IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ILLINOIS REPUBLICAN PARTY, *et al.*, Plaintiffs, v. J.B. PRITZKER, in his official capacity as Governor of the State of Illinois, Defendant.	No. 1:20-cv-3489 **Reply in Support of Motion for Preliminary Relief**

Thus far, cases nationwide challenging COVID-19 restrictions on gatherings have turned on arguments about whether churches and retailers are apples-to-oranges comparisons or not. *Elim Romanian Pentecostal Church v. Pritzker*, 2020 U.S. App. LEXIS 18862, at *13 (7th Cir. June 16, 2020); *S. Bay United Pentecostal Church v. Newsom,* 207 L.Ed.2d 154, 155 (U.S. 2020) (Roberts, C.J., concurring) (rejecting the comparison) *with id.* at 155-56 (Kavanaugh, J., dissenting); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020); *First Pentecostal Church v. City of Holly Springs*, 959 F.3d 669, 671 (5th Cir. 2020) (Willet, J., concurring) (accepting it).

This is the first case to clearly compare apples to apples: churches to political parties, Black Lives Matter rallies to Republican rallies. But the Governor's response treats this case just like all the others, and this foundational error infects his entire brief.

Jacobson, *Elim Church*, and the Roberts concurrence (as adopted by *Elim Church*) would be the correct framework to assess an assertion of inherent rights in a pandemic. *See* Def.'s Memo. at 5-7. But the Plaintiffs do not assert an inherent right to gather, only a right to equal treatment when others are permitted to gather.

The Order would be a neutral time, place, and manner restriction on conduct if it restricted all gatherings. *See* Def.'s Memo. at 7-13. But it does not: the Governor has granted an exemption *de jure* to churches and *ex cathedra* to Black Lives Matter protests.[1] Treatment, in other words, turns on the content of your speech, not the nature of your conduct. If 100 people gathered in a rented high school gymnasium on Sunday morning to hear a sermon on faith, that is permitted. If the same 100 people gathered in the same rented gymnasium on Sunday night to hear a speech on free enterprise, that is banned. The key difference between the two is the content of the speech given at the gathering, not the time, place, or manner of gathering.

With that said, several specific points in reply.

First, the Governor suggests that Zoom meetings are a sufficient substitute, pointing to several instances where Plaintiffs have used videoconferencing to continue their work. Def.'s Memo. at 9. This misses the point. If churches were only allowed online services, and Black Lives Matter protestors were only permitted to make and share viral videos on social media, this would be fair. But they're not. They're allowed to gather in person. Plaintiffs aren't. Moreover, that the Plaintiffs

[1] This is also why Plaintiffs did not file this case in March 2020, when the ban on gatherings of 10 or more was first issued, but only in June 2020, shortly after the Governor's May 29, 2020, executive order first extending an exemption to churches.

have done the best that they can under the circumstances is hardly a warrant to deny them their desired format. Anyone who has seen a picture of LBJ whipping votes, watched a video of President Clinton working a rope line, or felt the energy pulsing thru the crowd at a rally featuring President Obama or President Trump knows that politics happens best in person.

Second, the Governor asserts that churches are special under the First Amendment. Def.'s Memo. at 11-12. They are.[2] So are political parties. Both exist at the very heart of the First Amendment, *see Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring), "on the highest rung of the hierarchy of First Amendment values." *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

The Governor mentions in this regard the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012), which recognized a First Amendment right of religious organizations to select their own leaders regardless of federal anti-discrimination statutes. The U.S. Supreme Court has similarly decided that political parties enjoy a First Amendment right to select their own standard-bearers and convention delegates regardless of state statutes. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214

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[2] The Governor says that churches' special standing derives from their "separate and unique safeguards against governmental action against free exercise." They certainly do enjoy those safeguards. But, as the cases cited throughout by the Governor all hold, the right to free exercise does not include an inherent right to gather in-person for worship services during a pandemic. So the Governor's exemption is an act of executive grace, not a response to a First Amendment mandate to treat churches differently.

(1989); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981); *Cousins*, 419 U.S. at 490. That churches and political parties are both protected in the choice of their leaders by the First Amendment indicates their similar status as First Amendment institutions.

