



# Liberties and Lockdowns

Illinois COVID-19 restrictions and First Amendment rights.

**AMERICA'S FIGHT AGAINST ITS INVISIBLE OPPONENT, COVID-19, IS ONGOING.** In response to COVID-19, communities, state, and local officials continue to issue, extend, and modify emergency orders to stop the spread. These authorities are exercised in a variety of measures, including mask mandates and stay-at-home orders. These orders, often incorporating the Centers for Disease Control and Prevention (CDC) guidelines, include such terms and phrases as "quarantine," "social distancing," "six feet apart," and "work from home."

Illinois courts and the Seventh Circuit of the U.S. Court of Appeals have slowly established precedent for injunctive relief and how to weigh executive emergency orders responding to the border-crossing, novel virus against First Amendment rights.

This article examines how Illinois' response to COVID-19 has aligned with the majority of U.S. courts when analyzing fact-intensive claims involving freedom of religion, the right to assemble, and freedom of speech during the COVID-19 pandemic.

## Public health emergency orders

While unpopular with some citizens, these public health orders are firmly grounded: The U.S. Constitution entrusts "[t]he safety and the health of the people" to the politically accountable officials of the states "to



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guard and protect.”<sup>1</sup> When those officials “act in areas fraught with medical and scientific uncertainties,” their autonomy “must be especially broad.”<sup>2</sup> A state’s inherent police power to protect public safety and health applies to declarations of states of emergencies by state officials and, through state laws, to declarations of local states of emergencies by local officials.

On March 9, 2020, Illinois Gov. Pritzker signed his first gubernatorial disaster proclamation when he declared all counties in the state as a disaster area in response to the COVID-19 outbreak. The proclamation was redeclared every 30 days thereafter and remained effective as of Jan. 1, 2021.<sup>3</sup> Since then, the governor has signed a series of COVID-19 executive orders, which include stay-at-home orders, face-covering requirements, and limitations on social gatherings. These emergency orders and guidelines have imposed unprecedented limitations on a wide range of personal freedoms—including those enumerated in the First Amendment—during work hours, public gatherings, and public protests. The First Amendment, as applied to states through the 14th Amendment, commands that Congress “make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>4</sup>

## Injunctive relief

Parties have challenged COVID-19-related

orders and sought to enjoin the orders or stay them pending appeal. Injunctions are a greater judicial intrusion into the responsibilities of elected officials than a stay, as the U.S. Supreme Court reiterated in its recent denial of an application seeking to enjoin the enforcement of California Gov. Newsom’s Executive Order: “Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction . . . grants judicial intervention that has been withheld by lower courts.”<sup>5</sup> In his concurring opinion, Chief Justice Roberts explained that “this power is used where ‘the legal rights at issue are indisputably clear’ and, even then, ‘sparingly and only in the most critical and exigent circumstances.’”<sup>6</sup> Therefore, where limits are not exceeded by state officials, they should not be subject to second guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people.<sup>7</sup> On that same day, in *Elim Romanian Pentecostal Church v. Pritzker*, the Supreme Court accounted for Illinois’ evolving executive orders and denied the churches’ application for injunctive relief without prejudice after the

1. *South Bay United Pentecostal Church v. Newsom*, 590 U.S. \_\_\_\_ (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

2. *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

3. See Ill. Dept. of Pub. Health, Gov. Pritzker’s Exec. Orders and Rules, [dph.illinois.gov/covid19/governor-pritzkers-executive-orders-and-rules](https://dph.illinois.gov/covid19/governor-pritzkers-executive-orders-and-rules) (last visited Jan. 1, 2021); see also 20 ILCS 3305/7.

4. National Archives, The Bill of Rights: A Transcription, [archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i](https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i).

5. *South Bay United Pentecostal Church*, 590 U.S. at \_\_\_\_.

6. *Id.*

7. *Id.*

## TAKEAWAYS >>

- Proving claims that the freedom of speech or the right to assemble have been illegally restrained by states during public health crises such as the COVID-19 pandemic will be difficult when states are broadly applying recommended public health practices.
- The U.S. Supreme Court has, for more than 100 years, more often than not deferred to states and their exercises of emergency powers during public health crises.
- The existence of accessible communication technology makes it particularly challenging for plaintiffs to argue that their freedom of speech and expression are being infringed upon as a result of restrictive emergency orders.

## 2021 Lincoln Award Legal Writing Contest Winners

The 2021 first place winner of the Lincoln Award Legal Writing Contest is Deanna Shahnam, Rockville, Maryland, who wrote “Liberties and Lockdowns: Illinois COVID-19 Restrictions and First Amendment Rights.” Her article appears in this issue of the Illinois Bar Journal.

