20-2175

United States Court of Appeals
for the Seventh Circuit

ILLINOIS REPUBLICAN PARTY,
WILL COUNTY REPUBLICAN CENTRAL COMMITTEE,
SCHAUMBURG TOWNSHIP REPUBLICAN ORGANIZATION,
and NORTHWEST SIDE GOP CLUB,

Plaintiffs-Appellants,

v.

J.B. PRITZKER, in his official capacity as Governor of Illinois,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:20-cv-03489
Honorable Sara L. Ellis

APPELLANTS' PRINCIPAL BRIEF AND SHORT APPENDIX

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DISCLOSURE STATEMENT

1. The full name of every party that the undersigned attorney represents in the case: Appellants Illinois Republican Party, Will County Republican Central Committee, Schaumburg Township Republican Organization, and Northwest Side GOP Club.

2. The name of all law firms whose partners or associates have appeared on behalf of the party 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: the Liberty Justice Center.[1]

3. If the party or amicus is a corporation: the Illinois Republican Party is a nonprofit, nonstock corporation registered in the State of Illinois. The other three plaintiffs are unincorporated associations.

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[1] Liberty Justice Center is technically not a law firm, but a legal aid foundation.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the United States Constitution, and pursuant to 28 U.S.C. § 1343, because relief is sought under 42 U.S.C. § 1983. The District Court's reviewed a request for preliminary injunction based on Fed. R. Civ. P. 65. On July 2, 2020, Plaintiffs-Appellants Illinois Republican Party, et al., filed a timely notice of appeal (Short Appendix ("S.A.") 1) of the District Court's July 2, 2020, order and opinion (S.A. 2) denying their request for a preliminary injunction. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Under the free speech clause of the First Amendment, content-based government regulation of speech — that which applies to particular speech because of the topic discussed or the idea or message expressed — is subject to strict scrutiny. The Governor of Illinois's COVID-19 Executive Order is content-based — permitting gatherings over 50 involving religious speech and protests supporting Black Lives Matter, but prohibiting gatherings over 50 involving political speech, including those of Plaintiffs-Appellants — and is, therefore, subject to strict scrutiny. Are Plaintiffs-Appellants entitled to a preliminary injunction allowing them to gather in groups over 50 to engage in political speech?

STATEMENT OF THE CASE

A. Governor Pritzker has pursued an evolving response to COVID-19.

The COVID-19 epidemic is a serious situation that is challenging multiple institutions and systems across our country. In response to this crisis, Illinois Governor J.B. Pritzker has issued a series of executive orders under his emergency powers. The first such order, issued March 13, 2020, banned all gatherings over 1,000.[2] Three days later, a new order lowered the ban on gatherings to 50, including "civic" and "faith-based events."[3] Four days after that, the cap on gatherings was lowered to ten.[4] This third order contained not only a prohibition but a hammer: "This Executive Order may be enforced by State and local law enforcement."[5] There the limit on gatherings stayed until just recently, when on June 26 the state's entry into Phase 4 lifted the cap on gatherings up to 50.[6] There it is expected to remain for quite a while, as the Governor's plan for entry into Phase 5 requires the advent of a vaccine or other medical advance that could take years.[7]

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[2] Executive Order 2020-04, https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-04.aspx.

[3] Executive Order 2020-07, https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-07.aspx.

[4] Executive Order 2020-10, https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx.

[5] *Id.* at Sec. 17.

[6] Executive Order 2020-44, https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-43.aspx.

[7] "What Is Phase 5 and When Might We Get There?," NBC-5 (June 24, 2020), https://www.nbcchicago.com/news/local/what-is-phase-5-and-when-might-we-get-there/2294882/; Nsikan Akpan, "Why a coronavirus vaccine could take way longer than a year," NAT. GEO. (April 2020),

As weeks dragged into months of people frozen in their homes, a public outcry developed for a restoration of basic First Amendment rights, leading to litigation that eventually wound its way to this Court, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), and the U.S. Supreme Court, *S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020). Under pressure from lawsuits, church leaders, and the general public[8], on April 30, Governor Pritzker, for the first time, issued an executive order that said "to engage in the free exercise of religion" was an "essential activity," as long as the limit of ten was observed.[9] Then on May 13 the Cardinal Archbishop of Chicago announced that the Catholic Church had reached a concordat with the Governor permitting the phased resumption of Masses and other services.[10]

On May 29, the Governor issued Executive Order 38, which continued the ten-person limit on gatherings, but added "free exercise of religion" alongside "emergency functions" and "governmental functions" as the three recognized exemptions to the Order.[11] Religious organizations and houses of worships are "encouraged" to "consult"

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https://www.nationalgeographic.com/science/2020/04/why-coronavirus-vaccine-could-take-way-longer-than-a-year/.

[8] *See, e.g.,* John Kass, "Is Pritzker's coronavirus levee about to break?," CHI. TRIB. (May 21, 2020), https://www.chicagotribune.com/columns/john-kass/ct-coronavirus-illinois-churches-kass-20200521-o2pk6tvcprhwvblo5mvfntuwoa-story.html.

[9] Executive Order 2020032, https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx.

[10] *See* "Letter from Cardinal Cupich," Archdiocese of Chicago (May 13, 2020), https://www.archchicago.org/coronavirus/reopening.

[11] https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-38.aspx.

the "recommended" "guidelines" and "encouraged to take steps" to follow social distancing, but are not required to obey any part of the Order.[12] "What used to be a cap of ten persons became a recommendation. Because this section is an 'exemption,' none of Executive Order 2020-38's rules applies to religious exercise." *Elim Romanian Pentecostal Church*, 962 F.3d at *8.

When Illinois entered Phase 4 on June 26, the cap on gatherings was lifted to 50, and the special exemption for religious gatherings remained in place.[13]

A. Governor Pritzker has explicitly extended special treatment recognizing the First Amendment rights of Black Lives Matter speakers.

On May 25, 2020, George Floyd was killed by a Minneapolis police officer. Communities across the country rose up in righteous indignation, and took to the streets. Governor Pritzker, like many elected officials, faced an unexpected choice: vocally and visibly side with the protestors, even amidst the pandemic; express sympathy but still deploy the police to shut down the protests in the name of public health; or do nothing, and forbear enforcement of the ban on gatherings as a tactical decision to prevent situations from spinning out of control. In an official press release, in official press conferences, and in an official event arranged by his official office, the Governor chose to recognize the protests as legitimate, protected "First Amendment" activity.[14]

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[12] *Id*. at 4.a.

[13] Executive Order 44, https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-44.aspx.

[14] Cole Lauterbach, "Pritzker stresses National Guard in Chicago is only 'support' for police," TheCenterSquare.com (May 31, 2020),

In fact, the Governor indicated his respect for the choice protestors were making to speak up and assemble even during a pandemic, saying: "It's not lost on me that the peaceful protesters who have been out the last few days weighed the risks of the pandemic against coming out to speak the truth. I see you. I hear you. I understand why you made the choice you made."[15] When he joined in one of the protests himself, he defended doing so amidst a pandemic by saying, "Especially at this moment, it's important to express ourselves. It's important to stand up for people's First Amendment rights, and I'm talking about the peaceful protesters across the state. It's important to have the governor stand with them . . ."[16]

Not all gatherings or protests have received such gubernatorial patronage. According to one news report, "From March 25 to May 1, Chicago police reported nearly 6,000 dispersals, 18 arrests and 13 citations. Large gatherings or events may

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thecentersquare.com/illinois/pritzker-stresses-national-guard-in-chicago-is-only-support-for-police/article_8590229a-a38e-11ea-955c-f3536e04f622.html; Mike Nolan, "Gov. Pritzker marches with hundreds in Matteson, demanding racial equality," CHI. TRIB. (June 9, 2020), https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-matteson-march-pritzker-st-0610-20200609-dig6tag4bzezhnoftw537hxxde-story.html; "Pritzker Activates Additional National Guard Members, ISP Troopers to Aid Local Law Enforcement," NBC-5 (June 1, 2020), https://www.nbcchicago.com/news/local/pritzker-activates-additional-national-guard-members-isp-troopers-to-aid-local-law-enforcement/2282229/.

[15] "National Guard will be in Chicago to support police, protect First Amendment rights, mayor says," Fox-32 (June 1, 2020), https://www.fox32chicago.com/news/national-guard-will-be-in-chicago-to-support-police-protect-first-amendment-rights-mayor-says.

[16] 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), https://www.chicagotribune.com/politics/ct-coronavirus-pritzker-trump-protests-george-floyd-congress-20200609-bifn4ekl6bewdhxtujmdplkfpa-story.html.

result in city fines of up to $5,000."[17] Specific to political protests, though some "Reopen Illinois" protests have been permitted to proceed while police stood by, others have been busted up by law enforcement.[18] When Chicago police ended a "Reopen" protest several 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 @GovPritzker's stay-at-home order."[19]

B. Applicants are political party organizations seeking to gather in-person in the months leading up to November's presidential election.

