No. 2020AP000828 - OA

STATE OF WISCONSIN
SUPREME COURT

JERÉ FABICK AND LARRY CHAPMAN,
Petitioners,

v.

ANDREA PALM, JULIE WILLEMS VAN DIJK, NICOLE SAFAR, IN THEIR OFFICIAL CAPACITIES AS EXECUTIVES OF WISCONSIN DEPARTMENT OF HEALTH SERVICES; JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF WISCONSIN; DAVID ERWIN, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE WISCONSIN STATE CAPITOL POLICE; DAVID MAHONEY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF DANE COUNTY, WISCONSIN; ISMAEL OZANNE, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF DANE COUNTY, WISCONSIN; ERIC SEVERSON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WAUKESHA COUNTY, WISCONSIN; SUSAN OPPER, IN HER OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF WAUKESHA COUNTY, WISCONSIN; KURT PICKNELL, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WALWORTH COUNTY; AND ZEKE WIEDENFELD, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF WALWORTH COUNTY, WISCONSIN.
Respondents.

APPENDIX TO NON-PARTY BRIEF SUBMITTED BY THE FREEDOM FROM RELIGION FOUNDATION

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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.

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Signed May 3, 2020

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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

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

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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** "[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).

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

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).

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

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** 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** 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.

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

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** 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).

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

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** 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.

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.

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.*

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.

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

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).

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

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").

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

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

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** 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.

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.

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.

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Wendy GISH, et al.
v.
Gavin NEWSOM, et al.

Case No. EDCV 20-755 JGB (KKx)
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Proceedings: Order DENYING Plaintiffs' Emergency Request for Temporary Restraining Order (Dkt. No. 8) (IN CHAMBERS)

The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is an Emergency Request for Temporary Restraining Order filed by Plaintiffs Patrick Scales, Wendy Gish, James Dean Moffatt, and Brenda Wood. ("Request," Dkt. No. 8.) The Court held a hearing on the Request on April 22, 2020. After considering the papers filed in support of and in opposition to the Request and argument presented at the hearing, the Court DENIES the Request.

I. BACKGROUND

On April 13, 2020, Plaintiffs filed their complaint against Defendants Xavier Becerra and Gavin Newsom (collectively, "State Defendants"); Chad Bianco, Jeff Hewitt, Kevin Jeffries, George Johnson, Cameron Kaiser, V. Manuel Perez, Karen Spiegel, and Chuck Washington (collectively, "Riverside Defendants"); Erin Gustafson, John McMahon, Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, and Josie Gonzales (collectively, "San Bernardino Defendants"). ("Complaint," Dkt. No. 1.) The Complaint alleges eleven causes of action: (1) Violation of Free Exercise Clause of First Amendment to U.S. Constitution; (2) Violation of Establishment Clause of First Amendment to U.S. Constitution; (3) Violation of Free Speech Clause of First Amendment to U.S. Constitution; (4) Violation of First Amendment Freedom of Assembly Clause; (5) Violation of Due Process Clause of Fourteenth Amendment to U.S. Constitution; (6) Violation of Due Process Clause of Fourteenth Amendment to U.S. Constitution; (7) Violation of Equal Protection Clause of Fourteenth Amendment to U.S. Constitution; (8) Right to Liberty (Cal. Const. Art. 1, § 1); (9) Freedom of Speech (Cal. Const. Art. 1, § 2); (10) Freedom of Assembly (Cal. Const. Art. 1, § 3); and (11) Free Exercise and Enjoyment of Religion (Cal. Const. Art. 1, § 4).

Plaintiffs filed the Request on April 13, 2020, the same day they filed the Complaint. (Request.) In support of the Request, Plaintiffs filed:

- Declaration of Mark Meuser ("Meuser Declaration," Dkt. No. 8-2);
- Declaration of Wendy Gish ("Gish Declaration," Dkt. No. 8-3);
- Declaration of James Moffatt ("Moffatt Declaration," Dkt. No. 8-4);
- Declaration of Patrick Scales ("Scales Declaration," Dkt. No. 8-5);
- Declaration of Brenda Wood ("Wood Declaration," Dkt. No. 8-6);

Defendants opposed the Request on April 17, 2020. ("State Opposition," Dkt. No. 13; "Riverside Opposition," Dkt. No. 15; "San Bernardino Opposition," Dkt. No. 18.) In support of the State Opposition, State Defendants filed the Declaration of Todd Grabarsky. (Grabarsky Declaration," Dkt. No. 13-1.) In support of the Riverside Opposition, Riverside Defendants filed:

- Request for Judicial Notice ("Riverside RJN," Dkt. No. 15-1);
- Jason Anderson ("Anderson Declaration," Dkt. No. 15-2);
- Declaration of Kelly A. Moran, ("Moran Declaration," Dkt. No. 15-3);
- Declaration of Dr. Cameron Kaiser ("Kaiser Declaration," Dkt. No. 15-4.)