Tied for second place is Arlo Walsman, Chicago, who wrote “The Incomplete Impeachment Conundrum: A Guide to Impeaching Witnesses With Prior Inconsistent Statements;” and Daniel C. Katzman, Belleville, who wrote “Are E-Signatures E-nough Under Illinois Law?”

Third place goes to Amber Hopkins Reed, Ottawa, for her manuscript, “If It’s Not Their Spit, You Must Acquit: Challenging Familial DNA Database Searches After *Carpenter*.”

The first-, second-, and third-place winners received \$2,000, \$1,000, and \$500 respectively. They were among 23 manuscripts submitted in the 2021 contest. Some entries will appear in upcoming issues of the Illinois Bar Journal.

On behalf of the contest’s sponsors—the Illinois Bar Journal Editorial Board and the ISBA Young Lawyers Division—the Illinois Bar Journal would like to thank all contest participants. Details about the 2022 Lincoln Award Legal Writing Contest will be announced this spring.

TIME, PLACE, AND MANNER RESTRICTIONS ARE SUBJECT TO INTERMEDIATE SCRUTINY AND PERMISSIBLE SO LONG AS THEY ARE CONTENT-NEUTRAL, NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST, AND LEAVE OPEN AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION OF THE INFORMATION.

Illinois Department of Public Health issued new guidance.<sup>8</sup> On a case-by-case basis, the question remains how far officials' actions to protect the safety and health of the people during a nationwide public health crisis can compromise civil liberties guaranteed in the Constitution. On this issue, the success of temporary restraining orders (TROs) and preliminary injunctions has relied upon the merits during the pandemic.

### Freedom of religion

The First Amendment begins with protection against laws affecting freedom of religion or impinging on the free exercise of religion. The Court addressed free exercise in *Reynolds v. United States* and concluded that, while freedom of religious belief is absolute, freedom of religious practice is subject to restraint.<sup>9</sup> Furthermore, "[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease or ... to ill health or death."<sup>10</sup>

Courts reviewing a free-exercise claim in the context of COVID-19 restrictions use a two-step analysis to address 1) whether the prohibition is neutral and generally applicable, and if so, 2) whether the prohibition is properly tailored under the appropriate level of scrutiny.<sup>11</sup> In *Church of Lukumi Babalu Aye v. City of Hialeah*, the Court held that generally applicable, neutrally applied laws that incidentally restrict religious exercise need only be rational and legitimate



### 2021 Lincoln Award Legal Writing Contest Judges

**Judge John J. O'Gara Jr.** is a circuit judge in St. Clair County and past-president of the Illinois Association of Criminal Defense Lawyers and the St. Clair County Bar Association. He is currently president of the East St. Louis Bar Association and serves on the Illinois Judges Association Board of Directors and the Board of Directors for Catholic Urban Programs. He is a member of the ISBA's Bench and Bar Section Council, the Law Related Education for the Public Committee, and the ISBA Assembly.



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**Jennifer L. Ernest** is the managing partner of Larsen, Edlund, and Ernest, PC in Park Ridge and Algonquin. She focuses on residential real estate, estate planning, and domestic relations. She is also an experienced mediator.



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exercises of governmental power.<sup>12</sup> A law is considered neutral if it prohibits conduct without regard to whether that conduct is religiously motivated.<sup>13</sup> As to general applicability, all laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.<sup>14</sup> A law is underinclusive—and fails to satisfy the generally applicable standard—when it does not prohibit secular activity that endangers the same interests to a similar or greater degree than the prohibited religious conduct.<sup>15</sup>

For more than 100 years, the Court has also recognized a more deferential approach to constitutional analysis when courts evaluate the exercise of emergency state action during a public health crisis. In *Jacobson v. Massachusetts*, the Court denied a challenge against a board of health regulation requiring adults to get

a smallpox vaccination in the City of Cambridge in response to a smallpox epidemic.<sup>16</sup> The *Jacobson* court found that, in a matter concerning the safety and health of the people of a state, the Court "should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law" (e.g., officials cannot use public

8. *Elim Romanian Pentecostal Church v. Pritzker*, 140 S.Ct. 2823 (2020).

9. *Reynolds v. United States*, 98 U.S. 145 (1879).

10. *Ass'n of Jewish Camp Operators v. Cuomo*, No. 1:20-CV-0687 (GTS/DJS), 2020 U.S. Dist. LEXIS 117765, at \*21 (N.D.N.Y. July 6, 2020) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

11. *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 U.S. Dist. LEXIS 88883, at \*24 (May 20, 2020).

12. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

13. *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JBSCY, 2020 U.S. Dist. LEXIS 68415, at \*72 (Apr. 17, 2020) (citing *Hines v. S.C. Department of Corrections*, 148 F.2d 353, 357 (4th Cir. 1998)).

