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

ILLINOIS REPUBLICAN PARTY, WILL COUNTY REPUBLICAN CENTRAL COMMITTEE, SCHAUMBURG TOWNSHIP REPUBLICAN ORGANIZATION, and NORTHWEST SIDE GOP CLUB, Plaintiffs, v. GOVERNOR JB PRITZKER, Defendant.	No. 20-C-03489 Honorable Sara L. Ellis

THE GOVERNOR'S OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Dated: June 24, 2020

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INTRODUCTION

In response to the COVID-19 pandemic, many states and countries have imposed numerical limits on public gatherings. They have done so because of the compelling governmental interest in slowing the virus's spread. Limiting gatherings has been necessary because "congregate functions," where people linger "close to one another for extended periods" to speak or sing, "increase the chance that persons with COVID-19 may transmit the virus through the droplets that speech or song inevitably produce." *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 3249062, at *5 (7th Cir. June 16, 2020). The Supreme Court, the Seventh Circuit, and this court have afforded deference to executive actions limiting public gatherings in keeping with long-standing precedent applicable to public health emergencies, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (Roberts, C.J., concurring); *Elim*, 2020 WL 3249062, at *5; *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *6–7 (N.D. Ill. May 3, 2020).

Through successive executive orders, the Governor of Illinois has generally limited gatherings to 10 people or fewer since March 20, 2020. Nearly three months later, on June 15, 2020, Plaintiffs, state and local units of the Republican Party, filed this lawsuit in which they ask this Court to disregard the cases affirming the validity of this public health measure. They claim two events have converted Illinois's 10-person limitation on gatherings into a First Amendment violation: first, on May 29, the Governor decided to recommend, rather than require, that houses of worship conduct indoor services with 10 people or fewer; and second, on June 8, the Governor, in his personal capacity, attended an outdoor protest against police brutality and systemic racism with more than 10 people. Neither of these facts, together or in isolation, somehow transform the 10-person limitation from a valid public health measure into impermissible viewpoint

discrimination, as Plaintiffs contend. Plaintiffs' erroneous logic regarding the treatment of houses of worship would require invalidation of numerous exemptions for religious conduct under Illinois and federal law, such as the Illinois Religious Freedom Restoration Act and its federal counterpart. Indeed, the First Amendment itself, which expressly elevates the "free exercise" of religion, would fail Plaintiffs' ill-conceived test. That is not and cannot be the law.

Plaintiffs are also wrong that the Governor's personal participation in a protest converts the 10-person limitation into viewpoint discrimination. Plaintiffs allege no facts indicating that the Governor has selectively enforced the 10-person limitation in a way that constitutes state-sanctioned viewpoint discrimination. To the contrary: during the peak of the pandemic, the Governor did not prohibit or sanction the "Reopen Illinois" protests against his own "stay at home" orders that violated the 10-person limit on state property. And, of course, the 10-person limitation applies to rallies, fundraisers, and other activities for any political party, including the Governor's.

The numerical limitation on gatherings was and is valid under *Jacobson* both before and after the two events upon which Plaintiffs base their lawsuit. Furthermore, the numerical limitation on gatherings regulates conduct, not speech, meaning that it is no more subject to First Amendment scrutiny than a building occupancy limit. At most, it is subject to and easily passes intermediate scrutiny as a reasonable time, place, and manner regulation; indeed, Plaintiffs' own conduct demonstrates that numerous avenues remain available for their political speech. Plaintiffs' request for injunctive relief fares no better than those that have come before it, because the numerical limitation on gatherings complies with the First Amendment during this ongoing pandemic.

