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United States Court of Appeals
for the Seventh Circuit

ILLINOIS REPUBLICAN PARTY,
WILL COUNTY REPUBLICAN CENTRAL COMMITTEE,
SCHAUMBERG 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' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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MOTION

Plaintiffs/Appellants moved for an injunction pending appeal in the District Court, and the Court denied that motion for the same reasons that the Court denied the Plaintiffs' original motion for a temporary restraining order and preliminary injunction. Appendix 2; Docket 18. *See* Fed. R. App. Pro. 8(a)(2)(A)(ii). Therefore, pursuant to Fed. R. App. Pro. 8(a)(2), the Plaintiffs/Appellants respectfully move this Court for an injunction pending appeal. The Plaintiff Will County Republican Central Committee does so on an emergency basis because it intends to hold a Fourth of July picnic on the evening of Saturday, July 4, 2020, but cannot currently do so because it would violate the Governor's executive order challenged in this case.

STATEMENT OF FACTS

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.[1] Three days later, a new order lowered the ban on gatherings to 50, including "civic" and "faith-based events."[2] Four days after that, the cap on gatherings was

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

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

lowered to ten.[3] This order also contained not only a prohibition but a hammer: "This Executive Order may be enforced by State and local law enforcement."[4] There the limit on gatherings stayed until just last week, when on June 26, the state's entry into Phase 4 lifted the cap on gatherings up to 50.[5] 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.[6]

As weeks dragged into months of people frozen in their homes, a public outcry developed for a restoration of basic First Amendment rights. This included litigation on behalf of churches, which eventually wound its way to this Court, *Elim Romanian Pentecostal Church v. Pritzker*, 2020 U.S. App. LEXIS 18862 (7th Cir. June 16, 2020), and the Supreme Court, *S. Bay United Pentecostal Church v. Newsom,* 207 L.Ed.2d 154 (U.S. 2020).

As the complaints and opinions flew back and forth, and as pressure from church leaders and the general public grew louder and more insistent[7], Governor Pritzker

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

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

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

[6] "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), https://www.nationalgeographic.com/science/2020/04/why-coronavirus-vaccine-could-take-way-longer-than-a-year/.

[7] *See, e.g.,* John Kass, "Is Pritzker's coronavirus levee about to break?," CHI. TRIB.

started to cave. On April 30, for the first time his new executive order said "to engage in the free exercise of religion" was an "essential activity," as long as the limit of ten was observed.[8] 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.[9] On May 29, the Governor issued Executive Order 38, which continued the 10-person limit on gatherings, but added "free exercise of religion" alongside "emergency functions" and "governmental functions" as the three recognized exemptions to the Order.[10] Religious organizations and houses of worships are "encouraged" to "consult" the "recommended" "guidelines" and "encouraged to take steps" to follow social distancing, but are not required to obey any part of the Order.[11] In the words of this Court, "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 Church*, 2020 U.S. App. LEXIS 18862, at *8. When Illinois entered Phase 4 on June 26, the cap on

(May 21, 2020), https://www.chicagotribune.com/columns/john-kass/ct-coronavirus-illinois-churches-kass-20200521-o2pk6tvcprhwvblo5mvfntuwoa-story.html.

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

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

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

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

gatherings was lifted to 50, and the special exemption for religious gatherings remained in place.[12]

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. Governor Pritzker went all-chips-in on option 1. 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.[13] 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

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

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

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."[14] When he joined in one of the protests himself, he defending 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 . . ."[15]

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 result in city fines of up to $5,000."[16] 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.[17] When Chicago police ended a "Reopen"

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[14] "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.

[15] 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.

[16] 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/.

[17] *Compare* Sam Charles and Neal Earley "Reopen Illinois rally draws hundreds to Loop, Springfield," CHI. SUN-TIMES (May 1, 2020),

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."[18]

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.[19] They seek to elect Republican candidates to local, state, and federal office and to advocate for their policy platform.

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

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https://chicago.suntimes.com/politics/2020/5/1/21244518/reopen-illinois-rally-thompson-center-coronavirus-covid-19-stay-at-home-order, *with*

[18] "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] All the following facts are taken from declarations entered below 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 (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. *See* Fed. R. App. Pro. 8(a)(2)(B)(ii). However, the declaration of George Pearson is included as Appendix 4 because it is central to the need for emergency relief in this motion.

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 sanitizing, 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 Republicans through their local units. Of most immediate concern in this emergency motion, the Will County Republicans are planning a July 4 celebration with picnic food and fireworks (*see* Pearson Affidavit ¶ 7, Docket 3-3, Appendix 4). They want to hold the festivities on a farm to allow plenty of room for people to spread out and maintain safe distances as they watch the night sky light up and listen to speakers from their blankets and lawn chairs.

