

IV. Likelihood of Success on the Merits

Plaintiffs challenge the April 30 Order on two grounds. First, they maintain that it runs afoul of the First Amendment's Free Exercise Clause. Second, they insist that the Order violates three state statutes—the Illinois Religious Freedom Restoration Act, the Emergency Management Agency Act, and the Illinois Department of Health Act.

A. Free Exercise Claim [3]

1. Government Authority During a Public Health Crisis

[17] The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis. For more than a century, the Supreme Court has recognized that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27, 25 S.Ct. 358, 49 L.Ed. 643 (1905); *see Prince v. Massachusetts*, 321 U.S. 158, 166–67, 64 S.Ct. 438, 88 L.Ed. 645 (1944) ("The right to practice religion freely does not include liberty to expose the community...to communicable disease."). During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply. *Id.*; *see In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Under those narrow circumstances, courts only overturn rules that lack a "real or substantial relation to [public health]" or that amount to "plain, palpable invasion[s] of rights." *Jacobson*, 197 U.S. at 31, 25 S.Ct. 358. Over the last few months, courts have repeatedly applied *Jacobson*'s teachings to uphold stay-at-home orders meant to check the spread of COVID-19. *See, e.g.*, *Abbott*, 954 F.3d at 783–85; *Gish v. Newsom*, No. EDCV20755JGBKKX, 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020).

***7** **[18]** **[19]** This is not to say that the government may trample on constitutional rights during a pandemic. As other judges have emphasized, *Jacobson* preserves the authority of the judiciary to strike down laws that use public health emergencies as a pretext for infringing individual liberties. *See, e.g.*, *Abbott*, 954 F.3d at 800 (Dennis, J., dissenting) (citing *Jacobson*, 197 U.S. at 28–29, 25 S.Ct. 358)). Furthermore, *Jacobson*'s reach ends when the epidemic ceases; after that point, government restrictions on constitutional rights must meet traditionally recognized tests. And so, courts must remain vigilant, mindful that government claims of emergency have served in the past as excuses to curtail constitutional freedoms. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *abrogated by Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2423, 201 L.Ed.2d 775 (2018).

[20] Today, COVID-19 threatens the lives of all Americans. The disease spreads easily, causes severe and sometimes fatal symptoms, and resists most medical interventions. April 30 Order at 1–2. When Governor Pritzker issued the amended stay-at-home rules, thousands of Illinoisans had perished due to the disease. *Id.* Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crisis that the Supreme Court contemplated in *Jacobson* and that the coronavirus continues to threaten the residents of Illinois.

While Plaintiffs acknowledge the seriousness of the pathogen, they insist that the stay-at-home orders have successfully flattened the curve of active COVID-19 cases, eliminating the need for continued precautions. But, to borrow an analogy from Justice Ginsburg, that "is like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty., Ala. v. Holder*, 570 U.S. 570 U.S. 529, 590, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting). Without the stay-at-home restrictions, the Governor estimates that ten to twenty times as many Illinoisans would have died and that the state's hospitals would be overrun. April 30 Order at 2. Plaintiffs have failed to marshal any credible evidence that suggests otherwise.

As a fallback position, Plaintiffs portray the April 30 Order as "arbitrary" and "unreasonable." *Jacobson*, 197 U.S. at 28, 25 S.Ct. 358. Specifically, they claim that the Order subjects religious organizations to more onerous restrictions than their secular counterparts. But, as we shall shortly see, the Order adopts neutral principles that satisfy *Jacobson*'s reasonableness standard.

In sum, because the current crisis implicates *Jacobson*, and because the Order undoubtedly advances the government's interest in protecting Illinoisans from the pandemic, the Court finds that Plaintiffs have a less than negligible chance of prevailing on their constitutional claim.

2. Traditional First Amendment Analysis

[21] **[22]** **[23]** **[24]** Even if *Jacobson* were not to apply here, the Order nevertheless would likely withstand scrutiny under the First Amendment's Free Exercise Clause.

That provision prevents the government from "plac[ing] a substantial burden on the observation of a central religious belief or practice" unless it demonstrates a "compelling government interest that justifies the burden." *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007). As the Supreme Court has elaborated, however, "neutral, generally applicable laws may be applied to religious practice even when not supported by a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 2761, 189 L.Ed.2d 675 (2014) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 879–80, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). In other words, a "neutral law of general applicability is constitutional if it is supported by a rational basis." *Ill. Bible Colleges Ass'n. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017).

***8** **[25]** **[26]** For the rational basis test to apply, the challenged law must be both neutral and generally applicable. The neutrality element asks whether "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 743 (7th Cir. 2015) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). The general applicability element "forbids the government from impos[ing] burdens only on conduct motivated by religious belief in a selective manner." *Listecki*, 780 F.3d at 743. As these definitions suggest, the neutrality and general applicability requirements usually rise or fall together.

[27] **[28]** **[29]** In evaluating these two elements, courts draw on principles developed in the context of the Fourteenth Amendment's Equal Protection Clause. *See*, *e.g.*, *Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217 (instructing lower courts to "find guidance in our equal protection cases"). At its core, equal protection analysis hinges on whether "the decisionmaker ...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon a particular group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In keeping with that framework, courts apply the rational basis test to Free Exercise Clause claims, unless the challenged rule "fail[s] to prohibit nonreligious conduct that endangers the [government's] interests in a similar or greater degree" than religious conduct. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

Lukumi is instructive. There, the Supreme Court reviewed municipal ordinances that prescribed penalties for "any individual or group that kills, slaughters or sacrifices animals for any type of ritual." *Lukumi*, 508 U.S. at 527, 113 S.Ct. 2217. In holding that "the object or purpose of [the challenged] law is the suppression of religion or religious conduct," the Court looked to three main factors. *Id.* at 533, 113 S.Ct. 2217. First, it determined that the drafters of the ordinances displayed a "pattern" of animosity towards "Santeria worshippers," who practiced animal sacrifice. *Id.* at 542, 113 S.Ct. 2217. Second, it recognized that "the ordinances [we]re drafted with care to forbid few killings but those occasioned by religious sacrifice." *Id.* at 543, 113 S.Ct. 2217. Third, it concluded that the "ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." *Id.* at 536, 113 S.Ct. 2217.

This case is different. For one, nothing in the record suggests that Governor Pritzker has a history of animus towards religion or religious people, and Plaintiffs do not argue otherwise. For another, the Order proscribes secular and religious conduct alike. *See*, *e.g.*, April 30 Order § 2, ¶ 3 (forbidding "any gathering of more than ten people"). Indeed, its limitations extend to most places where people gather, from museums to theaters to bowling alleys. *Id.* And finally, Plaintiffs have not established that the Order "suppress[es] much more religious conduct than is necessary" to slow the spread of COVID-19. *Lukumi*, 508 U.S. at 536, 113 S.Ct. 2217. To the contrary, the April 30 Order expressly preserves various avenues for religious expression, including gatherings of up to ten people and drive-in services. April 30 Order § 2, ¶ 5(f). For these reasons, the Court concludes that the Order does not "impose special disabilities on the basis of...religious status." *Smith*, 494 U.S. at 877, 110 S.Ct. 1595.

Neither of Plaintiffs' counterarguments is persuasive. First, they claim that the Order "targets... church services because it makes them the only Essential Activity effectively subject to the 10-person maximum requirement." But that argument rests on a misreading of the Order. In fact, the Order broadly prohibits "any gathering of more than ten people [other than members of the same household]... unless exempted by this Executive Order." April 30 Order § 2, ¶ 3. And nothing in the Section that enumerates "Essential Activities" appears to exempt secular activities from that generally-applicable constraint. *Id.* § 2, ¶ 5.

***9** It is true that the provision recognizing religious activities as essential reiterates the ten-person restriction. *Id.* ¶ 5(f). But, read as a whole, the Order appears to apply that limit to the

other Essential Activities as well. For example, Section 2, ¶ 5 of the Order permits "individuals" to leave their homes in order to visit their doctors, pick up groceries, and travel to work at "Essential Businesses" (which must abide by their own additional restrictions). *Id.* ¶ 5(a)–(d). It also lists "hiking," "running," and "[f]ishing" as essential activities. *Id.* ¶ 5(c). In practice, those are pursuits that individuals normally perform alone or in small groups. By contrast, people of faith tend to gather for worship in much greater numbers, as Plaintiffs themselves acknowledge. Compl. ¶ 27. Understood in that context, it makes sense for Order to explicitly remind worshippers that they must abide by the prohibition on large groups.

[30] Second, Plaintiffs complain that "grocery stores," "food and beverage manufacturing plants," and other "Essential Businesses" need not comply with the ten-person limitation. [4] April 30 Order § 2, ¶ 12(a), (b). If Walmart and Menards are allowed to host more than ten visitors, Plaintiffs' theory goes, then so should the Beloved Church. But the question is not whether any secular organization faces fewer restrictions than any religious organization. Rather, the question is whether secular conduct "that endangers the [government]'s interests in a similar or greater degree" receives favorable treatment. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. Only then does different treatment signal that the government's "object" is to target religious practices. *Id.* at 533, 113 S.Ct. 2217.

Contrary to Plaintiffs' suggestion, retailers and food manufacturers are not comparable to religious organizations. The avowed purpose of the Order is to slow the spread of COVID-19. As other courts have recognized, holding in-person religious services creates a higher risk of contagion than operating grocery stores or staffing manufacturing plants. *See*, *e.g.*, *Gish*, 2020 WL 1979970, at *6. The key distinction turns on the nature of each activity. When people buy groceries, for example, they typically "enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete." *Id.* The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible. [5]

By comparison, religious services involve sustained interactions between many people. During Sunday services, for example, Cassell encourages members of his congregation to "converse" and "build fellowship and morale." Compl. ¶ 29. Indeed, Plaintiffs view "informal conversations and fellowship" as "essential parts of a functioning Christian congregation." *Id.* Given that religious gatherings seek to promote conversation and fellowship, they "endanger" the government's interest in fighting COVID-19 to a "greater degree" than the secular businesses Plaintiffs identify. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

This distinction finds support in the record. There are many examples where religious services have accelerated the pathogen's spread. For instance, of eighty congregants who attended a Life Church service in Illinois on March 15, ten contracted the disease, and at least one died. *See* Anna Kim, "Glenview church hit by COVID-19 is now streaming service online, as pastor remembers usher who died of disease," *Chicago Tribune* (Mar. 31, 2020). Along the same lines, South Korea tracked more than 5,000 individual cases to a single church. *See* Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, "How a South Korean church helped fuel the spread of the coronarvirus," *Washington Post* (Mar. 25, 2020). And, near Seattle, at least forty-five individuals who attended a church choir gathering were diagnosed with COVID-19. *See* Richard Read, "A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead," *Los Angeles Times* (Mar. 29, 2020). In comparison, Plaintiffs have failed to identify a grocery store or liquor store that has acted as a vector for the virus.

***10** A more apt analogy is between places of worship and schools. Like their religious counterparts, educational institutions play an essential part in supporting and promoting individuals' wellbeing. At the same time, education and worship are both "activities where people sit together in an enclosed space to share a communal experience," exacerbating the risk of contracting the coronavirus. *Gish*, 2020 WL 1979970, at *6. And here, the Order imposes the same restrictions on schools as it does on churches, synagogues, mosques, and other places of worship.

What is more, the interior of Beloved Church (like many churches of its kind) resembles that of a small movie theater. And, like moviegoers, during a service, congregants generally focus on the pastor or another speaker, who is typically in the front of the room. *See* Cassell Decl. ¶ 15 (photos of church interior). But, here again, movie theaters and concert halls (unlike churches) are completely barred from hosting any gatherings. April 30 Order § 2, ¶ 3. This reinforces the conclusion that the Order is not meant to single out religious people or communities of faith for adverse treatment.

This is not the first time that a governor's stay-at-home order has been challenged by a religious group, and the majority of courts in those cases have determined that the orders reflect neutral, generally-applicable principles. *See*, *e.g.*, *Gish*, 2020 WL 1979970, at *5–6 ("Because the Orders treat in-person religious gatherings the same as they treat secular in-person communal activities, they are generally applicable."); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *35 (D.N.M. Apr. 17, 2020) ("[The government] may distinguish between certain classes of activity, grouping religious gatherings in with a host of secular conduct, to achieve ... a balance between maintaining community health needs and protecting public health.").

For their part, Plaintiffs make much of *First Baptist v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). In *First Baptist*, the stay-at-home orders in question prohibited "mass gatherings" at a number of establishments, including auditoriums, theaters, and stadiums, as well as "churches and other religious facilities." *Id.* at *2. The orders also exempted places like airports, "retail establishments where large numbers of people are present but are generally not within arm's length of one another for more than 10 minutes," and food establishments provided that patrons practice social distancing. *Id.*

Even though the orders covered a wide array of secular places as well as religious places, the court determined that the orders amounted to "a wholesale prohibition against assembling for religious services anywhere in the state by more than ten congregants." *Id.* at *4. "[B]oth orders," the court emphasized, "expressly state" that "their prohibitions against mass gatherings apply to churches or other religious facilities." *Id.* at *7. For that reason, *First Baptist* held that "these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral." *Id.*

[31] **[32]** The approach in *First Baptist* is difficult to square with *Lukumi*. Taken alone, the fact that a government restriction refers to religious activity (while at the same time listing others) cannot be sufficient to show that its "object or purpose" is to target religious practices for harsher treatment. *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217; *see Maryville Baptist Church, Inc. et al. v. Andy Beshear*, No. 20-5427. —— F.3d ——, 2020 WL 2111316, at *3 (6th Cir. May 2, 2020) (slip opinion) (mentioning religious gatherings "by name" does not establish "that the Governor singled out faith groups"). Instead, *Lukumi* embraced a functional assessment of how the challenged law operates in practice. In engaging in that analysis, courts must consider how a particular stay-at-home order treats secular and religious activities that are substantially comparable to one another. *First Baptist* overlooked that step. [6]

***11** Nor does *Maryville Baptist*, a recently released Sixth Circuit opinion, support Plaintiffs' position. That case involved a pair of stay-at-home orders that proscribed both "drive-in and in-person worship services," while permitting their secular equivalents. *Maryville Baptist*, 2020 WL 2111316,. at 1. Because Kentucky's governor "offered no good reason" to treat drive-in religious services and drive-in businesses differently, the court halted enforcement of the prohibition on drive-in services. *Id.* at *4. At the same time, because of gaps in the factual record, the Court of Appeals allowed the ban on in-person services to continue pending further proceedings in the district court. *Id.*

Applied here, the Sixth Circuit's reasoning counsels in favor of upholding Governor Pritzker's Order. Unlike in *Maryville Baptist*, the April 30 Order confirms that religious organizations in Illinois may hold drive-in services. *See* Supp. Not. at 1–2, ECF No. 32. To the extent that the Sixth Circuit expressed concerns about restrictions on in-person services, those doubts stemmed from the fact that the Kentucky Governor's orders prohibit in-person religious gatherings, regardless of how many worshippers attend. *Maryville Baptist*, slip. op. at 9. "[I]f the problem is numbers, and risks that grow with greater numbers," the court reasoned, "there is a straightforward remedy: limit the number of people who can attend a service at one time." *Id.* That is exactly what Governor Pritzker's latest order does.

[33] Ultimately, then, the Court concludes that the April Order qualifies as a neutral, generally applicable law. It therefore withstands First Amendment scrutiny so long as "it is supported by a rational basis." *Anderson*, 870 F.3d at 639. Given the importance of slowing the spread of COVID-19 in Illinois, the Order satisfies that level of scrutiny, and Plaintiffs do not seriously argue otherwise. As a result, the Court finds that Plaintiffs' Free Exercise claim is unlikely to succeed on the merits.

B. State Law Claims

1. Sovereign Immunity

[34] **[35]** **[36]** The Eleventh Amendment protects Defendants from Plaintiffs' RIFRA, EMAA, and DHA claims. That provision dictates that "[t]he Judicial power

of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although not explicit in the text, the Eleventh Amendment also "guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens." *Council 31 of Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO v. Quinn*, 680 F.3d 875, 881–82 (7th Cir. 2012) (citations and quotation marks omitted). "[I]f properly raised, the amendment bars actions in federal court against ... state officials acting in their official capacities." *Id.* (citation omitted).

[37] Because Defendants are state officials, who have been sued in their official capacities and have raised sovereign immunity, the Eleventh Amendment shields them from Plaintiffs' state law claims. To be sure, "individual state officials may be sued personally" for federal constitutional violations committed "in their official capacities." *Goodman v. Carter*, No. 2000 C 948, 2001 WL 755137, at *9 (N.D. Ill. July, 2, 2001) (citing *Ex Parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). But that principle does not extend to "claim[s] that officials violated state law in carrying out their official responsibilities." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

For example, in *Carter*, a court in this circuit considered a suit that raised claims under the First Amendment's Free Exercise Clause, as well as Illinois's RFRA statute. 2001 WL 755137, at *1 . "[Plaintiff]'s ILRFRA claim," the *Carter* court observed, "asks this court to instruct state officials on how to conform their conduct to state law." *Id.* at *10. Explaining that "such a state-law claim may not be entertained under this court's supplemental jurisdiction simply because a proper § 1983 claim is also presented," the court applied the doctrine of sovereign immunity and dismissed the RFRA claim. *Id.* (citing *Pennhurst*, 465 U.S. at 121, 104 S.Ct. 900). For the same reason, the Eleventh Amendment almost certainly forecloses Plaintiffs' state law claims here.

2. Merits of the State Law Claims

***12** Sovereign immunity aside, the Court finds that Plaintiffs' RFRA, EMAA, and PHDA claims are unlikely to succeed on the merits. The Court addresses each statutory claim in turn.

a. RFRA

[38] For starters, Plaintiffs maintain that the Order violates Illinois's RFRA statute. Under that statute, the "government may not substantially burden a person's exercise of religion ...unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling government interest." 775 Ill. Comp. Stat 35/15.

At this stage, the Court assumes (without deciding) that the Order's prohibition on in-person religious gatherings of more than ten people qualifies as a "substantial burden" under the RFRA. *Id.* § 35/15. That means that Defendants must show that the ten-person limitation is the least restrictive way to promote a compelling interest.

Turning first to the government's interest in fighting COVID-19, Plaintiffs reiterate their claim that "the coronavirus epidemic 'curve' has been substantially 'flattened' statewide." Compl. ¶ 69. Because previous stay-at-home orders have partially succeeded in limiting the pathogen's spread, Plaintiffs posit that the government no longer has a compelling interest in preventing large gatherings. Yet the virus continues to proliferate, Illinoisans continue to die, and restrictions remain vital to ensuring that hospitals are not overwhelmed. April 30 Order at 1–2. In these exceptional circumstances, controlling the spread of COVID-19 counts as a compelling interest. *See United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (recognizing that the government's interest in "the safety...of [its] citizens" is "compelling").

[39] The remaining question is whether the ten-person limit is the "least restrictive means" of pursuing that goal. 775 Ill. Comp. Stat 35/15. This element turns on "whether [the government] could have achieved, to the same degree, its compelling interest" without interfering with religious activity. *Affordable Recovery Hous. v. City. of Blue Island*, No. 12 C 4241, 2016 WL 5171765, at *8 (N.D. Ill. Sept. 21, 2016). But Plaintiffs have failed to spotlight, and the Court has not found, any less restrictive rules that would achieve the same result as the prohibition on large gatherings.

While permitting the Beloved Church to hold in-person services with its full congregation might be less disruptive, it would not advance the government's interest in curtailing

COVID-19 "to the same degree" as the ten-person limit. *Id.* The Court recognizes that Cassell has promised to equip worshippers with masks, place hand sanitizer at entryways, and arrange seating so that families can remain six feet apart and follow the social distancing requirements set forth in the Order. Cassell Decl. ¶¶ 7–11. But it is not entirely clear, given the seating configuration at Beloved Church, whether social distancing would be possible.

According to Cassell, ten to fifteen families attend a typical service, and many are "large families, some with up to 12 members." [7] *Id.* ¶ 12. Yet the photographs of the church's interior provided by Cassell depict a total of twenty rows, many with fewer than seven seats. *Id.* ¶ 15. To remain six feet apart, it appears that each family unit must sit at least one row apart from another. It is difficult to see how the church could accommodate ten to fifteen large families in this manner. [8] But, even assuming that it is possible, an eighty-person service poses a greater risk to public safety than a gathering of ten or fewer or a drive-in service.