BACKGROUND

The COVID-19 pandemic continues to inflict a disastrous toll in Illinois and across the world. As of June 24, nearly 6,800 people in Illinois had died of the disease, with over 138,000

positive tests confirmed.[1] Illinois ranks fourth among states in the highest number of cases nationwide.[2] Although the daily numbers of new COVID-19 cases and deaths in Illinois have decreased in the previous month compared to the months before,[3] the crisis is far from over. Infection numbers are rising again nationwide, portending a second wave this fall.[4] Several states that undertook relatively early reopening measures have seen spikes in COVID-19 cases and deaths in recent weeks.[5] But despite the relative progress Illinois has achieved through its cautious approach, there is still no vaccine or treatment available for COVID-19,[6] or evidence that recovered individuals are immune to a second infection.[7]

The relatively positive trends in Illinois are the hard-earned product of social-distancing measures. On March 20, 2020, the Governor issued an order requiring individuals to refrain from gathering in "any number of people occurring outside a single household or living unit," and noted

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[1] *Coronavirus (COVID-19) Response*, STATE OF ILLINOIS, https://coronavirus.illinois.gov/s/ (updated June 24, 2020). This court may take judicial notice of this information and other external sources cited in this brief, as they are public records "not subject to reasonable dispute." *Ennenga v. Starns*, 677 F.3d 766, 774 (7th Cir. 2012); *see* Fed. R. Evid. 201(b)(2) (permitting judicial notice of facts "whose accuracy cannot reasonably be questioned"); *see also* Fed. R. Evid. 902(6) (official documents and newspapers are self-authenticating); Fed. R. Evid. 101(b)(6) (rules on printed information apply to electronic sources of information).

[2] *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://nyti.ms/2Vet0Yo (updated June 24, 2020).

[3] *See COVID-19 Statistics*, ILL. DEP'T OF PUB. HEALTH, https://www.dph.illinois.gov/covid19/covid19-statistics (updated June 24, 2020) (see graphs "Confirmed Cases Change All Time" and "Deaths Change All Time").

[4] Sheryl Gay Stolberg & Noah Weiland, *Fauci, Citing 'Disturbing Surge,' Tells Congress the Virus Is Not Under Control*, N.Y. TIMES (June 23, 2020), https://nyti.ms/3fUSMst.

[5] *See 6 States Report Record-High Jumps in Coronavirus Cases As Reopening Plans Weighed*, CBS NEWS (June 17, 2020), https://cbsn.ws/30ZJN4T; Julie Bosman & Mitch Smith, *Coronavirus Cases Spike Across Sun Belt as Economy Lurches into Motion*, N.Y. TIMES (June 18, 2020), https://nyti.ms/2ASujoH.

[6] Dr. Caitlin Rivers, *Coronavirus Is Not Done with Us Until We Have a Vaccine for COVID-19: Q&A*, USA TODAY (June 17, 2020), https://bit.ly/2UYc48b. One study recently found that Illinois's stay-at-home orders have produced significant decreases in the rate of COVID-19 as compared to Iowa, which did not issue a stay-at-home order. Wei Lyu & George L. Wehby, *Comparison of Estimated Rates of Coronavirus Disease 2019 (COVID-19) in Border Counties in Iowa Without a Stay-at-Home Order and Border Counties in Illinois with a Stay-at-Home Order*, JAMA NETWORK OPEN (May 15, 2020), https://bit.ly/3fKK3ZO.

[7] *See* Apoorva Mandavilli, *You May Have Antibodies After Coronavirus Infection. But Not for Long*, N.Y. TIMES (June 18, 2020), https://nyti.ms/2YTOAlZ.

