No. 20-1811

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELIM ROMANIAN PENTECOSTAL CHURCH, and
LOGOS BAPTIST MINISTRIES,

Plaintiffs–Appellants

v.

JAY R. PRITZKER,
in his official capacity as Governor of the State of Illinois,

Defendant–Appellee

On Appeal from the United States District Court
for the Northern District of Illinois
In Case No. 1:20-cv-02782 before The Honorable Robert W. Gettleman

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL

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DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

   Elim Romanian Pentecostal Church, and
   Logos Baptist Ministries

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Liberty Counsel; Mauck & Baker, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

   N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

   N/A

DATED this May 15, 2020.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellants

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RELIEF SOUGHT

Plaintiffs–Appellants, ELIM ROMANIAN PENTECOSTAL CHURCH ("ERPC") and LOGOS BAPTIST MINISTRIES (collectively, "Churches"), on an emergency basis, move the Court:

1. Pursuant to Fed. R. App. P. 8(a)(2), for an injunction pending appeal (IPA) of the district court's May 13, 2020 Memorandum Opinion and Order ("TRO/PI Order," attached as Exhibit 1), which is the subject of Churches' Notice of Appeal to this Court (attached as Exhibit 2), restraining and enjoining Defendant–Appellee, Jay Robert Pritzker, in his official capacity as Governor of the State of Illinois (the "State" or "Illinois"), from enforcing and applying against Churches the series of COVID-19 executive orders issued by Governor Pritzker (the "Orders") purporting to prohibit Churches, on pain of criminal sanctions or closure, from gathering for worship services of more than 10 people, regardless of whether Churches meet or exceed the social distancing, enhanced sanitization, and hygiene guidelines pursuant to which the Governor disparately and discriminatorily allows other "Essential" commercial and non-religious entities (*e.g.*, beer, wine, and liquor stores, marijuana dispensaries, warehouse clubs, 'big box' and 'supercenter' stores) to accommodate gatherings, crowds, and masses without any numerical limitation; and, or in the alternative,

2. For an order expediting the briefing, oral argument, and ultimate disposition of their appeal, to remedy the irreparable harm being suffered by Churches in having to conduct religious worship services each Sunday morning and Wednesday night under the continuing threat of unconstitutional and illegal State enforcement actions against Churches.

JURISDICTION AND TIMING

On May 13, 2020, the district court's TRO/PI Order denied Churches' motion for temporary restraining order (TRO) and preliminary injunction (PI), providing Churches an interlocutory appeal to this Court as of right under 42 U.S.C. § 1292(a)(1). On the same day, May 13, Churches filed their Notice of Appeal and, pursuant to Fed. R. App. P. 8(a)(1)(C), moved for an emergency IPA in the district court. On May 14, by minute entry on the docket, the district court denied Churches' IPA motion "[f]or the reasons set forth in [the TRO/PI Order]." (Notification of Docket Entry ("IPA Denial"), attached as Exhibit 3.) By filing, herewith, both the IPA Denial and the TRO/PI Order containing the district court's reasons for denial, Churches satisfy the conditions for seeking an emergency IPA from this Court under Fed. R. App. P. 8(a)(2)(A)(ii) and 7th Cir. R. 8.

GROUNDS FOR RELIEF

A. Introduction.

Good cause and other reasons for the requested IPA are shown herein, as supported by Churches' Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages ("Verified Complaint," attached as Exhibit 4), Churches' Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction ("TRO/PI Memo," attached as Exhibit 5), the Supplemental Declaration of Pastor Cristian Ionescu ("Ionescu Declaration," attached as Exhibit 6), the Second Supplemental Declaration of Pastor Cristian Ionescu ("Ionescu 2d Declaration," attached as Exhibit 7), and the Chicago Department of Public Health enforcement letter to Pastor Ionescu dated today, May 15, 2019 (the "CDPH Letter," attached as Exhibit 8).

This record shows Churches are committed to protecting the well-being of their congregants, in both word and deed, even as they seek to avail themselves of the same rights to gather with more than 10 people as Governor Pritzker has conferred on other "Essential" entities under his discriminatory Orders. The Orders' prohibition of Churches' exercising their most cherished religious beliefs—*i.e.*, to worship God in obedience to and fulfillment of the fundamental purpose for their existence—violates Churches' constitutionally and statutorily protected rights, and

inflicts irreparable harm on Churches with each passing Sunday and Wednesday that their worship services are threatened by criminal and regulatory state enforcement actions.