***13** Indeed, Defendants highlight the example of a church choir practice where the members actually used hand sanitizer and practiced social distancing. *See* Richard Read, "A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead," *Los Angeles Times* (Mar. 29, 2020). Despite those efforts, forty-five choir members ended up contracting COVID-19 and two died. *Id.* As that example illustrates, large gatherings magnify the risk of contagion even when participants practice preventative measures.

It is also important to recognize the religious exercises that the April 30 Order does allow. In addition to drive-in services and smaller worship services, the Order permits Cassell and other staff members to visit and minister to parishoners in their homes. It allows small group meetings, bible study meetings, and prayer gatherings at the church or in private homes, subject to the ten-person limit. It empowers Cassell and members of his congregation to celebrate communion in small groups. And it authorizes individual congregants to go to the church to obtain spiritual help and guidance from their pastor and/or other church staff members. *See* Compl. ¶ 33 (noting that "prayer and spiritual counseling visits and meetings are central functions of [Cassell's] leadership").

Considering the seriousness of the continuing COVID-19 pandemic, the threat of additional infections in the context of large gatherings, and the avenues for religious worship, prayer, celebration, and fellowship that the April 30 Order does allow, the Court finds that no equally effective but less restrictive alternatives are available under these circumstances, and Plaintiffs' RFRA claim is thus unlikely to succeed on the merits.

b. Emergency Management Agency Act

[40] Plaintiffs also contend that Governor Pritzker exceeded his authority under the EMAA. That Act equips the Governor with an array of emergency powers, including the authority "[t]o control... the movement of persons within the area, and the occupancy of premises therein." 20 Ill. Comp. Stat. 3305/7(8). To make use of those powers, the Governor must first issue a proclamation "declar[ing] that a disaster exists." *Id.* § 3305/7. After that, he may invoke the Act's emergency powers "for a period not to exceed 30 days." *Id.*

The question here is whether the Act permits Governor Pritzker to declare more than one emergency related to the spread of COVID-19. [9] In Plaintiffs' view, the ongoing pandemic only justifies a single 30-day disaster proclamation. In response, Defendants maintain that, so long as the Governor makes new findings of fact to determine that a state of emergency still exists, the Act empowers him to declare successive disasters, even if they stem from the same underlying crisis.

Based on the text and structure of the Act, Defendants have the better argument. By its terms, the Act defines a disaster as "an occurrence or threat of widespread or severe damage, injury or loss of life...resulting from ... [an] epidemic." 20 Ill. Comp. Stat. 3305/4. The data show that COVID-19 has infected more and more residents and continues to do so; therefore, a "threat of widespread or severe damage, injury or loss of life" continues to exist. *Id.*; *see* April 30 Order at 1–2 (discussing the continued threat imposed by Covid-19).

***14** This statutory construction makes sense. Some types of disasters, such as a storm or earthquake, run their course in a few days or weeks. Other disasters may cause havoc for months or even years. For example, the Act designates "air contamination, blight, extended periods of inclement weather, [and] drought" as disasters. 20 Ill. Comp. Stat. 3305/4. Those events pose a threat that may persist for long periods of time and certainly beyond a single 30-day period. It is difficult to see why the legislature would recognize these long-running problems as disasters, yet divest the Governor of the tools he needs to address them.

This is not to say that the Governor's authority to exercise his emergency powers is without restraint. To support each successive emergency declaration, the Governor must identify an "occurrence or threat of widespread or severe damage, injury or loss of life." 20 Ill. Comp. Stat. 3305/4. Once an emergency has abated, the facts on the ground will no longer justify such findings, and the Governor's emergency powers will cease. And, should this or any future Governor abuse his or her authority by issuing emergency declarations after a disaster subsides, affected parties will be able to challenge the sufficiency of those declarations in court. But in this case, Plaintiffs do not question the Governor's factual findings, only his authority to issue successive emergency proclamations based on the same, ongoing disaster. For these reasons, the Court concludes that this claim lacks even a negligible chance of success.

c. Department of Health Act

[41] Lastly, Plaintiffs invoke Illinois's Department of Health Act, 20 Ill. Comp. Stat. 2305/2(a). Under that Act, the "State Department of Public Health....has supreme authority in matters of quarantine and isolation." *Id.* § 2305/2(a). Before exercising its authority to "quarantine," "isolate," and make places "off limits the public," however, the Department must comply with certain procedural requirements. *Id.* § 2305/2(c). As Plaintiffs see it, the Act vests the Department with the exclusive authority to quarantine and isolate Illinoisans, making Governor Pritzker's orders *ultra vires*.

The problem for Plaintiffs is that the challenged Order does not impose restrictions that fall within the meaning of the Act. By definition, a "quarantine" refers to "a state of enforced isolation." *Quarantine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/quarantine; *see also*, *e.g.*, *In re Washington*, 304 Wis.2d 98, 735 N.W.2d 111, 121–22 (2007) (explaining that to "quarantine" is "to isolate"); *Com. v. Rushing*, 627 Pa. 59, 99 A.3d 416, 423 (2014) (indicating that to "place in quarantine" equates to requiring an individual to be "*set apart*" from other members of society (emphasis added)); *Ex Parte Culver*, 187 Cal. 437, 202 P. 661, 664 (1921) (" 'Quarantine' as a verb means to keep persons, when suspected of having contracted or been exposed to an [infectious] disease, out of a community, or to confine them to a given place therein, and *to prevent intercourse between them and the people generally of such community*.' " (emphasis added) (citation omitted)).

As discussed above, the Order empowers Cassell to, among other things, worship and pray with small groups of his parishioners, visit them in their homes (while observing social distancing), and lead drive-in sermons. *See Daniel v. Putnam Cty.*, 113 Ga. 570, 38 S.E. 980, 981 (1901) (noting that even stringent means of preventing disease dissemination are not "quarantine" unless they preclude engagement between the individual and members of their community). So, while the Order curtails the ability of individuals to gather in large groups, it falls far short of a "quarantine" as that term appears in the Act. The Court therefore concludes that this claim has almost no likelihood of success on the merits.

V. Equitable Considerations

***15** **[42]** The remaining factors confirm that Plaintiffs are not entitled to a preliminary injunction. Under the Seventh Circuit's "sliding scale approach," the less likely a claimant is to win, the more that the "balance of harms [must] weigh in his favor." *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 966 (7th Cir. 2018). Given that Plaintiffs' claims have little likelihood of prevailing on the merits, they cannot obtain a preliminary injunction without showing that the scales tip heavily in their direction.

[43] But, if anything, the balance of hardships tilts markedly the other way. Preventing enforcement of the latest stay-at-home order would pose serious risks to public health. The record reflects that COVID-19 is a virulent and deadly disease that has killed thousands of Americans and may be poised to devastate the lives of thousands more. April 30 Order at 1–2. And again, the sad reality is that places where people congregate, like churches, often act as vectors for the disease. *See* Pritzker Resp. at 12–13 (collecting examples). Enjoining the Order would not only risk the lives of the Beloved Church's members, it also would increase the risk of infections among their families, friends, co-workers, neighbors, and surrounding communities.

While Plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic. Certainly, the restrictions imposed by the Order curtail the ability of the congregants of Beloved Church to worship in whatever way they would like. But this is not a case where the government has "ban[ned]" worshippers from practicing their religion altogether, as

Plaintiffs insist. PI Mot. at 8, ECF No. 7. And again, the Order empowers Cassell and the other members of his church to worship, sing, break bread, and pray together in drive-in services, online meetings, and in-person in groups of ten or fewer. April 30 Order § 2, ¶ 5(f). Such allowances go a long way towards mitigating the harms Plaintiffs identify.

[44] Taking into account COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity, the Court finds that equitable considerations, including the promotion of the public interest, weigh heavily against the entry of the temporary restraining order and preliminary injunction that Plaintiffs seek. Coupled with the relative weakness of Plaintiffs' legal arguments, this is fatal to their motion.

VI. Conclusion

These are unsettling times. Illinois and the rest of world are engaged in a massive effort to stave off the COVID-19 pandemic and the human suffering and death that it brings. At the same time, the stay-at-home orders issued by government officials as part of these efforts have resulted in their own form of loss and suffering—financial, emotional, psychological, and spiritual. The broader societal and political debate about how to balance these interests is beyond the purview of this Court. For present purposes, it suffices to state that Governor Pritzker's April 30 Order satisfies minimal constitutional requirements as they pertain to religious organizations, like the Beloved Church. Accordingly, Plaintiffs' motion for a temporary restraining order and a preliminary injunction is denied.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2112374

Footnotes

1 "[T]he district judge, in considering a motion for preliminary injunction...must make factual determinations on the basis of a fair interpretation of the evidence before the court." *Darryl H. v. Coler*, 801 F.2d 893, 898 (7th Cir. 1986). The facts summarized here derive from Plaintiffs' complaint, the parties' briefs supporting and opposing the motion, and the accompanying exhibits; none are materially disputed.

2 For example, in recent weeks, Cassell has presented a series of sermons titled "Corona-Lie," where he has expressed skepticism regarding the extent of the COVID-19 crisis, as well as the government's motives in responding to it. *See*, *e.g.*, Beloved Church Media, *Sunday March 15, 2020: Corona-Lie (Pastor Steve Cassell)* at 38:35, YOUTUBE, https://www.youtube.com/watch?v=QJix0dCxhGQ&t=1699s ("Why don't we shut the country down for the 2500 people that have died from [Corona Beer]? Because it doesn't fit the narrative. I don't know if you realize this, but you are being absolutely manipulated and controlled by a system that wants you to believe what it tells you."). *See Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018) (approving the district court taking judicial notice of a party's website in deciding a motion where the counterparty cited the website in its response brief).

3 Plaintiffs' motion focuses on their claim under the Free Exercise Clause. In the reply brief, however, they also argue that the Order violates the First Amendment's Free Speech and Freedom of Assembly provisions. But, because Plaintiffs failed to include these arguments in their opening brief and offer them only in reply, the arguments are waived as a matter of fairness. *See Wonsey v. City of Chi.*, 940 F.3d 394, 399 (7th Cir. 2019).

4 At times, Plaintiffs also argue that the government does not enforce social distancing requirements as applied to Essential Businesses. *See* Pls.' Reply at 8. In support, Cassell states that he has observed social distancing violations while shopping at Menards and Walmart. Cassell Decl. ¶ 16. But limited, anecdotal instances of noncompliance contribute little to the inference that the "object or purpose" of the challenged order is to interfere with religious practices. *Lukumi*, 508 U.S. at 527, 113 S.Ct. 2217.

5 Indeed, among other things, the Order requires retail stores that are designated as Essential Businesses to set up aisles to be one-way "to maximize spacing between customers and identify the one-way aisles with conspicuous signage and/or floor markings." April 30 Order § 2.

6 *On Fire Christian Center, Inc. v. Fischer*, another district court case Plaintiffs cite, does not support their position either. No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). In *Fischer*, the City of Louisville proscribed "drive-in church services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs." *Id.* at *6. That is not the case here.

7 In fact, as Plaintiffs put it, "[t]he Church has numerous families that have taken seriously the biblical admonition to 'be fruitful and multiply.' " Pl. Reply at 3.

8 Cassell also states that "[i]t is not feasible to conduct drive-in services on TheBeloved Church's property" because they "do not have a parking lot that can accommodate such services." *Id.* ¶ 5. But the church appears to have a large parking lot that can accommodate a number of cars to conduct such services. *See* https://www.google.com/maps/place/216+W+Mason+St,+Lena,+IL+61048/@42.3784957,-89.827654,3a,75y,99.24h,66.75t/data=!3m6!1e1!3m4!1s- EqLIBLYW6X0O96wk9B0nA!2e0!7i13312!8i6656!4m5!3m4!1s0x8808103eadade1e7:0x6807f35e1247a6cb!8m2!3d42.378454!4d-89.8273456; *see also* *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2012) (taking judicial notice of Google Maps).

9 Plaintiffs also cast Governor Pritzker's previous orders as improper continuations of the initial emergency declaration. Given that the Governor has issued a new disaster declaration, that argument is moot.

Exhibit 7

Bailey v. Pritzker

IN THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT
CLAY COUNTY, ILLINOIS

Darren Bailey,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2020-CH-06
	)	
Governor Jay Robert Pritzker, in his official capacity.	)	
	)	
	)	
Defendant.	)	

ORDER

THIS CAUSE COMING TO BE HEARD for hearing on the Plaintiff's Motion for Summary Judgment on Counts I, II and III of Plaintiff's Amended Complaint, the Court having considered the pleadings, arguments of counsel, and having been otherwise apprised of matters with the record on Summary Judgment supplanted as ordered by the Court in the 7/2/20 record of proceedings.

IT IS HEREBY ORDERED:

1) Defendant's request to make an oral motion for summary judgment is considered and the request denied without prejudice to file a written motion for summary judgment.
2) Plaintiff's motion for summary judgment as to Count I is denied.
3) Plaintiff's motion for summary judgment as to Count II is granted as follows:
    a) The Court declares Defendant issued Proclamation #2, as defined in the amended complaint, and Proclamation #3, as defined in the amended

complaint, for the same occurrence or threat which gave rise to the issuance of Proclamation #1, as defined in the amended complaint, on March 09, 2020;

b) The Court declares the 30-days of emergency powers provided under Section 7 of the IEMAA provided to the Defendant to address the COVID-19, lapsed on April 08, 2020;

c) The Court declares any executive orders in effect after April 08, 2020 relating to COVID-19, and finding their authority under the emergency powers of Section 7 of the IEMAA are void ab initio.

4) Plaintiff's motion for summary judgment as to Count III is granted as follows:

a) The Court declares Defendant had no Illinois constitutional authority as Governor to restrict a citizen's movement or activities and/or forcibly close business premises in EO 32;

b) The Court declares that none of the cited provisions of the IEMAA in EO 32 delegated Defendant any authority to restrict a citizen's movement or activities and/or forcibly close business premises;

c) The Court declares the proper authority to restrict a citizen's movement or activities and/or forcibly close their business due to any public health risks has been expressly delegated to the Department of Health under the Illinois Department of Public Health Act and the County Code;

5) On Plaintiff's oral motion, Count IV of his complaint is dismissed with prejudice.

6) Plaintiff' oral request that his Amended Complaint be a representative action and apply to all citizens of the State of Illinois is granted

DATE: 7-2-20

ENTER: Michael D. McHaney
JUDGE

Prepared by:
Thomas G. DeVore
IL Bar No. 0630573
DeVore Law Offices, LLC
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Greenville, IL 62246
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Exhibit 8

Ill. Republican Party v. Pritzker

2020 WL 3604106
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

ILLINOIS REPUBLICAN PARTY, WILL COUNTY REPUBLICAN CENTRAL COMMITTEE, SCHAUMBURG TOWNSHIP REPUBLICAN ORGANIZATION, and NORTHWEST SIDE GOP CLUB Plaintiffs,
v.
JB PRITZKER, in his official capacity as Governor of the State of Illinois, Defendant.

No. 20 C 3489
|
07/02/2020

SARA L. ELLIS, United States District Judge

OPINION AND ORDER

***1** In response to the ongoing COVID-19 pandemic, Defendant JB Pritzker, Governor of Illinois, has issued a series of executive orders including Executive Order 2020-43 ("Order"), at issue here.[1] The Order prohibits gatherings greater than fifty people but exempts the free exercise of religion from this limit. Doc. 12 at 3, 6.[2] Plaintiffs Illinois Republican Party, Will County Republican Central Committee, Schaumburg Township Republican Organization, and Northwest Side GOP Club challenge this exemption as violating their rights under the First and Fourteenth Amendments. Plaintiffs allege that by exempting the free exercise of religion from the general gathering limit, the Governor has created an unconstitutional content-based restriction on speech. Plaintiffs also claim that by not enforcing the Order against protestors following the death of George Floyd, the Governor has created another exception. Plaintiffs filed a complaint and a motion for a temporary restraining order ("TRO") and preliminary injunction in this Court on June 15, 2020 [3] because they want to hold political party events larger than fifty people, including a picnic on July 4th. Plaintiffs seek a declaration stating that treating political party gatherings differently than religious gatherings violates the First and Fourteenth Amendments. Plaintiffs also ask the Court to enjoin the Governor from enforcing the Order against political parties. Because Plaintiffs' likelihood of success on the merits is less than negligible and the balance of harms weighs heavily against Plaintiffs, the Court denies their motion [3].

BACKGROUND

The world is currently facing a major global pandemic – one of the most significant challenges our society has faced in a century. There is no cure, vaccine, or effective treatment for COVID-19. As of June 30, more than 126,739 Americans have died due to the virus,[3] including approximately 6,923 Illinois residents.[4] In Illinois, there are more than 143,185 confirmed cases.[5] Despite efforts to slow the spread of COVID-19, many states are experiencing a rise in new cases. Medical experts agree that to stop the spread of COVID-19, people should practice social distancing and wear face coverings when near other people outside their homes. Federal, state, and local governments have enacted measures to reduce the spread of this highly contagious and easily transferable virus while remaining sensitive to economic concerns and citizens' desire to resume certain activities.

***2** In Illinois, following stay-at-home orders, the Governor developed a multi-stage plan to "safely and conscientiously resume activities that were paused as COVID-19 cases rose exponentially and threatened to overwhelm [the] healthcare system." Doc. 10-1 at 5. On May 29, 2020, the Governor issued an Order related to this plan. The Order provides that "[a]ny gathering of more than ten people is prohibited unless exempted by this Executive Order." *Id.* at 6. The Order exempts free exercise of religion, emergency functions, and governmental functions. Relevant here, with respect to free exercise of religion, the Order states that it:

> [D]oes not limit the free exercise of religion. To protect the health and safety of faith leaders, staff, congregants and visitors, religious organizations and houses of worship are encouraged to consult and follow the recommended practices and guidelines from the Illinois

> Department of Public Health. As set forth in the IDPH guidelines, the safest practices for religious organizations at this time are to provide services online, in a drive-in format, or outdoors (and consistent with social distancing requirements and guidance regarding wearing face coverings), and to limit indoor services to 10 people. Religious organizations are encouraged to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures.

Id. at 9. The Governor issued the most recent executive order, EO 2020-43, on June 26, 2020. That order increases the gathering limit to fifty people but retains the exemption for free exercise of religion. *See* Doc. 12 at 3, 6.

Plaintiffs allege that by merely "encourag[ing]" religious organizations and houses of worship to consult the IDPH guidelines, the Order treats religious speech differently. Plaintiffs contend that the Illinois Republican Party and its local and regional affiliates typically gather in groups greater than ten people for formal business meetings, informal strategy meetings, and other events. Plaintiffs believe there is particular time pressure to conduct meetings and events in the five months leading up to the 2020 general election. Plaintiffs allege that their "effectiveness is substantially hampered by [the Party's] inability to gather in person." Doc. 1 ¶ 14. According to Plaintiffs, "[p]olitics is a people business" that is "most effective when people can connect in person." *Id.* Plaintiffs hope to resume all gatherings greater than ten people, including gatherings amongst "staff, leaders, consultants, members, donors, volunteers, activists, and supporters." *Id.* In their motion for preliminary relief, Plaintiffs specifically reference an outdoor picnic that they hope to have on July 4, 2020, as well as a rally and indoor convention at some point.

Plaintiffs also criticize the Governor's enforcement of the Order. Plaintiffs allege that the Governor has declined to enforce his executive order against protestors following the death of George Floyd. *Id.* ¶ 17. According to Plaintiffs, the Governor has characterized these protestors as "exercising their First Amendment rights" and has engaged in one such protest himself. Plaintiffs allege that the Governor has discriminated in favor of certain speakers based on the content of their speech; "in this case religious speech versus political speech, or protest speech versus Republican speech." *Id.* ¶ 21.