Centers for Disease Control guidance in prohibiting "any gathering of more than ten people."[8] The Governor issued subsequent orders on April 1 and April 30 continuing these and other requirements of the March 20 order.[9]

On May 29, 2020, the Governor issued Executive Order 2020-38 ("EO38"), which relies on epidemiological modeling showing that social distancing measures had proven, and continued to be, critical in inhibiting the spread of the virus and ensuring that Illinois was equipped to treat infected individuals. Ex. A at 3. Accordingly, EO38 includes requirements to wear face coverings in public places, stay six feet apart from others, and not to gather in groups of more than 10 people. *Id.* at 4–5. In addition to exemptions for emergency and governmental functions, EO38 states that it "does not limit the free exercise of religion," and instead encourages religious organizations to follow specific state guidance and provide services online, in a drive-in format, or outdoors, and to limit indoor services to 10 people. *Id.* at 8. Businesses and nonprofits are encouraged (though not required) to facilitate remote work from home and offices must "consider implementing capacity limits where the physical space does not allow for social distancing." *Id.* at 5–6. Thus, while EO38 limited gatherings outside the home to 10 people or fewer, businesses and nonprofits are encouraged but not required to facilitate remote work and in-office capacity limits.

LEGAL STANDARD

Injunctive relief 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 (1997) (internal quotations omitted). The plaintiff "must establish that it has some likelihood of success on the merits; that it has no adequate remedy at law; [and] that without

[8] Ill. Exec. Order No. 2020-10 (Mar. 20, 2020), https://bit.ly/2Bi8QWd.

[9] Ill. Exec. Order No. 2020-18 (Apr. 1, 2020), https://bit.ly/2YO90wM; Ill. Exec. Order No. 2020-32 (Apr. 30, 2020), https://bit.ly/2YhpNsS.

relief it will suffer irreparable harm." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019) (internal quotations omitted).[10] If the plaintiff satisfies all three requirements, then the court must weigh the harm that the plaintiffs will incur without an injunction against the harm to the defendant if one is entered, and "consider whether an injunction is in the public interest." *Id.* (internal quotations omitted). This analysis is done on a "sliding scale"—if the plaintiffs are less likely to win on the merits, the balance of harms must weigh more heavily in their favor, and vice versa. *Id.* (internal quotations omitted).

ARGUMENT

Plaintiffs' request for injunctive relief fails because they have no reasonable likelihood of success on the merits of their claim that the numerical limitation on gatherings violates the First Amendment.[11] Under *Jacobson* and traditional First Amendment analysis, the 10-person limitation is a valid public health measure in the midst of an ongoing pandemic. In addition, the balance of harms tips decidedly against granting injunctive relief. Enjoining the Governor from imposing a numerical limit on gatherings at this point—even as that strategy has helped mitigate the harm from the pandemic in Illinois—would be akin to "'throwing away your umbrella in a rainstorm because you are not getting wet.'" *Cassell*, 2020 WL 2112374, at *7 (citation omitted).

I. Plaintiffs have no likelihood of success on the merits.

A. EO38 is valid under *Jacobson*'s standard for public health emergencies.

Although Plaintiffs do not discuss it, the proper framework for evaluating governmental action in a health crisis derives from *Jacobson*, 197 U.S. 11. In *Jacobson*, the Supreme Court

[10] Although Plaintiffs contend that the Court need not consider factors other than likelihood of success "[b]ecause this case arises in the First Amendment context," ECF 3-1 at 5, this is incorrect; they cite a case saying only that once likelihood of success *is established* will courts "normally favor[ ] granting preliminary injunctive relief." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). As explained later, Plaintiffs have not established that likelihood.

[11] Plaintiffs' motion is not based on Count III, which is nonetheless barred from federal court because it seeks to compel a state official to follow state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984).

recognized that a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. In such situations, "the safety of the general public may demand" regulations that restrict individual rights. *Id.* at 29. And "[t]he mode or manner in which those results are to be accomplished is within the discretion of the state." *Id.* at 25.