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 rally is the content of the speech delivered at the event.

STATEMENT OF REASONS

The Seventh Circuit grants a motion for an injunction pending appeal using a "sliding scale" approach that also governs applications for a preliminary injunction. *Korte v. Sebelius*, 528 F. App'x 583, 585-86 (7th Cir. 2012). *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007). Plaintiffs must show they lack an adequate remedy at law, will suffer irreparable harm without an injunction, and that they have "some likelihood" of success on the merits. *Id*. Having done so, "the court weighs the equities, balancing each party's likelihood of success against the potential harms. The more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail." *Id*. at 586. In order to show their likelihood of success on the merits, Plaintiffs must only establish a "better than negligible" chance of ultimately prevailing. *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). Plaintiffs meet these thresholds, and the balance of harms favors their equal treatment.

1. Plaintiffs will suffer irreparable harm if an injunction pending appeal is not issued.

It is blackletter law that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of issuing an injunction. *Backpage.com, LLC v. Dart,* 807 F.3d 229, 239 (7th Cir.

2015) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See* Opinion & Order, Docket 16, at 6. That is especially so now for the Will County Republicans, who want to hold a Fourth of July picnic. A picnic, even with fireworks, on some other day is no substitute for the special patriotic environment created on the Fourth of July.

Moving forward, these summer weeks leading into the November election are crucial for the Party to begin organizing, identifying voters, and sharing its message with meetings, events, and assemblies of volunteers.

2. Money damages are no remedy for the Plaintiffs' harm.

It is equally clear that traditional legal remedies (i.e., money damages) are inadequate. The injury here is literally "irreparable" — there is no way for the Governor to later make whole the lost opportunity to exercise First Amendment freedoms now, in the months leading up to a presidential election. *See National People's Action v. Wilmette,* 914 F.2d 1008, 1013 (7th Cir. 1990) ("injunctions are especially appropriate in the context of [F]irst [A]mendment violations because of the inadequacy of money damages"); *Korte*, 528 F. App'x at 588.

3. Plaintiffs are likely to succeed on the merits of their claims.

A. The Governor may not treat similar speakers differently based only on the content of their speech.

Reed v. Town of Gilbert makes clear that just as the government may not favor or disfavor the speaking of certain viewpoints, it also may not favor or disfavor certain categories of speech content. 576 U.S. 155, 159 (2015). When the

government draws lines that differentiate between similar speakers based only on the content of their speech, that classification is subject to strict scrutiny. *Id*. at 163.

This is what the Governor has done here: he has favored two categories of content (religious speech, protest speech) but denied that favor to all other categories of speech. Whether the treatment is a burden on one class (as it was in *Reed*) or a favor for one class makes no difference, the key is unequal treatment based on content. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("[G]overnment regulation may not favor one speaker over another."); *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) (the Constitution "[p]rohibit[s . . .] restrictions distinguishing among different speakers, allowing speech by some but not others.").[20] *See also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659 (1994); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). These concerns are especially pronounced when favor is conferred on politically powerful or sympathetic speakers but denied to others. *Southworth v. Bd. of Regents of Univ. of Wis.*, 307 F.3d 566, 594 (7th Cir. 2002).

And the Governor's favor turns on the content of the speech being delivered at the gathering. *See* Opinion & Order at 12. 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

[20] The guarantees of the 14th Amendment's equal protection clause provide the same basis for relief as the free speech clause. *Proft v. Raoul*, 944 F.3d 686, 691 (7th Cir. 2019) ("[I]t makes no difference whether a challenge to the disparate treatment of speakers or speech is framed under the First Amendment or the Equal Protection Clause.").

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 talk about racial injustice and police brutality, and wave banners. But the same-sized crowd could not 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.

Because the difference in treatment is based on content, the Order is subject to strict scrutiny. *Reed*, 576 U.S. at 163-64. *Accord* Opinion & Order at 13. Plaintiffs grant that fighting COVID-19 is a compelling state interest. *See Elim Church*, 2020 U.S. App. LEXIS 18862, at *2 (discussing how the disease spreads exponentially). But such an order must still pass narrow tailoring, and in this case it cannot. *Roberts v. Neace*, 958 F.3d 409, *12 (6th Cir. 2020) (per curiam). Scientifically and constitutionally, a political party caucus is no more likely to spread COVID-19 than a church service, and a Republican rally is no more likely to do so than a Black Lives Matter rally.