Plaintiffs are Republican Party organizations that wish to exercise their First Amendment rights to speak about politics in the months leading up to the presidential election this coming November.[20] They seek to elect Republican candidates to local, state, and federal office and to advocate for their policy platform.

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[17] Judy Wang, "Chicago police break up weekend crowds defying Illinois stay-at-home order," WGN-9 (May 4, 2020), https://wgntv.com/news/chicago-news/chicago-police-break-up-weekend-crowds-defying-illinois-stay-at-home-order/.

[18] *Compare* Sam Charles and Neal Earley, "Reopen Illinois rally draws hundreds to Loop, Springfield," CHI. SUN-TIMES (May 1, 2020), https://chicago.suntimes.com/politics/2020/5/1/21244518/reopen-illinois-rally-thompson-center-coronavirus-covid-19-stay-at-home-order, *with* "Police Break Up Rally Protesting Stay-At-Home Order At Buckingham Fountain," CBS-2 (May 25, 2020), https://chicago.cbslocal.com/2020/05/25/police-break-up-rally-protesting-stay-at-home-order-at-buckingham-fountain/.

[19] @ChicagosMayor, https://twitter.com/chicagosmayor/status/1265005179201601536?lang=en (May 25, 2020).

[20] All the following facts are taken from declarations entered in the District Court by the chairmen of the four plaintiff Republican organizations. *See* Docket 3-2 (Declaration of Joe Folisi, Schaumburg Township Republican Organization); 3-3 (Declaration of George Pearson, Will County Republican Central Committee); 3-4

In-person gatherings are foundational to the Party's activities. The Party's grassroots activists meet for caucuses and conventions to conduct the business of the party, elect officers, adopt platforms, and allocate resources. The Party's candidates speak, work a rope-line, and interact with voters through rallies and community events, which also draw substantial media coverage that permits the Party to amplify its message without paying for advertising. The Party raises funds through receptions, luncheons, and house parties. The Party reaches undecided voters and turns out its own voters through phone banks, door-to-door canvassing, and other assemblies of volunteers. Many of these activities are not possible or not as effective when done through online alternatives. Many can be undertaken with proper precautions in place, such as encouraging masks, spacing seating or tables at least 6 feet apart, frequent cleaning, and providing hand sanitizer.

The months leading up to a presidential election are the busiest and most important for the Party. During this time, it organizes its staff, volunteers, voters, and donors to maximum effect. It undertakes numerous meetings and public events, including rallies, bus tours, training sessions, phone banks, fundraising receptions, press conferences, headquarters ribbon-cuttings and meet-and-greet coffees. In-person interaction is vital to ensuring the full effectiveness of these events.

Though many of these activities are organized at the state level, just as many if not more happen through the spontaneous organizing and energy of grassroots

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(Declaration of Matt Podgorski, Northwest Side GOP Club); 3-5 (Declaration of Timothy Schneider, Illinois Republican Party). None of the facts asserted in these affidavits were disputed below.

Republicans through their local units. The Northwest Side GOP Club, for instance, is anxious to host a rally for the Republican candidate for Cook County State's Attorney.

None of these activities are permitted under the Governor's policy because they do not fit in one of his carve-outs. All of them are subject to police enforcement. And the only substantive difference between them and a religious service or a Black Lives Matter march is the content of the speech delivered at the event.

C. This hearing is this Court's first opportunity to address the merits.

In order to secure equal treatment under law, the Plaintiffs filed a complaint against the Governor in the Northern District of Illinois on June 15, 2020 (No. 1:20-cv-03489, Docket 1). They simultaneously filed a motion for a temporary restraining order and a preliminary injunction (Docket 3). The District Court held a hearing on the motion on June 29, and issued an opinion and order denying the motion on July 2 (Docket 16). The District Court subsequently denied a motion for an injunction pending appeal (Docket 18), for the same reasons as it denied the preliminary relief.

The Plaintiffs immediately filed a notice of interlocutory appeal to the U.S. Court of Appeals for the Seventh Circuit (S.A. 1). They also filed an emergency motion for an injunction pending appeal (No. 20-2175, App. Docket 4). The next day, Friday, July 3, a motions panel issued a brief order denying the request (S.A. 23). That night, the Plaintiffs-Appellants filed an emergency application for an injunction pending appeal with the circuit justice of the United States Supreme Court (S.Ct. 19A1068, Docket 1). That application was denied without comment on July 4 (S.Ct. Docket 2). Due to the timeliness of the issues present in the case, Plaintiffs-Appellants

requested an expedited briefing schedule, which the Defendant did not oppose and which this Court granted. Now this case comes before this Court for a decision on the merits of the District Court's denial of Plaintiffs' motion for a preliminary injunction.

The decision of the motions panel is not binding on this Court in deciding whether Plaintiffs are entitled to a preliminary injunction. *United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008) (*citing Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991)) ("Often a motions panel must decide on a scanty record, and its ruling is not entitled to the weight of a decision made after plenary submission."). *Accord Pierce by Guardian v. Pemiscot Memorial Health Systems*, 657 Fed.Appx. 613, n.4 (8th Cir. 2016) (same).

SUMMARY OF ARGUMENT

"The First Amendment is a kind of Equal Protection Clause for ideas." *Barr v. Am. Ass'n of Political Consultants*, No. 19-631 (U.S. July 6, 2020) (plurality), slip op., at 20 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting)). Right now Governor Pritzker is violating this fundamental guarantee of equal treatment for ideas, extending his favor to religious and Black Lives Matter speakers while denying it to all others. This content-based discrimination is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Assuming the government has a compelling interest in fighting the COVID-19 pandemic, its method of granting exemptions is not narrowly tailored because it treats speakers differently based solely on the content of their speech, which finds no justification in science or law. For this reason, the ban on gatherings as applied to Plaintiffs must fail.

ARGUMENT

I. The Governor's Executive Order is content-based, and therefore subject to strict scrutiny, because it provides exemptions to its general prohibition of gatherings of people based solely on the content of the speech at those gatherings.

Under the executive order, 100 people may go to a church, sit inside in rows of chairs, shake sanitized hands at the passing of the peace, and listen to a 20-minute homily about faith, sandwiched between announcements and the singing of hymns. But the same 100 people may not go to a hotel ballroom, sit inside in rows of chairs, shake sanitized hands before the event begins, and listen to a 20-minute speech about politics, sandwiched between announcements and the singing of God Bless America. The only difference between permitted and proscribed speech is the content.

Similarly, the Governor has conferred his protection when hundreds of people gather in a parking lot, loft homemade posters, listen to speakers on racial injustice and police brutality, and wave banners. But the same-sized crowd risks arrest if they gather in a farm field, loft homemade posters, listen to speakers talk about free enterprise, and wave Trump 2020 signs. Again, the only difference between permitted and proscribed speech is the content the Governor has given his imprimatur.

For houses of worship, the difference in treatment is right there in the text of the Order. Exec. Order 44, at 4.a. For Black Lives Matter protestors, the difference is equally obvious: the Governor has publicly pledged his protection to the peaceful protestors gathered against police brutality and racial injustice.[21] The District Court

[21] *See Soos v. Cuomo*, 1:20-cv-00651-GLS-DJS (N.D.N.Y. June 26, 2020), Docket 35, at 32 ("[B]y acting as they did [in their public statements praising and encouraging

concluded that the Plaintiffs failed to show that they have been subject to discriminatory enforcement. S.A. at 11–12. If the Plaintiffs held a protest, the Court reasoned, perhaps they too would be exempt from enforcement.

There are four problems with this reasoning. First, and most importantly, it ignores the clear holding of *ACLU v. Alvarez*: in a preenforcement challenge like this, plaintiffs are entitled to assume the law will be enforced against them. 679 F.3d 583, 593–94 (7th Cir. 2012). There is always ambiguity in a preenforcement challenge; a plaintiff could never meet the District Court's test without risking arrest, a gamble the First Amendment does not require. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014). How are Plaintiffs to know the scope of the Governor's *de facto* exemption? He has only made the remarks recognizing the First Amendment rights of protestors in the context of Black Lives Matter; Plaintiffs have no reason to assume his pronouncements would cover them. Moreover, if his exemption indeed does apply to all protests, then how are Plaintiffs to know whether it also covers political speech events that are unlike protests, such as formal business meetings (conventions and caucuses), volunteer training sessions, or fundraising receptions?

Second, if the Governor indeed does not intend to enforce the rule against any political speakers, he need only say so, and this case would be moot. This case could settle tomorrow. Yet he is instead fighting this case, maintaining his right to enforce

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the Black Lives Matter protests even during the pandemic], Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of preferential treatment.").

the rule against the Plaintiffs. The fact he is contesting this case says all the Court needs to know about his intention to stand by his Order.