Such actions will be upheld if they (1) have a "real or substantial relation" to public health and safety and (2) do not constitute "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. Unless the executive exercises its authority in "an arbitrary, unreasonable manner" or "go[es] so far beyond what was reasonably required for the safety of the public," courts will not "usurp the functions of another branch of government." *Id.* at 28. *See also S. Bay United Pentecostal Church*, 2020 WL 2813056, at *1 (Roberts, C.J., concurring) (under *Jacobson*, when "officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad'"); *Elim*, 2020 WL 3249062, at *5 (stating "[w]e line up with Chief Justice Roberts" in his concurrence from *South Bay* and citing *Jacobson*). Many other courts have invoked *Jacobson* while rejecting constitutional challenges against COVID-19 social-distancing orders.[12]

The *Jacobson* standard applies here as well. *See Cassell*, 2020 WL 2112374, at *6 (applying *Jacobson* to the Governor's 10-person limitation on gatherings); *Elim*, 2020 WL 3249062, at *5 (same). Given the harsh reality of the COVID-19 crisis, there is no serious dispute that EO38 has "a real or substantial relation to the protection of the public health and the public

[12] *See, e.g.*, *McCarthy v. Cuomo*, No. 20-cv-2124, 2020 WL 3286530, at *3 (E.D.N.Y. June 18, 2020); *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, No. 2:20-CV-210, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020); *Antietam Battlefield KOA v. Hogan*, Civ. Action No. CCB-20-1130, 2020 WL 2556496, at *17 (D. Md. May 20, 2020); *Amato v. Elicker*, No. 3:20-cv-464, 2020 WL 2542788, at *11 (D. Conn. May 19, 2020); *Open Our Oregon v. Brown*, No. 6:20-cv-773, 2020 WL 2542861, at *2 (D. Or. May 19, 2020); *Geller v. De Blasio*, No. 20cv3566, 2020 WL 2520711, at *5 (S.D.N.Y. May 18, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-156, 2020 WL 2310913, at *7 (D. Me. May 9, 2020); *McGhee v. City of Flagstaff*, No. CV-20-8081, 2020 WL 2308479, at *5 (D. Ariz. May 8, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-832, 2020 WL 2121111, at *4–5 (E.D. Cal. May 5, 2020); *Gish v. Newsom*, No. EDCV 20-755, 2020 WL 1979970, at *4–5 (C.D. Cal. Apr. 23, 2020).

safety." *Jacobson*, 197 U.S. at 31. In addition, EO38 did not "beyond all question" produce "a plain, palpable invasion of rights secured by the fundamental law" under the First and Fourteenth amendments. *Id.* As explained below, the order regulates conduct, not speech; permits Plaintiffs to exercise free speech; and contains reasonable, non-arbitrary measures intended to both protect public health and preserve avenues for First Amendment activities. As when Chief Justice Roberts observed in applying *Jacobson* to restrictions on religious gatherings in California, "[t]he notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable." *S. Bay*, 2020 WL 2813056.

B. EO38 is valid under traditional First Amendment analysis.

As Plaintiffs have demonstrated through their own recent expressive activities, EO38 does not bar speech. And although Plaintiffs contend that EO38 makes distinctions between groups of speakers, it does not. Instead, the order appropriately regulates *conduct* of various types of institutions, a distinction Plaintiffs fail to address. Further, even if EO38 incidentally regulates the expression of ideas, it is a reasonable "time, place, and manner" regulation that complies with the First Amendment. Under *Jacobson* or else under traditional First Amendment analysis, Plaintiffs are unlikely to show EO38 is invalid.

1. The numerical limitation on gatherings regulates conduct, not speech, and does not violate the First Amendment.

Conduct is entitled to protection under the First Amendment only if it is "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). "To fall within the scope of [First Amendment] doctrine, the conduct in question must comprehensively communicate its own message without additional speech." *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017). The Supreme Court has long rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct

intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Accordingly, "[i]n most cases, the government may regulate conduct without regard to the First Amendment because most conduct carries no expressive meaning of First Amendment significance." *Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000).