Third, the Governor asserts that his participation in the Black Lives Matter protest was a "personal decision," and not "state action." Def.'s Memo. at 12-13. First, this assertion is belied by the fact that his government office included it on his official public schedule for June 8, 2020. *See* Exhibit 1. Second, the Governor's own comments about the march cast his participation as part of his official duties: "It's important [for the protestors] to have the governor stand with them on issues that are important to the state and progress that we need to make." Rick Pearson, "Republicans rip Pritzker as social distancing hypocrite as he joins protests; he hits back on Trump conspiracy tweet," CHI. TRIB. (June 9, 2020).[3] Third, the Governor recognized the protestors' "First Amendment right" to gather in an official press release and in remarks at official press conferences. Cole Lauterbach, "Pritzker stresses National Guard in Chicago is only 'support' for police," TheCenterSquare.com (May 31, 2020)[4]; "Pritzker Activates Additional National Guard Members, ISP Troopers to Aid Local Law Enforcement," NBC-5 (June 1,

[3] Available online at https://www.chicagotribune.com/politics/ct-coronavirus-pritzker-trump-protests-george-floyd-congress-20200609-bifn4ekl6bewdhxtujmdplkfpa-story.html.

[4] Available online at thecentersquare.com/illinois/pritzker-stresses-national-guard-in-chicago-is-only-support-for-police/article_8590229a-a38e-11ea-955c-f3536e04f622.html.

2020);[5] "National Guard will be in Chicago to support police, protect First Amendment rights, mayor says," Fox-32 (June 1, 2020).[6] The message across all these platforms is clear: the Governor — as Governor — recognizes the protests as protected First Amendment activity and so will not enforce the Order against them.

Fourth, the Governor notes that several "Reopen Illinois" rallies have not been broken up by police enforcement, and that Plaintiffs have made "no allegations or evidence that they have attempted any gatherings that have been thwarted by state authorities." Def.'s Memo. at 13. Plaintiffs have not attempted any gatherings because to do so would be illegal under the Order, and they are entitled to bring this challenge on the assumption that laws on the books will be enforced. *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 591 (7th Cir. 2012). Moreover, while some rallies have been permitted, others have been ended by law enforcement. *See, e.g.,* "Police Break Up Rally Protesting Stay-At-Home Order At Buckingham Fountain," CBS-2 (May 25, 2020).[7] When Chicago police ended a political protest a few weeks ago, Mayor Lori Lightfoot tweeted, "[W]hile we respect 1st amendment rights, this gathering posed an unacceptable health risk and was dispersed. No matter where in the city you live, no one is exempt from

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[5] Available online at https://www.nbcchicago.com/news/local/pritzker-activates-additional-national-guard-members-isp-troopers-to-aid-local-law-enforcement/2282229/.

[6] Available online at https://www.fox32chicago.com/news/national-guard-will-be-in-chicago-to-support-police-protect-first-amendment-rights-mayor-says.

[7] Available online at https://chicago.cbslocal.com/2020/05/25/police-break-up-rally-protesting-stay-at-home-order-at-buckingham-fountain/.

@GovPritzker's stay-at-home order." *Id*. Plaintiffs want to follow the law without risking arrest based on the discretion of the Governor or Mayor.

Fifth, the Governor asserts that the ban applies equally to the Democratic Party as to the Republican Party, and thus is viewpoint neutral. Def.'s Memo. at 13, 14. This again misses the point. The issue isn't viewpoint discrimination, but content discrimination; the Governor permits some content (religious) but prohibits other content (political). *Reed v. Town of Gilbert* charts the way. There, "[t]he Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination." 576 U.S. 155, 169 (2015). Here the Order singles out speakers on specific subject matters — religious speech, Black Lives Matter speech — and extends to them more favorable treatment than political speech. That is content-based discrimination, and it cannot stand.

Finally, the Plaintiffs respectfully direct the Court's attention to Judge Ho's concurring opinion last week in *Spell v. Edwards*, No. 20-30358, 2020 U.S. App. LEXIS 19148, at *11-15 (5th Cir. June 18, 2020). It is an apt coda to this case: "Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are 'open' and which remain 'closed.' . . . The First Amendment does not allow our leaders to decide which rights to honor and which to

ignore. In law, as in life, what's good for the goose is good for the gander. In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution."

Dated: June 25, 2020

Respectfully Submitted,

ILLINOIS REPUBLICAN PARTY

WILL COUNTY REPUBLICAN CENTRAL COMMITTEE

SCHAUMBURG TOWNSHIP REPUBLICAN ORGANIZATION

NORTHWEST SIDE GOP CLUB

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