B. Factual Summary.[1]

The COVID-19 Orders issued by Governor Pritzker from March 9 to May 5, 2020, including the currently controlling Executive Order 2020-32, prohibit "[a]ll public and private gatherings of any number of people" and (inconsistently) "any gathering of more than ten people." (V.Compl. ¶ 39, Ex. H.) But the Orders exempt from the 10-person gathering limit, *inter alia*, **23 expansive categories** of commercial and non-religious entities as "Essential Businesses and Operations," allowing such "Essential" entities to accommodate large crowds of people subject only to social distancing and other hygiene precautions, and only "to the greatest extent possible" or "where possible." (V.Compl. ¶ 43, Ex. H.) These "Essential" entities include, *inter alia*, grocery stores, alcoholic beverage stores, hardware stores, cannabis stores, gas stations, law firms and professional businesses, labor unions, and hotels, and also include warehouse, supercenter, and 'big box' stores combining several categories. (V.Compl. ¶ 43, Ex. H.) Despite the Orders' permissive and trusting approach for favored "Essential" entities, however, churches

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[1] Churches commend to the Court ¶¶ 1–81 of the Verified Complaint (and referenced exhibits) for a complete factual background.

remain subject to **both** social distancing requirements **and the 10-person limit on gathering—even though "engag[ing] in the free exercise of religion" (*i.e.*, worship) is also designated "Essential" by the Orders**. (V.Compl. ¶ 41, Ex. H (emphasis added).)

By their own terms, the Orders are enforceable by state and local police. (*See, e.g.*, V.Compl. Ex. H at 12.) The Illinois State Police has issued enforcement guidance for the Orders, advising its officers they are "free to use their training to disperse the crowd" and that non-compliance may result in misdemeanor criminal citations for Reckless Conduct and Disorderly Conduct. (V.Compl. ¶¶ 51–53, Ex. K.) Governor Pritzker himself has overtly threatened criminal and regulatory enforcement, stating at press conferences, "Local law enforcement and the Illinois State Police can and will take action," and, "[T]here are enforcement mechanisms here that we will be using against them," 5/13/20 Illinois Governor J. B. Pritzker COVID-19 Press Briefing, https://www.youtube.com/watch?v=RkkbHgfaqS0 (at 23:54, 25:58), and, "[T]here will be consequences. . . . [T]hey'll be subject to liability as a result," 5/14/20 Illinois Governor J. B. Pritzker COVID-19 Press Briefing, https://www.youtube.com/watch?v=AglD5LyplMA (at 21:30). To be sure, the Commissioner of the Chicago Department of Public Health sent a letter to Pastor Cristian Ionescu of Plaintiff–Appellant ERPC, threatening, *inter alia*, criminal

sanctions and closure of his church under the authority of the Orders. (CDPH Ltr. (Ex. 8) at 1–2.)

And there is no end in sight for Churches. On May 5, 2020, Governor Pritzker released his 5-phase "Restore Illinois" plan, continuing to subject churches to the 10-person limit through Phases 1, 2, and 3, upping the limit to 50 under Phase 4, and eventually removing limits in Phase 5— **no sooner than 12 to 18 months from now**, and all subject to change, at any time. (V.Compl. ¶¶ 45–49, Ex. J.)

Churches initially complied with the Orders, even foregoing worship on Easter Sunday, their most treasured day. (V.Compl. ¶ 9.) But on May 2, 2020, Churches joined in a letter to Governor Pritzker challenging the legality of his arbitrary 10-person limit for churches and stating their intentions to reopen for in-person worship on May 10. (V.Compl. ¶ 55, Ex. L.) Their letter also reiterated, however, their desire to protect the well-being of their congregations, and committed to exceeding the distancing and hygiene requirements applicable to other "Essential" entities by voluntarily incorporating 10 safety initiatives, including reduced seating by removal of chairs or cordoning off pews, sanitization before and after services, offering masks and gloves, discouraging hand-shaking and physical contact, hand sanitizer at entrances and throughout the building, one-way foot traffic, and admonitions to stay home for anyone who is COVID-19 symptomatic or in contact

with someone who is, or who is at heightened risk due to age or health. (V.Compl. ¶¶ 55–56, Ex. L.)