14. *Church of Lukumi Babalu Aye*, 508 U.S. at 542.

15. *Id.* at 543.

16. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).



health emergencies as a pretext for infringing individual liberties).<sup>17</sup>

Once courts decide that the order is neutral and generally applicable, they apply the applicable standard of review—strict scrutiny or a less rigorous standard as employed under *Jacobson*—when reviewing the challengers’ likelihood to succeed on the merits of a free-exercise claim. Under the *Jacobson* framework, to overturn state and local emergency orders in response to COVID-19, plaintiffs must show that the orders have “no real or substantial relation” to protecting public health, or the orders are “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”<sup>18</sup>

Since the Court’s denial of injunctive relief in *Elim Romanian Pentecostal Church v. Pritzker*, the Seventh Circuit held that the two churches, who argued that an executive order limiting the size of public assemblies (including religious services) to 10 people violates their rights under the Free Exercise Clause of the First Amendment, did not show a sufficient likelihood of success on the merits to warrant the extraordinary relief of an injunction pending appeal.<sup>19</sup> The Seventh Circuit relied on *Employment Division v. Smith*, which held that the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally applicable laws.<sup>20</sup> Thus, the court concluded that Pritzker’s order was neutral and generally applicable, responded to an extraordinary public health emergency, and did not discriminate against religious activities nor set out to disadvantage religious services compared with secular events.<sup>21</sup>

Contrary to the Seventh Circuit, Illinois relies on the *Jacobson* framework. In one of its earliest COVID-19-related cases, *Cassell v. Snyders*, an Illinois federal district court denied a motion to enter a TRO and a preliminary injunction against Pritzker’s stay-at-home orders.<sup>22</sup> The court found that the order in question adopted neutral principles that satisfied *Jacobson*’s reasonableness standard, the current crisis implicated *Jacobson*, and the order advanced the government’s interest in protecting

Illinoisans from the pandemic.<sup>23</sup> The court distinguished *Lukumi* to the facts of the case and noted that nothing in the record suggested that the governor had a history of animus toward religion or religious people, the order proscribed secular and religious conduct alike, and plaintiffs did not establish that the order suppressed much more religious conduct than was necessary to slow the spread of COVID-19.<sup>24</sup> Illinois joins the majority of the courts in its application and reliance on *Jacobson* during the pandemic.

In *Antietam Battlefield KOA v. Hogan*, a district court in Maryland denied the plaintiffs’ motion for a TRO enjoining enforcement of Gov. Hogan’s COVID-19 executive orders because the plaintiffs did not demonstrate a likelihood of success on their freedom of exercise claim, among others.<sup>25</sup> The *Hogan* court found that Hogan’s order was neutral and generally applicable because it prohibited conduct without regard to whether that conduct was religiously motivated and plaintiffs failed to show that the exempted secular activities were comparable to religious services. Applying the *Jacobson* framework, the court held that the prohibition against gatherings of more than 10 people was *rationaly related to the legitimate government interest* of reducing the spread of COVID-19: The prohibition limits contact between individuals, which is how the virus spreads.<sup>26</sup>

A minority of courts have relied on *Lukumi*. Under the *Lukumi* framework, a law that fails to satisfy the requirements of neutrality and general applicability is subject to strict scrutiny, which requires that the restriction is necessary to achieve a compelling governmental interest using the least restrictive means possible.<sup>27</sup> Slowing the spread of COVID-19, a known cause of death for which no vaccine or cure existed at the time, serves indisputably as a compelling state interest. However, a minority of courts have held that the state orders in question were neither narrowly tailored nor amounted to the least restrictive means, and therefore concluded that the laws in question, seeking to curtail the spread of the virus,

**SLOWING THE SPREAD OF COVID-19, A KNOWN CAUSE OF DEATH FOR WHICH NO VACCINE OR CURE EXISTED AT THE TIME, SERVES INDISPUTABLY AS A COMPELLING STATE INTEREST. HOWEVER, A MINORITY OF COURTS HAVE HELD THAT THE STATE ORDERS IN QUESTION WERE NEITHER NARROWLY TAILORED NOR AMOUNTED TO THE LEAST RESTRICTIVE MEANS, AND THEREFORE CONCLUDED THAT THE LAWS IN QUESTION SEEKING TO CURTAIL THE SPREAD OF THE VIRUS WERE UNCONSTITUTIONAL.**

were unconstitutional.<sup>28</sup>

### Assembly and speech

Under the pressure of great dangers, constitutional rights may be reasonably restricted as the safety of the general public may demand.<sup>29</sup> That settled rule allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home.<sup>30</sup> However, government officials cannot simply prohibit public assembly under their own discretion but can impose content-neutral restrictions

17. *Id.* at 39.