Plaintiffs identify no specific instance of actual *expression* that they fear is prohibited under EO38. Rather, they point to *types of events*, such as a candidate rally and a July 4 celebration, that they claim are "barred" by EO38. ECF 3-1 at 3. Yet here, as in *Rumsfeld*, "the expressive component" of Plaintiffs' preferred events "is not created by the conduct itself but by the speech that accompanies it." 547 U.S. at 66. The mere act of gathering in a group of more than 10 people at a particular time and place signals nothing unless accompanied by other speech or expressive conduct. The gatherings Plaintiffs have identified—such as fundraisers and July 4 cookouts with political speeches—convey a message only through their accompanying speech. Additional tasks Plaintiffs identify are similarly non-expressive without communicative content (*e.g.*, community events, press conferences), while others are also conceivably free from the 10-person limit on gathering (door-to-door canvassing, strategy meetings). *See* ECF 3-1 at 2–3. These facts are strong indicators that the cap on gatherings in EO38 regulates only conduct, not speech.

The 10-person limitation on gatherings is no different for First Amendment purposes than a building occupancy limit imposed by a municipal fire code. Political rallies and conventions have always had to abide by occupancy limits, even though overflow crowds (or lack thereof) may signal strong support (or the reverse) for a particular message or messenger. The act of gathering in a confined space, which increases the risk of casualties in the event of a fire, is what is being regulated, not the message being delivered at the gathering. But no one could plausibly contend that a building occupancy limit triggers First Amendment scrutiny, even if applied to a political

convention. The same reasoning applies here. Yes, the numerical limit in EO38 is stricter, but only because the risk of COVID-19 transmission increases with each additional person present and the imminence and probability of harm and death from COVID-19 are far higher.

Plaintiffs have also demonstrated their ability to communicate their message to the public despite the numerical limit on in-person gatherings. Although Northwest Side GOP Club chairman Matt Podgorski declared that his committee's "meetings have been canceled," ECF 3-4 at 1–2, the group's Facebook page indicates it hosted virtual club meetings in April and May, with a video of at least one meeting viewable online.[13] Plaintiff Schaumburg Township Republican Organization announced it was opening its offices on May 14–16 and May 20–23 to collect signatures for a political candidate.[14] Members of the Will County Republican Central Committee held a press conference on June 5; a video posted to the group's Facebook page shows six people standing shoulder-to-shoulder addressing reporters.[15] And the Illinois Republican Party hosted part of its convention online two days before filing this lawsuit, inviting the public to "gather[ ] with Republicans all across Illinois!" and join over a dozen training and discussion events.[16]

Plaintiffs include a single sentence in their brief that could be responsive to the distinction between conduct and speech, arguing that political speech "is most effective and persuasive when delivered in person." ECF 3-1 at 12. But the First Amendment does not guarantee a right to the "most effective and persuasive" mode of speech in the midst of a pandemic, and Plaintiffs appear

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[13] Northwest Side GOP Club, *Events*, FACEBOOK, https://bit.ly/3djmeqf (last visited June 24, 2020); Northwest Side GOP Club, *Live Video*, FACEBOOK (May 14, 2020), https://bit.ly/2NfNJq7.

[14] *Reminder—Urgent—We Still Need Your Help*, SCHAUMBURG TWP. REPUBLICAN ORG., https://bit.ly/317eTHZ (last visited June 24, 2020); *We're Heading to the Home Stretch But Still Need Your Help*, SCHAUMBURG TWP. REPUBLICAN ORG., https://bit.ly/2YYu3wm (last visited June 24, 2020).

[15] Will County Republican Central Committee, *Live Video*, FACEBOOK (June 5, 2020), https://bit.ly/2AMPuZC.

[16] *ILGOP 2020 State Convention*, ILLINOIS REPUBLICAN PARTY, https://illinois.gop/convention2020/; *2020 Illinois Republican State Virtual Convention—Schedule of Events*, ILLINOIS REPUBLICAN PARTY, https://bit.ly/2AXwszt (both sites last visited June 24, 2020).

to acknowledge that they can still "deliver[ ]" speech of their choice.[17] *Id.* Because EO 38 regulates the conduct of gathering in close quarters to limit the spread of COVID-19, and does not limit the content of Plaintiffs' speech, it does not violate the First Amendment.