Third, the Plaintiffs have a "credible threat" of a law enforcement encounter. *See Susan B. Anthony List,* 573 U.S. at 158–59. 6,000 gatherings have been dispersed in Chicago alone, including political protests,[22] and the State Police have threatened criminal charges for "crowds of people gathering" and "flagrant violations."[23]

Fourth and finally, if the Governor has created a *de facto* exemption for all protest speech, this is just another content category that receives special treatment contrary to *Reed v. Town of Gilbert*. As the exemptions multiply in number and expand in scope, they undermine the government's case for its compelling interest, expose the fallacy of narrow tailoring, and vitiate the possibility of surgical severability.

Whether for religious or Black Lives Matter gatherings, then, the difference in treatment depends on the nature of the content delivered at the event. This is not a neutral time, place, and manner restriction like a fire code or a conduct regulation that incidentally burdens speech. S.A. at 13–16 (The District Court correctly rejected this argument from Defendant). *See Barr* (plurality), slip op., at 8 (robocall ban is not

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[22] *See supra* notes 18–21 and accompanying text. The District Court distinguishes these actions because they were undertaken by Chicago municipal police rather than State Police. But they acted pursuant to the Governor's executive order. And the Plaintiffs have every reason to fear enforcement by the State Police acting under the Governor's authority. *See infra* at note 23.

[23] Mike Koziatek, "Plan to violate the stay-at-home order? Here's what Illinois State Police will do," BELLEVILLE NEWS-DEMOCRAT (March 24, 2020), https://www.bnd.com/news/coronavirus/article241467266.html ("For Illinoisans wondering how the shelter-in-place order from Gov. J.B. Pritzker will be enforced, the Illinois State Police on Tuesday announced potential violators can face a six-step process with a criminal charge being the final step.").

simply an economic regulation). Because the difference in treatment is "based on the message the speaker conveys," it is content-based. *Id.* (quoting *Reed,* 576 U.S. at 163). And content-based classifications, whether they favor or disfavor a particular category of speech, are subject to strict scrutiny. *Id.* (quoting *Reed*, 576 U.S. at 170) ("Laws favoring some speakers over others demand strict scrutiny when they legislature's speaker preference reflects a content preference."); *id*. at 9 ("Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech."). Such preferences are "presumptively unconstitutional." *Reed,* 576 U.S. at 163.

The Governor's *de jure* protection for religious speech and his *ex cathedra* pronouncements protecting Black Lives Matter speech reflect content preferences that are presumptively unconstitutional and can only survive if they pass strict scrutiny. This they cannot do.

II. The Governor's restriction on speech involving gatherings of more than 50 people, while permitting unlimited gatherings for religious speech and protests, is not narrowly tailored to serve the interest in preventing the spread of COVID-19.

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. *Compare S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. at 1613 (Roberts, C.J., concurring); *Elim Romanian Pentecostal Church*, 962 F.3d at *13 (rejecting the comparison) *with S. Bay United Pentecostal Church,* 140 S. Ct. at 1615 (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 the comparison).

This is the first case to clearly compare apples to apples: churches to political parties, Black Lives Matter rallies to Republican rallies. This is so because Illinois Governor J.B. Pritzker's policy bans gatherings of 50 or more people, unless you fall in one of his designated carve-outs for religious or Black Lives Matter speech.

A. The Governor may not treat churches differently than political parties; they both exist at the heart of the First Amendment.

The Constitution commands that "entities of similar character" are entitled to similar treatment. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983). Political parties and houses of worship are "entities of similar character" in that they both live at the heart of the First Amendment. Plaintiffs do not ask this Court to make an apples-to-oranges comparison between churches or political parties, on the one hand, and soup kitchens or hardware stores on the other hand. They ask the Court to compare apples-to-apples, between sets of expressive associations that are alike in both constitutional stature and the actual activities undertaken. In fact, courts often list churches and political parties in the same breath as core First Amendment actors. *See, e.g., Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 57 (1st Cir. 1990); *IDK, Inc. v. Cty. of Clark*, 836 F.2d 1185, 1195 (9th Cir. 1988); *Communist Party of U.S. v. United States*, 384 F.2d 957, 963 n.9 (D.C. Cir. 1967).

The District Court said the Governor's exemption for houses of worship met the standard for narrow tailoring because religious exercise enjoys a special status under the First Amendment, because of the free exercise clause. S.A. at 17–18. But the

Seventh Circuit has held that the previous iterations of the Governor's order that did not exempt churches did not violate the free exercise clause. *Elim Church*, 962 F.3d at *16. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring). And the Governor only decided that the Illinois Religious Freedom Act meant he should grant an exemption on April 30, after his ban had already been in place for six weeks and quite obviously prevented churches from gathering. Clearly, then, the exemption now in place is a matter of executive grace, not constitutional command or statutory obligation.

The motions panel's order gives two reasons for treating religious speech differently from political speech.[24] First, the panel says the free exercise clause cannot be mere surplusage; its presence in the First Amendment must do some work. Slip op. at 2. But the work it does is not to give religious speech greater protection than non-religious speech. *Elim Church*, 962 F.3d at *16. Often its work has nothing to do with speech or assembly. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (free exercise clause guarantees freedom for religious organizations when hiring leaders); *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267 (U.S. Jul. 8, 2020) (affirming and applying *Hosanna-Tabor*). In fact, when it comes to religious speech, religious speakers usually rely on the speech clause rather than the free exercise clause because it provides more robust protection. *See, e.g., Reed*, 576 U.S. 155; *Bd. of Airport Comm'rs v. Jews for Jesus*, 482

[24] Orders from a motion panel are not precedent like a published decision on the merits. *United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008) (*citing Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991)).

U.S. 569, 572 (1987). And the Supreme Court has never said that religious speech, because of its religious content, is more protected than other kinds of speech under the free exercise clause. The clause primarily serves to prevent "special disabilities on the basis of religious status," *Espinoza v. Montana*, No. 18-1195 (U.S. June 30, 2020), slip op. at 6, not to require grants of special benefits based on religious status, *see Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) ("the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citations omitted)).

The motions panel goes on to say that though *Elim Church* does not require the Governor to grant an exemption, it also does not prohibit him from doing so anyway if he wishes go beyond the floor set by the free exercise clause. Slip op., at 2. But the free exercise clause is not a grant of powers to government; it is a limit on government powers, and does not insulate government action from constitutional scrutiny. *See Emp't Div.*, 494 U.S. at 877 (listing what the free exercise clause prevents governments from doing). And while the First Amendment may permit some "play in the joints," *Espinoza*, slip op., at 6, as this Court has recognized, "the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012) (*en banc*) (*quoting McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005)). The Governor's order preventing secular speech but exempting religious speech cannot meet the First Amendment's neutrality mandate. Nor can the free exercise clause be

used to show that a restriction on speech that applies to all speech but exempts religious speech is narrowly tailored when such a policy would violate the First Amendment's establishment clause. The motion panel's analysis is contrary to precedent of this Court and the Supreme Court. The free exercise clause is not a basis to justify a government order that prohibits all speech except religious speech.

Here, the lack of narrow tailoring is especially evident because the Governor's order exempts not only religious services, but all religious activity. It covers not only Sunday morning services, but daily Mass, youth group, adult teaching classes, weddings, funerals, retreats, and assemblies of service project volunteers. And it exempts religious activity from not only the ban on gathering, but also the masks mandate and all social distancing requirements. Under strict scrutiny, it cannot be said that the Governor's order is narrowly tailored to prevent the spread of COVID-19 where it exempts any religious speech not only from the number of people that participate in such speech, but from other precautions such as requirements to wear a mask or to distances themselves, while preventing any political gathering over a certain number of people, even if the attendees wear masks and observe other precautions. A "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,'" *Reed*, 576 at 172 (*quoting Republican Party v. White*, 536 U. S. 765, 780 (2002)).

The Governor's order is not narrowly tailored if a thousand worshipers can gather inside any of a dozen reopened megachurches on a Sunday morning,[25] but 51 Republicans meeting for a caucus are a severe public-health threat that must be stopped on pain of arrest. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from restrictions on speech can "diminish the credibility of the government's rationale for restricting speech in the first place" and demonstrate that restrictions are not narrowly tailored); *see also Vanguard Outdoor, LLC v. City of L.A.*, 648 F.3d 737, 742 (9th Cir. 2011) (a restriction on speech can be underinclusive, and therefore invalid, when it has exceptions that undermine and counteract the interest the government claims its restrictions further).