Additionally, Plaintiffs challenge the authority on which the Order rests. Plaintiffs contend that the Illinois Emergency Management Agency Act ("Act") permits the Governor to issue a disaster declaration for up to thirty days in response to a public health emergency. Plaintiffs allege that the Office of the Attorney General of Illinois "has concluded that the text of the Act does not permit successive declarations based on the same disaster." *Id.* ¶ 28. Therefore, according to Plaintiffs, the Governor only has authority to issue one thirty-day disaster declaration, rendering any further COVID-19 declaration ultra vires. Consequently, the Order is also ultra vires because it relies on the Governor's authority under the fifth declaration. Plaintiffs' motion for preliminary relief does not address this aspect of their complaint.

LEGAL STANDARD

***3** Temporary restraining orders and preliminary injunctions are extraordinary and drastic remedies 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) (citation omitted). The party seeking such relief must show: (1) it has some likelihood of success on the merits; (2) there is no adequate remedy at law; and (3) it will suffer irreparable harm if the relief is not granted. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). [6] If the moving party meets this threshold showing, the Court "must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019) (quoting *Planned Parenthood*, 896 F.3d at 816). "Specifically, the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbott Labs. v Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992)). The Seventh Circuit has described this balancing test as a "sliding scale": "if a plaintiff is more likely to win, the balance of harms can weigh less heavily in its favor, but the less likely a plaintiff is to win the more that balance would need to weigh in its favor." *GEFT Outdoors*,

992 F.3d at 364 (citing *Planned Parenthood*, 896 F.3d at 816). Finally, the Court considers whether the injunction is in the public interest, which includes taking into account any effects on non-parties. *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018).

ANALYSIS

In First Amendment cases, the likelihood of success on the merits "is usually the decisive factor." *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014). "The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and 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) (citation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Barland*, 751 F.3d at 830 (same). Therefore, the Court limits its analysis to the likelihood of success on the merits and the balance of harms.

I. Likelihood of Success on the Merits

"[T]he threshold for demonstrating a likelihood of success on the merits is low."*D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). "[T]he plaintiff's chances of prevailing need only be better than negligible." *Id.* In their motion for preliminary relief, Plaintiffs argue that they are likely to succeed on their claims because the Order favors religion and is therefore an unconstitutional content-based restriction on speech. Additionally, Plaintiffs argue that by not enforcing the Order against protestors following the death of George Floyd, the Governor is favoring that speech over Plaintiffs' political speech. The Governor contends that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), provides the appropriate standard by which to evaluate the Order. Additionally, the Governor argues that the Order does not distinguish between speakers but instead regulates conduct and therefore strict scrutiny does not apply.

A. *Jacobson v. Massachusetts*

"Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' " *S. Bay United Pentecostal Church v. Newsom* (*S. Bay II*), 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38). When state officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Id.* (alteration in original) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Over a century ago in *Jacobson*, the Supreme Court developed a framework by which to evaluate a State's exercise of its emergency authority during a public health crisis. There, the Court rejected a constitutional challenge to a State's compulsory vaccination law during the smallpox epidemic. *See generally Jacobson*, 197 U.S. 11. *Jacobson* explained that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. The Court reasoned that the Constitution does not provide an absolute right to be "wholly freed from restraint" at all times, as "[t]here are manifold restraints to which every person is necessarily subject for the common good." *Id.* at 26. Therefore, while "individual rights secured by the Constitution do not disappear during a public health crisis," the government may "reasonably restrict[ ]" rights during such times. *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Judicial review of such claims is only available in limited circumstances. *See S. Bay II*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (where state officials do not exceed their broad latitude during a pandemic "they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people" (citation omitted)); *Jacobson*, 197 U.S. at 31. If a State implements emergency measures during an epidemic that curtail individual rights, courts uphold such measures unless they have "no real or substantial relation" to public health or are, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.*; *see also In re Abbott*, 954 F.3d at 784.

***4** There is no doubt that Illinois is in the midst of a serious public health crisis, as contemplated in *Jacobson*. *See Elim Romanian Pentecostal Church v. Pritzker* (*Elim II*), No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020) (citing *Jacobson* and explaining that courts do not evaluate orders issued in response to public-health emergencies by the usual standard); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020) (COVID-19 qualifies as a public health crisis under *Jacobson*). Plaintiffs agree that Illinois has a compelling interest in fighting the pandemic. However, they suggest *Jacobson* is inapplicable because they do not assert an inherent right to gather but instead request equal treatment

when others are permitted to gather. *Jacobson* draws no such distinction and instead provides for minimal judicial interference with state officials' reasonable determinations. The Order undoubtedly relates to public health and safety because it minimizes the risk of virus transmission by limiting gathering size. Additionally, the Order still encourages religious organizations to limit indoor services to fifty people and implement other public health measures. Plaintiffs have not shown how this exemption is a plain invasion of their constitutional rights. The Order involves reasonable measures intended to protect public health while preserving avenues for First Amendment activities. Overall, the Court concludes that Plaintiffs have a less than negligible chance of prevailing on their constitutional claims because the current crisis implicates *Jacobson* and the Order advances the Governor's interest in protecting the health and safety of Illinois residents.

B. Traditional First Amendment Analysis

Even if this case falls outside *Jacobson*'s emergency crisis standard, Plaintiffs have failed to show a likelihood of success under traditional First Amendment analysis.[7] The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that "abridge[e] the freedom of speech." U.S. Const. amend. I. Pursuant to that clause, 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*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Laws that target speech based on its communicative content are "presumptively unconstitutional." *See id.* Here, the parties dispute whether the Governor's actions, through both the Order and his failure to enforce it against protestors, are content neutral. According to Plaintiffs, the Governor has distinguished between speech based on its content (*i.e.*, religious v. political or Black Lives Matter v. Republican), therefore creating a content-based restriction. *See* Doc. 3-1 at 10. The Governor argues that the Order is instead a content-neutral time, place, and manner regulation. The Court evaluates content-based restrictions under strict scrutiny but assesses content-neutral "time, place, or manner" restrictions under an intermediate level of scrutiny. *Price v. City of Chicago* (*Price II*), 915 F.3d 1107, 1109 (7th Cir. 2019).

At the outset, the Court addresses the specific governmental actions that Plaintiffs challenge. The complaint and motion for preliminary relief treat the Order and enforcement of the Order as contributing to the same First Amendment violation. Plaintiffs fail to distinguish between the two governmental actions or acknowledge that each action raises separate and distinct questions. The Order provides a clear exemption for religious gatherings on its face. Enforcement of the Order against protestors, however, does not create a *de facto* exemption unless Plaintiffs can show that the Governor has enforced it differently against protestors based on the content of their message. At the hearing, Plaintiffs could not provide a single example of state officials engaging in such discriminatory enforcement. In their brief, Plaintiffs allege that City of Chicago officials dispersed "Reopen Illinois" protestors on one occasion, but that is irrelevant to Plaintiffs' claim because it does not involve State action. Plaintiffs have failed to point to a single instance in which they, or anyone similarly situated, protested with political messages and *state officials* enforced the Order against them because of this content. Thus, the Court has no basis by which to evaluate whether the Governor has selectively enforced the Order. *See Anderson v. Milwaukee Cty.*, 433 F.3d 975, 980 (7th Cir. 2006) (rejecting the plaintiff's argument that discretionary enforcement resulted in discrimination against religious literature in part because the plaintiff did not offer evidence that anyone had been able to distribute nonreligious literature under similar circumstances); *S. Labor Party v. Oremus*, 619 F.2d 683, 691 (7th Cir. 1980) ("An individual must allege facts to show that while others similarly situated have generally not been prosecuted, he has been singled out for prosecution, and that the discriminatory selection of him was based upon an impermissible consideration such as...the desire to prevent his exercise of constitutional rights."); *cf. Hudson v. City of Chicago*, 242 F.R.D. 496, 509 (N.D. Ill. 2007) (for plaintiffs to prevail on their selective enforcement claim, they must show they were exercising their First Amendments rights and were arrested or ticketed under the relevant ordinance when other similarly situated individuals were not). Instead, the facts before the Court indicate that the Governor similarly did not take action against "Reopen Illinois" protests that occurred on state property. And while Plaintiffs emphasize the Governor's decision to march in one demonstration as showing that he has engaged in content-based discrimination, this singular act is not enough to establish such discrimination. *See Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446, 449 (7th Cir. 2016) (public officials "enjoy the right of free speech under the First Amendment").[8] Overall, Plaintiffs have failed to point to anything that suggests selective enforcement against protestors based on the content of their message, and the Governor's participation in one protest does not give rise to content-based discrimination in violation of the First Amendment. Accordingly, the Court will limit its analysis to

Plaintiffs' claim that the Order's religious exemption violates their First Amendment rights.

1. Content Neutrality

***5** To determine whether a challenged regulation is content based, the Court first asks whether the regulation "draws distinctions [on its face] based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (citation omitted). *Reed* explained that facial distinctions include those which define regulated speech "by particular subject matter" or "its function or purpose." *Id.* at 163. Laws that are facially content-neutral may still be considered content-based restrictions on speech if they " 'cannot be justified without reference to the content of the regulated speech' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Price II*, 915 F.3d at 1118 (a law is content based "if enforcement authorities must 'examine the content of the message that is conveyed to determine whether a violation has occurred' " (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014))). In other words, following *Reed*, "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015).

The Order is a content-based restriction. The Order broadly prohibits any gathering of more than fifty people but exempts the free exercise of religion from this requirement. Instead, religious organizations "are encouraged to consult and follow" the IDPH's recommended guidelines and practices. Doc. 10-1 at 9. On its face, the Order distinguishes between religious speech and all other forms of speech based on the message it conveys. *See Norton*, 806 F.3d at 413 (Manion, J., concurring) ("*Reed* now requires any regulation of speech implicating religion ...to be evaluated as content-based and subject to strict scrutiny."); *cf. Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) ("[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time."); *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 63 F.3d 581, 586, 592 (7th Cir. 1995) (prohibition of menorah's message because of religious perspective was unconstitutional under the First Amendment's free speech clause). By providing an exemption, the Order is "endorsing" religious expression compared to other forms of expression. *See Reed*, 576 U.S. at 168–69 (the town's ordinance singled out specific subject matter for different treatment: ideological messages received more favorable treatment than political messages, and political messages received more favorable treatment than messages announcing assemblies of like-minded individuals); *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017) (political speech exception from anti-robocall statute would be content discrimination in violation of *Reed*).

Additionally, enforcement of the Order reiterates that it is content based. To determine whether a gathering violates the Order, authorities must look to the content of the message communicated. *See Price II*, 915 F.3d at 1118 ("[D]ivining purpose clearly requires enforcement authorities 'to examine the content of the message that is conveyed.' " (quoting *McCullen*, 573 U.S. at 479)). If the content is religious, a gathering greater than fifty people is permissible; if the content is not religious, such gathering is impermissible. *See Swart v. City of Chicago*, No. 19-CV-6213, 2020 WL 832362, at *8 (N.D. Ill. Feb. 20, 2020) (assessing the speaker's intent requires the City to evaluate the content of the speech, making its enforcement content-based). Overall, the fact that one group of speakers can gather because they are expressing religious content while Plaintiffs cannot gather to express political content causes this restriction to be content based.

The Governor contends that the Order does not distinguish between groups of speakers but instead regulates conduct. This argument is not persuasive because conduct-based regulations are still impermissible under the First Amendment if they draw distinctions based on the speech expressed. *Cf. Left Field Media LLC v. City of Chicago*, 822 F.3d 988, 990 (7th Cir. 2016) (evaluating regulation of conduct under *Reed* and finding it was content-neutral because it regulated all sales alike); *BBL, Inc. v. City of Angola*, 809 F.3d 317, 324 (7th Cir. 2015) (city's zoning rule that required all property owners to seek permit before making changes on land was generally applicable and did not discriminate based on content of speech); *see also Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000) ("[T]he First Amendment tolerates greater interference with expressive conduct, provided that this interference results as an unintended byproduct from content-neutral regulation of a general class of conduct."). The Governor argues that Plaintiffs point to types of events they cannot hold, not expression that the Order prohibits. This confuses the relevant First Amendment inquiry. Again, the Order prevents a group of fifty-one individuals from discussing their political platform in person but allows the same group to discuss their

religion in person and is therefore a content-based restriction. The Order does not regulate all gatherings the same but instead distinguishes them based on their expressive conduct. *Cf. Left Field*, 822 F.3d at 990 (ordinance regulating peddling applied equally to sale of bobblehead dolls, baseball jerseys, and printed matter was content neutral); *cf. Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 288 (7th Cir. 2014) (requirements that small groups obtain permit to gather must comport with First Amendment and be content-neutral); *Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) ("[P]ermit requirement is less likely to be content-neutral and narrowly tailored when it is intended to apply even to small groups.").

***6** Additionally, the Governor's reliance on *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006), is misplaced. *Rumsfeld* evaluated whether the Solomon Amendment, which denied federal funding to higher education institutions that had a policy or practice that prevented the military from gaining equal access to campuses for recruiting as other employers, violated the plaintiffs' free speech rights. *See id.* at 55. The Court found that the Solomon Amendment regulated conduct, not speech, because it "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60. The Court explained that the Amendment did not "limit what law schools may say" and "the conduct regulated by the Solomon Amendment is not inherently expressive." *Id.* at 60, 66. Instead, the law schools had to provide explanatory speech to explain why they were treating military recruiters differently. *Id.* The Governor analogizes this case to *Rumsfeld* because the act of gathering more than fifty people in person does not signal anything unless accompanied by expressive conduct. However, unlike the law at issue in *Rumsfeld*, the Order *does* regulate speech by selecting which speech is permissible for an in-person group larger than fifty people. The Governor's argument that the gathering limit is comparable to a building occupancy limit also fails. A building occupancy limit that did not apply to certain groups based on the content of their speech would similarly be discriminatory. Building occupancy limits and gathering limits are comparable to zoning ordinances for purposes of the Governor's argument, and courts have consistently assessed whether such ordinances are content based. *See BBL*, 809 F.3d at 325 (zoning ordinances that limit where sexually oriented businesses can operate "are content based, and we should call them so" (quoting *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring))); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 980 (N.D. Ill. 2003) (ordinance that limited locations of religious institutions regulated speech not non-expressive conduct for First Amendment freedom of speech claim). When a gathering is still allowed based on the speech involved, the government has engaged in content-based discrimination. The Court finds that by exempting free exercise of religion from the gathering limit, the Order creates a content-based restriction.

2. Strict Scrutiny

Because the exemption is a content-based restriction, this provision can only stand if it survives strict scrutiny. *Reed*, 576 U.S. at 171. Therefore, the Governor must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). Plaintiffs concede that the Governor has a compelling interest in "fighting a pandemic," so the Court limits its analysis to whether the Order is narrowly tailored to further that interest. Doc. 3-1 at 12. It is the Governor's burden to demonstrate that the Order's differentiation between religious gatherings and other gatherings furthers its interest in limiting the spread of COVID-19 and is narrowly tailored to that end. *See id.*

"Generally, 'a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the evil it seeks to remedy.' "*Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (quoting *Ward*, 491 U.S. at 804). That is, "a statute is not narrowly tailored if 'a less restrictive alternative would serve the Government's purpose.' " *See id.* (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000)). The Governor argues that the Order is narrowly tailored to its compelling interest in fighting a pandemic by exempting free exercise of religion from its gathering limit because the First Amendment, federal law, and state law provide religious organizations unique safeguards against governmental interference with the free exercise of religion. In other words, the Governor contends that by exempting free exercise of religion while still encouraging those organizations to take specific measures to prevent the spread of COVID-19, the Order is narrowly tailored. In support, the Governor references religious exemptions that appear throughout federal and state law. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (recognizing "ministerial exception" to Title VII's prohibition on religious discrimination in employment and explaining that by imposing an unwanted minister "the state infringes the Free Exercise Clause"); 775

Ill. Comp. Stat. 35/15 (exemption from generally applicable government regulations that "substantially burden a person's exercise of religion"). The Constitution expressly prevents the government from interfering with free exercise of religion. *See* U.S. Const. amend. I ("Congress shall make no law...prohibiting the free exercise [of religion]."); *see also Espinoza v. Mont. Dep't of Revenue*, — S. Ct. —, No. 18-1195, 2020 WL 3518364, at *22 (June 30, 2020) (Gorsuch, J., concurring) (the Free Exercise Clause "protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly"). And numerous state and federal laws reflect the unique protections accorded to religion. *See Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019) (noting that "more than 2,600 federal and state tax laws provide religious exemptions" and finding a tax exemption for religious housing constitutional (citation omitted)); *see also Hosannah-Tabor*, 565 U.S. at 189 (the First Amendment "gives special solicitude to the rights of religious organizations"). Across the country, individuals have brought free exercise challenges to similar executive orders issued throughout this public health crisis. Supreme Court Justices and Circuit Court judges have been receptive to such challenges. *See S. Bay II*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) (state's 25% occupancy cap imposed on religious worship services but not comparable secular businesses discriminates on the basis of religion in violation of the First Amendment and state lacked compelling justification for such distinction); *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (the governor's restriction on in-person worship services likely violates free exercise of religion); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 946 (9th Cir. 2020) (Collins, J., dissenting) ("By regulating the specific underlying risk-creating behaviors, rather than banning the particular religious setting within which they occur, the State could achieve its ends in a manner that is the least restrictive way of dealing with the problem at hand." (citation omitted)). The President has even indicated that religious houses of worship are essential services and suggested he would "override the governors."[9] Against this backdrop, the Governor concluded that the least restrictive means by which to protect this constitutional right was to permit free religious exercise but encourage individuals who engage in such practices to adhere to public health guidelines. The Court finds that this is indeed the least restrictive means by which to accomplish both aims.[10]

***7** Plaintiffs contend that the Governor cannot satisfy the least restrictive means test because a political party caucus is no more likely to spread COVID-19 than a church service. *See* Doc. 3-1 at 12. However, the Constitution does not accord a political party the same express protections as it provides to religion. *See* U.S. Const. amend. I. And by statute, Illinois has undertaken steps to provide additional protections for the exercise of religion. *See* 775 Ill. Comp. Stat. 35/15. Additionally, the Order's limited exemptions reinforce that it is narrowly tailored. The Order only exempts two other functions from the gathering limit: emergency and governmental functions. These narrow exemptions demonstrate that the Order eliminates the increased risk of transmission of COVID-19 when people gather while only exempting necessary functions to protect health, safety, and welfare and free exercise of religion. Therefore, the Governor has carried his burden at this stage in demonstrating that the Order is narrowly tailored to further a compelling interest, and the Order survives strict scrutiny. *See also Amato v. Elicker*, No. 3:20-CV-464 (MPS), 2020 WL 2542788, at *11 (D. Conn. May 19, 2020) (restriction on gathering size with specific exemption for religious services was narrowly tailored under intermediate scrutiny in part because it involved spiritual needs the state may deem more pressing); *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 WL 3051207, at *13 (E.D.N.C. June 8, 2020) (executive order was narrowly tailored under intermediate scrutiny because the government's interest in preventing the spread of COVID-19 would be achieved less effectively if other facilities were able to open). In conclusion, Plaintiffs have failed to show a likelihood of success on the merits of their First and Fourteenth Amendment claims under *Jacobson* or traditional First Amendment analysis.

II. Balance of Harms

The balance of harms further confirms that Plaintiffs are not entitled to preliminary relief. Under the sliding scale approach, the less likely Plaintiffs' chance of success the more the balance of harms must weigh in their favor. *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018). Because Plaintiffs' claims have little likelihood of succeeding on the merits, they are not entitled to preliminary relief unless they show that the scales weigh heavily in their favor.