2. The numerical limitation on gatherings is a reasonable, content-neutral time, place, and manner regulation.

Even if EO38 affects the expression of ideas, it does not violate the right to free speech. The order prohibits "[a]ny gathering of more than ten people . . . unless exempted by this Executive Order." Ex. A at 5. Although the First Amendment prohibits the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (internal quotations omitted), the government may impose a reasonable time, place, and manner restriction on protected speech or assembly as long as the restriction is (1) content-neutral, (2) "narrowly tailored to serve a legitimate governmental objective," and (3) "leave[s] open ample channels of alternative communication." *CLUB v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989)). EO38 meets these requirements.

First, "[t]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Plaintiffs point to no portion of EO38 that signals disagreement with Plaintiffs; indeed, political organizations are not mentioned in the order. Rather, Plaintiffs contend EO38 is not content-neutral because it exempts

[17] Plaintiffs' citations on this point do not support their argument, either, as both concern physical buffer zones around health care facilities providing abortions. In one, the Court observes that in-person conversations between those inside and outside buffer zones are less effective, while the other is a dissenting opinion by a lone justice arguing that personal conversations with a woman prior to an abortion are irreplaceable. *McCullen v. Coakley*, 573 U.S. 464, 489–90 (2014); *Hill v. Colorado*, 530 U.S. 703, 780 (2000) (Kennedy, J., dissenting). Neither addresses social distancing requirements in a pandemic where physical proximity poses a public health risk.

"free exercise of religion." Ex. A at 8. However, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Milestone v. City of Monroe*, 665 F.3d 774, 783 (7th Cir. 2011) (quoting *Ward*, 491 U.S. at 791). Addressing a similar order in North Carolina that included an exemption for religious gatherings, a district court recently found that the order "seeks to prevent the spread of COVID-19, a purpose unrelated to speech; therefore, it is content neutral." *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218, 2020 WL 3051207, at *5, 13 (E.D.N.C. June 8, 2020) (citing *Ward*, 491 U.S. at 791). The numerical limitation on gatherings in EO38 is plainly targeted at curtailing the spread of COVID-19, not limiting any message or messenger. It is therefore content-neutral.

As for the other requirements, Plaintiffs concede that EO38 serves a "compelling interest." ECF 3-1 at 11. However, they contend that EO38 is not narrowly drawn because political parties and houses of worship are treated differently despite being "entities of similar character." *Id.* at 12; *see also* ECF No. 1 ¶ 1. This is incorrect. Religious organizations cannot engage in political activity, unlike political parties.[18] Furthermore, while the First Amendment provides speech protections to all entities, it gives religious organizations separate and unique safeguards against governmental action against free exercise. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts" such as "assembling with others for a worship service." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). Accepting Plaintiffs' logic, which treats the religious exemption in EO38 as impermissible viewpoint discrimination, would nullify religious exemptions that can be found throughout state and federal law. These exemptions also permit conduct by religious organizations that is prohibited for non-religious organizations. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v.*

[18] *See* CONG. RESEARCH SERV., RL34447, CHURCHES AND CAMPAIGN ACTIVITY (Oct. 2012), https://bit.ly/3euTyMp.

EEOC, 565 U.S. 171, 188 (2012) (recognizing "ministerial exception" to Title VII's prohibition on religious discrimination in employment); 775 ILCS 35/15 (exemption from generally applicable government regulations that "substantially burden a person's exercise of religion").