Churches filed this action on May 7, before their intended May 10 reopening, but they more than kept their promises to exceed the hygiene requirements applicable to other "Essential" entities that accommodate more than 10 people. (Ionescu Decl. ¶¶ 2–6 (containing photographs and video links); Ionescu 2d Decl. ¶¶ 3–12 (containing photographs).) For example, for ERPC's May 10 worship service, the church strictly complied with or surpassed each of the 10 safety initiatives promised to Governor Pritzker, hiring an industrial cleaning company to thoroughly clean and disinfect its premises, including treatment for microbial and virologic agents, and imposing social distancing even between members of the same household. (Ionescu Decl. ¶¶ 2–6.) In addition**, ERPC took the temperature of every person seeking admittance with contactless thermometers, and turned away anyone with a temperature above 99.5 degrees** (plus anyone who arrived after the church reached its self-limited capacity of 120 seats out of an available 750

(15%)).[2] (Ionescu Decl. ¶¶ 6(a), (d), (e).) The seriousness of ERPC's effort is depicted in these photographs:

[2] The district court chastised Churches because none of the ERPC congregants "were wearing face coverings, contrary to CDC guidelines." (TRO/PI Denial 8.) But neither the CDC nor Governor Pritzker's Orders **require** masks where appropriate distancing is maintained. (V.Compl. Ex. H at 3 ("when in a public place and unable to maintain a six-foot social distance"); Ex. J at 7 ("when social distancing is not possible"); CDC, *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19,* https://www.cdc.gov/coronavirus/2019-ncov/downloads/DIY-cloth-face-covering-instructions.pdf (last visited May 13, 2020) (**recommending** "wearing cloth face coverings in public where other social distancing measures are difficult").

(Ionescu Decl. ¶¶ 6(h), (*i*).)

LEGAL ARGUMENT

This Court "evaluate[s] a motion for an injunction pending appeal using the same factors and 'sliding scale' approach that govern an application for a preliminary injunction." *Grote v. Sebelius*, 708 F.3d 850, 853 (7th Cir. 2013). To obtain the injunction, Churches must show "(1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest." *Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 619 (7th Cir. 2004). Upon this threshold showing, "the inquiry becomes a 'sliding scale' analysis where these factors are weighed against one another." *Id.* Where, as here, "a party

seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determining factor." *Id.* All factors favor Churches, and the IPA should issue.

I. THE CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT THE ORDERS SHOULD BE ENJOINED BECAUSE THEY VIOLATE THE CHURCHES' FREE EXERCISE RIGHTS UNDER THE FIRST AMENDMENT AND IRFRA.

A. A Surge of Precedents Hold COVID-19 Executive Orders Imposing Meeting Restrictions on Churches While Exempting Other "Essential" Entities Violates Free Exercise and State RFRA Rights.

1. The Highest Federal Court to Address Similar Orders Has *TWICE* Held Their Restrictions Violate Free Exercise Rights.

Twice in two weeks the Sixth Circuit has enjoined enforcement of executive orders like Governor Pritzker's, determining that restrictions on drive-in **and in-person** worship services violate the First Amendment and Kentucky RFRA. *See Roberts v. Neace*, No. 20-5465, 2020 WL 2316679 (6th Cir. May 9, 2020) (**in-person** worship services); *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (holding likely to succeed on merits of Free Exercise and Kentucky RFRA claims for both drive-in and **in-person** services).

In *Roberts*, the Sixth Circuit granted an IPA enjoining the Kentucky Governor from treating religious gatherings differently from those of exempt essential entities, concluding the prohibitions on religious gatherings "likely fall on the prohibited side

of the line" drawn by the Free Exercise Clause. *Roberts*, 2020 WL 2316679, at *2. Indeed, "[a]s a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Id.* at *3.

Just as here, the *Roberts* plaintiffs merely sought to be treated equally with exempted non-religious gatherings:

> Keep in mind that the Church and its congregants just want to be treated equally. . . . They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . . **The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same**.
>
> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

2020 WL 2316679, at *3 (emphasis added).

2. Other Federal Courts Have Likewise Enjoined Prohibitions on Religious Gatherings.

Twice in April, and twice last week, federal district courts have also enjoined disparate COVID-19 prohibitions on religious worship. On April 11, the Western District of Kentucky issued a TRO enjoining enforcement of Kentucky executive orders prohibiting drive-in church services. *On Fire Christian Ctr., Inc. v. Fisher*,

No. 3:20-CV-264-JRW, 2020 WL 1820249, at *1 (W.D. Ky. Apr. 11, 2020) [hereinafter *On Fire*]. The Louisville Mayor had threatened Easter churchgoers with criminal enforcement of the orders by police. *Id.* at *4–5. The court held such threats and actions unconstitutional because the government "**may not ban its citizens from worshipping**." *Id.* at *8 (emphasis added).