In support of the San Bernardino Opposition, San Bernardino Defendants filed a request for judicial notice. ("San Bernardino RJN," Dkt. No. 18-1.) The Court held a telephonic hearing on April 22, 2020.

II. REQUESTS FOR JUDICIAL NOTICE

***2** Riverside Defendants and San Bernardino Defendants separately submit unopposed requests for judicial notice. (See Riverside RJN; San Bernardino RJN.) A court may take judicial notice of an adjudicative fact not subject to "reasonable dispute," either because it is "generally known within the territorial jurisdiction of the trial court," or it is capable of accurate and ready determination by resort to sources whose "accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Under Federal Rule of Evidence 201, "[a] court must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

Judicial notice is appropriate here. The documents at issue are publicly available and not subject to reasonable dispute. Moreover, Defendants request only that the Court take judicial notice of the contents of the documents, not of the truth of those contents. Accordingly, the Court GRANTS the Riverside RJN and the San Bernardino RJN.

III. FACTS

On December 31, 2019, China reported incidents of a pneumonia of unknown cause to the World Health Organization. Since then, that infectious disease, which came to be known as coronavirus disease 2019 (COVID-19), has swept the globe, infecting millions and killing nearly two hundred thousand people. [1]

Defendant Newsom, the Governor of California, declared a State of Emergency in California on March 4, 2020. (Complaint ¶ 30; Grabarsky Declaration, Exhibit 1.) On March 19, 2020, the Defendant Newsom issued Executive Order N-33-20, which directed all California residents to heed the State's public health directives relating to COVID-19, including the March 19, 2020 Order of the State Public Health Officer ("State Order"). (Complaint ¶ 31; Grabarsky Declaration, Exhibit 3.) The State Order requires "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (Grabarsky Declaration, Exhibit 3.) On March 22, 2020, the Public Health Officer designated a list of "Essential Critical Infrastructure Workers," including "[f]aith based services that are provided through streaming or other technology." (Grabarsky Declaration, Exhibit 4.)

Defendant Kaiser, Riverside County's Public Health Officer, issued a Declaration of Local Health Emergency in Riverside County on March 8, 2020. (Kaiser Declaration ¶ 10.) On April 6, 2020, Defendants Kaiser and Johnson issued an Amended Order of the Health Officer for the County of Riverside and of the County Executive Officer as Director of Emergency Services ("Riverside Order"). (Complaint ¶ 62; Kaiser Declaration ¶ 10, Exhibit I.) The Riverside Order prohibits "[a]ll public or private gatherings ... including, but not limited to an auditorium, ... church, ... or any other indoor or outdoor space used for any non-essential purpose including, but not limited to ... church ...." (Complaint ¶ 63; Kaiser Declaration, Exhibit I.) Consistent with the State Order, the Riverside Order exempts essential business, including "courts of law, medical providers ... daycare and child care ... [and] necessary shopping at fuel stations, stores or malls," provided that a "state and federal guidelines for infection control" are observed. (Complaint ¶ 64; Kaiser Declaration Exhibit I.)

The County of San Bernardino Board of Supervisors declared a Local Health Emergency in San Bernardino County on March 10, 2020. (San Bernardino RJN, Exhibits F and G.) On April 7, 2020, Defendant Gustafson, the San Bernardino Health Officer, signed the Order of the Health Officer of the County of San Bernardino for the Control of COVID-19 ("San Bernardino Order"). (Complaint ¶ 36; San Bernardino RJN, Exhibit I.) The San Bernardino Order "allow[s] faith based services that are provided through streaming or other technology, while individuals remain in their homes, but

does not allow individuals to leave their home for driving parades or drive-up services, or for picking up non-essential items." (Complaint ¶ 37; San Bernardino RJN, Exhibit I.)