Moreover, speech about politics is the essence of the speech clause just as much as worship services are the essence of the free exercise clause. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters. . . ."); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 405-06 (2011) (Scalia, J., concurring in part) ("The unique protection granted to political speech is grounded in the history of the Speech Clause,

[25] The Orchard (Arlington Heights); New Life Covenant Church (Chicago); Apostolic Church of God (Chicago); New Life Community Church (Chicago); Logos Baptist Assembly (Chicago); Apostolic Faith Church (Chicago); Living Word Christian Center (Forest Park); Crossroads Community Church (Freeport); Village Church (Gurnee); The Chapel (Libertyville); Central (Mt. Vernon); Gracepointe (Naperville); Calvary Church (Naperville); Northwoods (Peoria); Abundant Faith (Springfield); West Side Church (Springfield); Vineyard (Urbana). *See* "Database of Megachurches in the U.S.," Hartford Institute for Religion Research, available online at http://hirr.hartsem.edu/megachurch/database.html (a megachurch is defined as a congregation with sustained average weekend service attendance of 2,000 or more).

which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (citation omitted)). The free exercise clause may do some work, but the work of the free speech clause is most particularly to protect expression like that of political parties. Political parties exist "at the very heart" of the First Amendment. *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring). Numerous Supreme Court cases recognize the unique place that political parties hold in our democratic system, and extend First Amendment protection to their activities as a result. *See, e.g., 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 (1989); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981); *Cousins*, 419 U.S. at 490.[26] And their speech on public issues "belong[s] on the highest rung of the hierarchy of First Amendment values." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). *Especially* during the six months leading up to a presidential election. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs.

[26] As evidence of the special status of religious organizations, the Governor below cited the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012), recognizing a First Amendment right of religious organizations to select their own leaders regardless of federal anti-discrimination statutes. Def.'s Response to Motion for Temporary Relief, Docket 10, at 11–12. 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*, 520 U.S. at 359; *Eu*, 489 U.S. 214; *Democratic Party of U.S.*, 450 U.S. at 124; *Cousins*, 419 U.S. at 490. That churches and political parties are both protected in the choice of their leaders is further proof of their similar status as core First Amendment institutions.

McIntyre's expression . . . "). This "proposition . . . ought to be unassailable: Political speech is the primary object of First Amendment protection." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting).[27]

Nothing inherent in the content of religious or political speech, however, allows the government to prevent one kind of speech to prevent the spread of COVID-19, while allowing the other kind of speech to continue with absolutely no restriction. Such a distinction is not narrowly tailored because there is nothing inherent in the content of religious speech that helps the government stop the spread of COVID-19. And there is nothing inherent in the content of political speech that makes it more likely to fuel the transmission of COVID-19. In short, the exemption does nothing to further the government's interest. Rather, it exists for the governor's political convenience or policy preference. And having chosen to extend it, he must recognize that other similar speakers with similar status under the First Amendment are entitled to similar treatment.

Such a holding will not blow the doors off the ban on gatherings. *Reed* commands only that content categorizations must withstand strict scrutiny, not that they fail

[27] *Accord Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) ("There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, including discussions of candidates." (internal quotations omitted)); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black*, 528 U.S. 343, 365 (2003)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever difference may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.")

automatically. Most activities subject to the ban on gatherings do not inherently involve speech at all, like athletic matches, social gatherings, or sales conventions. And the Court has subjected some kinds of content-based restrictions on speech — like restrictions that apply only to commercial speech, but not non-commercial speech — only to intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("although laws that restrict only commercial speech are content based . . . such restrictions need only withstand intermediate scrutiny." (citation omitted)). Granting Plaintiffs the relief they seek simply requires the Governor to follow constitutional means to achieving his ends. The Governor still has ample tools available to him to prevent the spread of COVID-19 (for instance, pegging the limit to a percentage of the fire marshal's designated capacity for a particular space). What the Governor cannot do, however, is make exceptions to the limit on the number of people who may gather at a time based on the content of the speech of those gatherings.

B. The Governor may not treat political parties differently than Black Lives Matter protestors; they both are speaking in similar gatherings on timely topics of public importance.

While the Governor has written an explicit exemption for houses of worship into his executive order, he subsequently conferred a second explicit exemption by public pronouncement, recognizing the "First Amendment rights" of Black Lives Matter

protestors to gather even during a pandemic.[28] This is truly an apples-to-apples comparison: speech on timely political topics in gatherings like rallies and marches.

It is fundamentally unfair to say Black Lives Matter protestors can engage in political speech they believe is timely and important free from fear of arrest, but Republicans cannot engage in political speech they believe is timely and important without risking criminal charges.

III. *Jacobson* does not grant the Governor carte blanche to discriminate based on the content of a speaker's speech.

Since the COVID-19 pandemic began, courts have struggled with how to reconcile a century-old precedent, *Jacobson v. Massachusetts*, 197 U. S. 11 (1905), with modern tiers-of-scrutiny and other frameworks. Here, two principles, which are really two sides of the same coin, provide the path forward.

First, though an executive may constitutionally suspend the exercise of constitutional rights during a pandemic, *Jacobson*, 197 U.S. at 27–29, it does not follow that he may pick-and-choose who gets exemptions to that suspension based on the content of their speech. *Jacobson* only allows treating dissimilar gatherings differently. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (the governor's order barring church gatherings treated "comparable secular gatherings" the same and treated "only dissimilar activities" differently). As in the balance of harms, *Jacobson* is not such an open-ended warrant of unlimited, unfettered discretion that a court must sit idly by if the Governor permitted Catholics

[28] *See supra* notes 13–15 and accompanying text.

to gather but barred Lutherans from doing so, or that he allowed Democratic rallies but not Republican ones. In fact, at a time when the executive wields the greatest power, courts should be especially vigilant to ensure that power is applied fairly for the good of all, and especially skeptical of exemptions granted only to a chosen few. *Jacobson* grants tremendous power to the executive in a crisis. But that power does not include the right to discriminate on a non-medical basis in the exercise of constitutional rights. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (even during a crisis like World War II, discrimination "solely and explicitly on the basis of race[ ] is objectively unlawful.").

Second, it is important to remember the context in which *Jacobson* arose: universal vaccination to stop the spread of smallpox. The health regulation at issue in that case would have been severely undermined by any exceptions. In fact, the Court dedicates a paragraph to the question of exceptions. Massachusetts' vaccination regulation made "an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, [but] makes no exception in the case of adults in like condition." *Jacobson*, 197 U.S. at 30. The Court upheld this distinction, reasoning, "this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years." *Id*. Though the Court did not use the terminology at the time, we would today call this a question of tailoring. In *Jacobson*, the Court decided that children were sufficiently different from adults to justify an

exception for one category of persons but not the other. Had the Massachusetts statute exempted one group of politically powerful adults, no doubt the Court would have come out differently. Here, there is no compelling reason, medical or otherwise, to treat political speech differently from religious speech, or Republican speech different from Black Lives Matter speech, so the difference in treatment cannot be sustained.

To the extent that *Elim Church* relies on *Jacobson*, 962 F.3d at *15, there is a key factual difference between the situation the Court considered in *Elim Church* and the one present here. In *Elim Church*, the Court considered a previous executive order from a previous time period when the Governor had not yet significantly undermined the government's interest in fighting COVID-19 by handing out exemptions to houses of worship and Black Lives Matter protestors. Here the Court is called on to resolve different questions, based on different arguments and legal theories, concerning differential treatment between truly similar speakers.

IV. The balance of harms should not stop the Court from ending discriminatory treatment of similar speakers.

The District Court and motions panel leaned heavily on the balance of harms in their conclusions, pointing out that more events will lead to more spread of the disease. S.A. at 20–21; S.A. at 24. Both ignore that Applicants have pledged in their affidavits to observe appropriate precautions in the events they hold, including mask-wearing, hand-washing and sanitizing, and social distancing. And both posit a straw-man as the end of all regulations on gatherings, *id.*, and ignore the clear limiting

principle Plaintiffs have offered distinguishing core political speech from entertainment or commercial or other types of speech and non-speech gatherings.

More importantly, based on this logic, if the Governor extended an exemption to Catholics for their services but denied one to Lutherans, the Lutherans would not succeed in challenging the distinction because the balance of harms would favor the Governor, because any injunction protecting the Lutherans from this discrimination would expand the opportunities for the virus to spread. This cannot be the law. Both the District Court and the motions panel ignore the fact that it is the Governor's exemption of religious speech and protest speech that has undermined his compelling interest in preventing the spread of COVID-19. *Reed*, 576 U.S. at 172.

In *Reed*, the Supreme Court found that the "Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs." *Id*. Similarly, the Governor has offered no reason to believe that political speech poses a greater threat to the spread of COVID-19 than do religious or protest speech. The District Court and the motions panel both err because they assume that allowing any more exceptions to the Governor's order would undermine the prevention of the spread of COVID-19, when the Governor has already undermined that purpose by allowing the exception in the first place. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488–89 (1995). This reasoning gives the Governor a free pass to discriminate based on whatever classifications he wishes without any possibility of judicial intervention, because any preliminary injunction will inevitably expand the number of events taking place during the pandemic.