The scales weigh significantly against Plaintiffs. The number of COVID-19 infections continues to rise across the United States, which has led some states to recently impose greater restrictions on gatherings and activities. COVID-19 is highly contagious and continues to spread, requiring public officials to constantly evaluate the best method by which to protect residents' safety against the economy and a myriad of

other concerns. *See Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at *6 (N.D. Ill. May 13, 2020) ("The record clearly reveals how virulent and dangerous COVID-19 is, and how many people have died and continue to die from it."), *aff'd*, No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020); *Cassell*, 2020 WL 2112374, at *15 ("While Plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic."). Granting Plaintiffs the relief they seek would pose serious risks to public health. Plaintiffs contend that in-person speech is most effective, and their communications are hampered by gathering limits. But the current state of our nation demands that we sacrifice the benefits of in-person interactions for the greater good. Enjoining the Order would risk infections amongst members of the Illinois Republican Party and its regional affiliates, as well as their families, friends, neighbors, and co-workers. *See Cassell*, 2020 WL 2112374, at *15. Plaintiffs ask that they be allowed to gather—without limitation—despite the advice of medical experts and the current rise in infections. The risks in doing so are too great. The Court acknowledges that Plaintiffs' interest in gathering as a political party is important, especially leading up to an election. But this interest does not outweigh the Governor's interest in protecting the health of Illinois' residents during this unprecedented public health crisis. Moreover, Plaintiffs may still engage in a number of expressive activities like phone banks, virtual strategy meetings, and, as of Friday, June 26, gatherings like fundraisers and meet-and-greet coffees that do not exceed fifty people. *See* Doc. 3-1 at 4. As the Governor suggested, allowing Plaintiffs to gather would open the floodgates to challenges from other groups that find in-person gatherings most effective. It would also require that the Court turn a blind eye to the increase in infections across a high majority of states, which as of July 1, 2020 includes Illinois. [11] An injunction that allows Plaintiffs to gather in large groups so that they can engage in more effective speech is simply not in the public interest. Such relief would expand beyond any gatherings and negatively impact non-parties by increasing their risk of exposure. Thus, the harms tilt significantly in the Governor's favor as he seeks to prevent the spread of this virulent virus.

CONCLUSION

***8** For the foregoing reasons, the Court denies Plaintiffs' motion for preliminary relief [3].

Dated: July 2, 2020 _____ SARA L. ELLIS

United States District Judge

All Citations

Slip Copy, 2020 WL 3604106

Footnotes

1 Just prior to the hearing in this case, the Governor issued the Executive Order 2020-43***o***n June 26, 2020, which supersedes all previous Covid-19 Executive Orders. The prior Executive Order, in operation at the time of filing of the lawsuit, was EO 2020-38. The significant difference between the two orders is that EO 2020-38 limited public gatherings to ten persons while EO 2020-43increases that number to fifty. Both orders provide the same exemption to religious gatherings, which is basis for Plaintiffs' complaint. Because the operative order is EO 2020-43, the Court will refer to that Order throughout this Opinion.

2 The Court uses the internal pagination for the Order.

3 *Coronavirus Disease 2019 cases in the U.S.*, Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

4 *Coronavirus Disease 2019 (COVID-19) in Illinois*, Illinois Department of Public Health, http://www.dph.illinois.gov/covid19.

5 *See id.*

6 Although *Planned Parenthood* involved a preliminary injunction, courts use the same standard to evaluate TRO and preliminary injunction requests. *See USA-Halal Chamber of Commerce, Inc. v. Best Choice Meats, Inc.*, 402 F. Supp. 3d 427, 433 (N.D. Ill. 2019) ("The standards for granting a temporary restraining order and preliminary injunction are the same.") (citing cases).

7 The Court limits its analysis to the First Amendment because Plaintiffs' Fourteenth Amendment claim is derivative of their First Amendment claim, and the parties agree that the claims rise and fall together.

8 Plaintiffs' reliance on *Soos v. Cuomo* is not persuasive. *Soos v. Cuomo*, No. 20-00651-GLS-DJS, 2020 WL 3488742 (N.D.N.Y. June 26, 2020). *Soos* concluded that plaintiffs were likely to succeed on their free exercise claim when government officials selectively enforced their order against religious groups but not protestors and allowed outdoor graduation ceremonies (with a larger numbers of individuals than allowed to religious gatherings) to occur, finding no compelling justification to treat graduation ceremonies and religious gatherings differently. *Id.* at *11–12. Further, one official made comments distinguishing between outdoor religious gatherings and protests, indicating that mass protests deserve better treatment than religious gatherings. *Id.* at *5, 12. Here, the Court finds that the Governor has provided a compelling justification for the Order's religious gathering exemption, which is narrowly tailored and outside this exemption, has not indicated a preference for one type of mass gathering over another.

9 *See* Brian Naylor, *Trump Calls on States to Reopen Places of Worship Immediately*, NPR., May 22, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/05/22/861057500/trump-calls-on- states-to-immediately-reopen-places-of-worship.

10 Although the Court concludes that the exemption satisfies strict scrutiny, such exemption was not necessary under the Free Exercise Clause. The Seventh Circuit upheld the Governor's previous executive order that limited the size of public assemblies, including religious services, against a free exercise challenge. *See Elim II*, 2020 WL 3249062, at *6. And another court in this district recently found that a challenge under Illinois' RFRA statute was also unlikely to succeed on the merits. *Cassell*, 2020 WL 2112374, at *13 (challenge to previous executive order banning all gatherings greater than ten people under Illinois' RFRA statute unlikely to succeed on the merits). However, this case does not involve a free exercise challenge and neither party suggests that imposing a blanket gathering limit is the least restrictive means by which the Governor could achieve his compelling interest in protecting public health.

11 *Illinois Coronavirus Map and Case Count*, N.Y. Times, July 1, 2020, https://www.nytimes.com/interactive/2020/us/illinois-coronavirus-cases.html (Illinois reported 768 new cases on June 29, compared to 581 on June 28).

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Exhibit 9

Elim Romanian Pentecostal Church v. Pritzker

2020 WL 2468194
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

ELIM ROMANIAN PENTECOSTAL CHURCH, Logos Batist Ministries, Plaintiff,
v.
Jay Robert PRITZKER, in his official capacity as Governor of the State of Illinois, Defendant.

Case No. 20 C 2782
|
Signed May 13, 2020

Synopsis

Background: Religious organizations brought action against Governor of State of Illinois in his official capacity, alleging that Governor's stay-at-home order restricting religious gatherings to ten persons violated numerous of their federal constitutional rights, including the right to free exercise of religion contained in the First Amendment. Following denial of plaintiffs' request for a temporary restraining order (TRO), and one organization's election to disobey order and hold services at its church with more than the allotted ten persons with none of the congregants wearing face coverings but with social distancing between congregants and clergy, court granted defendant leave to file a sur-reply to motion because plaintiffs' reply brief contained new factual matter.

Holdings: The District Court, Robert W. Gettleman, Senior District Judge, held that:

[1] plaintiffs had less-than-negligible chance of prevailing on claim that order violated Free Exercise Clause;

[2] order was neutral, generally applicable law, and thus rational basis test applied, such that plaintiffs had a less-than-negligible likelihood of success on merits of Free Exercise Clause claim;

[3] plaintiffs had a less-than-negligible chance of success on Establishment Clause claim;

[4] plaintiffs had a less-than-negligible chance of success on Free Speech and Assembly claim; and

[5] plaintiffs' interest in communal services did not heavily outweigh health and safety of public.

Motion denied.

West Headnotes (30)

[1] **Injunction** Extraordinary or unusual nature of remedy

Injunction Extraordinary or unusual nature of remedy

Injunction Clear showing or proof

Temporary restraining orders (TRO) and preliminary injunctions are extraordinary and drastic remedies that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.

[2] **Injunction** Grounds in general; multiple factors

The party seeking a temporary restraining order (TRO) must show that: 1) it has some likelihood of success on the merits, 2) it has no adequate remedy at law, and, 3) that without relief it will suffer irreparable harm.

[3] **Injunction** Injury, Hardship, Harm, or Effect

If the movant for a temporary restraining order (TRO) meets the requirements for granting a TRO, the court must then weigh the harm the movant will suffer without an injunction against the harm the non-movant will suffer if an injunction is issued; the court makes this assessment using a sliding scale.

[4] **Injunction** Balancing or weighing factors; sliding scale

The more likely the movant seeking a temporary restraining order (TRO) is to win, the less heavily need the balance of harm weigh in its favor, while

the less likely the movant is to win, the more the balance must weigh in its favor.

[5] **Injunction** Public interest considerations

In deciding whether to issue a temporary restraining order (TRO), the court must determine whether the injunction is in the public interest, taking into account any effects on non-parties.

[6] **Injunction** Entitlement to relief; likelihood of success

Plaintiffs seeking a temporary restraining order (TRO) need show only that their chances of success are better than negligible.

[7] **Constitutional Law** Restraint, commitment, and detention

The liberty secured by the Constitution does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.

[8] **Constitutional Law** Liberties and liberty interests

Even liberty itself, the greatest right, is not an unrestricted license to act according to one's will.

[9] **Health** Contagious and Infectious Diseases

A community has the right to protect itself against an epidemic of disease which threatens the safety of its members.

[10] **States** Police power

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.

[11] **Health** Contagious and Infectious Diseases

Under emergency circumstances, such as when 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 violation of rights secured by the fundamental law.

[12] **Civil Rights** Preliminary Injunction

Religious organizations had a less-than-negligible chance of prevailing on claim that Governor's stay-at-home order issued in response to emergency public health crisis of COVID-19 pandemic which threatened lives of all citizens, imposing ten-attendee limit on worship services and social distancing requirements, violated First Amendment's Free Exercise Clause, and thus organizations were not entitled to temporary restraining order (TRO) enjoining enforcement of order; order advanced state's interest in protecting its citizens from the pandemic. U.S. Const. Amends. 1, 14.

[13] **Civil Rights** Preliminary Injunction

Constitutional Law Religious Organizations in General

Governor's stay-at-home order issued in response to COVID-19 pandemic, which included ten-attendee limit on worship services and social distancing requirements, was neutral, generally applicable law, and thus rational basis test applied to claim that order violated First Amendment's Free Exercise Clause, such that religious organizations had a less than negligible likelihood of success on merits of claim, and therefore were not entitled to a temporary restraining order (TRO) to enjoin enforcement of order; order proscribed secular and religious conduct alike and expressly preserved various avenues for religious expression, including drive-in services, holding in-person religious services created higher risk of contagion due to sustained interactions between many people, and

order imposed same restrictions on schools. U.S. Const. Amends. 1, 14.

[14] **Constitutional Law** Burden on religion

Constitutional Law Strict scrutiny; compelling interest

The Free Exercise Clause of the First Amendment, applied to the states through the Fourteenth Amendment, prohibits government from placing a substantial burden on the observation of a central religious belief or practice without first demonstrating that a compelling governmental interest justifies the burden. U.S. Const. Amends. 1, 14.

[15] **Constitutional Law** Reasonableness or rationality

A neutral law of general applicability is constitutional if it is supported by a rational basis.

[16] **Constitutional Law** Reasonableness or rationality

In deciding whether a neutral law of general applicability is supported by a rational basis, and thus constitutional, neutrality and general application of a law are interrelated, and failure to satisfy one likely indicates a failure to satisfy the other.

[17] **Constitutional Law** Neutrality; general applicability

Whether a law qualifies as neutral, and thus constitutional under the Free Exercise Clause if supported by a rational basis, depends on its object; a law is not neutral if the object of the law is to infringe upon or restrict practices because of their religious motivation. U.S. Const. Amend. 1.

[18] **Constitutional Law** Neutrality; general applicability

General applicability of a law that has the incidental effect of burdening a particular religious practice forbids the government, under the Free Exercise Clause, from imposing burdens only on conduct motivated by religious belief in a selective manner. U.S. Const. Amend. 1.

[19] **Constitutional Law** Neutrality

If a law does not target religion, the First Amendment has not been offended. U.S. Const. Amend. 1.

[20] **Constitutional Law** Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

The Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. U.S. Const. Amend. 1.

[21] **Constitutional Law** Neutrality

The central purpose of the Establishment Clause is to ensure government neutrality in matters of religion. U.S. Const. Amend. 1.

[22] **Constitutional Law** Establishment of Religion

To comply with the Establishment Clause, government action must: 1) have a secular purpose, 2) have a primary effect that neither advances nor inhibits religion, and 3) not foster an excessive government entanglement with religion. U.S. Const. Amend. 1.

[23] **Civil Rights** Preliminary Injunction

Religious organizations had a less-than-negligible chance of success on Establishment Clause claim regarding Governor's stay-at-home order restricting gathering to ten or fewer attendees to prevent spread of COVID-19 pandemic, and thus organizations were not entitled to a temporary restraining order (TRO) to enjoin enforcement of order, since order had

a secular purpose, did not favor one religion over another, or religion as such, and did not foster government entanglement with religion, and order's primary effect neither advanced nor prohibited religion. U.S. Const. Amends. 1, 14.

[24] **Civil Rights** Preliminary Injunction

There was no evidence that Governor's stay-at-home order restricting gathering to ten or fewer attendees to prevent spread of COVID-19 pandemic was based on content discussed at churches or ideas or messages expressed, or that defendant had a history of animus toward religion, and thus religious organizations had a less-than-negligible chance of success on free speech and assembly claim, and thus organizations were not entitled to a temporary restraining order (TRO) to enjoin enforcement of order; order sought to reduce infections and save lives, and large gatherings magnified risk of contagion, even when participants practiced preventative measures. U.S. Const. Amends. 1, 14.

[25] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

A law must pass strict scrutiny when it restricts speech based on content. U.S. Const. Amend. 1.

[26] **Constitutional Law** Content-Based Regulations or Restrictions

A speech restriction is content-based when it applies to particular speech because of the topic discussed or the idea or message expressed. U.S. Const. Amend. 1.

[27] **Constitutional Law** Content-Based Regulations or Restrictions

A commonsense meaning of "content-based" requires the court to consider whether a regulation of speech on its face draws distinctions based on the message the speaker conveys. U.S. Const. Amend. 1.

[28] **Constitutional Law** Content-Based Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

In deciding whether a regulation of speech is content-based because on its face the regulation draws distinctions based on the message the speaker conveys, some distinctions are obvious, such as defining speech by particular subject matter, while others are more subtle, defining regulated speech by its function or purpose, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. U.S. Const. Amend. 1.

[29] **Constitutional Law** Governmental disagreement with message conveyed

Constitutional Law Content-Based Regulations or Restrictions

Some facially content neutral laws will be considered content-based regulations of speech if they cannot be justified without reference to the content of the regulated speech, or if they were adopted by the government because of disagreement with the message the speech conveys. U.S. Const. Amend. 1.

[30] **Civil Rights** Preliminary Injunction

Religious organizations' interest in communal services did not heavily outweigh health and safety of public during COVID-19 pandemic, as required since likelihood of success on merits of First Amendment action was remote, and thus organizations were not entitled to temporary restraining order (TRO) to enjoin enforcement of Governor's stay-at-home order, issued in response to COVID-19 pandemic, which included ten-attendee limit on worship services and social distancing requirements; issuance of TRO would have risked lives of congregants, as well as lives of their family members, friends, co-workers, and other members of communities with whom they would come in contact. U.S. Const. Amends. 1, 14.

1 Cases that cite this headnote

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Robert W. Gettleman, United States District Judge

MEMORANDUM OPINION AND ORDER [1]

***1** "These are the times that try men's souls." [2] Illinois, the nation, and the world are in the grip of a deadly pandemic the likes of which haven't been experienced in more than a century. As of yesterday, May 12, 2020, Illinois has experienced more than 83,000 known infections and more than 3,600 deaths from the COVID-19 virus, with more than 4,000 new cases and 144 new deaths reported on that date alone. In the nation, some 1.4 million cases and 82,000 deaths have been reported. In the world, more than 291,000 have died from the disease, which has infected more than 4 million people.

The virus is highly contagious and easily transferable. Because people may be infected but asymptomatic, they may be infecting others without knowing. At this time there is no known cure, no effective treatment and no vaccine. The only preventative measures agreed upon by all medical experts is to avoid contact with infected persons. To that end people have been cautioned to stay at home if at all possible, practice social distancing when it is not, and to wear face coverings when coming near others. Despite the dire numbers and warnings, some people have refused to comply, causing governors across the country to issue what have been described as "stay-at-home" orders. Defendant Governor Jay Pritzker has issued a number of such orders, including, Executive Order 2020-32 (the "Order"), which requires wearing a face covering in public places or when working, the cessation of all non-essential business and operations, and most importantly for the instant case, prohibits "All public and private gatherings of any number of people occurring outside a single household or living unit" except for limited purposes. "[A]ny gathering of more than ten people is prohibited unless exempted ..." Individuals may leave their residences only to perform certain "Essential Activities" and must follow social distancing requirements set forth in the Order, including wearing face coverings when in public and work. Among the Essential Activities listed is "to engage in the free exercise of religion." That provision of the Order provides:

> 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.

Plaintiffs have sued Governor Pritzker, challenging the Order to the extent that it restricts religious gatherings to ten persons, arguing that it violates numerous of their federal constitutional rights, most notably the right to free exercise of religion contained in the First Amendment. They filed their complaint on Thursday, May 7, 2020 at 11:16 p.m. and their motion for a temporary restraining order ("TRO") and preliminary injunction at 1:47 a.m. Friday, May 8, 2020. The motion sought a TRO enjoining defendant from enforcing the Order against them starting on Sunday, May 10, 2020. The court ordered defendant to respond to the motion by 5:00 p.m. Saturday May 9, 2020 with plaintiffs to reply by 5:00 p.m. Sunday, May 10, 2020. Because of the briefing schedule, the court denied the request for a TRO effective for May 10, 2020.

***2** Undeterred by the court's refusal to grant the TRO motion, plaintiff Elim Romanian Pentecostal Church ("Elim") elected to disobey the Order and hold services at its church with more than the allotted ten persons. The pictures that plaintiffs have included in their reply show that none of the congregants were wearing face coverings, contrary to CDC guidelines. Because plaintiffs' reply brief contained new factual matter, the court granted defendant leave to file a sur-reply by noon on Tuesday, May 12, 2020, with no further briefing to be accepted. Nevertheless, plaintiffs submitted

a response to the sur-reply, principally to contend that the congregants and clergy were social distancing. The motion is now fully briefed and ready for resolution. For the reasons described below, the motion is denied.

[1] [2] [3] [4] [5] Temporary restraining orders and preliminary injunctions, are extraordinary and drastic remedies 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, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997). The party seeking such relief must show that: 1) it has some likelihood of success on the merits; 2) it has no adequate remedy at law; and, 3) that without relief it will suffer irreparable harm. Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 896 F.3d 809, 816 (7th Cir. 2018). If the movant meets these requirements, the court must then weigh the harm the movant will suffer without an injunction against the harm the non-movant will suffer if an injunction is issued. The court makes this assessment using a sliding scale. The more likely the movant is to win, the less heavily need the balance of harm weigh in its favor. The less likely the movant is to win, the more the balance must weigh in its favor. Finally, the court must also determine whether the injunction is in the public interest, taking into account any effects on non-parties. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1068 (7th Cir. 2018).

Likelihood of Success on the Merits

[6] Plaintiffs need show only that their chances of success are better than negligible. Ill. Council on Long Term Care v. Bradley, 957 F.2d 305, 310 (7th Cir. 1992). Plaintiffs' complaint challenges the Order on both federal and state constitutional grounds, as well as on state statutory grounds. Their motion, however, raises only that the Order violates their First Amendment Rights to Free Exercise of Religion and to "Be Free from Government Hostility and Disparate Treatment Under the Establishment Clause," and that the Order restricts their First Amendment rights to speech and assembly.

[7] [8] [9] [10] Over one hundred years ago the Supreme Court established a framework governing the emergency exercise of state authority during a public health crisis. Jacobson v. Commonwealth of Mass., 197 U.S. 11, 27, 25 S.Ct. 358, 49 L.Ed. 643 (1905). The "liberty secured by the Constitution ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Id. at 26, 25 S.Ct. 358. "Even liberty itself, the greatest right, is not unrestricted license to act according to one's will." Id. "[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 28, 25 S.Ct. 358. As the Court explained, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." Id. at 26-27, 25 S.Ct. 358 (emphasis added).

In Jacobson, the Court was faced with a claim that the state's compulsory vaccination law enacted during the smallpox epidemic violated the Fourteenth Amendment. Rejecting the claim, the court described the state's police power to combat an epidemic, id at 29, 25 S.Ct. 358:

> In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the public may demand.