IV. LEGAL STANDARD

***3** The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm until a hearing may be held on the propriety of a preliminary injunction. See Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); see Stuhlbarg Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2011).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The Ninth Circuit employs the "serious questions" test, which states " 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). "A preliminary injunction is an 'extraordinary and drastic remedy.' It should never be awarded as of right." Munaf v. Geren, 553 U.S. 674, 690 (2008) (citation omitted). When seeking a temporary restraining order through an *ex parte* application, a plaintiff must further show that he is without fault in creating the crisis necessitating the bypass of regular motion procedures. See Mission Power Eng'g Co. v. Cont'l Gas Co., 883 F. Supp. 488, 492–93 (C.D. Cal. 1995). The propriety of a temporary restraining order, in particular, hinges on a significant threat of irreparable injury, Simula, Inc. Autoliv, Inc., 175 F.3d 716, 725 (9th Cir. 1999), that must be imminent in nature, Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988).

V. DISCUSSION

Plaintiffs request that the Court enjoin enforcement of the State Order, Riverside Order, and San Bernardino Order (collectively, "Orders") to "Plaintiffs' engagement in religious services, practices, or activities at which the Center for Disease Control's social distancing guidelines are followed." (Request at 24.) To succeed, Plaintiffs must demonstrate that they are likely to succeed on their claims that the Orders violate their constitutional rights and demonstrate that the other factors weigh in favor of granting the temporary restraining order.

A. Success on the Merits or Serious Questions

Plaintiffs assert that the Orders violate their constitutionally protected rights, including their right to the free exercise of religion. (Request at 9–21.) In response, Defendants argue that Plaintiffs will not succeed on their constitutional claims for two reasons: First, as acts of the executive in response to a national emergency, the Orders are subject to only minimal scrutiny, which they easily survive.[2] (State Opposition at 7–14.) Second, even absent consideration of greater leeway afforded to executive acts during a state of emergency, the Orders do not violate Plaintiffs' rights under traditional constitutional analysis. (State Opposition at 14–19; Riverside Opposition at 16–34; San Bernardino Opposition at 11–17.)

1. Exercise of Executive Powers During State of Emergency

***4** State Defendants argue that because the Orders are temporary executive actions taken in response to a national emergency, they are entitled to substantial judicial deference and not subject to traditional constitutional scrutiny. (State Opposition at 7–14.) The Court agrees: Defendants have a right to protect California residents from the spread of COVID-19—even if those protections temporarily burden constitutional rights to a greater degree than normally permissible.

The Supreme Court held over a century ago 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 Massachusetts, 197 U.S. 11, 27 (1905). The COVID-19 pandemic threatens the lives of all Californians: indeed, nearly 1,500 have already died.[3] The virus has proven to be extremely contagious—it is airborne and can linger on surfaces for days.[4] Because asymptomatic and pre-symptomatic carriers of the virus can infect others, a belief that one "has never had or contracted

the coronavirus ... been at any time exposed to the danger of contracting it ... and has never been in close proximity to any locality where said coronavirus has or have existed" is largely meaningless. (See Complaint ¶¶ 58, 79.) Anyone could be an unknowing, undetectable vector for the virus at any time. For these reasons, government and health officials have struggled to contain the virus. Without a vaccine, measures limiting physical contact between citizens, such as the Orders, are widely recognized as the only way to effectively slow the spread of the virus.

Undoubtedly, the Orders—and the similar orders in effect around the country—restrict the rights and freedoms normally enjoyed by citizens. The residents of California are confined to their homes, unable to gather with friends and family, unable to attend political rallies, unable to enjoy art and recreation, and largely unable to work or go to school. The Orders also prevent Plaintiffs (and all other California residents) from gathering for in-person worship or laying hands upon each other. Because Plaintiffs' religious beliefs compel them to do these things, the Orders do burden Plaintiffs' unrestrained exercise of their religion. But the Constitution does not guarantee "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Jacobson, 197 U.S. at 26. Indeed, "[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease." Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

Recognizing that the need to protect the public may trump individual rights during a crisis, the Supreme Court has held that states and municipalities have greater leeway to burden constitutionally protected rights during public emergencies:

> 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 general public may demand.