The Seventh Circuit should join the Sixth Circuit in its conclusion that events that follow "the same risk-minimizing precautions as similar . . . activities" permit no greater harm to others than the Governor already allows, and "treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock [constitutional] guarantees." *Roberts*, 958 F.3d at 416.

CONCLUSION

Judge Ho's concurring opinion in *Spell v. Edwards*, No. 20-30358, 2020 U.S. App. LEXIS 19148, at *11–15 (5th Cir. June 18, 2020) 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."

The District Court's decision denying the preliminary injunction should be reversed.

Dated: July 13, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 7,034 words in 12-point proportionately spaced Century Schoolbook font.

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel R. Suhr
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Counsel of Record for Appellants

REQUIRED SHORT APPENDIX

Contents

Certificate

Pursuant to Circuit Rule 30(d), I hereby certify that this short appendix includes all the materials required by Circuit Rules 30(a) and (b).

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

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

ILLINOIS REPUBLICAN PARTY, *et al.*, Plaintiffs, v. J.B. PRITZKER, as Governor, Defendant.	**No. 1:20-cv-03489** **Judge Sara L. Ellis** **NOTICE OF INTERLOCUTORY APPEAL**

Notice is hereby given that the Illinois Republican Party, Will County Republican Central Committee, Schaumburg Township Republican Organization, and Northwest Side GOP Club, Plaintiffs in the above-captioned case, hereby enter an interlocutory appeal to the United States Court of Appeals for the Seventh Circuit of the Decision and Order denying a preliminary injunction entered in this case on July 2, 2020 (Docket 15 & 16). *See* 28 U.S.C. § 1292(a)(i) (granting appellate jurisdiction over interlocutory orders granting or denying injunctions).

Dated: July 2, 2020

Respectfully Submitted,

ILLINOIS REPUBLICAN PARTY, *ET AL.*

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UNITED STATES DISTRICT COURT
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. JB PRITZKER, in his official capacity as Governor of the State of Illinois, Defendant.	)	No. 20 C 3489 Judge Sara L. Ellis

OPINION AND ORDER

In response to the ongoing COVID-19 pandemic, Defendant JB Pritzker, Governor of Illinois, has issued a series of executive orders including Executive Order 2020-43 ("Order"), at issue here.[1] The Order prohibits gatherings greater than fifty people but exempts the free exercise of religion from this limit. Doc. 12 at 3, 6.[2] Plaintiffs Illinois Republican Party, Will County Republican Central Committee, Schaumburg Township Republican Organization, and Northwest Side GOP Club challenge this exemption as violating their rights under the First and Fourteenth Amendments. Plaintiffs allege that by exempting the free exercise of religion from the general gathering limit, the Governor has created an unconstitutional content-based restriction on speech. Plaintiffs also claim that by not enforcing the Order against protestors

[1] Just prior to the hearing in this case, the Governor issued the Executive Order 2020-43on June 26, 2020, which supersedes all previous Covid-19 Executive Orders. The prior Executive Order, in operation at the time of filing of the lawsuit, was EO 2020-38. The significant difference between the two orders is that EO 2020-38 limited public gatherings to ten persons while EO 2020-43increases that number to fifty. Both orders provide the same exemption to religious gatherings, which is basis for Plaintiffs' complaint. Because the operative order is EO 2020-43, the Court will refer to that Order throughout this Opinion.
[2] The Court uses the internal pagination for the Order.

following the death of George Floyd, the Governor has created another exception. Plaintiffs filed a complaint and a motion for a temporary restraining order ("TRO") and preliminary injunction in this Court on June 15, 2020 [3] because they want to hold political party events larger than fifty people, including a picnic on July 4th. Plaintiffs seek a declaration stating that treating political party gatherings differently than religious gatherings violates the First and Fourteenth Amendments. Plaintiffs also ask the Court to enjoin the Governor from enforcing the Order against political parties. Because Plaintiffs' likelihood of success on the merits is less than negligible and the balance of harms weighs heavily against Plaintiffs, the Court denies their motion [3].

BACKGROUND

The world is currently facing a major global pandemic – one of the most significant challenges our society has faced in a century. There is no cure, vaccine, or effective treatment for COVID-19. As of June 30, more than 126,739 Americans have died due to the virus,[3] including approximately 6,923 Illinois residents. [4] In Illinois, there are more than 143,185 confirmed cases.[5] Despite efforts to slow the spread of COVID-19, many states are experiencing a rise in new cases. Medical experts agree that to stop the spread of COVID-19, people should practice social distancing and wear face coverings when near other people outside their homes. Federal, state, and local governments have enacted measures to reduce the spread of this highly

[3] *Coronavirus Disease 2019 cases in the U.S.*, Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

[4] *Coronavirus Disease 2019 (COVID-19) in Illinois*, Illinois Department of Public Health, http://www.dph.illinois.gov/covid19.

[5] *See id.*

contagious and easily transferable virus while remaining sensitive to economic concerns and citizens' desire to resume certain activities.

In Illinois, following stay-at-home orders, the Governor developed a multi-stage plan to "safely and conscientiously resume activities that were paused as COVID-19 cases rose exponentially and threatened to overwhelm [the] healthcare system." Doc. 10-1 at 5. On May 29, 2020, the Governor issued an Order related to this plan. The Order provides that "[a]ny gathering of more than ten people is prohibited unless exempted by this Executive Order." *Id.* at 6. The Order exempts free exercise of religion, emergency functions, and governmental functions. Relevant here, with respect to free exercise of religion, the Order states that it:

> [D]oes not limit the free exercise of religion. To protect the health and safety of faith leaders, staff, congregants and visitors, religious organizations and houses of worship are encouraged to consult and follow the recommended practices and guidelines from the Illinois Department of Public Health. As set forth in the IDPH guidelines, the safest practices for religious organizations at this time are to provide services online, in a drive-in format, or outdoors (and consistent with social distancing requirements and guidance regarding wearing face coverings), and to limit indoor services to 10 people. Religious organizations are encouraged to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures.

Id. at 9. The Governor issued the most recent executive order, EO 2020-43, on June 26, 2020. That order increases the gathering limit to fifty people but retains the exemption for free exercise of religion. *See* Doc. 12 at 3, 6.

Plaintiffs allege that by merely "encourag[ing]" religious organizations and houses of worship to consult the IDPH guidelines, the Order treats religious speech differently. Plaintiffs contend that the Illinois Republican Party and its local and regional affiliates typically gather in groups greater than ten people for formal business meetings, informal strategy meetings, and other events. Plaintiffs believe there is particular time pressure to conduct meetings and events

in the five months leading up to the 2020 general election. Plaintiffs allege that their "effectiveness is substantially hampered by [the Party's] inability to gather in person." Doc. 1 ¶ 14. According to Plaintiffs, "[p]olitics is a people business" that is "most effective when people can connect in person." *Id.* Plaintiffs hope to resume all gatherings greater than ten people, including gatherings amongst "staff, leaders, consultants, members, donors, volunteers, activists, and supporters." *Id.* In their motion for preliminary relief, Plaintiffs specifically reference an outdoor picnic that they hope to have on July 4, 2020, as well as a rally and indoor convention at some point.

Plaintiffs also criticize the Governor's enforcement of the Order. Plaintiffs allege that the Governor has declined to enforce his executive order against protestors following the death of George Floyd. *Id.* ¶ 17. According to Plaintiffs, the Governor has characterized these protestors as "exercising their First Amendment rights" and has engaged in one such protest himself. Plaintiffs allege that the Governor has discriminated in favor of certain speakers based on the content of their speech; "in this case religious speech versus political speech, or protest speech versus Republican speech." *Id.* ¶ 21.

Additionally, Plaintiffs challenge the authority on which the Order rests. Plaintiffs contend that the Illinois Emergency Management Agency Act ("Act") permits the Governor to issue a disaster declaration for up to thirty days in response to a public health emergency. Plaintiffs allege that the Office of the Attorney General of Illinois "has concluded that the text of the Act does not permit successive declarations based on the same disaster." *Id.* ¶ 28. Therefore, according to Plaintiffs, the Governor only has authority to issue one thirty-day disaster declaration, rendering any further COVID-19 declaration ultra vires. Consequently, the Order is

also ultra vires because it relies on the Governor's authority under the fifth declaration. Plaintiffs' motion for preliminary relief does not address this aspect of their complaint.