***3 [11]** Courts have acknowledged this principle numerous times, applying it to various constitutional claims. For example, in Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U.S. 380, 22 S.Ct. 811, 46 L.Ed. 1209 (1902), the court upheld Louisiana's right to quarantine passengers aboard a vessel despite the fact that all were healthy. And in Prince v. Mass., 321 U.S. 158, 166-67, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court stated "[t]he right to practice religion freely does not include the liberty to expose the community ... to communicable disease." Under such emergency circumstances, such as when 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 violation of rights secured by the fundamental law." In re Abbott, 954 F.3d 772, 784-85 (5th Cir. 2020) (quoting Jacobson, 197 U.S. at 31, 25 S.Ct. 358).

[12] As described above, there is no question that the world, the country, and Illinois in particular are in the midst of a deadly pandemic of epic proportions. Plaintiffs do not dispute that COVID-19 threatens the lives of the citizens of Illinois and all Americans. The court finds, as did the court in Cassell v. Snyders, —— F.Supp.3d ——, ——, 2020 WL 2112374 at *7 (N.D. Ill. May 3, 2020), that the COVID-19 pandemic qualifies as the type of public health crisis that Jacobson contemplated. That finding means that to have any likelihood of success on the merits plaintiffs must demonstrate either that the Order has no real or substantial relation to the public health crisis or that it is a plain, palpable invasion of their rights. They have failed to demonstrate either. Indeed, nowhere in any of their briefs do they cite Jacobson or mention its standard. As a result, because Jacobson is implicated by the current health crisis, and because the Order advances the State's interest in protecting its citizens from the pandemic, the court concludes that plaintiffs have a less than negligible chance of success on their constitutional claims.

[13] **[14]** **[15]** **[16]** Moreover, even if Jacobson's emergency crisis standard does not apply, plaintiffs have failed to show any likelihood of success under traditional First Amendment analysis. The Free Exercise Clause of the First Amendment (applied to the states through the Fourteenth Amendment) provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof …." It prohibits government from "[p]lacing a substantial burden on the observation of a central religious belief or practice without first demonstrating that a "compelling governmental interest justifies the burden." St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 631 (7th Cir. 2007). In Employment Division v. Smith, 494 U.S. 872, 883, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), however, the Supreme Court held that neutral laws of general applicability do not violate the Free Exercise Clause even if they have the incidental effect of burdening a particular religious practice, and thus need not be justified by a compelling governmental interest. Put another way, a "neutral law of general applicability is constitutional if it is supported by a rational basis." Ill. Bible Colleges Ass'n v. Anderson, 870 F.3d 631, 639 (7th Cir. 2017). Neutrality and general application are interrelated, and failure to satisfy one likely indicates a failure to satisfy the other. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

[17] **[18]** **[19]** Whether a law qualifies as neutral depends on its object. A law is not neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation." Lukumi, 508 U.S. at 533, 113 S.Ct. 2217. General applicability forbids the government from "imposing burdens only on conduct motivated by religious belief in a selective manner." Id. In short, if the Order does not target religion, "the First Amendment has not been offended." Employment Division, 494 U.S. at 878, 110 S.Ct. 1595.

***4** In the instant case, plaintiffs have provided no evidence that the Order targets religion. They point to the Order's exemptions for essential businesses that may host more than ten people and argue "if large gatherings at liquor stores, warehouse supercenters, and cannabis stores are not prohibited – and distancing and hygiene practices are only required to the greatest extent possible – even though endangering citizens (or not) to an equal degree, then it is obvious religious gatherings have been targeted for discriminatory treatment." The court disagrees.

Gatherings at places of worship pose higher risks of infection than gatherings at businesses. As Judge Lee explained in Cassell, —— F.Supp.3d at ——, 2020 WL 2112374 at *9, when analyzing the same Order:

> [I]n person religious services create a higher risk of contagion than operating grocery stores or staffing manufacturing plants. The key distinction turns on the nature of each activity. When people buy groceries, for example, they typically enter a building quickly, do not engage directly with others except at point of sale, and leave once the task is complete. The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible.
>
> By comparison, religious services involve sustained interactions between many people ... Given that religious gatherings seek to promote conversation and fellowship, they "endanger" the government's interest in fighting COVID-19 to a "greater degree" than the secular businesses that Plaintiffs identify.

Plaintiffs do not address Cassell's reasoning (they don't even cite it in their reply) except to argue in their initial motion that COVID-19 does not care about people's intentions - what matters is hygiene and social distancing. That distorts Cassell's reasoning and common sense. The congregants do not just stop by Elim Church. They congregate to sing, pray, and worship together. That takes more time than shopping for liquor or groceries. The word "congregate," from which the

term "congregation" derives, means to "gather into a crowd or mass." Indeed, the church's YouTube channel lists a live recording from last Sunday's service that was one hour, forty-seven minutes long, with virtually no one in the congregation or clergy wearing a face covering.

Plaintiffs also complain that the Order classifies law and accounting firms as essential, with no ten-person limit, suggesting that this somehow shows that the Order targets religion. Again, however, people do not go to those places to gather in groups for hours at a time. In this regard the court agrees with Judge Lee that a more apt analysis is between places of worship and schools, both of which involve "activities where people sit together in an enclosed space to share a common experience," exacerbating the risk of contracting the virus. Cassell, —— F.Supp.3d at ——, 2020 WL 2112374 at *10. All public and private schools serving pre-kindergarten through twelfth grade students have been closed under other Executive Orders. And under this Order, theaters and concert halls, which clearly resemble the layout of plaintiffs' churches, are completely banned from hosting any gatherings.

As a result, the court concludes that the Order is both neutral and of general applicability. As such, it does not violate the Free Exercise Clause so long as it is supported by a rational basis. Anderson, 870 F.3d at 639. The Order, without doubt, is rationally based in light of the need to slow the spread of COVID-19 in Illinois. Consequently, the court concludes that plaintiffs have a less than negligible likelihood of success on the merits of this claim.

***5** **[20]** **[21]** **[22]** Plaintiff's Establishment Clause claim fares no better. "[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." Gillette v. U.S., 401 U.S. 437, 450, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). "Its central purpose is to ensure government neutrality in matters of religion." Id. at 449, 91 S.Ct. 828. To comply with the Establishment Clause, government action must: 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[23] There is no doubt that the Order passes the Lemon test, and plaintiffs do not argue otherwise. Indeed, once again, they fail to address Lemon in any of their three briefs. In any event, the Order obviously has a secular purpose to prevent the spread of COVID-19. Its primary effect neither advances nor prohibits religion. It does not favor one religion over another, or religion as such. Plaintiff's argument that the Order inhibits religion because it does not limit other essential businesses to ten persons or fewer fails for the same reason its Free Exercise Claim fails. Finally, the Order in no way fosters government entanglement with religion. Consequently, the court concludes that plaintiffs have a less than negligible chance of success on their Establishment Clause claim.

[24] **[25]** **[26]** **[27]** **[28]** **[29]** Nor do plaintiffs have even a negligible chance of success on their Free Speech and Assembly claim. The First Amendment bars the government from "abridging the freedom of speech." A law must pass strict scrutiny when it restricts speech based on content. A speech restriction is content-based when "it applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). A commonsense meaning of content-based requires the court to consider "whether a regulation of speech on its face draws distinctions based on the message the speaker conveys." Id. (internal quotations omitted). Some such distinctions are obvious, such as defining speech by particular subject matter; others are more subtle, defining regulated speech by its function or purpose. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." Id. Additionally, some facially content neutral laws will be considered content-based regulations of speech if they "cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys." Id.

Plaintiffs have failed to present any evidence to demonstrate that the Order is based on the content discussed at churches or the ideas or messages expressed. They again rely on the exemptions for other essential businesses that are not restricted to gatherings of ten persons. From this, plaintiffs conclude that the Order restricts religious speech because it is religious speech. Once again, the court disagrees.

As noted in Cassell, the Order has nothing to do with suppressing religion and everything to do with reducing infections and saving lives. There is no evidence that defendant has a history of animus toward religion. Cassell noted the example of a church choir practice in Washington

State where members actually used hand sanitizer and practiced social distancing. Despite those efforts, forty-five of the sixty choir members contracted COVID-19 and two died. Cassell, —— F.Supp.3d at ——, 2020 WL 2112374 at *13. That example illustrates the purpose of the Order. Large gatherings magnify the risk of contagion even when participants practice preventative measures as plaintiffs claim they are prepared to do.[3] Consequently, the court concludes that plaintiffs' chance of success on this claim is less than negligible.

Balancing of Harms

***6 [30]** Because plaintiffs have not shown a greater than negligible chance of success on the merits, they are not entitled to preliminary relief. But, even if they had a slight chance of success, under the sliding scale approach, the less likely their chance of success the more the balance of harms must weigh in their favor. Valencia v. City of Springfield, Ill., 883 F.3d 959, 966 (7th Cir. 2018). Because their likelihood of success is so remote, plaintiffs must show that the scales weigh heavily in their favor. They do not and cannot.

Indeed, quite the contrary is true. The harm to plaintiffs if the Order is enforced pales in comparison to the dangers to society if it is not. The record clearly reveals how virulent and dangerous COVID-19 is, and how many people have died and continue to die from it. "[T]he sad reality is that places where people congregate, like churches, often act as vectors for the disease." Cassell, —— F.Supp.3d at ——, 2020 WL 2112374 at *15. Plaintiffs' request for an injunction, and their blatant refusal to follow the mandates of the Order are both ill-founded and selfish. An injunction would risk the lives of plaintiffs' congregants, as well as the lives of their family members, friends, co-workers and other members of their communities with whom they come in contact. Their interest in communal services cannot and does not outweigh the health and safety of the public.

CONCLUSION

For the reasons described above, plaintiffs' motion for temporary restraining order and preliminary injunction (Doc. 4) is denied.

All Citations

--- F.Supp.3d ----, 2020 WL 2468194

Footnotes

1 The facts discussed in this opinion are uncontested and principally taken from the parties' submissions.
2 Thomas Payne, "The Crisis" (December 23, 1776).
3 As mentioned above, the pictures of the services held by Elim on Sunday, May 10, 2020, show that the participants were not wearing face coverings, as required by the CDC guidelines.

Exhibit 10

Elmsford Apartment Assocs., LLC v. Cuomo

2020 WL 3498456
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

ELMSFORD APARTMENT ASSOCIATES, LLC, 36 APARTMENT ASSOCAITES, LLC, and 66 APARTMENT ASSOCIATS, J.V., Plaintiffs,
v.
ANDREW CUOMO, as Governor of the State of New York, Defendant.

20-cv-4062 (CM)
|
Filed 06/29/2020

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Colleen McMahon Chief Judge

***1** The world is navigating the deadliest pandemic in over a century. Presently, the United States has suffered more than any other country, reporting over two million cases of the novel coronavirus known as COVID-19, and over one hundred and twenty thousand deaths as a result. [1] Among the fifty states, New York has experienced the highest number of cases, with nearly four hundred thousand cases and twenty-five thousand dead. [2]

The New York State Legislature and the Governor, Defendant Andrew Cuomo, have worked together to respond to this evolving crisis and its effects on the health, safety, and economic wellbeing of New Yorkers. At issue here is the Governor's Executive Order 202.28, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," issued May 7, 2020 (the "Order" or "EO 202.28"), which, *inter alia*, temporarily permits tenants to apply their security deposit funds to rents due and owing – provided the tenants replenish those funds at a later date – and temporarily prohibits landlords from initiating eviction proceedings against tenants who are facing financial hardship due to the pandemic.

Three residential landlords – Plaintiffs Elmsford Apartment Associates, LLC; 36 Apartment Associates, LLC; and 66 Apartment Associates, J.V. ("Plaintiffs") – ask this Court to enjoin EO 202.28 on the grounds that the Order violates their rights under the United States Constitution's Contracts Clause, Takings Clause, Due Process Clause and Petition Clause. [3] While the Plaintiffs initially sought only a temporary restraining order and preliminary injunction, the parties agreed that Plaintiffs' challenge turns entirely on legal issues that required no discovery and could be resolved on cross-motions for summary judgment. After an expedited briefing schedule, the Court heard oral argument via telephone conference on June 24, 2020.

For the following reasons, Plaintiffs' motion for summary judgment is denied, and Defendant's motion for summary judgment dismissing this action is granted.

BACKGROUND

A. New York's response to COVID-19

On March 2, 2020, in response to the first reported cases of COVID-19 in New York state, the legislature passed Senate Bill S7919, which afforded Governor Cuomo the power to suspend statutes or regulations, and issue necessary accompanying directives, in the event of an epidemic or other disease outbreak. *See* SB S7919; N.Y. Exec. Law Art. 2-B § 29-a. Specifically, Governor Cuomo may respond to the current pandemic by:

> ***2** "temporarily suspend[ing] any statute, local law, ordinance, or order, rules or regulations, or parts thereof, or any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster."

N.Y. Exec. Law Art. 2-B § 29-a. Any such suspensions must be "in the interest of the health or welfare of the public," "reasonably necessary to aid the disaster effort," and must "provide for the minimum deviation" from pre-suspension legal requirements "consistent with the goals of the disaster action deemed necessary." *Id.* Suspensions are only authorized for period of 30 days, although Section 29 of the amended Executive Law allows the Governor to "extend the suspension[s] for additional periods not to exceed thirty days each." *Id.*

To reduce the spread of COVID-19, government officials around the world ordered all "non-essential" businesses

closed, and instructed their constituents to shelter in place, so that medical professionals and other first responders could try to stem the exponential wave of infections that reached catastrophic levels in mid-March. By mid-March, New York State was rapidly becoming the epicenter of this unprecedented public health crisis. Governor Cuomo declared a statewide emergency on March 6. (EO 202.) On March 20, he ordered all non-essential businesses either to close or to require their employees to work from home. (EO 202.8.) The initial orders also prohibited public gatherings not related to essential work.

These indefinite disruptions to everyday life had a number of second-order economic effects. Tens of millions of Americans filed for unemployment in the weeks following the stay-at-home orders, as bars, restaurants, shops, and live entertainment venues were forced to close.[4] As a result of these shutdowns, more and more households were forced to eat into their financial resources as they waited out the emergency. Many are still waiting as New York continues to gradually reopen sectors of the economy.

On March 27, 2020, the federal government enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). The CARES Act provided numerous forms of relief to affected industries and industries, including a prohibition against new eviction cases filed by housing providers who participate in certain federal housing rental programs on the basis of non-payment of rent. *See* 15 U.S.C. § 9058.

Which brings us to the order that is the subject of this lawsuit.

B. The Order Under Review

On March 20, 2020, in response to this emergency. Governor Cuomo issued EO 202.8 (the "First Moratorium") – the first of several orders designed to prohibit the eviction or foreclosure of either residential or commercial tenants for a period of 90 days. As he did when initially declaring a state of emergency, Governor Cuomo said the measures included in EO 202.8 were justified in light of "travel-related cases and community contact transmission of COVID-19" which were "documented in New York State and expected to ... continue," and because allowing landlords to continue evictions and foreclosures "would prevent, hinder, or delay action necessary to cope with the disaster emergency."

***3** Governor Cuomo later issued the challenged Order, EO 202.28, on May 7, 2020. (*See* Executive Order 202.28, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," available at https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.) The Order contains two sections that, while suspending the operation of certain state laws, have the effect of modifying existing relationships between landlords and their tenants.

i. Security Deposit Provisions

The Order suspends Sections 7-103, 7-107 and 7-108 of the General Obligations Law, dealing with the rights and obligations of lessors and lessees with respect to security deposits, for thirty days. Security deposits are deposits of rent – most commonly, one month's rent – to provide the landlord with security for the making of repairs to damage caused by the tenant once the tenant vacates the premises. By law, the landlord must place the security deposit into an interest bearing account for the benefit of the tenant (who retains legal title to the funds). The tenant is entitled to the return of the security deposit, with interest, at the conclusion of the lease, unless the landlord needs to use the funds to make repairs in order to re-lease the premises. All this is governed by the cited sections of the General Obligations Law.

The Order temporarily suspends the operation of the usual procedures governing the use of security deposits in order to permit tenants to apply their security deposit funds to rental payments:

> Landlords and tenants or licensees of residential properties may, upon the consent of the tenant or licensee, enter into a written agreement by which the security deposit and any interest accrued thereof, shall be used to pay rent that is in arrears or will become due. If the amount of the deposit represents less than a full month rent payment, this consent does not constitute a waiver of the remaining rent due and owing for that month. Execution in counterpart by email will constitute sufficient execution for consent;
>
> Landlords shall provide such relief to tenants or licensees who so request it that are eligible for unemployment insurance or benefits under state or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic;

> It shall be at the tenant or licensee's option to enter into such an agreement and landlords shall not harass, threaten or engage in any harmful act to compel such agreement;
>
> Any security deposit used as a payment of rent shall be replenished by the tenant or licensee, to be paid at the rate of 1/12 the amount used as rent per month. The payments to replenish the security deposit shall become due and owing no less than 90 days from the date of the usage of the security deposit as rent. The tenant or licensee may, at their sole option, retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment, which the landlord, must accept such insurance as replenishment.

Even if the landlord does not want the tenant to use his security deposit to cover a month's rent, the tenant may invoke these new procedures and the landlord must allow it to do so.

ii. Eviction Moratorium

The order also suspends the landlord's ability to commence eviction proceedings for nonpayment of rent pursuant to Article 7 of the Real Property Actions and Proceedings Law, ("RPAPL") and Article 7 of the Real Property Law ("RPL"). (*See* Pl. Br. at 2-3.) That law (to which reference is made in many standard leases) provides that, after following certain procedures, the landlord may commence what is known as a summary non-payment proceeding in order to evict the tenant who is occupying leased premises without paying rent and obtain a money judgment for any unpaid rent. Specifically, the order provides:

> ***4** "There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020."

A bit of background is in order. Evicting a tenant – especially a residential tenant – in New York is a slow, cumbersome and extremely tenant-favorable process, especially when compared to analogous procedures in other states. As Plaintiffs acknowledge, tenants in New York City enjoy even more generous protections. (Dkt. No. 10, Pl.'s Br. at 2 n.1.) The way the process actually plays out belies the term "summary proceeding" that is statutorily authorized to recover real property from a non-paying tenant.

To secure an eviction warrant from the housing courts, a New York landlord must serve the tenant a notice of nonreceipt of payment (*see* RPL § 235-e(d)), and give the tenant one final chance to pay by making a demand of payment within 14 days (*See* RPAPL § 711(2)). If the landlord is still owed payment after two weeks have passed, he may commence what is known as a summary nonpayment proceeding by filing a petition in the civil court, returnable by the tenant within 10 days. (RPAPL § 732(1).) If the tenant does not respond in ten days, the court may (but rarely does) issue an eviction warrant immediately. (RPAPL § 732(3).) However, if the tenant does respond, however, a trial is set for eight days hence. (RPAPL § 732(2).) The trial may be adjourned up to ten additional days if the parties so require in order to produce their witnesses. (RPAPL § 745(1).)

If, after trial, a judgment is entered for the landlord and the court issues a warrant for eviction, the Sheriff must give the tenant 14 days' notice in writing prior to execution. (*See* RPAPL § 749(2)(a).) There are the usual provisions for appeal (to the Appellate Term of Supreme Court) and stays issue routinely so that non-defaulting tenants are not evicted before their cases are fully reviewed.

But even if the evidence supports a judgment for the landlord, the housing court is not required to order the tenant's immediate eviction. A tenant may obtain a stay of the issuance of the warrant for up to one year by showing that "it would occasion extreme hardship to the [tenant] or the [tenant's] family if the stay were not granted." (RPAPL § 753(1).) Such stays are far from uncommon.

On June 6, 2020, Governor Cuomo issued Executive Order 202.38, which renewed the security deposit provision of EO 202.38 for an additional 30 days, but did not extend the eviction moratorium period beyond August 19. (*See* Executive Order 202.38, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," *available at* https://www.governor.ny.gov/news/no-20238-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.)

