

## MEMORANDUM

**TO:** Patrick J. Delfino, Director

**FROM:** David J. Robinson, Chief Deputy Director

**RE:** Illinois Governor's Executive Orders - COVID-19

**DATE:** April 21, 2020

**Director Delfino:**

Given the volume of requests from individual State's Attorneys this Agency has received regarding the viability of enforcement (and potential civil liability under Federal section 1983), you asked that I prepare a memorandum outlining potential arguments that may confront Illinois State's Attorneys as part of future civil and criminal litigation with regard to the Governor's Executive Orders in the wake of the COVID-19 pandemic.<sup>1</sup>

### The Executive Order(s)

On March 20, 2020, Governor J.B. Pritzker issued Executive Order ("EO") No. 8<sup>2</sup> in which he ordered the following – citing several sections of the Emergency Management Act (20 ILCS 3305/7(1),(2),(8),(10),(12)) being "consistent with public health laws", but making no reference to the Illinois Constitution:

- (1) All residents must stay "at home";
- (2) "Non-essential" businesses and operations must "cease";
- (3) Certain activity is "prohibited", which includes any "gathering" of ten or more people;
- (4) "All travel" is "prohibited" in any form, except for "essential activities" ("Essential activities"<sup>3</sup> includes, among other things, (a) "outdoor activity" so long as "social distancing" is adhered to; (b) essential travel, as well as (c) food, medical, day care and professional services); and
- (5) Citizens must engage in "social distancing", which specifically requires that (a) citizens maintain a 6-foot social distance from others, (b) citizens must wash hands with soap and water "for at least twenty seconds" as frequently as possible, must cover coughs or sneezes, and may not shake hands.

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<sup>1</sup> This memo is work product and is designed solely to assist you in informing and advising Illinois State's Attorneys.

<sup>2</sup> This was extended by EO 18 on April 1, 2020 (purporting to extend EO 8 through April 30, 2020).

<sup>3</sup> Note that attending religious services is not a listed "essential activity."

## Background and Statistics

As of April 19, 2020, the Illinois Department of Public Health (“IDPH”) reported 30,357 confirmed diagnoses of COVID-19 and 1290 total deaths.<sup>4</sup> On April 19, 2020, Dr. Ngozi O. Ezike – who appears daily with the Governor at his press briefings – reported that 22%-25% of those who test positive (approximately 11% of those who are tested are testing positive) – require hospitalization. (That is approximately 7,500 individuals<sup>5</sup> on the high side.)<sup>6</sup>

Dr. Ezike also reported on April 19, 2020, that the 1290 reported deaths were based on a “very simplistic” death calculation, which means that if an individual dies “with” COVID-19, the State reports that the individual died “of” COVID-19. Dr. Ezike explained that “if you are on HOSPICE, even if you die of a clear alternate death, [you] would still be listed as a COVID death.” She continued: “Everyone [*sic*] who is listed as a COVID death doesn’t mean that was the cause of death.”

On April 7, 2020, Governor Pritzker, when asked by a reporter how the EO should be enforced, responded “*we are asking people to do the right thing*” and that it was “*up to local law enforcement.*” Governor Pritzker later added<sup>7</sup> that the restrictions are mandated “*not by State law*” but by executive order.

These statements by Dr. Ezike and Governor Pritzker are vitally important to the questions that will be presented after the “dust” has settled. If, as is apparently quite likely, the number of actual deaths *caused* by COVID-19 will be revised by IDPH, that will no doubt impact how a court of review will view the need for action in hindsight – this may be unfair but it is the reality. It also appears that the Governor is taking no position on the enforcement of his EO, except to say that it is *up to local law enforcement*, which is an indication that he is presuming it would be enforced in a constitutional way, if at all (“*we are asking people to do the right thing*”).

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<sup>4</sup> <https://dph.illinois.gov/covid19>.

<sup>5</sup> Governor Pritzker reported on April 20, 2020, that as of April 19, 2020, 4599 Illinoisans were hospitalized with COVID-19 (suspected and confirmed cases) – 757 of those were on ventilators.

<sup>6</sup> It should also be noted that every refutable resource (as well as new research regarding anti-bodies) indicates that many more individuals have had COVID-19 but were never formally diagnosed. This is important because it will almost certainly significantly reduce the number of deaths per million, which currently stands at approximately 101 per M in Illinois. Compare to statistical death rates 2010-2018 <https://dph.illinois.gov/data-statistics/vital-statistics/death-statistics>.

<sup>7</sup> April 11, 2020 and April 15, 2020 press conferences.

## Constitutionality and Enforcement

A cursory review of the EO (and extension) reveal clear – although potentially justified – infringements on the constitutional rights of Illinois citizens. See Article I, §2 (the State due process clause); Article I, §3 (religious freedom, including “mode of worship” protection); Article I, §5 (right to assemble and petition); Article I, §15 (right of eminent domain); and Article I, §24 (rights retained).

Article I, §23 also specifically accounts for citizen’s being responsible for their actions to preserve liberty, as follows: “A frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty. These blessings cannot endure unless the people recognize their corresponding individual obligations and responsibilities.” Implicit in §23 is idea that emergencies may require adherence to individual responsibility rather than suspension of Constitutional rights.