LEGAL STANDARD

Temporary restraining orders and preliminary injunctions are extraordinary and drastic remedies 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) (citation omitted). The party seeking such relief must show: (1) it has some likelihood of success on the merits; (2) there is no adequate remedy at law; and (3) it will suffer irreparable harm if the relief is not granted. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018).[6] If the moving party meets this threshold showing, the Court "must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019) (quoting *Planned Parenthood*, 896 F.3d at 816). "Specifically, the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbott Labs. v Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992)). The Seventh Circuit has described this balancing test as a "sliding scale": "if a plaintiff is more likely to win, the balance of harms can weigh less heavily in its favor, but the less likely a plaintiff is to win the more that balance would need to weigh in its favor." *GEFT Outdoors*, 992 F.3d at 364 (citing *Planned Parenthood*, 896 F.3d at 816). Finally, the Court

[6] Although *Planned Parenthood* involved a preliminary injunction, courts use the same standard to evaluate TRO and preliminary injunction requests. *See USA-Halal Chamber of Commerce, Inc. v. Best Choice Meats, Inc.*, 402 F. Supp. 3d 427, 433 (N.D. Ill. 2019) ("The standards for granting a temporary restraining order and preliminary injunction are the same.") (citing cases).

considers whether the injunction is in the public interest, which includes taking into account any effects on non-parties. *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018).

ANALYSIS

In First Amendment cases, the likelihood of success on the merits "is usually the decisive factor." *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014). "The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (citation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Barland*, 751 F.3d at 830 (same). Therefore, the Court limits its analysis to the likelihood of success on the merits and the balance of harms.

I. Likelihood of Success on the Merits

"[T]he threshold for demonstrating a likelihood of success on the merits is low." *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). "[T]he plaintiff's chances of prevailing need only be better than negligible." *Id.* In their motion for preliminary relief, Plaintiffs argue that they are likely to succeed on their claims because the Order favors religion and is therefore an unconstitutional content-based restriction on speech. Additionally, Plaintiffs argue that by not enforcing the Order against protestors following the death of George Floyd, the Governor is favoring that speech over Plaintiffs' political speech. The Governor contends that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), provides the appropriate standard by which to evaluate the Order. Additionally, the Governor argues that the Order does not distinguish between speakers but instead regulates conduct and therefore strict scrutiny does not apply.

A. *Jacobson v. Massachusetts*

"Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay United Pentecostal Church v. Newsom* (*S. Bay II*), 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38). When state officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Id.* (alteration in original) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Over a century ago in *Jacobson*, the Supreme Court developed a framework by which to evaluate a State's exercise of its emergency authority during a public health crisis. There, the Court rejected a constitutional challenge to a State's compulsory vaccination law during the smallpox epidemic. *See generally Jacobson*, 197 U.S. 11. *Jacobson* explained that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. The Court reasoned that the Constitution does not provide an absolute right to be "wholly freed from restraint" at all times, as "[t]here are manifold restraints to which every person is necessarily subject for the common good." *Id.* at 26. Therefore, while "individual rights secured by the Constitution do not disappear during a public health crisis," the government may "reasonably restrict[ ]" rights during such times. *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Judicial review of such claims is only available in limited circumstances. *See S. Bay II*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (where state officials do not exceed their broad latitude during a pandemic "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" (citation omitted)); *Jacobson*, 197 U.S. at 31. If a State implements emergency measures during an epidemic that

curtail individual rights, courts uphold such measures unless they have "no real or substantial relation" to public health or are, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.*; *see also In re Abbott*, 954 F.3d at 784.

There is no doubt that Illinois is in the midst of a serious public health crisis, as contemplated in *Jacobson*. *See Elim Romanian Pentecostal Church v. Pritzker* (*Elim II*), No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020) (citing *Jacobson* and explaining that courts do not evaluate orders issued in response to public-health emergencies by the usual standard); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020) (COVID-19 qualifies as a public health crisis under *Jacobson*). Plaintiffs agree that Illinois has a compelling interest in fighting the pandemic. However, they suggest *Jacobson* is inapplicable because they do not assert an inherent right to gather but instead request equal treatment when others are permitted to gather. *Jacobson* draws no such distinction and instead provides for minimal judicial interference with state officials' reasonable determinations. The Order undoubtedly relates to public health and safety because it minimizes the risk of virus transmission by limiting gathering size. Additionally, the Order still encourages religious organizations to limit indoor services to fifty people and implement other public health measures. Plaintiffs have not shown how this exemption is a plain invasion of their constitutional rights. The Order involves reasonable measures intended to protect public health while preserving avenues for First Amendment activities. Overall, the Court concludes that Plaintiffs have a less than negligible chance of prevailing on their constitutional claims because the current crisis implicates *Jacobson* and the Order advances the Governor's interest in protecting the health and safety of Illinois residents.

B. Traditional First Amendment Analysis

Even if this case falls outside *Jacobson*'s emergency crisis standard, Plaintiffs have failed to show a likelihood of success under traditional First Amendment analysis.[7] The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that "abridge[e] the freedom of speech." U.S. Const. amend. I. Pursuant to that clause, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Laws that target speech based on its communicative content are "presumptively unconstitutional." *See id.* Here, the parties dispute whether the Governor's actions, through both the Order and his failure to enforce it against protestors, are content neutral. According to Plaintiffs, the Governor has distinguished between speech based on its content (*i.e.*, religious v. political or Black Lives Matter v. Republican), therefore creating a content-based restriction. *See* Doc. 3-1 at 10. The Governor argues that the Order is instead a content-neutral time, place, and manner regulation. The Court evaluates content-based restrictions under strict scrutiny but assesses content-neutral "time, place, or manner" restrictions under an intermediate level of scrutiny. *Price v. City of Chicago* (*Price II*), 915 F.3d 1107, 1109 (7th Cir. 2019).

At the outset, the Court addresses the specific governmental actions that Plaintiffs challenge. The complaint and motion for preliminary relief treat the Order and enforcement of the Order as contributing to the same First Amendment violation. Plaintiffs fail to distinguish between the two governmental actions or acknowledge that each action raises separate and distinct questions. The Order provides a clear exemption for religious gatherings on its face.

[7] The Court limits its analysis to the First Amendment because Plaintiffs' Fourteenth Amendment claim is derivative of their First Amendment claim, and the parties agree that the claims rise and fall together.

Enforcement of the Order against protestors, however, does not create a *de facto* exemption unless Plaintiffs can show that the Governor has enforced it differently against protestors based on the content of their message. At the hearing, Plaintiffs could not provide a single example of state officials engaging in such discriminatory enforcement. In their brief, Plaintiffs allege that City of Chicago officials dispersed "Reopen Illinois" protestors on one occasion, but that is irrelevant to Plaintiffs' claim because it does not involve State action. Plaintiffs have failed to point to a single instance in which they, or anyone similarly situated, protested with political messages and *state officials* enforced the Order against them because of this content. Thus, the Court has no basis by which to evaluate whether the Governor has selectively enforced the Order. *See Anderson v. Milwaukee Cty.*, 433 F.3d 975, 980 (7th Cir. 2006) (rejecting the plaintiff's argument that discretionary enforcement resulted in discrimination against religious literature in part because the plaintiff did not offer evidence that anyone had been able to distribute nonreligious literature under similar circumstances); *S. Labor Party v. Oremus*, 619 F.2d 683, 691 (7th Cir. 1980) ("An individual must allege facts to show that while others similarly situated have generally not been prosecuted, he has been singled out for prosecution, and that the discriminatory selection of him was based upon an impermissible consideration such as . . . the desire to prevent his exercise of constitutional rights."); *cf. Hudson v. City of Chicago*, 242 F.R.D. 496, 509 (N.D. Ill. 2007) (for plaintiffs to prevail on their selective enforcement claim, they must show they were exercising their First Amendments rights and were arrested or ticketed under the relevant ordinance when other similarly situated individuals were not). Instead, the facts before the Court indicate that the Governor similarly did not take action against "Reopen Illinois" protests that occurred on state property. And while Plaintiffs emphasize the Governor's decision to march in one demonstration as showing that he has engaged in content-

based discrimination, this singular act is not enough to establish such discrimination. *See Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446, 449 (7th Cir. 2016) (public officials "enjoy the right of free speech under the First Amendment").[8] Overall, Plaintiffs have failed to point to anything that suggests selective enforcement against protestors based on the content of their message, and the Governor's participation in one protest does not give rise to content-based discrimination in violation of the First Amendment. Accordingly, the Court will limit its analysis to Plaintiffs' claim that the Order's religious exemption violates their First Amendment rights.