On April 18, 2020, the District of Kansas issued a TRO enjoining enforcement of a Kansas restriction on religious gatherings of more than 10 people, requiring the state to treat worship services the same as exempted "essential" gatherings. *See First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, *6–7 (D. Kan. Apr. 18, 2020) [hereinafter *First Baptist*]. The *First Baptist* TRO specifically stated that the government's disparate treatment of religious gatherings was a violation of the Free Exercise Clause because it showed that "**religious activities were specifically targeted for more onerous restrictions than comparable secular activities**." *Id.* at *7 (emphasis added). The court concluded that restricting religious gatherings while permitting other non-religious activities "show[s] that these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral, *id.*, and—much like here—"churches and religious activities appear to have been **singled out among essential functions for stricter treatment. It appears to be the only essential function whose core purpose—association for the purpose of worship—had been basically eliminated**." *Id.* (emphasis added).

On May 8, 2020, the Eastern and Western Districts of Kentucky held that prohibitions on in-person religious gatherings violate the First Amendment. *See Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, 2020 WL 2393359 (W.D. Ky. May 8, 2020) [hereinafter *Maryville* W.D. Ky.]; *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020).

In *Maryville* W.D. Ky., the district court granted an IPA and PI enjoining enforcement of Kentucky's orders against in-person worship services. 2020 WL 2393359, at *1, 3. The court had previously denied a TRO, 2020 WL 1909616 (W.D. Ky. April 18, 2020), but ruled for the plaintiffs after finding the Governor failed to meet his burden to prove narrow tailoring under the strict scrutiny standard. 2020 WL 2393359, at *2–3 ("The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals.") ("He still 'has offered no good reason . . . for refusing to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the same.'").

In *Tabernacle*, the district court issued a statewide TRO enjoining Kentucky from enforcing its prohibition on in-person religious gatherings. 2020 WL 2305307, at *1, 6. The court observed that the First Amendment does not "mean something different because society is desperate for a cure or prescription." *Id.* at *1. The court

acknowledged that it was tasked with "identifying precedent in unprecedented times," *id.* at *4, but concluded, "'**even under *Jacobson [v. Massachusetts,* 197 U.S. 11 (1905)], constitutional rights still exist**.'" *Id.* at *4 (quoting *On Fire*, 2020 WL 1820248, *15 (emphasis added)).[3] In fact, "while courts should refrain from second-guessing the efficacy of a state's chosen protective measures" a government very well may "'go so far beyond what was reasonably required for the safety of the public, as to authorize or **compel the courts to interfere**.'" *Tabernacle*, 2020 WL 2305307, at *4 (quoting *Jacobson*, 197 U.S. at 28 (emphasis added)).

> It follows that the prohibition on **in-person** services should be enjoined . . . . There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, *benefit from constitutional protection***.

Tabernacle, 2020 WL 2305307, at *5 (emphasis added).

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[3] The district court faulted Churches for not citing *Jacobson* below (TRO/PI Order 6), but the district court was mistaken because Churches had quoted verbatim the *On Fire* court's appraisal of *Jacobson* in their TRO/PI Memo (at 7), just as the *Tabernacle* court did in granting a TRO.

B. The Orders Burden Churches' Free Exercise Rights Under the First Amendment and IRFRA.

Churches demonstrated below that they have sincerely held religious beliefs, rooted in Scripture's commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. (V.Compl. ¶¶ 85, 169, 204, 215.) Indeed, the *On Fire* court explained, "the Greek work translated church . . . literally means **assembly**." 2020 WL 1820249, at *8 (cleaned up) (emphasis added). Governor Pritzker's threatened and actual enforcements of his Orders substantially burden Churches' religious practice of assembling together for worship, according to their sincerely held beliefs, in violation of the First Amendment and the Illinois Religious Freedom Restoration Act, 775 ILCS §§ 35/1–35/99 [hereinafter IRFRA].