The Governor's Order does not address any summary proceeding that was commenced prior to its effective date; however, as a practical matter, there was not much that a landlord could do to prosecute an ongoing proceeding, as the New York State courts were closed until very recently. (*See* March 16, 2020 Administrative Order, AO/68/20, *available at* nycourts.gov/latest-AO.shtml (suspending "All eviction proceedings and pending eviction orders ... until further notice").) Also, Governor Cuomo did nothing to impede the commencement of holdover proceedings brought when a tenant fails to cure a violation of the terms of its lease – such as when a tenant enters into an unauthorized sublease, *see, e.g.*, *Mann Theatres Corp. of Calif. v. Mid-Island Shopping Plaza, Inc.*, 94 A.D.2d 466, 464 N.Y.S.2d 793, 799 (2d Dep't 1983), operates a "bawdy-house" on the premises, *see* RPAPL § 711(5), or overstays their agreed lease term, *see, e.g, Riverdale Realty Development LLC v. EJM Rest. Corp.*, 65 Misc.3d 1227(A), 119 N.Y.S.3d 706 (Table), 2019 WL 6335262, at *1 (N.Y. Civ. Ct. Nov. 25, 2019). Nor does EO 202.28 suspends the landlords' right to initiate a common law breach of contract action in the New York State Supreme Court to redress a tenant's failure to perform its payment obligations under his or her lease, *see, e.g.*, *1000 Northern of N.Y. Co. v. Great Neck Med. Assocs.*, 7 A.D.3d 592, 775 N.Y.S.2d 884 (2d Dep't 2004) – although this court recognizes that such a remedy is not the one to which landlords usually resort.

C. The Current Availability of Eviction Remedies in New York Civil Courts

***5** The First Moratorium, which placed a 90-day pause on all evictions, whether commenced for reason of nonpayment of rent or otherwise, expired on June 20. Recognizing the potential for confusion – compounded by New York's gradual and incomplete reopening of public spaces across the state, including state courts – Chief Administrative Judge Lawrence K. Marks issued an order clarifying the current availability of eviction remedies. (Dkt. No. 23, Reply Decl. of M. Guterman, Ex. 1 (the "Administrative Order" or "AO") at 1.)

The Administrative Order permits landlords to file a new eviction petition electronically, provided that the petition includes an affirmation that, to the best of the landlord's knowledge, the petition "comports with the requirements of ... Executive Order 202.28." (*Id.* at 3.) Although landlords remain barred from initiating new summary proceedings "for nonpayment of rent" against a tenant "eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship," they may seek eviction of any tenant for any reason other than nonpayment of rent. (*Id.*)

However, the Administrative Order only allows the action to be filed; it cannot proceed to trial as long as "state and federal emergency measures addressing the COVID-19 pandemic" remain in place. (AO at 1.) All RPAPL eviction matters, new or old, "shall continue to be suspended," although parties represented by counsel may schedule virtual, judicially-supervised settlement conferences. (*Id.*)

D. The Pending Motion

Plaintiffs assert that EO 202.28 violates their rights under the Contracts Clause by allowing security deposit funds to be disposed contrary to the terms of the parties' leases, as well as by denying the landlords a forum in which to commence (or, presumably, prosecute) eviction proceedings for non-payment of rent, a remedy to which they claim at least an implied contractual right. Plaintiffs further argue that Governor Cuomo's denial of access to housing court for the prosecution of summary nonpayment proceedings violates their rights under Petition Clause of the First Amendment. Finally, they claim that the Order violates both the Takings Clause and the procedural due process protections of the Fourteenth Amendment, because the temporary suspension of evictions forces landlords to provide their property for use as housing without just compensation. (Dkt. No. 10, at 1.)

Governor Cuomo argues in response that the temporary modifications to New York's residential rent regulation scheme do not violate the Constitution because they do not upset a landlord's expectations relating to state interference with their business operations. EO 202.28 neither robs the Plaintiffs' of the entire value of their property interests nor does it bar them from vindicating those interests to the fullest extent provided by lease and by law once the current health crisis has abated. He urges that state governments are entitled to deference when their exercise of the police power to protect the general welfare of their citizens incidentally burdens private contractual relationships, and points out that the purely temporary nature of the burden to the landlords renders that burden "incidental" as a matter of law. (Dkt. No. 21.)

The Court has also received and reviewed the brief of *amici curiae* Housing Court Answers, Mount Vernon United Tenants, and United Tenants of Albany (collectively, the "*Amici*"). (Dkt. No. 19.) In addition to the arguments made by Governor Cuomo, *Amici* stress that lifting the eviction

moratorium "would require tenants to make impossible choices between their health (and the community's health) and their homes," and could ultimately "risk further spread of COVID-19," thus aggravating the very emergency that the Governor and the Legislature hoped to curtail. (Dkt. No. 19 at 5-6.) Even worse, based on *Amici's* experience, the housing courts would experience "extreme stress" and overcrowding if tenants, landlords, court officials, and counsel were forced to cram into housing courts in order to attend evictions proceedings, thereby exacerbating the current public health emergency. (*Id.* at 6-7.)

LEGAL STANDARD

***6** Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering cross-motions for summary judgment, "all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). As a government actor, it is the Defendant's burden to justify its actions as consistent with the U.S. Constitution. *See Vugo, Inc. v. City of New York*, 931 F.3d 42, 48 (2d Cir. 2019) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-72, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011)).

Because Plaintiffs do not allege imminent or actual harm to any particular property interest or contractual relationship as a result of the Order, the parties agreed at the June 5 conference that this case takes the form of a facial challenge. As the Supreme Court has held, a facial challenge "is ... the most difficult challenge to mount successfully, since the challenger must establish no set of circumstances under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Outside of the First Amendment context, "facial challenges to legislation are generally disfavored." *Sanitation & Recycling Indus., Inc. v. City of New York ("Sanitation I")*, 928 F. Supp. 407, 416 (S.D.N.Y. 1996) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)).

DISCUSSION

I. This Court Does Not Have Jurisdiction to Enjoin Purported Violations of the Executive Law or the New York State Constitution.

Before reaching the constitutional issues, the Court must first make clear that it lacks the jurisdiction necessary to reach the merits of the state law questions raised in Plaintiffs' papers.

Plaintiffs claim that the Governor "has effectively legislated new laws" in violation of the Executive Law and the New York Constitution (Pl.'s Br. at 7-13; Reply at 14-16.) For instance, Plaintiffs object to the imposition of a 60-day eviction moratorium in light of the language in § 29-a forbidding suspensions "in excess of thirty days." (*Id.* (citing N.Y. Exec. Law Art. 2-B § 29-a(2)(a)).)

Federal courts do not have the power to address claims that Governor Cuomo has violated state law. While it may be the case that Governor has overstepped his authority under New York's Executive Law, curing those alleged harms would require this Court to ignore the doctrine of state sovereign immunity and principles of federalism embodied in the Eleventh Amendment. As the Supreme Court has said, "it is difficult to think of a greater intrusion on state sovereignty than ... a federal court instruct[ing] state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). In *Pennhurst*, the Supreme Court ruled that federal courts could not grant relief against state officials for their purported violations of state law, because doing so does not implicate any aspect of federal law, nor does it "vindicate the supreme authority of federal law." *Id.* Therefore, efforts to cure violations of state law fall beyond the jurisdiction of federal courts, because they do not "aris[e] under the Constitution, the Laws of the United States, [or] Treaties ...." U.S. Const. Art. III § 2.

The only acknowledged exception to the rule in *Pennhurst* is not applicable here. A federal court may intervene when a state official "may be said to act *ultra vires*," meaning that he or she "acts without any authority whatever." *Id.* at 101 n.11 (internal quotation marks omitted). Yet, by their own admission, Plaintiffs "do not argue ... that Executive Law § 29-a as amended is, itself, unconstitutional." (Pl.'s Br. at 11 n.3.) Their claim is not that the Governor lacks the power to respond to the COVID-19 emergency – only that he has abused that power. Therefore, by seeking redress for Governor Cuomo's alleged violations of the authority delegated to him by the New York legislature, Plaintiffs ask the Court "to police the boundaries of [state law]," *ACA Int'l v. Healey*, No. 20-cv-10767, 2020 WL 2198366, at *4 (D. Mass. May 6, 2020).

***7** In *ACA*, the District of Massachusetts rejected similar arguments made against a regulation promulgated in response to COVID-19, citing *Pennhurst* to conclude that federal courts may not enjoin the actions of state officials for purported violations of state law. I concur with the court in that case: this Court lacks jurisdiction to address the issues of New York law raised in Plaintiffs' papers.

II. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Takings Clause.

The Takings Clause of the Fifth Amendment provides that no "private property shall be taken for public use, without just compensation." U.S. Const. Amend. V. The clause applies to the states through the Fourteenth Amendment. *See Kelo v. New London,* 545 U.S. 469, 125 S.Ct. 2655, 2658 n. 1, 162 L.Ed.2d 439 (2005). Courts have construed "private property" to include rights secured in private contract, but parties cannot simply " 'remove the subject matter of their agreement by making contracts about them'." *Sanitation I*, 928 F. Supp. at 416 (citing *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223-24, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986)).

"The law recognizes two species of takings: physical takings and regulatory takings." *Buffalo Teachers Fed'n v. Tobe,* 464 F.3d 362, 374 (2d Cir.2006). "The paradigmatic taking requiring just compensation," known as a physical taking, "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). A regulatory taking occurs "when the government acts in a regulatory capacity." *Buffalo Teachers*, 464 F.3d at 374. "The gravamen of a regulatory taking claim is that the state regulation goes too far and in essence effects a taking." *Id.* (internal quotation marks omitted).

Plaintiffs fails to demonstrate that the Order cause them to suffer either type of taking.

A. EO 202.28 does not constitute a physical taking.

"[T]he government affects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992); *accord Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992). Government action that does not entail a physical occupation, but merely affects the use and value of private property, does not result in a physical taking of property.

The Supreme Court has ruled that a state does not commit a physical taking when it restricts the circumstances in which tenants may be evicted. For example, in *Yee v. City of Escondido*, mobile home park owners challenged a municipal rent control ordinance and a California statute that "limit[ed] the bases upon which a park owner may terminate a mobile homeowner's tenancy." *Yee*, 503 U.S. at 524. They argued that this regime of mobile home regulations effected a physical taking because "what has been transferred from park 10 owner to mobile homeowner is no less than a right of physical occupation of the park owner's land." *Id*. at 527. The Supreme Court rejected the park owners' argument, holding that it "cannot be squared with our cases on physical takings," which occur only when the government "requires the landowner to submit to the physical occupation of his land." *Id*. The local rent controls and state law at issue in Yee "authorize[d] no such thing." To the contrary, the park owners "voluntarily rented their land to mobile homeowners .... Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id*. at 528. The Second Circuit, in evaluating New York's rent control laws, has agreed, holding that these laws "regulate[ ] land use rather than effecting a physical occupation." *W. 95 Hous. Corp. v. New York City Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002); *see also Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011) (affirming dismissal of physical takings claim on the ground that the rent stabilization law "does not affect permanent physical occupation of the [owners'] property").

***8** Second Circuit precedent further clarifies that restrictions like those contained in EO 202.28 do not amount to a physical taking. In this circuit, a physical taking only occurs when "a government has committed or authorized a permanent physical occupation of property." *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). "The *absolute* exclusivity of the occupation, and the *absolute* deprivation of the owner's right to use and exclude others from the property ... [are] the hallmarks of a physical taking." *Id.* at 93 (emphasis in original) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)). In *Southview*, the court upheld the Vermont Environmental Commission's decision to deny a building permit to a developer whose plans would have threatened a white-tail deer population, because the

plaintiff "retain[ed] substantial power to control the use of the property." *Id.* at 94. So too here: because the landlords fail to show that EO 202.28 denies them control of their property, which they continue to rent to their tenants, and collect rents from, a temporary halt on evictions does not take on the character of a physical taking.

Nor does the fact that the landlords object to some tenants' continued occupancy in a subset of their units transform the Order enabling those occupancies into a physical taking. In *Kirsh v. City of New York*, No. 94-cv-8489, 1995 WL 383236 (S.D.N.Y. June 27, 1995), the court held that New York State does not violate the Takings Clause when it assumes management of a property from a landlord and rents units therein to parties without the landlords' approval. *Id.* at *5. In that case, the Civil Court exercised its authority under Article 7A of RPAPL to appoint administrators to manage a particular property in response to a number of tenant complaints alleging harassment by their landlords. The plaintiff landlords challenged the Housing Court's order as a physical taking, complaining that the administrators were permitted to decrease rent, spend the landlord's funds on repairs, and rent vacant units. Even though the administration went on for over six years, the Court rejected the landlord's physical takings claim, reasoning "7A administration does not constitute a permanent, physical occupation because the City has not permanently extinguished [the landlord's] property rights." *Id.*

Plaintiffs have temporarily lost the ability to expel tenants facing COVID-related financial setbacks. They argue that these restrictions prohibit them from asserting their implied contractual rights to summary proceedings for nonpayment under RPAPL § 711(2), thereby "effectively creat[ing] an actual, state-sponsored occupancy" of the units that amounts to a physical taking. (Dkt. No. 10, Pl.'s Br. at 14.) However, the intrusions at issue in this case pose a much shorter and less significant burden to Plaintiffs' property rights than those upheld in *Kirsh*. First, contrary to the Plaintiffs' insinuation that the Governor will extend duration of the Order as long as he can, into 2021 (Dkt. No 24, Pl.'s Reply at 6), there is nothing permanent about EO 202.28; it expires on August 19. Second, the Order preserves Plaintiffs' rights as property owners to either obtain a warrant for eviction or sue their tenant (or former tenants, or the successors and assigns of the former tenant) for back rent. And, finally, the Order neither reduces the amount a tenant must pay their landlord for occupying the apartments, nor forgives the tenant's rental obligations altogether, thereby allowing them to live on the landlord's property rent free.

As long as the order is in place, tenants will continue to accrue arrearages, which the landlord will be able to collect with interest once the Order has expired. Furthermore, landlords will regain their ability to evict tenants once the Order expires. Since EO 202.28 is temporary on its face, and does not disturb the landlords' ability to vindicate their property rights, the Order is one more example of "government regulation of the rental relationship [that] does not constitute a physical taking." *Fed. Home Loan Mtge. Corp. v. N.Y.S. Div. of Hous. & Cmty. Renewal ("FHMLC")*, 83 F.3d 45, 47-48 (2d Cir. 1996) (citing *Yee*, 503 U.S. at 529).

B. EO 202.28 does not constitute a regulatory taking.

***9** Regulatory takings may be either categorical or non-categorical. *Huntleigh USA Corp. v. United States,* 525 F.3d 1370, 1378 n. 2 (Fed. Cir. 2008). A categorical regulatory taking occurs in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 330, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (emphasis in original). The Order is clearly not a categorical regulatory taking, since Plaintiffs still enjoy many economic benefits of ownership. Even under the eviction moratorium, landlords can continue to accept rental payments from tenants not facing financial hardship, while also covering the cost of ownership by collecting security deposit funds from consenting tenants who have been affected by the pandemic. As such, their properties have not been rendered "worthless or 'economically idle'." *Alexandre v. New York City Taxi & Limousine Com'n*, No. 07-cv-8175, 2007 WL 2826952, at *8 (S.D.N.Y. Sept. 28, 2007) (quoting *Lucas v. S.C. Costal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)).

"Anything less than a complete elimination of value, or a total loss," is a non-categorical taking, which is analyzed under the framework established in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). The *Penn Central* analysis of a non-categorical taking "requires an intensive *ad hoc* inquiry into the circumstances of each particular case." *Buffalo Teachers,* 464 F.3d at 375. Courts must "weigh three factors

to determine whether the interference with property rises to the level of a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* (internal quotation marks omitted).

Because of the ad-hoc nature of regulatory takings analysis, facial challenges brought under the Takings Clause "face an uphill battle ... made especially steep" when the parties seeking relief "have not claimed ... that [government action] makes it commercially impracticable" for them to continue business operations on their property. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495–96, 107 S. Ct. 1232, 1247, 94 L. Ed. 2d 472 (1987). Such cases present "no concrete controversy concerning either application of the [government action] to particular ... operations or its effect on specific [property]." *Id.* at 495 (quoting *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)). Therefore, the only issue properly before this Court is "whether the mere enactment of the [Order] constitutes a taking." *Id.*

Applying the *Penn Central* factors to this case, the Court finds that Plaintiffs have not shown that the Order inflicts "any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone*, 480 U.S. at 493. That conclusion is in line with the Second Circuit's holding that regulations altering the landlord-tenant relationships are "not susceptible to facial constitutional analysis under the Takings Clause." *W. 95 Hous.*, 31 F. App'x at 21.

1. Economic Impact

The economic impact of EO 202.28 can only qualify as a regulatory taking if it "effectively prevented [Plaintiffs] from making *any economic use* of [their] property." *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014) (emphasis added). To compare the value that the property has lost with the value it held prior to the Order, the court must first determine the "unit of property whose value is to furnish the denominator of the fraction." *Keystone*, 480 U.S. at 497. For example, an ordinance prohibiting construction on the curtilage of a single-family dwelling does not cause a regulatory taking, because courts focus "on the nature of the interference with rights *in the parcel as a whole*," including the portions of the property not subject to restrictions. *Id.* (quoting *Penn Central*, 438 U.S., at 130-31).

***10** It is difficult to quantify the precise economic impact that the eviction moratorium and security deposit provisions have had on Plaintiffs' property, because the Complaint contains only two allegations relevant to the question and Plaintiffs elected not to introduce evidence in support of their application.[5] First, they argue that, "Each of the Plaintiffs is owed rents by various tenants" – a statement that could just as easily encompass those tenants against whom an eviction proceeding was initiated prior to pandemic as it could to those actually protected from immediate eviction by the Order – and, second, that each landlord "has had [at] least one tenant that has directed the tenant's security deposit be applied to rent arrears." (Compl. ¶¶ 29-30.) Like the vague allegation that the landlords are owed back rent by some of their tenants, the security deposit allegations are insufficiently precise to support a finding that EO 202.28 has a constitutionally significant economic impact -- not least because the Order decrees that, "Any security deposit used as a payment of rent shall be replenished by the tenant or licensee."

Besides, even if an unspecified number of tenants are behind in their rental payments, that is not enough for Plaintiffs to prevail on a facial challenge to the Order under the Takings Clause. Plaintiffs may not frame their takings claim by "narrowly defin[ing] certain segments of their property [to] assert that ... [EO 202.28] denies them economically viable use" of their property. *Keystone*, 480 U.S. at 496. In *Keystone*, the Supreme Court rejected a Takings Clause challenge to a Pennsylvania law that prevented a mining company from extracting 2% of its coal from the ground, reasoning that some 2% of the company's total raw materials, "do not constitute a separate segment of property for takings law purposes." *Id.* at 498. The same is true for the subset of rental units currently occupied by tenants behind in their rent. As was true in *Keystone*, Plaintiffs provide no basis for treating the subset of their rented apartments occupied by tenants facing financial hardship as a separate parcel; nor do they claim that EO 202.28 makes it "commercially impracticable" for them to operate their buildings as a whole -- let alone every building impacted by the Order, as they must to prevail on a facial challenge. *See id.* 495-498. I note that the court specifically asked whether plaintiffs required discovery in order to bring/oppose a motion for summary judgment and was told that none was required.

2. Investment-backed expectations

The second *Penn Central* factor is the extent to which EO 202.28 has interfered with Plaintiffs' "investment-backed expectations." "The purpose of the investment-backed expectation requirement is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996). To analyze the effect of the Order on Plaintiff's expectations, this Court must acknowledge that the Governor did not act on a blank slate, but, rather, made temporary adjustments to a statutory scheme that has governed landlord-tenant relations in the state for some time. As my colleague, the Hon. Richard Berman, reiterated, when denying a takings challenge to a rule requiring costly technological upgrades to New York City taxis, "[o]ne who chooses to engage in a publicly regulated business ... by so doing surrenders his right to unfettered discretion as to how to conduct same." *Alexandre*, 2007 WL 2826952, at *8 (internal quotation marks omitted).

Because landlords understand that the contractual right to collect rent is conditioned on compliance with a variety of state laws, their reasonable investment-backed expectations cannot extend to absolute freedom from "public program[s] adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. That is why numerous New York rent regulations have withstood Takings Clause challenges over the years, and why New York landlords do not enjoy a constitutional right to realize a profit from their rental properties – let alone all the profits contemplated in each of their individual rental agreements. *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 140 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985). In *Park Avenue*, the court upheld a zoning amendment limiting the height of commercial real estate towers, rejecting the argument that the Takings Clause protects commercial landlords' right "to use ... property in a 'profitable' manner." Because the property retained economically beneficial use to the current owner as long as "others 'might be interested in purchasing all or part of the land' for permitted uses," the court held that the height restriction did not qualify as a regulatory taking. *Id.* at 139 (quoting *Pompa Constr. Corp. v. Saratoga Springs*, 706 F.3d 418, 424 (2d Cir. 1983)).