EO38 permissibly respects the unique status of religious organizations by exempting free exercise of religion, but at the same time encourages those organizations to take specific measures to prevent the spread of COVID-19.[19] Ex. A at 8. In another recent case concerning a distancing order with an exemption for religious services, the court found that exemption reinforced the order's narrow tailoring. *Amato*, 2020 WL 2542788, at *11. Furthermore, Plaintiffs fail to address other narrowing aspects of EO38, including its differing guidelines for other industries as well as its exemptions for emergency and governmental functions. Ex. A at 5–9. EO38 is part of a phased reopening that adapts to circumstances; the Governor has issued a new social-distancing order each month since March, and has already released guidelines for expanded gatherings currently set to take effect on Friday, which will permit gatherings of up to fifty people with social distancing.[20] And as described above, EO38 leaves open ample alternative channels for communication in addition to in-person meetings of 10 or fewer, which Plaintiffs have already used in their virtual convention, online meetings, open office days, and outdoor press conferences.

Finally, Plaintiffs erroneously assert that the Governor "publicly announc[ed] he would not enforce the order against" those attending recent police brutality protests. ECF 3-1 at 1. This is false: there has been no such announcement by the Governor. Indeed, Plaintiffs do not point to any state action to allow any recent protest in the wake of the death of George Floyd, such as issuance

[19] At least three of the Plaintiffs publicly sought or celebrated this exemption. *See End the Shutdown on Faith*, ILL. REPUBLICAN PARTY, https://bit.ly/2zZfgJu (last visited June 24, 2020); Northwest Side GOP Club, *End the Shutdown on Faith*, FACEBOOK (May 24, 2020), https://bit.ly/3hVoNTg; Will County Republican Central Committee, *Have You Heard the Good News!*, FACEBOOK (May 28, 2020), https://bit.ly/37PhCas.

[20] Tina Sfondeles, *Pritzker Releases Safety Guidance for Phase 4 with Reopening of Indoor Restaurant Services, Gyms, Museums*, CHI. SUN-TIMES (June 24, 2020), https://bit.ly/317QRwn.

of state permits. The Governor has also not prohibited any public demonstration on the basis of its content. For example, multiple "Reopen Illinois" protests took place in May on state property without interference by state authorities—despite the fact that the protests were against the Governor's policies, involved attacks on the Governor himself, and featured a member of the State Assembly from Plaintiffs' party as a speaker.[21] Although Plaintiffs make much of the Governor's attendance at a protest march, ECF 3-1 at 4, 9–11, 12–13, they have sued him in his official capacity; his personal decision to attend an outdoor protest march is not state action.

At bottom, Plaintiffs raise the specter of selective enforcement, but provide no allegations or evidence that they have attempted any gatherings that have been thwarted by state authorities. Nor do they contend that the Governor's political party, or any other political party, is receiving preferential exemption from the gatherings limitation. Plaintiffs' objection to the Governor's personal participation in a protest march may be a political talking point, but it does not transform a public health measure that has been widely upheld into a First Amendment violation. *See, e.g.*, *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327, 2020 WL 1905586, at *39–41 (D.N.M. Apr. 17, 2020) (denying injunctive relief from numerical limitation on gatherings due to COVID-19); *Binford v. Sununu*, No. 217-2020-CV-00152, at *16–19 (N.H. Super. Ct. March 25, 2020) (same).[22] Plaintiffs have no likelihood of success and their request for injunctive relief fails.

C. Plaintiffs are unlikely to succeed on their Fourteenth Amendment claim.

Plaintiffs acknowledge that their Fourteenth Amendment Equal Protection claim rises or falls with their First Amendment claim without any independent analysis. *See* ECF 3-1 at 13; *see*

[21] *See, e.g.*, *Hundreds of Protesters Crowd State Capitol*, WAND 17 NEWS (May 16, 2020), https://bit.ly/2VgzG8h; Mike Miletich, *Hundreds Join Capitol Protest to Reopen Illinois*, WEEK 25 NEWS (May 1, 2020), https://week.com/2020/05/01/hundreds-join-capitol-protest-to-reopen-illinois/.