18. *Id.* at 26.

19. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

20. *Id.*

21. *Id.*

22. *Cassell v. Snyders*, No. 20 C 50153 (N.D. Ill. May 3, 2020).

23. *Id.*

24. *Id.*

25. *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 U.S. Dist. LEXIS 88883 (May 20, 2020).

26. *Id.* at \*24.

27. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

28. *Roberts v. Neace*, 2020 U.S. App. LEXIS 14933, at \*5 (6th Cir. 2020) (invalidating “an exception-ridden” order applying strict scrutiny).

29. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal citations omitted).

30. *Id.*

## ISBA RESOURCES >>

- Lesley Gool, *Executive Orders and Their Challenges During COVID-19*, Law Related Education (Nov. 2020), [law.isba.org/2KxSixW](http://law.isba.org/2KxSixW).
- ISBA Free On-Demand CLE, *Employment Claims Arising Out of a COVID-19 Pandemic and Remedy Buffet for Civil Rights Cases* (recorded May 2020), [law.isba.org/2Ksbb5w](http://law.isba.org/2Ksbb5w).
- ISBA COVID-19 Information and Resources, [isba.org/covid19](http://isba.org/covid19).

on the time, place, and manner of peaceful assembly and speech provided that constitutional safeguards are met.<sup>31</sup> Time, place, and manner restrictions are subject to intermediate scrutiny and permissible so long as they are content-neutral, narrowly tailored to serve a substantial governmental interest, and leave open ample alternative channels for communication of the information.<sup>32</sup>

In *Illinois Republican Party v. Pritzker*, plaintiffs argued that Pritzker's COVID-19 executive order, which exempted the free exercise of religion from a mandatory 50-person cap on gatherings, was a content-based restriction on their gatherings for political speech, and the governor's failure to enforce the order against Black Lives Matter protestors created another exemption violating their First Amendment rights.<sup>33</sup> Under the *Jacobson* standard and traditional First Amendment analysis, the court denied the plaintiffs' motion for preliminary injunction and concluded that the plaintiffs had a less-than-negligible chance of prevailing on their constitutional claims.<sup>34</sup> The court reasoned that the order minimized the risk of virus transmission by limiting gathering sizes, encouraging religious organizations

to limit indoor services to 50 people, and implementing other public health measures.<sup>35</sup> Furthermore, the court said that the enforcement of the order against protestors did not create a *de facto* exemption unless plaintiffs could show that the governor has enforced it differently against protestors based on the content of their message—which they could not.<sup>36</sup>

It is harder for plaintiffs to challenge COVID-19 emergency orders based solely on the freedom of speech and expression due to the many ways people can communicate using today's technology. For example, in deciding whether Pennsylvania Gov. Wolf's COVID-19-related order was content neutral, the Pennsylvania Supreme Court addressed 1) whether the order served a substantial governmental interest and did not unreasonably limit alternative avenues of communication and 2) whether Wolf issued the order "because of disagreement with the message it conveys."<sup>37</sup> The court upheld Wolf's executive order responding to the rapid spread of COVID-19 and held that "[t]here is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial government interest."<sup>38</sup> The court found

that Wolf's orders provided alternative avenues of expression and did not "in any respect prohibit operations by telephone, video-conferencing, or on-line through websites and otherwise. In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of First Amendment rights."<sup>39</sup> That assertion seems increasingly evident as the coronavirus has forced millions of individuals and their organizations to work and interact remotely, making alternative avenues of expression such as Zoom and Microsoft Teams ubiquitous.

## Conclusion

State and local officials have exerted unprecedented executive action during the COVID-19 pandemic. Although vigorously challenged by various constituents asserting their individual rights under the Constitution, a majority of courts, including Illinois, have deferred to officials' powers to protect the health and safety of the people under a state of emergency and have found the governmental interest to stop the spread of a novel and deadly virus in the community a compelling one. But as long as shutdown orders and social distancing mandates remain best practice for fighting pandemics, the battle over public safety versus individual rights will continue. **EB**

31. *Id.*

32. *Id.*

33. *Illinois Republican Party v. Pritzker*, No. 20 C 3489, 2020 U.S. Dist. LEXIS 116383, at \*1-2 (N.D. Ill.), *aff'd*, No. 20-2175, 2020 U.S. Dist. LEXIS 28118 (7th Cir. Sept. 3, 2020).

34. *Id.* at \*12.

35. *Id.* at \*11.

36. *Id.* at \*13.

37. *Friends of Devito v. Wolf*, 227 A.3d 872 at \*902 (Pa. Apr. 13, 2020) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

38. *Id.* at \*902-03.

39. *Id.* (citing *Packingham v. North Carolina*, 582 U.S. \_\_\_ (2017)).