***5** Jacobson, 197 U.S. at 29; see also United States v. Caltex, 344 U.S. 149 (1952) (acknowledging that "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"). When responding to the COVID-19 pandemic, therefore, Defendants "may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' " In re Abbott, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (quoting Jacobson, 197 U.S. at 31). In other words, during an emergency, traditional constitutional scrutiny does not apply. Instead, any measures that limit or suspend constitutional rights (1) must have a "real or substantial relation" to the crisis and (2) must not represent "plain, palpable" invasions of clearly protected rights. Jacobson, 197 U.S. at 31.

The Orders easily meet that test. First, they have a substantial relation to the COVID-19 crisis: they require the physical distancing that is needed to slow the spread of the virus. Second, there is no "plain, palpable invasion" of Plaintiffs' free exercise of religion. While Plaintiffs are unable to gather together in-person, they are free to gather virtually or over the phone. They are also free to gather in-person with the members of their household. They remain free to practice their religion in whatever way they see fit so long as they remain within the confines of their own homes. Although physical contact with others is curtailed, a wide swath of religious expression remains untouched by the Orders. The Orders, therefore, do not represent a plain or palpable invasion of the general right to free exercise of religion. Accordingly, the Orders are likely a permissible exercise of executive authority during a national emergency.

2. Traditional Constitutional Analysis

Because the Orders survive the minimal scrutiny required where executive action taken in response to an emergency, the Court need not determine whether the Orders likewise survive traditional constitutional analysis. But they do: the Request must also be denied because the Orders likely do not impermissibly infringe on Plaintiffs' constitutional rights even when applying the traditional constitutional scrutiny.

a. Free Exercise of Religion

Plaintiffs argue that the Orders target religion and must therefore be subjected to a strict scrutiny analysis. (Request

at 9–11.) Defendants respond that the Orders are neutral and generally applicable and therefore only rational basis review applies. (State Opposition 15–16; Riverside Opposition at 16–19; San Bernardino Opposition at 11–13.) "In assessing neutrality and general applicability, courts evaluate both 'the text of the challenged law as well as the effect ... in its real operation." Parents for Privacy v. Barr, 949 F.3d 1210, 1234 (9th Cir. 2020).

The Orders are neutral on their faces: they "make no reference to any religious practice, conduct, belief, or motivation." Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076 (9th Cir. 2015). While they do list faith-based gatherings as a type of in-person gathering that is prohibited, faith-based gatherings are referenced as an example—they are not the target of the Orders. (See e.g., Kaiser Declaration Exhibit I (prohibiting all gatherings including those for "church").) Facial neutrality does not require freedom from any mention of religion, instead "the minimum requirement of neutrality is that a law not *discriminate* on its face." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (emphasis added). Because the orders apply to both religious and secular gatherings, they do not discriminate, and are therefore facially neutral.

***6** The Orders are also neutral in operation: they apply to both religious and secular conduct and do not "substantially underinclude nonreligiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." See Stormans, 794 F.3d at 1079. The Supreme Court has long recognized that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Church of the Lukumi Babalu Aye, 508 U.S. at 534. Plaintiffs have presented no evidence that the Orders target religious conduct over secular conduct. And a review of the Orders demonstrates that both secular and religious conduct are prohibited equally. The majority of the prohibited conduct is secular: schools are closed, restaurants are shuttered, concerts and sporting events are canceled; citizens cannot visit public recreation spaces or gather with friends who live outside of their household; non-essential workers fortunate enough to still have jobs must work from home. Far from singling out religious conduct for additional restrictions, the State Order identifies workers preparing religious videoconferences as essential workers—an exception that facilitates religious conduct. Similar exceptions have not been made for sports, concerts, or non-essential work events. The Orders, therefore, are not restrictions against religion in disguise. They are generally applicable restrictions on gatherings of all kinds.

Plaintiffs argue that the Orders are underinclusive of secular activities that may also contribute to the spread of COVID-19 because they allow grocery stores, fast food restaurants, and marijuana dispensaries to remain open. (Request at 10.) But these are all essential services: without access to the food and medicines sold at these locations, more citizens would become ill or die. And despite social distancing the virus is spreading at these locations—grocery store employees are falling ill and dying. [5] If the state applies the same rules to in-person religious gatherings as it does to grocery stores, people will get sick and die from attending religious gatherings just as they are dying from working in grocery stores.