"[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). Prohibiting church services while allowing other "Essential" entities to gather "**violat[es] the Free Exercise Clause beyond all question**." *On Fire*, 2020 WL 1820249, at *6 (emphasis added). Even in a time of crisis or disease, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the First Amendment does not evaporate. Indeed, "even under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose." *On Fire*, 2020 WL 1820249, at *8. And like the Free Exercise Clause,

IRFRA also prohibits Governor Pritzker from substantially burdening a person's exercise of religion. IRFRA, § 35/15.

There can be no question that the Orders, on their face and as applied, impose direct burdens on Churches' assembled worship in conformance with their sincerely held religious beliefs. As shown in the Grounds for Relief (*supra* pp. 5–6), Governor Pritzker, the state police, and the Chicago Department for Public Health, all under the authority of the Orders, have threatened sanctions ranging from closure to criminal prosecution for conducting worship services with more than 10 people, even if distanced. Such threatened sanctions substantially burden Churches' religious exercise, triggering First Amendment and IRFRA protections.

C. The Orders' Burdens on Churches' Free Exercise of Religious Beliefs Is Subject to Strict Scrutiny Under the First Amendment and IRFRA.

The Governor's application of the Orders to burden Churches' religious practices must be subjected to strict scrutiny under IRFRA, which specifies that "Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, 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 governmental interest." IRFRA, § 35/15. Under the First Amendment, however, the Orders just as clearly must be subjected to strict scrutiny because they

are not neutral or generally applicable, and therefore "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) [hereinafter *Lukumi*].

"Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. 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. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 533–34 (cleaned up). The First Amendment prohibits hostility that is "masked, as well as overt." *Id.* "The constitutional benchmark is government *neutrality*, **not government avoidance of bigotry**." *Roberts*¸ 2020 WL 2316679, at *4 (cleaned up) (emphasis added). The Orders are not facially neutral, but even if so, they covertly depart from neutrality by treating religious worship differently from other "Essential" entities' gatherings.

Similarly, to determine general applicability courts focus on disparate treatment of similar conduct. *Lukumi*, 508 U.S. at 542. A law is not generally applicable where "inequality results" from the government's "decid[ing] that the governmental interests it seeks to advance are worthy of being pursued only against

conduct with religious motivation." *Id.* at 543. Thus, a law "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

The Orders fail neutrality on facial examination, and fail both neutrality and general applicability on enforcement. First, the orders facially impose a 10-person limit on "Essential" religious worship, but exempt a multitude of "Essential" commercial and nonreligious activities involving crowds (*e.g.*, shopping at liquor, warehouse, and supercenter stores). (V.Compl. ¶¶ 39–43, Ex. H.) Exempted gatherings are permitted if distancing and hygiene guidelines are followed "to the greatest extent possible" or "where possible," but worship gatherings of more than 10 people are prohibited even if distancing and hygiene guidelines are followed religiously. (V.Compl. ¶ 43, Ex. H.)

Second, the Orders were not applied neutrally or generally. The Chicago Department of Public Health, acting pursuant to Governor Pritzker's Orders, directly targeted ERPC's Pastor with its enforcement threats (CDPH Ltr. (Ex. 8)), even as other "Essential" entities can accommodate crowds and masses of people without worry. (*See supra* p. 8.) Where the government "has targeted religious worship" for disparate treatment, there is no neutrality. *On Fire*, 2020 WL 1820249, at *6.

D. The Orders Cannot Withstand Strict Scrutiny and Should Be Restrained.

Because the State's discriminatory application of the Orders triggers strict scrutiny under the First Amendment and IRFRA (*see supra* pts. I.A–C), Governor Pritzker is subject to "the most demanding test known to constitutional law," *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (cleaned up), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . ."). "**Strict-scrutiny review is strict in theory but usually fatal in fact**." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (cleaned up) (emphasis added). This is not that rare case.

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire*, 2020 WL 1820249, at *7. But where the State permits regular large gatherings of persons for commercial and non-religious purposes, while expressly prohibiting Churches' worship gatherings of more than 10 people, the State's assertions of a compelling interest are substantially diminished. Indeed, the Orders "cannot be regarded as protecting an interest of the highest order . . . **when [they leave] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added).

Whatever interest Governor Pritzker purports to claim, however, he cannot show the Orders and their enforcement are narrowly tailored to be the least restrictive

means of protecting that interest. And it is the State's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Churches] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the Orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

The State cannot carry its burden because it cannot demonstrate that it seriously undertook to consider other, less-restrictive alternatives and ruled them out for good reason. To meet this burden, the State must show that it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). And the Governor cannot meet his burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added). Furthermore, "[i]t is not enough to show that the Government's ends are compelling; the means must

be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "There must be a fit between the . . . ends and the means chosen to accomplish those ends." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011) (cleaned up).