***11** The decision in *Park Avenue* establishes that the particular profitability of a heavily regulated property interest may fluctuate under a new regulation without that regulation affecting a regulatory taking, provided that the state's action does not destroy the marketability of the regulated property. The record before this court contains no evidence that would allow me to conclude that the plaintiffs' properties have become unmarketable by virtue of the order in suit.

Park Avenue involved commercial real estate. Twelve years later, the Circuit applied the rule that a regulatory taking only occurs where government action affects total deprivation of marketability to residential real estate. In *FHMLC*, the Second Circuit rejected a takings challenge to a provision of the New York City Rent Stabilization Law ("RSL") that imposed a maximum allowable rent on three quarters of the apartments in a residential rental building. *See FHMLC*, 83 F.3d 45. The court analyzed the plaintiff-landlord's expectations in light of the fact that "FHLMC purchased an occupied building and acquiesced in its continued use as rental housing." *Id.* at 48. In *FHLMC*, as here, the challenged enactment still allowed landlords to "use the[ir] property as previously planned," even though they "[would] not profit as much as ... under a market-based system." *Id.* If a residential landlord continues to derive "economically viable use" from his investments by "rent[ing] apartments and collect[ing] the regulated rents," he cannot establish a regulatory taking under the controlling precedents. *Id.*

Indeed, prior to EO 202.28, the state enacted New York Senate Bill S6458, the New York Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), which doubled the length of a stay of eviction available to a tenant facing financial hardship from six months to one year. (*See* RPAPL § 753(1).) It is telling that Plaintiffs did not challenge the HSTPA's adjustment to the stay period, even though it would, in some cases, result in eviction delays considerably longer than any that might be occasioned by the Order in suit. That silence is consistent with what the Second Circuit has long held: the extent to which Plaintiffs' can realize a profit from their rental properties is not the relevant measure of their investment-backed expectations for the purposes of Takings Clause analysis.

Prior to the Order, millions of tenants in this state avoided ever-increasing rents, as well as the threat of immediate eviction, thanks to rules limiting a landlord's ability to extract the maximum value from their properties. Plaintiffs knew that they operated as landlords under those rules. The Order's

temporary adjustment of those rules, which does nothing more than defer the ability of the landlord to collect (or obtain a judgment for) the full amount of the rent the tenant freely agreed to pay, does not disrupt the landlords' investment-backed expectations.

3. The character of the governmental action

The nature of the Order also weighs against a finding that Plaintiffs have suffered a regulatory taking. Relying in part on *FHLMC*, the Second Circuit explained in *Buffalo Teachers* that government actions possess the character of regulatory takings when they visit "affirmative exploitation" on affected parties, as opposed to "negative restrictions." *Buffalo Teachers*, 464 F.3d at 375. There, the court ruled that a temporary wage freeze imposed to ensure a municipality's fiscal stability did not amount to a regulatory taking because "Nothing is affirmatively taken by the government" when a state action mandates nonpayment of a preexisting obligation. *Id.* Although the Order may embody a policy decision to "take from Pete [the landlords] to pay Paul [the tenants] ... such burden shifting does not, without more, amount to a regulatory taking." *Id.* at 376 (citing *Connolly*, 475 U.S. at 223 ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.")). And again, I must note that any reallocation of resources is purely temporary, since nothing in the Order diminishes the tenant's ultimate responsibility to pay the entire amount of rent due and owing under the lease, or to suffer judgment to be entered against him for that full amount plus interest.

* * *

***12** Plaintiffs object to the Order because it "has foisted exclusively upon landlords the burden of rental issues." (*See* Dkt. No. 9, Lehrman Decl. ¶ 15.) But the law in this Circuit is clear: state governments may, in times of emergency or otherwise, reallocate economic hardships between private parties, including landlords and their tenants, without violating the Takings Clause. Plaintiffs' takings claim is dismissed.

III. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Contracts Clause

Article I, Section 10 of the U.S. Constitution prohibits the states from passing any law "impairing the Obligation of Contracts." U.S. Const. Art. I § 10, cl. 1. "Although facially absolute, the Contracts Clause's prohibition 'is not the Draconian provision that its words might seem to imply' and does not trump the police power of a state to protect the general welfare of its citizens, a power which is 'paramount to any rights under contracts between individuals.' " *Buffalo Teachers*, 464 F.3d at 367 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240, 98 S.Ct. 2716, L.Ed.2d 727 (1978)).

When deciding whether a state action affecting contracts is unconstitutional, courts in this Circuit ask: "(1) [whether] the contractual impairment [is] substantial and, if so, (2) [whether] the law serve[s] a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) [whether] the means chosen to accomplish this purpose [are] reasonable and necessary." *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54 (2d Cir. 2020) (quoting *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006)).

When, as in this case, the challenged law only impairs private contracts, and not those to which the state is a party, courts "must accord substantial deference to the [State's] conclusion that its approach reasonably promotes the public purposes for which [it] was enacted." *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998) (citing *Energy Reserves Grp., Inc. v. Kan, Power & Light Co.*, 459 U.S. 400, 412-13, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)). Accordingly, the law affords States a wide berth to infringe upon private contractual rights when they do so in the public interest rather than sel. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

Because the Court concludes that neither of the challenged sections of the Order substantially impairs Plaintiffs' contract rights, it does not address the purpose of the Order, or the means that Governor Cuomo chose to pursue that purpose.

A. The Security Deposit provisions do not substantially impair Plaintiffs' rights under the Contract Clause.

The first question when determining if a law violates the Contracts Clause is "whether the state law has 'operated as a substantial impairment of a contractual relationship.' " *Sveen v. Melin*, 138 S.Ct. 1815, 1821-22, 201 L.Ed. 2d 180 (2018) (quoting *Spannaus*, 438 U.S. at 244). "In answering

that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S.Ct. at 1822.

1. Plaintiffs could not reasonable expect to be free of additional rental regulations.

The Second Circuit treats the aggrieved party's reasonable expectations as the touchstone of the analysis: "Impairment is greatest where the challenged government legislation was wholly unexpected." *Sanitation & Recycling Indus., Inc. v. City of New York ("Sanitation II")*, 107 F.3d 985, 993 (2d Cir. 1997). Similar to the "investment-backed expectation" prong of the *Penn Central* analysis, a long line of cases teaches that the foreseeability of an impairment on contractual rights, and therefore the extent to which such impairment qualifies as substantial, "is affected by whether the relevant party operates in a heavily regulated industry." *Sullivan*, 959 F.3d at 64 (citing *Sanitation II*, 107 F.3d at 993); *see also Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792, 84 L.Ed. 1061 (1940). For those who do business in a heavily regulated industry, "the expected costs of foreseeable future regulation are already presumed to be priced into the contracts formed under the prior regulation." *All. of Auto. Mfrs., Inc. v. Currey ("AAM")*, 984 F. Supp. 2d 32, 55 (D. Conn. 2013), *aff'd,* 610 F. App'x 10 (2d Cir. 2015).

***13** Because past regulation puts industry participants on notice that they may face further government intervention in the future, a later-in-time regulation is less likely to violate the contracts clause where it "covers the same topic [as the prior regulation] and shares the same overt legislative intent to the protect [the parties protected by the prior regulation]." *AAM*, 984 F. Supp. 2d at 55. Again, there is no question that residential leases are subject to a number of regulations that do not implicate the Contracts Clause. For example, "It is well established that [New York] City's rent control laws do not unconstitutionally impair contract rights." *Brontel, Ltd. v. City of N.Y.*, 571 F. Supp. 1065, 1072 (S.D.N.Y. 1983) (citing *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198, 41 S.Ct. 465, 65 L.Ed. 877 (1921)). Therefore, EO 202.28 -- which modifies aspects of the statutory scheme relating to permissible uses of security deposits -- should have come as a no surprise to the landlord Plaintiffs, and thus could not amount to a substantial impairment of their rights under their rental agreements.

Furthermore, the foreseeability of additional regulation allows states to interfere with both past and future contracts. The landlords may not limit application of the Order to agreements they have yet to negotiate and execute; the Contracts Clause also permits states to modify and abrogate existing contract terms long since agreed to and performed by the parties. For example, in *Buffalo Teachers*, the Second Circuit upheld a wage freeze that prohibited payment of a 2% raise the plaintiff unions had previously negotiated with the city government. *Buffalo Teachers*, 464 F.3d at 367. And in *Tinnerello*, the court permitted a Connecticut town to invalidate seventy of the plaintiff's existing commercial waste contracts "in order to provide a safe and efficient disposal operation." *Tinnerello*, 141 F.3d at 54.

EO 202.28 also protects the same parties as those protected by General Obligations Laws temporarily displaced during the emergency. Security deposits are, by law, the property of the tenant, not the landlord. N.Y. Gen. Oblig. L. § 7-103. The preexisting security deposit regime ensured the landlord access to deposit funds "as security for performance of the contract or to be applied to payments upon such contract when due," while allowing the tenant to earn interest on the deposit funds during the period of the rental. N.Y. Gen. Oblig. L. § 7-101. So, the statutory scheme to which the Plaintiffs hope to return allows the same flow of deposit funds that the Order now mandates: deposits are "applied to payments," *i.e.*, collected by landlords, while renters experiencing financial hardship are able to rely on their security deposits to avoid falling behind in their rent. The Order also preserves the Plaintiffs' pre-emergency status quo, by ensuring that "Any security deposit used as a payment of rent shall be replenished by the tenant or licensee" within 90 days. Indeed, the Order provides even more protection for the landlord Plaintiffs than they enjoyed prior to the emergency, because they are also temporarily protected from foreclosure of their properties to the extent that their properties are is subject to a mortgage, which the landlords may have difficulty paying if tenants are defaulting on their rent.

2. EO 202.28 sufficiently safeguards Plaintiffs' ability to realize the benefit of their bargain.

The security deposit provisions allow the landlords to collect deposit funds in lieu of their tenants' missed rental payments, without waiving their right to collect "the remaining rent due and owing for that month" at a later time. For that reason, the

other two aspects of a "substantial impairment" enumerated in *Sveen* -- the extent to which an impairment undermines the contractual bargain, and the ability of the impaired party to safeguard or reinstate their rights at a later time -- weigh against finding a substantial impairment arising from the security deposit provisions.

***14** At bottom, provisions ensure that landlords will be made whole while their tenants are facing extraordinary financial hardships. As a court in this district once held, regulations that "reimburs[e] landlords for lost rental income" do not impose a substantial impairment on those parties' contract rights. *Kraebel v. New York City Dep't of Hous. Pres. & Dev.*, No. 90-cv-4391 (MJL), 1991 WL 84598, at *5 (S.D.N.Y. May 13, 1991), *aff'd in part, rev'd on other grounds*, 959 F.2d 395 (2d Cir. 1992). In *Kraebel*, the court dismissed a challenge to a program exempting senior citizens from paying rent increases, while reimbursing landlords through tax abatements and cash payments. The Court reasoned that, because the landlords were operating "in such a pervasively regulated area" and the program "seeks on its face only to *fulfill* landlords' contractual expectations," the claim under the Contracts Clause failed as a matter of law. *Id.* So to here.

Furthermore, the Order does not displace the civil remedies always available to landlords seeking to recover the costs of repairs or unpaid rents still owed at the end of a lease term. The security deposit is held as security for repairs the landlord might be required to make at the end of a tenancy. If the tenant uses the security deposit to pay a month's rent, and the tenancy ends before the deposit is fully replenished, the landlord can obtain a judgment for the amount expended in repairs. The whole scheme is no different than what actually happens in the real world, where tenants routinely forfeit their security deposit by allowing it to "cover the last month's rent" on a lease. And I again emphasize that nothing in the Order diminishes the tenant's rental obligation by even a nickel. The landlord can collect all he is owed at the end of the day by the simple expedient of going to some court when the courts are fully reopened. The fact that landlords would prefer not to avail themselves of their legal remedies – because it is often not worth the trouble to pursue a deadbeat tenant – does not mean that the state has impaired their contractual rights.

Because the security deposit provisions do not prevent Plaintiffs from "safeguarding or reinstating [their rights]," *Sveen*, 138 S.Ct. at 1822, as soon as the Order expires, they do not impose a substantial impairment on Plaintiffs' contractual rights.

B. The eviction moratorium in EO 202.28 does not violate the Contracts Clause.

Plaintiffs also claim that the Order impairs an implied term of their rental agreements: the landlords' right to use legal process to evict their tenants. At argument, Plaintiffs impressed upon the Court that eviction proceedings are critical tools for bringing the parties together to resolve nonpayment disputes. Plaintiffs argue that by pausing evictions and removing the landlords' enforcement mechanism, the Governor is encouraging tenants to shirk their obligations to pay rent, and thus "dictating the result" of potential evictions in favor of tenants who are in arrears. (Dkt. No. 27, at 3.)

On the present record, it is not clear whether the rental agreements between plaintiffs and their tenants expressly provide the landlords with contractual rights to pursue evictions. Plaintiffs have represented that the default clauses in each agreement allow the landlords to seek relief under state law, but that does not settle whether the right is express or implied. It is generally true that "the laws which subsist at the time and place of the making of a contract ... enter into and become a part of it." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30, 54 S.Ct. 231, 78 L.Ed. 413 (1934.) However, the implied contractual rights conferred by state laws, including judicial remedies such as eviction, may be the subject of a Contracts Clause claim "only when those laws affect the validity, construction, and enforcement of contracts." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 189, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992).

***15** The Court (which has seen more than its fair share of leases over the course of a 40+ year career in the law) will assume, *arguendo*, that the default provisions of the various rental agreements indicate that eviction proceedings are essential to "enforcement" of their rental agreements—and indeed, that the leases between Plaintiffs and their tenants contain standard provisions about the landlord's remedies in case of non-payment of rent, which specifically refer to RPAPL 711(2) – a remedy created by statute and not by contract -- in the event of non-payment.

Proving a violation of the Contracts Clause based on implied rights is difficult, especially when the party retains the opportunity to vindicate those rights by some other avenue. As the Supreme Court has noted, "a reasonable modification

of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *U.S. Trust*, 431 U.S. at 19 n.17. The Supreme Court reiterated the point in *Sveen* when it held that a measure altering available remedies without nullifying them neither undermines the contractual bargain or "prevents the party from safeguarding or reinstating [their] rights." *Sveen*, 138 S.Ct. at 1822.

The eviction moratorium does not eliminate the suite of contractual remedies available to the Plaintiffs; it merely postpones the date on which landlords may commence summary proceedings against their tenants. The tenants are still bound to their contracts, and the landlord may obtain a judgment for unpaid rent if the tenants fail to honor their obligations. Furthemore, on August 20, this Court is sure that Plaintiffs and others similarly situated will exercise their rights to commence eviction proceedings to make up for lost time. That being so, the implied right to such legal process has not been impaired by the Order. *See Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 499 (E.D.N.Y. 2012) (" 'Impairment' occurs when the law prohibits performance of an obligation and extinguishes available remedies for nonperformance.") (citing *Blaisdell,* 290 U.S. at 431 ("The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them.")).

Plaintiffs' claims under the Contract Clause fail as a matter of law. Defendant's cross motion for summary judgment on this claim is granted.

IV. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Due Process Clause.

Plaintiffs' failure to demonstrate substantial impairment of their property rights is fatal to their procedural due process claim, too.

"To succeed on a procedural due process claim, 'a plaintiff must first identify a property right, second show that the state has deprived him [or her] of *that* right, and third show that the deprivation was effected without due process.' " *Progressive Credit Union v. City of New York*, 889 F.3d 40, 51 (2d Cir. 2018) (quoting *Local 342, Long Island Pub. Serv. Emps., UMD, ILA, AFL-CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994) (internal quotation marks omitted)).

To begin with, Plaintiffs have not identified a property interest independent of the interests addressed by their other constitutional claims. That is fatal to their due process claim. The Second Circuit has expressly forbidden this sort of duplication, because the Due Process Clause cannot be called upon to safeguard a right, "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior." *Harmon*, 412 Fed. Appx. at 423 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 701, 721, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010)).

***16** Nor have the Plaintiffs shown a deprivation of those interests. As in the takings context, the Second Circuit requires something more than proof that a party's property has suffered "a decrease in ... value" to prevail on a procedural due process claim. *Progressive*, 889 F.3d at 52. But all that Plaintiffs complain of is the potential that they will have to wait before pursuing the remedies otherwise available to them. Therefore, EO 202.28 does not deprive Plaintiffs' of their property rights.

For the same reason, Plaintiffs also fail to show a denial of due process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldredge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). There is no question that, as to manner, Plaintiffs will be able to initiate new proceedings in the same forum and manner that they always have, after August 19. And as for Plaintiff's claim that "the Order precludes [them] from being heard at *any* time" (Pl.'s Br. at 13.), that is wrong for two reasons. First, they can still initiate eviction proceedings against the tenants who are not facing financial hardship but who have chosen not to pay their rent. And, second, they will be able to move against their other tenants after August 19. No case says that "a meaningful time" means as soon as a cause of action accrues – especially where, as in New York, the filing of a summary proceeding is but the first step in what often takes years to accomplish, which is the ultimate eviction of a tenant. Therefore, the delay embodied mandated by the Order does not deny the Plaintiffs a meaningful opportunity to be heard.

Plaintiffs' Due Process claim fails as a matter of law.

V. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Petition Clause.

Finally, Plaintiffs argue that EO 202.28 denies them their constitutional rights to petition the government, because they can no longer file summary proceedings for nonpayment of

rent, or for their tenants' failure to replenish their security. This claim is meritless.

The right to petition for a redress of grievances in the form of judicial relief is protected by the First Amendment. *See, e.g.*, *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994) (citing *United Mine Workers v. Ill. Bar Assoc.*, 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967)). The right of access to courts is burdened when state officials take systemic action to frustrate a plaintiff or class of plaintiffs from preparing and filing lawsuits. *Christopher v. Harbury*, 536 U.S. 403, 413, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002). To prevail on a denial of access claim, the plaintiff must show "that the defendant took or was responsible for actions that hindered [a plaintiff's] efforts to pursue a legal claim," *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003); (quoting *Lewis v. Casey,* 518 U.S. 343, 349, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (alteration in original)). "As the Supreme Court has explained, the requirement of actual injury 'derives ultimately from the doctrine of standing.' " *Monsky v. Moraghan*, 127 F.3d 243, 247 (2d Cir. 1997) (quoting *Lewis*, 518 U.S. at 349)).

Plaintiffs have not shown that the eviction moratorium EO 202.28 "had the actual effect of frustrating the [their] effort[s] to pursue a legal claim." *Oliva v. Town of Greece*, 630 Fed. Appx. 43, 45 (2d Cir. 2015). Although nonpayment proceedings have been suspended, Plaintiffs can still sue their tenants for arrearages through a breach of contract action in the New York Supreme Court – and the fact that is not their preferred remedy is of no moment. They will also have the opportunity to bring eviction proceedings for reason of nonpayment once the order expires, a right preserved by the portion of EO 202.28 that extends relevant statutes of limitation for the duration of court closures. Since "mere delay" to filing a lawsuit cannot form the basis of a Petition Clause violation when the plaintiff will, at some point, regain access to legal process, *Davis*, 320 F.3d at 352, the Plaintiffs' right to collect both the monetary remedies and injunctive relief they would seek through an eviction proceeding has not been "completely foreclosed" by EO 202.28, *Sousa v. Marquez*, 702 F.3d 124, 125 (2d Cir. 2012). The eviction moratorium in EO 202.28 does not violate Plaintiffs' First Amendment rights.

***17** At the hearing, Plaintiffs argued that the security deposition provisions caused a distinct, and irreparable, denial of access: because EO 202.28 allows the tenant to replenish the funds applied to rent due and owing on an incremental basis, the Order does not guarantee that the deposit will be made whole before the tenant vacates the premises, thus potentially leaving Plaintiffs to foot the bill for any necessary repairs to the unit. Normally, the failure to replenish the security deposit would be the proper subject of a holdover proceeding. Plaintiffs claim that the suspension of all petitions in state Civil Courts – including holdover proceedings for all reasons other than nonpayment – denies them the possibility of a remedy against tenants who have failed to maintain necessary deposit funds in escrow.