[22] The *Binford* opinion is available at https://bit.ly/2BxBZwK (last visited June 24, 2020).

also ECF 1, ¶¶ 22–24. As demonstrated, Plaintiffs' First Amendment claim has no likelihood of success, and the same is true for their Fourteenth Amendment claim.

II. Plaintiffs cannot demonstrate irreparable harm.

Even if Plaintiffs could show likelihood of success on the merits, they have not shown that they will "*likely* suffer irreparable harm" absent injunctive relief, as is required. *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) (movant must show "more than a mere possibility of harm"). Plaintiffs assert that their current circumstances—holding events of larger than 10 people online and forgoing some larger in-person events—"are particularly dire," given the general election in November. ECF No. 3-1 at 7. But Plaintiffs do not explain why they neglected to challenge any of the Governor's social distancing orders in the previous few months, which also occurred in relative proximity to the November election. Moreover, as non-profit entities, Plaintiffs are permitted to operate offices under EO38 provided that they take public health precautions and consider capacity limits. Ex. A at 6. Plaintiffs fail to address this aspect of EO38, including how it likely permits many of the activities they seek to undertake in their own offices. ECF 3-1 at 3. Further, as described above, Plaintiffs have held several of their events virtually. This places Plaintiffs in the same boat as their rivals, as all political parties and candidates in Illinois must abide by EO38, not just Plaintiffs' own party. Although declarant Tim Schneider asserts that his party's central committee cannot meet under EO38 while "the [Democratic] Speaker can meet with his staff or caucus" because government business is exempted, ECF 3-5, ¶ 14, Plaintiffs may convene in their offices under EO38, as may members of their party who are government officials.

III. The balance of harms weighs decidedly against injunctive relief.

Plaintiffs completely ignore the devastating toll of a pandemic that has ravaged Illinois and is more likely to reach attendees of their own events if EO38 is enjoined. Instead, Plaintiffs recite

rules that harm cannot arise from "enjoining the enforcement of a statute that is probably unconstitutional." ECF 3-1 at 13. Given their failure to address the *Jacobson* standard, Plaintiffs overestimate the power of their constitutional arguments. Plaintiffs also turn a blind eye to a once-in-a-lifetime health crisis. As one court in this district recently found, "the balance of hardships tilts markedly" in favor of social-distancing measures; deciding otherwise "would pose serious risks to public health. ... 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." *Cassell*, 2020 WL 2112374, at *15; *see also Elim Rom. Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at *6 (N.D. Ill. May 13, 2020) ("The harm to plaintiffs if the Order is enforced pales in comparison to the dangers to society if it is not."). Plaintiffs' desire to switch from virtual to in-person events does not compare favorably to the risk of further spread of COVID-19 and any subsequent loss of life that could result from enjoining EO38. Large, in-person gatherings, particularly indoors, can easily result in further spread of the disease. Illinois' measures are working, but COVID-19 remains in waiting. Plaintiffs' request to upend the Governor's lawful and effective public health measures should be denied.[23]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

[23] Plaintiffs' motion also should be denied for violating Rule 7(b)(1)(C) because neither their motion nor their brief specifies any particular relief they would like beyond granting the motion itself. This lack of specificity contravenes the purpose of Rule 7, which is "to provide notice to the court and the opposing party." *Elustra v. Mineo*, 595 F.3d 699, 708 (7th Cir. 2010). Accordingly, Plaintiffs' motion should be denied. *See Asberry v. Relevante*, No. 1:16-cv-1741, 2019 WL 3986358, at *2 (E.D. Cal. Aug. 23, 2019) ("Under Rule 7(b)(1)(C) …, a motion must state the relief sought. Because plaintiff has not identified the relief sought, his motion is denied."); *Wilson v. Travelers Ins. Co.*, Civ. Action No. 14-920, 2015 WL 1422569, at *8 (E.D. Pa. Mar. 30, 2015) (noting that under Rule 7(b)(1)(C), it is "not the court's responsibility, to specifically identify the relief sought").

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Respectfully submitted,

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