Governor Pritzker fails the test. He considered nothing but a complete prohibition beyond the 10-person limit for religious worship, while expansively exempting numerous other "Essential" businesses and non-religious entities, such as liquor, warehouse, and supercenter stores. (V.Compl. ¶¶ 39–43, Ex. H.) The Governor has not and cannot state why or how crowds and masses of persons at a warehouse or supercenter store, where distancing and hygiene are only required "to the greatest extent possible" or "where possible," are any less "dangerous" to public health than a responsibly distanced and sanitized worship service, yet the Governor exempted the non-religious gatherings and prohibited Churches' services.

Examples abound of less restrictive approaches that Governor Pritzker neither tried nor considered, such as in Arizona, Florida, Indiana, Ohio, and Texas, where religious worship is designated essential (V.Compl. ¶¶ 61–63, 67, 68, Exs. M– P, T, U), or as in Alabama, Arkansas, and Connecticut, where religious worship is allowed subject to distancing and sanitization practices (V.Compl. ¶¶ 64–66, Exs. Q–S). Churches have demonstrated they already meet or exceed the distancing and hygiene requirements Governor Pritzker deems sufficient for other commercial and non-

religious "Essential" entities. (*See supra* pp. 6–9.) There is no justification for depriving Churches of the same consideration or benefit.

Indeed, as the *On Fire* court reasoned, the Governor is unlikely to be able to demonstrate that he deployed the least restrictive means because his Orders, and their application,

> are **"underinclusive"** ***and*** **"overbroad."** They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that the Commonwealth has permitted . . . . Those . . . activities include driving through a liquor store's pick-up window, parking in a liquor store's parking lot, or walking into a liquor store where other customers are shopping. The Court does not mean to impugn the perfectly legal business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is "essential," **so is [church]**.

On Fire, 2020 WL 1820249, at *7 (emphasis added) (footnote omitted); *see also First Baptist*, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020).

The Governor's failure to tailor his Orders to closely fit the safety ends he espouses, and failure to try other, less restrictive alternatives that have worked and are working in other jurisdictions across the country, demonstrates that the Governor cannot satisfy his burden to prove narrow tailoring. Thus, the Orders fail strict scrutiny, and the IPA is warranted.

II. THE CHURCHES HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT AN IPA.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that **no further showing of irreparable injury is necessary**." (emphasis added)). Thus, demonstrating irreparable injury in this matter "**is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added). With each passing Sunday and Wednesday, Churches are suffering under the yoke of the Governor's unconstitutional orders prohibiting Churches from assembling together to exercise their sincerely held religious beliefs of assembling themselves together to worship God.

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WARRANT AN IPA.

An IPA enjoining enforcement of the Orders on Churches' responsibly conducted worship services will impose no harm on Illinois. "[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute . . . ." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). But

for Churches, "even minimal infringements upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). Indeed, absent an IPA, Churches "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest . . . or some other enforcement action for practicing those sincere religious beliefs." *On Fire*, 2020 WL 1820249, at *9.

An IPA is in the public interest, too. Contrary to the district court's remarkable charge that Churches are "selfish" to seek to vindicate their fundamental rights (TRO/PI Order 11), "[i]njunctions protecting First Amendment freedoms are **always in the public interest**." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added). "First Amendment rights are not private rights of the appellants so much as they are rights of the general public. Those guarantees [are] for the benefit of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288–90 (5th Cir. 1969) (cleaned up). Indeed, worship is ultimately submission, not selfishness, *see, e.g.*, *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 650 F.3d 30, 37 n.8 (2d Cir. 2011), and "**the public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added). Thus, the balance of the equities tips decidedly in Churches' favor, and an IPA is in the public interest.

CONCLUSION

For all of the foregoing reasons, Churches respectfully request that the Court (1) issue the requested IPA, and, or in the alternative, (2) order expedited briefing, oral argument, and ultimate disposition of this appeal on a significantly shorter schedule than currently set.

Respectfully submitted:

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DATED this May 15, 2020.

/s/ Roger K. Gannam
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

DATED this May 15, 2020.

/s/ Roger K. Gannam
Roger K. Gannam
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