It is not the case that Plaintiffs will some day have no way to hale their tenants into court for failing to replenish their security deposits – it is merely the case that it will generally not be worth a landlord's while to do so. But even if Plaintiffs were correct, Governor Cuomo is not to blame for the Plaintiff's lack of access to holdover proceedings for reasons other than nonpayment. EO 202.28 only applies to evictions "for nonpayment." It is the order of the Chief Administrative Judge that suspends all eviction proceedings in Civil Courts, "whether brought on the ground that respondent has defaulted in the payment of rent *or on some other ground.*" (AO at 1 (emphasis added).) Therefore, Governor Cuomo is not responsible for the injury for which Plaintiffs seek a cure, because striking his Order would not grant the Plaintiffs access to the Civil Courts to file holdover proceedings for reasons other than nonpayment.

Be that as it may, Plaintiffs argue that this Court should strike the Order under the Petition Clause because "the issues on this motion ... are similar to those raised" in *ACA International v. Healey,* No. 20-cv-10767, 2020 WL 2198366 (D. Mass. May 6, 2020). (Pl.'s Br. at 4.) The plaintiff in *ACA*, a trade association representing the credit-and-collection industry, attacked the constitutionality of an emergency regulation issued by the Massachusetts Attorney General in response to the COVID-19 pandemic. *Id.* at *1. Through the new regulation, the Attorney General used her authority to interpret the state's consumer protection statutes to define the initiation, filing, or threat to file "any new collection lawsuit" as an unfair or deceptive act subject to civil liability. *Id.* at *1-2 (citing Mass. Gen. Laws ch. 93A § 2). The court found that the plaintiff had demonstrated a likelihood of success on the merits of their Petition Clause claim, explaining that the regulation exceeded the sort of "mere procedural obstacles" permissible under the Petition Clause since it precluded the plaintiff's members from obtaining any "relief ... through authorized judicial proceedings." *Id.* at *9

(quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934)).

EO 202.28 is not nearly as broad as the regulation struck down in *ACA*. In that case, the attorney general effectively outlawed legal remedies of any kind in any court, state or federal, for a whole class of creditors, debt buyers, and collections agencies. By contrast, Governor Cuomo's Order suspended one of several avenues by which landlords can seek relief for nonpayment, while leaving other (if less favored) remedial proceedings for breach of contract (which is exactly what a breach of a lease is) in place. That most of New York's courts suspended their operations during the pandemic, thereby incidentally burdening other rights not addressed by EO 202.28, does not mean that the Order forecloses Plaintiffs from petitioning the government. To rule otherwise would greatly exaggerate the actual effects of a temporary pause on a subset of evictions, which nevertheless preserved the landlords' economic rights under the affected rental agreements, and which was tailored to avoid crowding in housing courts and homeless shelters during an ongoing public health emergency.

***18** Accordingly, Governor Cuomo is entitled to summary judgment on Plaintiffs' claim that EO 202.28 violates the Petition Clause of the First Amendment.

CONCLUSION

Plaintiffs' motion for summary judgment is DENIED in full.

Defendant's motion for summary judgment is GRANTED in full.

The Clerk of Court is directed to close the motion at Docket Number 7, and close this case.

All Citations

Slip Copy, 2020 WL 3498456

Footnotes

1 *See Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited June 29, 2020).

2 *See New York State Department of Health COVID-19 Tracker*, available at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n (last visited June 29, 2020).

3 The complaint originally sought relief under the New York State Constitution as well (*see* Dkt. No. 1, Compl. ¶ 43), but constitutional principles of federalism and state sovereign immunity constraint this Court from judging a New York official's interpretation and application of New York law. State constitutional issues will not be further addressed. For a brief discussion of non-constitutional state law issues, *see* Point I, *infra*.

4 *See* Rakesh Kochnar, Pew Research Center, "Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession" (June 11, 2020), https://www.pewresearch.org/facttank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-twoyears-of-the-great-recession/ (last visiting June 22, 2020).

5 As noted above, plaintiffs originally moved for a preliminary injunction; the motion was converted to a motion for a permanent injunction (i.e., a motion for summary judgment) after a conference with the court. In either instance, the plaintiffs bore the burden to introduce such evidence as might be necessary to support their legal arguments. By foregoing discovery the plaintiffs did not eliminate that burden.

Exhibit 11

Executive Order 2020-43

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

June 26, 2020 Executive Order 2020-43

EXECUTIVE ORDER 2020-43
(COVID-19 EXECUTIVE ORDER NO. 41)

Community Revitalization Order

WHEREAS, since early March 2020, Illinois has faced a pandemic that has caused extraordinary sickness and loss of life, infecting over 140,000 and growing, and taking the lives of thousands of residents; and,

WHEREAS, at all times but especially during a public health crisis, protecting the health and safety of Illinoisans is among the most important functions of State government; and,

WHEREAS, as Illinois enters the fifth month of responding to the public health disaster caused by Coronavirus Disease 2019 (COVID-19), a novel severe acute respiratory illness that spreads rapidly through respiratory transmissions and that continues to be without an effective treatment or vaccine, the burden on residents, healthcare providers, first responders, and governments throughout the State is unprecedented; and,

WHEREAS, as circumstances surrounding COVID-19 rapidly evolve and new evidence emerges, there have been frequent changes in information and public health guidance; and,

WHEREAS, although the CDC initially recommended against wearing cloth face coverings or masks as protection, as a result of research on asymptomatic and pre-symptomatic transmission, the CDC revised its conclusions and recommends wearing cloth face coverings in public settings where social distancing measures are difficult to maintain; and,

WHEREAS, public health research and guidance increasingly supports wearing cloth face coverings in public settings where social distancing measures are difficult to maintain, and indicates that the risk of transmission outdoors is less than the risk of transmission indoors; and,

WHEREAS, as COVID-19 has spread in Illinois over the course of the Gubernatorial Disaster Proclamations, the circumstances causing a disaster throughout the State have changed and continue to change, making definitive predictions of the course the virus will take over the coming months extremely difficult; and,

WHEREAS, as of today, June 26, 2020, there have been over 140,000 confirmed cases of COVID-19 in 101 Illinois counties; and,

WHEREAS, as of today, June 26, 2020, more than 6,800 residents of Illinois have died due to COVID-19; and,

WHEREAS, the CDC now estimates that for every reported case of COVID-19, there are 10 unreported infections, resulting in a number of total cases in the country that may be 10 times higher than currently reported; and,

WHEREAS, social distancing, face coverings, and other public health precautions have proven to be critical in slowing and stopping the spread of COVID-19; and,

WHEREAS, although the number of new COVID-19 cases has decreased in recent weeks, the virus continues to infect thousands of individuals and claim the lives of too many Illinoisans each day; and,

WHEREAS, while the precautions taken by Illinoisans have led to a steep decline in the number of COVID-19 cases and deaths in the State in recent weeks, other states that have resisted taking public health precautions or that lifted those precautions earlier are now experiencing exponential growth and record high numbers of cases; and,

WHEREAS COVID-19 has claimed the lives of and continues to impact the health of Black and Hispanic Illinoisans at a disproportionately high rate – magnifying significant health disparities and inequities; and,

WHEREAS, while hospitalizations have declined, Illinois is using a significant percentage of hospital beds and ICU beds, and, if COVID-19 cases were to surge, the State could face a shortage of critical health care resources; and,

WHEREAS, in addition to causing the tragic loss of more than 6,800 Illinoisans and wreaking havoc on the physical health of tens of thousands more, COVID-19 has caused extensive economic loss and continues to threaten the financial welfare of a significant number of individuals and businesses across the nation and the State; and,

WHEREAS, the Illinois Department of Employment Security announced that the State's unemployment rate rose to 16.4% in April, with 762,000 jobs lost during that month; and,

WHEREAS, the Illinois Department of Employment Security announced that the State's unemployment rate was 15.2% in May, and that major Illinois industries such as leisure and hospitality, transportation and utilities, and educational and health services had been particularly hard-hit during the March to May period; and,

WHEREAS, the Illinois Department of Employment Security is responding to the economic crisis in a number of ways, including through the Pandemic Unemployment Assistance program; and,

WHEREAS, the Department of Commerce and Economic Opportunity is working to address the economic crisis, including through assistance programs such as the Business Interruption Grants Program for businesses that experienced a limited ability to operate due to COVID-19 related closures; and,

WHEREAS, the economic loss and insecurity caused by COVID-19 threatens the viability of business and the access to housing, medical care, food, and other critical resources that directly impact the health and safety of residents; and,

WHEREAS, based on the foregoing facts, and considering the expected continuing spread of COVID-19 and the ongoing health and economic impacts that will be felt over the coming month by people across the State, I declared that the current circumstances in Illinois surrounding the spread of COVID-19 constitute an epidemic emergency and a public health emergency under Section 4 of the Illinois Emergency Management Agency Act; and,

WHEREAS, based on the foregoing, I declared that the continuing burden on hospital resources, the potential shortages of these resources in the event of a surge in infections, and the critical need to increase the purchase and distribution of PPE as well as to expand COVID-19 testing capacity constitute a public health emergency under Section 4 of the Illinois Emergency Management Agency Act;

THEREFORE, by the powers vested in me as the Governor of the State of Illinois, pursuant to the Illinois Constitution and Sections 7(1), 7(2), 7(3), 7(8), 7(9), and 7(12) of the Illinois Emergency Management Agency Act, 20 ILCS 3305, and consistent with the powers in public health laws, I hereby order the following, effective immediately:

Community Revitalization Order

1. **Intent of this Executive Order**. The intent of this Executive Order is to safely and conscientiously resume and expand activities that were paused or limited as COVID-19 cases rose exponentially and threatened to overwhelm our healthcare system. As Illinoisans safely resume and expand these activities, we must not backslide on the progress we have made. We cannot risk overwhelming our healthcare system, and we must prioritize the health and lives of all Illinoisans, especially the most vulnerable among us. While protecting our communities, we will restore our economy and begin to repair the economic damage that the virus has caused. The intent of this Executive Order is to effectuate those goals.

   This Executive Order supersedes Executive Order 2020-38.

2. **Public health requirements for individuals.** Individuals must take the following public health steps to protect their own and their neighbors' health and lives:

   a. **Practice social distancing.** To the extent individuals are using shared spaces when outside their residence, including when outdoors, they must at all times and as much as reasonably possible maintain social distancing of at least six feet from any other person who does not live with them.

   b. **Wear a face covering in public places or when working.**[1] Any individual who is over age two and able to medically tolerate a face covering (a mask or cloth face covering) shall be required to cover their nose and mouth with a face covering when in a public place and unable to maintain a six-foot social distance. This requirement applies whether in an indoor space, such as a store, or in a public outdoor space where maintaining a six-foot social distance is not always possible.

   c. **Elderly people and those who are vulnerable as a result of illness should take additional precautions.** People at high risk of severe illness from COVID-19, including elderly people and those with a health condition that may make them vulnerable, are urged to stay in their residence and minimize in-person contact with others to the extent possible.

   d. **Limit gatherings**. Any gathering of more than fifty people is prohibited unless exempted by this Executive Order. Nothing in this Executive Order prohibits the gathering of members of a household or residence. Because in-person contact presents the greatest risk of transmission of COVID-19, Illinoisans are encouraged to continue limiting in-person contact with others and to expand their social contact cautiously. Gathering remotely continues to be the safest way to interact with those outside a household or residence.

   e. **Go outdoors**. Public health guidance suggests that the risks of transmission of COVID-19 are greatly reduced outdoors as opposed to indoors. Where possible, Illinoisans are encouraged to conduct their activities outdoors.

[1] Throughout this Executive Order, any reference to a face covering requirement excludes those two years old and younger and those for whom wearing a face covering is not medically advisable. Guidance on use of face coverings from the Illinois Department of Human Rights is available here: https://www2.illinois.gov/dhr/Documents/IDHR_FAQ_for_Businesses_Concerning_Use_of_Face-Coverings_During_COVID-19_Ver_20205111b%20copy.pdf

3. **Public health requirements for businesses, nonprofits, and other organizations.** For the purposes of this Executive Order, covered businesses include any for-profit, non-profit or educational entity, regardless of the nature of the service, the function it performs, or its corporate or entity structure. Those entities must take the following public health measures to protect their employees, their customers, and all others who come into physical contact with their operations:

   a. **Requirements for all businesses.** All businesses must:
      - continue to evaluate which employees are able to work from home, and are encouraged to facilitate remote work from home when possible;
      - ensure that employees practice social distancing and wear face coverings when social distancing is not always possible;
      - ensure that all spaces where employees may gather, including locker rooms and lunchrooms, allow for social distancing; and
      - ensure that all visitors (customers, vendors, etc.) to the workplace can practice social distancing; but if maintaining a six-foot social distance will not be possible at all times, encourage visitors to wear face coverings; and
      - prominently post the guidance from the Illinois Department of Public Health (IDPH) and Office of the Illinois Attorney General regarding workplace safety during the COVID-19 emergency.[2]

      The Department of Commerce and Economic Opportunity (DCEO), in partnership with IDPH, has developed industry-specific guidance and toolkits to help businesses operate safely and responsibly. These documents are available at: https://dceocovid19resources.com/restore-illinois/restore-illinois-phase-4/.

   b. **Requirements for retail stores.** Retail stores must ensure all employees practice social distancing and must take appropriate additional public health precautions, in accordance with DCEO guidance, which include:
      - provide face coverings to all employees who are not able to maintain a minimum six-foot social distance from customers and other employees at all times;
      - cap occupancy at 50 percent of store capacity, or, alternatively, at the occupancy limits based on store square footage set by the Department of Commerce and Economic Opportunity;
      - communicate with customers through in-store signage, and public service announcements and advertisements, about the social distancing and face covering requirements set forth in this Order; and
      - discontinue use of reusable bags.

   c. **Requirements for manufacturers.** Manufacturers must ensure all employees practice social distancing and must take appropriate additional public health precautions, in accordance with DCEO guidance, which include:
      - provide face coverings to all employees who are not able to maintain a minimum six-foot social distance at all times;
      - ensure that all spaces where employees may gather, including locker rooms and lunchrooms, allow for social distancing; and
      - modify and downsize operations (staggering shifts, reducing line speeds, operating only essential lines, while shutting down non-essential lines) to the extent necessary to allow for social distancing and to provide a safe workplace in response to the COVID-19 emergency.

   d. **Requirements for office buildings.** Employers in office buildings must ensure all employees practice social distancing and must take appropriate additional

[2] This guidance is available at: https://www.dph.illinois.gov/sites/default/files/COVID-19_WorkplaceHealth_SafetyGuidance20200505.pdf

public health precautions, in accordance with DCEO guidance, which may include:

- provide face coverings to all employees who are not able to maintain a minimum six-foot social distance at all times;
- consider implementing capacity limits where the physical space does not allow for social distancing;
- allow telework where possible; and
- develop and prominently post plans and signage to ensure social distancing in shared spaces such as waiting rooms, service counters, and cafeterias.

e. **Requirements for meetings and events.** Indoor venues and meeting spaces can operate with the lesser of fifty attendees or fifty percent of room capacity, and in accordance with DCEO guidance.

f. **Requirements for restaurants and bars.** All businesses that offer food or beverages for on-premises consumption—including restaurants, bars, grocery stores, and food halls—may resume service for on-premises consumption, as permitted by DCEO guidance. Such businesses continue to be permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. Establishments offering food or beverages for on-premises consumption or for carry-out must ensure that they have an environment where patrons maintain adequate social distancing. All businesses covered in this section may permit outdoor on-premises food and beverage consumption in accordance with DCEO guidance and when permitted by local ordinances and regulations.

g. **Requirements for fitness and exercise gyms.** Fitness and exercise gyms may be open in a manner consistent with DCEO guidance, which involves operating for member workouts at a maximum of 50 percent capacity and with social distancing and other precautions.

h. **Requirements for personal services facilities.** Personal services facilities such as spas, hair salons, barber shops, nail salons, waxing centers, tattoo parlors, and similar facilities may be open but must ensure the use of face coverings, adherence to social distancing requirements, and use of capacity limits in accordance with DCEO guidance.

i. **Requirements for outdoor recreation, youth day camps, and youth sports.** Businesses offering outdoor recreation, youth day camps, and youth sports may be open but must ensure the use of face coverings, adherence to social distancing requirements, and must take other public health steps in accordance with DCEO guidance.

j. **Requirements for places of public amusement.** Places of public amusement may resume services consistent with DCEO guidance for indoor and outdoor recreation (including but not limited to arcades, bowling alleys, and driving ranges), museums and aquariums, zoos and botanical gardens, theaters and performing arts, and outdoor seated spectator events.

k. **Requirements for film production.** Film production may operate with restrictions contained in DCEO guidance.

l. **Minimum basic operations.** All businesses may continue to:

i. Perform necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions.

ii. Perform necessary activities to facilitate employees of the business being able to continue to work remotely.

iii. Fulfill online and telephonic retail orders through pick-up or delivery.

4. **Exemptions.**

a. **Free exercise of religion**. This Executive Order does not limit the free exercise of religion. To protect the health and safety of faith leaders, staff, congregants and visitors, religious organizations and houses of worship are encouraged to consult and follow the recommended practices and guidelines from the Illinois Department of Public Health.[3] As set forth in the IDPH guidelines, the safest practices for religious organizations at this time are to provide services online, in a drive-in format, or outdoors (and consistent with social distancing requirements and guidance regarding wearing face coverings), and to limit indoor services to 10 people. Religious organizations are encouraged to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures.

b. **Emergency functions.** All first responders, emergency management personnel, emergency dispatchers, court personnel, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support the emergency response are exempt from this Executive Order, but are encouraged to practice social distancing and take recommended public health measures.

c. **Governmental functions.** This Executive Order does not apply to the United States government and does not affect services provided by the State or any municipal, township, county, subdivision or agency of government and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public.

5. **Social Distancing, Face Covering, and PPE Requirements**. For purposes of this Executive Order, social distancing includes maintaining at least six-foot distance from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

a **Required measures.** Businesses must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:

i. **Designate six-foot distances**. Designating with signage, tape, or by other means six-foot spacing for employees and customers to maintain appropriate distance;

ii. **Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers;

[3] This guidance is available at: https://www.dph.illinois.gov/covid19/community-guidance/places-worship-guidance

iii. **Separate operating hours for vulnerable populations**. Implementing separate operating hours for elderly and vulnerable customers;

iv. **Online and remote access**. Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely; and

v. **Face Coverings and PPE**. Providing employees with appropriate face coverings and requiring that employees wear face coverings where maintaining a six-foot social distance is not possible at all times. When the work circumstances require, providing employees with other PPE in addition to face coverings.

6. **Enforcement**. This Executive Order may be enforced by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 15, Section 18, and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305.

   Businesses must follow guidance provided or published by the Illinois Department of Commerce and Economic Opportunity regarding safety measures during Phase IV, and the Illinois Department of Public Health, local public health departments, and the Workplace Rights Bureau of the Office of the Illinois Attorney General with respect to Social Distancing Requirements. Pursuant to Section 25(b) of the Whistleblower Act, 740 ILCS 174, businesses are prohibited from retaliating against an employee for disclosing information where the employee has reasonable cause to believe that the information discloses a violation of this Order.

7. **No limitation on authority**. Nothing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing the State or any county, or local government body to order (1) any quarantine or isolation that may require an individual to remain inside a particular residential property or medical facility for a limited period of time, including the duration of this public health emergency, or (2) any closure of a specific location for a limited period of time, including the duration of this public health emergency. Nothing in this Executive Order shall be construed as an exercise of any authority to order any quarantine, isolation, or closure. Nothing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing a county or local government body to enact provisions that are stricter than those in this Executive Order.

8. **Savings clause**. If any provision of this Executive Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable. This Executive Order is meant to be read consistently with any Court order regarding this Executive Order.

JB Pritzker, Governor

Issued by the Governor June 26, 2020
Filed by the Secretary of State June 26, 2020

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