To that end, Article V (The Executive) does not provide emergency powers to suspend constitutional rights, nor does Article XII (Militia) permit the Governor to organize the militia except to “enforce the laws, suppress insurrection, or repel invasion.” This is likely why the Governor has taken the position he has taken regarding enforcement, as well as why he did not cite any constitutional authority in the EO.<sup>8</sup>

When the legislative branch, let alone the executive branch, infringes on fundamental constitutional rights – *e.g.* the freedom of assembly and religion – the State action is subject to strict scrutiny, which means that the State action must be *narrowly tailored to the compelling State interest*. Such action is narrowly tailored if it targets and eliminates no more than the exact source of the “evil” it seeks to remedy, and the State must utilize the least restrictive means consistent with the attainment of its goal. *In re D.M.*, 214 Ill. 2d 289, 304 (2005); see also *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (discussing the First Amendment as applied to the States by the Fourteenth Amendment) and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (discussing executive authority, upholding the so-called “travel ban,” and finally overturning *Korematsu v. United States*, 323 U.S. 214 (1944) (forcible relocation of American citizens)). If undertaken at all, this action requires a scalpel, rather than hammer and sickle. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (although protections for religious freedoms are not absolute, the government’s action must be narrowly tailored to the danger presented).

On April 14, 2020, the United States Department of Justice (DOJ) – pursuant to 34 U.S.C. § 12601 – filed a statement of interest in support of the Temple Baptist Church (*Temple Baptist*

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<sup>8</sup> It is, of course, axiomatic, that statutory law, which is what the Governor has cited in the EO, may not supersede the constitutional rights of Illinois citizens.

*Church v. City of Greenville*, 4:20-CV-64), which was attempting to hold a drive-in church service (windows rolled up with the service broadcast by radio) when it was stopped from doing so by the City of Greenville. The DOJ filing mirrors the framework outlined above, emphasizing the following point, while acknowledging the important government interest: “There is no pandemic exception, however, to the fundamental liberties the Constitution safeguards.” (pg. 4) The same analysis no doubt applies to fundamental rights under the Illinois Constitution.

The Governor cites several sections of the Emergency Management Act (20 ILCS 3305/7(1),(2),(8),(10),(12) (Emergency Powers of the Governor) as authority for the EO. Putting aside the axiom that statutory law may not supersede the constitutional rights of citizens, other problems exist here as well.

Section 7 of the Act clearly permits the Governor to declare a disaster<sup>9</sup> and “suspend regulatory statutes” (§1), utilize the resources of the State (§2), “control ingress and egress” from a disaster area (§8), make provisions for temporary housing (§10), and control commodities and “perform and exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population”( §12).<sup>10</sup>

However, section 3(c) of 3305 specifically states that “this Act shall not be construed to: (c) Affect \*\*\* responsibilities of police forces, firefighting forces, \*\*\* or any personnel thereof[.]” 20 ILCS 3305/3(c)(West 2018). Moreover, section 18 of the Act merely requires “emergency services and disaster agency established under this Act \*\*\* shall execute and enforce the orders, rules and regulations” established by the Governor. 20 ILCS 3305/18 (West 2018). And finally, the Act appears to provide the Governor a maximum 30-day window. 20 ILCS 3305/7 (West 2018)(“Upon such proclamation [of a disaster], the Governor shall have and may exercise for a period not to exceed 30 days following emergency powers . . .”).<sup>11</sup>

## Conclusion

The issue of enforcement is an important one. The birth-pangs of future court challenges are already percolating: <https://illinoisfamily.org/politics/illinoisans-rights-during-the-pandemic/>

It appears that the stay-at-home recommendations and social distancing are great recommendations. Those things should be practiced; but criminal enforcement of the EO is a

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<sup>9</sup> Note that “disaster” is specifically defined to include “epidemic” and “injury or loss of life” resulting from “natural cause.” 20 ILCS 3305/4 (West 2018).

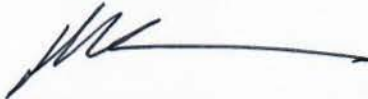
<sup>10</sup> The Governor has also issued EO 16 purporting to extend these orders, in which he added section 9 (which would allow him to suspend or limit sale or transportation of alcohol, firearms, explosives, and combustibles).

<sup>11</sup> April 20, 2020 would be 30 days from original EO.

different question. My research leaves me less than confident that a reviewing court will hold that the Governor has the authority close businesses, bar attendance at church services and assemblies in excess of ten citizens (particularly if they are assembling to redress grievances). From a strict enforcement standpoint, although well-intentioned on an emergency basis, the EO is very broad and does not appear to meet strict scrutiny – this is not to mention the EO appears to be beyond the framework of the specific Act it cites as support.

Accordingly, given what the Governor has said publically, a reasonable view is that he has taken executive action to combat the COVID-19 pandemic by issuing EOs *with the understanding that local officials will enforce those orders in compliance with the Illinois Constitution and the Constitution of the United States*. Hopefully this analysis will assist Illinois State's Attorneys to that end.

Very truly yours,

A handwritten signature in black ink, appearing to read 'DJR', with a long horizontal line extending to the right.

David J. Robinson

cc. Hon. Justin Hood, Chairman.