Moreover, because the risk of transmission increases with every out-of-home contact, it is necessary to suspend non-essential activities so that essential functions can be less dangerous. Many older and immunocompromised people must leave their homes to purchase food and medicine. Grocery store employees, food preparers, delivery drivers, pharmacists, and other essential workers must go to work to ensure that California residents have what they need to survive. These individuals risk contracting the virus when performing these essential tasks. If those that they encounter engage in non-essential contacts, the risk of transmission increases. But if everyone limits their out-of-home contacts to only essential tasks, the risk decreases. When we all reduce our contacts to the minimum possible level, the rates of transmission go down. In sum, Californians need to stay home whenever possible to protect those who cannot.

Finally, as Defendants argued at the hearing, constitutional analysis only requires that the Court compare the prohibited religious conduct with analogous secular conduct when assessing underinclusivity. See Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015) (holding that a law is only fatally underinclusive if it prohibits religious conduct but not "comparable secular conduct"). An in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. Instead, it is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience. Those activities are prohibited under the Orders. Because the Orders treat in-person religious gatherings the

same as they treat secular in-person communal activities, they are generally applicable.

Because the Orders are facially neutral and generally applicable, they are subject to rational basis review. Stormans, Inc., 794 F.3d at 1075–76. And they easily survive rational basis: the social distancing measures implemented by the Order are rationally related to slowing the spread of COVID-19—a state interest that is not only legitimate but compelling. Accordingly, the Orders likely do not violate the Free Exercise Clause.

b. Establishment of Religion

***7** A government action violates the Establishment Clause if it lacks a "secular legislative purpose" or endorses religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); see also Trunk v. City of San Diego, 629 F.3d 1099, 1106 (9th Cir. 2011) (noting that "the Supreme Court essentially has collapsed the[ ] last two prongs [of the test articulated in Lemon] to ask whether the challenged governmental practice has the effect of endorsing religion.") The Orders do neither. First, they serve the important secular purpose of slowing the spread of COVID-19. Second, they do not endorse any religion: the order bans gatherings for all religions along with secular gatherings.[6] Accordingly, the Orders likely do not violate the Establishment Clause.

c. Other Alleged Constitutional Violations

Plaintiffs make several other claims for violations of their rights under the U.S. and California Constitutions. (Request at 12–20.) Each of these, however, is premised on Plaintiffs' argument that the Orders impermissibly restrict their religious exercise. (See, e.g., Request at 13 (arguing that the Orders are an unconstitutional prior restraint on speech because religious worship is protected speech).) Because the Court concludes that the Orders do not impermissibly restrict Plaintiffs' free exercise of religion, Plaintiffs' other claims likely fail as well.

B. Remaining TRO Factors

Defendants have shown that because the Orders are likely a proper exercise of executive authority in a state of emergency they are entitled to enhanced deference, even where they infringe on typically protected rights. Moreover, even applying a traditional constitutional analysis, Plaintiffs' claims are unlikely to succeed. Accordingly, Plaintiffs are not likely to succeed on the merits of their claims, and the Court need not consider the remaining factors.

VI. CONCLUSION

For the reasons above, the Court DENIES Plaintiffs' Request.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1979970

Footnotes

1 World Health Organization, Coronavirus Disease 2019 Situation Report, April 23, 2020 https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf?sfvrsn=b8304bf0_4

2 Although only the State Defendants advance this argument, the Court will apply it to all three orders.

3 *Tracking Coronavirus in California*, Los Angeles Times https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/ (last accessed April 23, 2020.)

4 Neeltje van Doremalen, Ph.D., et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. England J. Med. 2020; 382:1564-1567 https://www.nejm.org/doi/full/10.1056/NEJMc2004973 (last accessed April 23, 2020.)

5 Dalvin Brown, *COVID-19 Claims Lives of 30 Grocery Store Workers, Thousands More May Have It, Union Says*, USA Today, https://www.usatoday.com/story/money/2020/04/14/coronavirus-claims-lives-30-grocery-store-workers-union-says/2987754001/ (last accessed April 23, 2020.)

6 Plaintiffs argue that special accommodations were made by the Riverside Defendants and the San Bernardino Defendants for Christians celebrating Easter. (Request at 2.) However, they do not seek to enjoin enforcement of any Easter exception. And they could not: Easter has passed. Accordingly, the Court need not determine whether the Easter exceptions violated the Establishment Clause.