1. Content Neutrality

To determine whether a challenged regulation is content based, the Court first asks whether the regulation "draws distinctions [on its face] based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (citation omitted). *Reed* explained that facial distinctions include those which define regulated speech "by particular subject matter" or "its function or purpose." *Id.* at 163. Laws that are facially content-neutral may still be considered content-based restrictions on speech if they "'cannot be justified without reference to the content of the regulated speech' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Price II*, 915 F.3d at 1118 (a law is content based "if enforcement authorities must 'examine the content of the message that is conveyed to determine whether a

[8] Plaintiffs' reliance on *Soos v. Cuomo* is not persuasive. *Soos v. Cuomo*, No. 20-00651-GLS-DJS, 2020 WL 3488742 (N.D.N.Y. June 26, 2020). *Soos* concluded that plaintiffs were likely to succeed on their free exercise claim when government officials selectively enforced their order against religious groups but not protestors and allowed outdoor graduation ceremonies (with a larger numbers of individuals than allowed to religious gatherings) to occur, finding no compelling justification to treat graduation ceremonies and religious gatherings differently. *Id.* at *11–12. Further, one official made comments distinguishing between outdoor religious gatherings and protests, indicating that mass protests deserve better treatment than religious gatherings. *Id.* at *5, 12. Here, the Court finds that the Governor has provided a compelling justification for the Order's religious gathering exemption, which is narrowly tailored and outside this exemption, has not indicated a preference for one type of mass gathering over another.

violation has occurred'" (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014))). In other words, following *Reed*, "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015).

The Order is a content-based restriction. The Order broadly prohibits any gathering of more than fifty people but exempts the free exercise of religion from this requirement. Instead, religious organizations "are encouraged to consult and follow" the IDPH's recommended guidelines and practices. Doc. 10-1 at 9. On its face, the Order distinguishes between religious speech and all other forms of speech based on the message it conveys. *See Norton*, 806 F.3d at 413 (Manion, J., concurring) ("*Reed* now requires any regulation of speech implicating religion . . . to be evaluated as content-based and subject to strict scrutiny."); *cf. Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) ("[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time."); *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 63 F.3d 581, 586, 592 (7th Cir. 1995) (prohibition of menorah's message because of religious perspective was unconstitutional under the First Amendment's free speech clause). By providing an exemption, the Order is "endorsing" religious expression compared to other forms of expression. *See Reed*, 576 U.S. at 168–69 (the town's ordinance singled out specific subject matter for different treatment: ideological messages received more favorable treatment than political messages, and political messages received more favorable treatment than messages announcing assemblies of like-minded individuals); *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017) (political speech exception from anti-robocall statute would be content discrimination in violation of *Reed*).

Additionally, enforcement of the Order reiterates that it is content based. To determine whether a gathering violates the Order, authorities must look to the content of the message communicated. *See Price II*, 915 F.3d at 1118 ("[D]ivining purpose clearly requires enforcement authorities 'to examine the content of the message that is conveyed.'" (quoting *McCullen*, 573 U.S. at 479)). If the content is religious, a gathering greater than fifty people is permissible; if the content is not religious, such gathering is impermissible. *See Swart v. City of Chicago*, No. 19-CV-6213, 2020 WL 832362, at *8 (N.D. Ill. Feb. 20, 2020) (assessing the speaker's intent requires the City to evaluate the content of the speech, making its enforcement content-based). Overall, the fact that one group of speakers can gather because they are expressing religious content while Plaintiffs cannot gather to express political content causes this restriction to be content based.

The Governor contends that the Order does not distinguish between groups of speakers but instead regulates conduct. This argument is not persuasive because conduct-based regulations are still impermissible under the First Amendment if they draw distinctions based on the speech expressed. *Cf. Left Field Media LLC v. City of Chicago*, 822 F.3d 988, 990 (7th Cir. 2016) (evaluating regulation of conduct under *Reed* and finding it was content-neutral because it regulated all sales alike); *BBL, Inc. v. City of Angola*, 809 F.3d 317, 324 (7th Cir. 2015) (city's zoning rule that required all property owners to seek permit before making changes on land was generally applicable and did not discriminate based on content of speech); *see also Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000) ("[T]he First Amendment tolerates greater interference with expressive conduct, provided that this interference results as an unintended byproduct from content-neutral regulation of a general class of conduct."). The Governor argues that Plaintiffs point to types of events they cannot hold, not expression that the

Order prohibits. This confuses the relevant First Amendment inquiry. Again, the Order prevents a group of fifty-one individuals from discussing their political platform in person but allows the same group to discuss their religion in person and is therefore a content-based restriction. The Order does not regulate all gatherings the same but instead distinguishes them based on their expressive conduct. *Cf. Left Field*, 822 F.3d at 990 (ordinance regulating peddling applied equally to sale of bobblehead dolls, baseball jerseys, and printed matter was content neutral); *cf. Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 288 (7th Cir. 2014) (requirements that small groups obtain permit to gather must comport with First Amendment and be content-neutral); *Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) ("[P]ermit requirement is less likely to be content-neutral and narrowly tailored when it is intended to apply even to small groups.").

Additionally, the Governor's reliance on *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006), is misplaced. *Rumsfeld* evaluated whether the Solomon Amendment, which denied federal funding to higher education institutions that had a policy or practice that prevented the military from gaining equal access to campuses for recruiting as other employers, violated the plaintiffs' free speech rights. *See id.* at 55. The Court found that the Solomon Amendment regulated conduct, not speech, because it "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60. The Court explained that the Amendment did not "limit what law schools may say" and "the conduct regulated by the Solomon Amendment is not inherently expressive." *Id.* at 60, 66. Instead, the law schools had to provide explanatory speech to explain why they were treating military recruiters differently. *Id.* The Governor analogizes this case to *Rumsfeld* because the act of gathering more than fifty people in person does not signal anything unless accompanied by

expressive conduct. However, unlike the law at issue in *Rumsfeld*, the Order *does* regulate speech by selecting which speech is permissible for an in-person group larger than fifty people. The Governor's argument that the gathering limit is comparable to a building occupancy limit also fails. A building occupancy limit that did not apply to certain groups based on the content of their speech would similarly be discriminatory. Building occupancy limits and gathering limits are comparable to zoning ordinances for purposes of the Governor's argument, and courts have consistently assessed whether such ordinances are content based. *See BBL*, 809 F.3d at 325 (zoning ordinances that limit where sexually oriented businesses can operate "are content based, and we should call them so" (quoting *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring))); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 980 (N.D. Ill. 2003) (ordinance that limited locations of religious institutions regulated speech not non-expressive conduct for First Amendment freedom of speech claim). When a gathering is still allowed based on the speech involved, the government has engaged in content-based discrimination. The Court finds that by exempting free exercise of religion from the gathering limit, the Order creates a content-based restriction.

2. Strict Scrutiny

Because the exemption is a content-based restriction, this provision can only stand if it survives strict scrutiny. *Reed*, 576 U.S. at 171. Therefore, the Governor must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). Plaintiffs concede that the Governor has a compelling interest in "fighting a pandemic," so the Court limits its analysis to whether the Order is narrowly tailored to further that interest. Doc. 3-1 at 12. It is the Governor's burden to demonstrate that the Order's differentiation between

religious gatherings and other gatherings furthers its interest in limiting the spread of COVID-19 and is narrowly tailored to that end. *See id.*

"Generally, 'a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the evil it seeks to remedy.'" *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (quoting *Ward*, 491 U.S. at 804). That is, "a statute is not narrowly tailored if 'a less restrictive alternative would serve the Government's purpose.'" *See id.* (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000)). The Governor argues that the Order is narrowly tailored to its compelling interest in fighting a pandemic by exempting free exercise of religion from its gathering limit because the First Amendment, federal law, and state law provide religious organizations unique safeguards against governmental interference with the free exercise of religion. In other words, the Governor contends that by exempting free exercise of religion while still encouraging those organizations to take specific measures to prevent the spread of COVID-19, the Order is narrowly tailored. In support, the Governor references religious exemptions that appear throughout federal and state law. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (recognizing "ministerial exception" to Title VII's prohibition on religious discrimination in employment and explaining that by imposing an unwanted minister "the state infringes the Free Exercise Clause"); 775 Ill. Comp. Stat. 35/15 (exemption from generally applicable government regulations that "substantially burden a person's exercise of religion"). The Constitution expressly prevents the government from interfering with free exercise of religion. *See* U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]."); *see also Espinoza v. Mont. Dep't of Revenue*, — S. Ct. —, No. 18-1195, 2020 WL 3518364, at *22 (June 30, 2020) (Gorsuch, J., concurring) (the Free Exercise Clause "protects not just the

right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly"). And numerous state and federal laws reflect the unique protections accorded to religion. *See Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019) (noting that "more than 2,600 federal and state tax laws provide religious exemptions" and finding a tax exemption for religious housing constitutional (citation omitted)); *see also Hosannah-Tabor*, 565 U.S. at 189 (the First Amendment "gives special solicitude to the rights of religious organizations"). Across the country, individuals have brought free exercise challenges to similar executive orders issued throughout this public health crisis. Supreme Court Justices and Circuit Court judges have been receptive to such challenges. *See S. Bay II*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) (state's 25% occupancy cap imposed on religious worship services but not comparable secular businesses discriminates on the basis of religion in violation of the First Amendment and state lacked compelling justification for such distinction); *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (the governor's restriction on in-person worship services likely violates free exercise of religion); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 946 (9th Cir. 2020) (Collins, J., dissenting) ("By regulating the specific underlying risk-creating behaviors, rather than banning the particular religious setting within which they occur, the State could achieve its ends in a manner that is the least restrictive way of dealing with the problem at hand." (citation omitted)). The President has even indicated that religious houses of worship are essential services and suggested he would "override the governors."[9] Against this backdrop, the Governor concluded that the least restrictive means by which to protect this constitutional right was to permit free religious exercise but encourage individuals who engage

[9] *See* Brian Naylor, *Trump Calls on States to Reopen Places of Worship Immediately*, NPR., May 22, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/05/22/861057500/trump-calls-on-states-to-immediately-reopen-places-of-worship.

in such practices to adhere to public health guidelines. The Court finds that this is indeed the least restrictive means by which to accomplish both aims.[10]

Plaintiffs contend that the Governor cannot satisfy the least restrictive means test because a political party caucus is no more likely to spread COVID-19 than a church service. *See* Doc. 3-1 at 12. However, the Constitution does not accord a political party the same express protections as it provides to religion. *See* U.S. Const. amend. I. And by statute, Illinois has undertaken steps to provide additional protections for the exercise of religion. *See* 775 Ill. Comp. Stat. 35/15. Additionally, the Order's limited exemptions reinforce that it is narrowly tailored. The Order only exempts two other functions from the gathering limit: emergency and governmental functions. These narrow exemptions demonstrate that the Order eliminates the increased risk of transmission of COVID-19 when people gather while only exempting necessary functions to protect health, safety, and welfare and free exercise of religion. Therefore, the Governor has carried his burden at this stage in demonstrating that the Order is narrowly tailored to further a compelling interest, and the Order survives strict scrutiny. *See also Amato v. Elicker*, No. 3:20-CV-464 (MPS), 2020 WL 2542788, at *11 (D. Conn. May 19, 2020) (restriction on gathering size with specific exemption for religious services was narrowly tailored under intermediate scrutiny in part because it involved spiritual needs the state may deem more pressing); *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 WL 3051207, at *13 (E.D.N.C. June 8, 2020) (executive order was narrowly tailored under intermediate scrutiny because the

[10] Although the Court concludes that the exemption satisfies strict scrutiny, such exemption was not necessary under the Free Exercise Clause. The Seventh Circuit upheld the Governor's previous executive order that limited the size of public assemblies, including religious services, against a free exercise challenge. *See Elim II*, 2020 WL 3249062, at *6. And another court in this district recently found that a challenge under Illinois' RFRA statute was also unlikely to succeed on the merits. *Cassell*, 2020 WL 2112374, at *13 (challenge to previous executive order banning all gatherings greater than ten people under Illinois' RFRA statute unlikely to succeed on the merits). However, this case does not involve a free exercise challenge and neither party suggests that imposing a blanket gathering limit is the least restrictive means by which the Governor could achieve his compelling interest in protecting public health.

government's interest in preventing the spread of COVID-19 would be achieved less effectively if other facilities were able to open). In conclusion, Plaintiffs have failed to show a likelihood of success on the merits of their First and Fourteenth Amendment claims under *Jacobson* or traditional First Amendment analysis.

II. Balance of Harms

The balance of harms further confirms that Plaintiffs are not entitled to preliminary relief. Under the sliding scale approach, the less likely Plaintiffs' chance of success the more the balance of harms must weigh in their favor. *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018). Because Plaintiffs' claims have little likelihood of succeeding on the merits, they are not entitled to preliminary relief unless they show that the scales weigh heavily in their favor.

The scales weigh significantly against Plaintiffs. The number of COVID-19 infections continues to rise across the United States, which has led some states to recently impose greater restrictions on gatherings and activities. COVID-19 is highly contagious and continues to spread, requiring public officials to constantly evaluate the best method by which to protect residents' safety against the economy and a myriad of other concerns. *See Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at *6 (N.D. Ill. May 13, 2020) ("The record clearly reveals how virulent and dangerous COVID-19 is, and how many people have died and continue to die from it."), *aff'd*, No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020); *Cassell*, 2020 WL 2112374, at *15 ("While Plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic."). Granting Plaintiffs the relief they seek would pose serious risks to public health. Plaintiffs contend that in-

person speech is most effective, and their communications are hampered by gathering limits. But the current state of our nation demands that we sacrifice the benefits of in-person interactions for the greater good. Enjoining the Order would risk infections amongst members of the Illinois Republican Party and its regional affiliates, as well as their families, friends, neighbors, and co-workers. *See Cassell*, 2020 WL 2112374, at *15. Plaintiffs ask that they be allowed to gather—without limitation—despite the advice of medical experts and the current rise in infections. The risks in doing so are too great. The Court acknowledges that Plaintiffs' interest in gathering as a political party is important, especially leading up to an election. But this interest does not outweigh the Governor's interest in protecting the health of Illinois' residents during this unprecedented public health crisis. Moreover, Plaintiffs may still engage in a number of expressive activities like phone banks, virtual strategy meetings, and, as of Friday, June 26, gatherings like fundraisers and meet-and-greet coffees that do not exceed fifty people. *See* Doc. 3-1 at 4. As the Governor suggested, allowing Plaintiffs to gather would open the floodgates to challenges from other groups that find in-person gatherings most effective. It would also require that the Court turn a blind eye to the increase in infections across a high majority of states, which as of July 1, 2020 includes Illinois.[11] An injunction that allows Plaintiffs to gather in large groups so that they can engage in more effective speech is simply not in the public interest. Such relief would expand beyond any gatherings and negatively impact non-parties by increasing their risk of exposure. Thus, the harms tilt significantly in the Governor's favor as he seeks to prevent the spread of this virulent virus.

[11] *Illinois Coronavirus Map and Case Count*, N.Y. Times, July 1, 2020, https://www.nytimes.com/interactive/2020/us/illinois-coronavirus-cases.html (Illinois reported 768 new cases on June 29, compared to 581 on June 28).

CONCLUSION

For the foregoing reasons, the Court denies Plaintiffs' motion for preliminary relief [3].

Dated: July 2, 2020

SARA L. ELLIS
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 3, 2020

Before

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 20-2175

ILLINOIS REPUBLICAN PARTY, *et al.*,
Plaintiffs-Appellants,

v.

J.B. PRITZKER, as Governor,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:20-cv-03489

Sarah L. Ellis,
Judge.

O R D E R

The plaintiff-appellants sued Governor Pritzker, asserting that his executive order in response to the global pandemic caused by the virus COVID-19 violates the First Amendment, the Fourteenth Amendment, and is ultra vires, and they moved in the district court for a temporary restraining order or preliminary injunction preventing the governor from enforcing the order. The district court denied the motion, and the plaintiffs appealed. They have filed this emergency motion to preliminarily enjoin the governor's executive order pending appeal.

For this court to enter a preliminary injunction, the movants must first demonstrate a likelihood of success on the merits. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). They must also show the absence of an adequate remedy at law and a threat of irreparable harm without a stay. *Whitaker ex rel. Whitaker*

v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1044 (7th Cir. 2017). If they make this showing, we then consider the balance of harms. *Id.*

The plaintiffs argue that they have a likelihood of success because the governor's order is a content-based restriction on speech. Although that may be true, see *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), that fact is not dispositive by itself. We must then consider whether this distinction can survive strict scrutiny. See *id.* at 171. The plaintiffs concede that the executive order is supported by a compelling state interest, namely, the need to fight COVID-19 effectively. That need necessarily takes into account both the extraordinarily infectious nature of this particular virus and the very high efficiency of transmission. There is thus a very close link between a measure regulating the size of gatherings and the goal of impeding the spread of the virus.

And the adoption of an exception that recognizes the constitutional status of the right to free exercise of religion does not automatically run afoul of the rule in *Reed*. The First Amendment already protects the right to freedom of speech and freedom of association. Using the normal canons of interpretation, we would not expect the Free Exercise Clause to be surplusage—it must be doing more work. See *Orgone Capital III, LLC v. Daubenspeck*, 912 F.3d 1039, 1047 (7th Cir. 2019) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 176 (2012)). Our recent opinion in *Elim Romanian Pentecostal Church v. Pritzker*, 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020) (*Elim II*), holds that the governor did not even have to accommodate religion in this way. But *Elim II* does not hold that he was forbidden from doing so. Accordingly, the plaintiffs are unlikely to succeed on the merits.

As for the balance of harms, we see no logical stopping point to the plaintiffs' position here; they seem to want an all-or-nothing rule. COVID-19 is "a novel severe acute respiratory illness that has killed … more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). If 100 Democrats or 100 Republicans gather and ten get infected, those ten may go home and infect a local shopkeeper, a local grocery-store worker, their postal carrier, or their grandmother—someone who had no interest in the earlier gathering. Thus, the balance of harms in this instance strongly favors the governor.

Accordingly, IT IS ORDERED that the motion is DENIED.