B. The Governor's arguments in support of his order are unavailing.

The Governor and District Court begin by observing that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), means the Governor has extraordinarily broad discretion and is entitled to extraordinary deference during a pandemic. Defendant's Response to Motion for TRO/PI, Docket 10, at 5–7 (hereafter "Response"); Opinion & Order at 7–8. This may be true; he may put in place a ban on all gatherings, even including church services or political gatherings, to stop the spread of a disease. *See generally Elim Church*, 2020 U.S. App. LEXIS 18862; *S. Bay United Pentecostal Church,* 207 L.Ed.2d at 155 (Roberts, C.J., concurring).

Though an executive may constitutionally suspend the exercise of constitutional rights during a pandemic, 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*, 207 L.Ed.2d at 155 (Roberts, C.J., concurring) (the governor's order barring church gatherings treated "comparable secular gatherings" the same and treated "only dissimilar activities" differently). *Jacobson* is not such an open-ended warrant of unlimited, unfettered discretion that a court must sit idly by if the Governor permitted Catholics to gather but barred Lutherans from doing so, or that he allowed Democratic rallies but not Republican ones.

This is so because *Jacobson* grants the governor discretion to make scientific and medical judgments while formulating policy. But there is no scientific or medical reason to distinguish between two viewpoints, just as there is no scientific or

medical reason to distinguish between the two categories of speech, religious or political, because the only difference is the speech delivered, not the mode or manner of delivery in the physical world.

Next, the District Court begins its "traditional First Amendment analysis" by deciding that the Governor has not created a "de facto exemption" for only Black Lives Matter protestors because the Plaintiffs have not shown that "the Governor has enforced [the order] differently against protestors based on the content of their message." Opinion & Order at 10. In other words, she suggests that if the Republicans held a protest, they have every reason to expect that the Governor would forbear to sic the State Police on them as well.

However, Plaintiffs wish to obey the law as it stands on the books (an especially important concern for a political party committed to the rule of law). And they are entitled, especially in this pre-enforcement setting, to assume that the law will be enforced. *ACLU v. Alvarez,* 679 F.3d 583, 593-94 (7th Cir. 2012). Plaintiffs should not have to risk arrest and citation by state or local law enforcement in order to exercise their First Amendment rights. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). They must only show a "credible threat" of enforcement. *Id*. That they have done here, when 6,000 gatherings have been dispersed in Chicago alone, including political protests,[21] and where the Governor's State Police have

[21] *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 22.

threatened criminal charges for "crowds of people gathering" and "flagrant violations."[22]

Black Lives Matter protestors, however, did not have to worry about the Governor sending the State Police after them, because of his official sanction for their speech. When the State Police showed up at a Black Lives Matter protest, it was as the Governor's bodyguards to protect him while participating in the march, not to break up an illegal gathering.[23] The Governor's own comments cast his marching as part of his official duties, not as a personal decision: "It's important [for the protestors] to have the governor stand with them on issues that are important to the state and progress that we need to make."[24] And the Governor recognized the protestors' "First Amendment right" to gather in an official press release and in remarks at official press conferences.[25] The message across all these platforms is clear: the Governor — as Governor — recognizes the protests as protected First

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[22] 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.").

[23] Docket 11-1 (copy of the Governor's official Daily Public Schedule for June 8, 2020, from the Governor's official press department).

[24] 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.

[25] *See supra* note 12 (listing news reports reporting these statements).

Amendment activity and so will not enforce the Order against them. *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 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.").[26] In other words, he carved out a special exemption for their gatherings, but has denied that explicit protection to any other speakers.

The Governor has argued the Order is like the fire code: a neutral time, place, and manner restriction on conduct that incidentally burdens speech, and is therefore only subject to strict scrutiny. Response at 7–13. And this would be true, if it were actually neutral. But it is not neutral — the Governor has exempted certain categories of speech from its strictures but not others. It is this difference in treatment, and not the Order's underlying ban on gatherings itself, which is subject to strict scrutiny. *See* Opinion & Order at 13-14. To return to the example used above, the substantive difference between the church service and the political caucus, or the Black Lives Matter protest and the Republican rally, is not time, place, or manner of gathering, but the speech delivered at the gathering.

The Governor has argued the Order only regulates the nonexpressive conduct of gathering, and not speech itself. Again, this would be true if it regulated all

[26] *See* Amicus Brief of the United States, *Givens v. Newsom*, No. 20-15949 (9th Cir. June 10, 2020) at 24, https://www.justice.gov/opa/press-release/file/1284296/download (similar, as to California officials' treatment of protests).

gatherings equally. Response at 10–13. But it does not, and the difference in treatment between the gatherings is the content of the speech delivered at the gathering. This is why it is a regulation based on expression. *See* Opinion & Order at 13-14.

The Governor has argued that the Order is viewpoint neutral because the Democratic Party and the Republican Party are subject to the same restrictions. Response at 14. True enough. But the First Amendment prohibits distinctions between categories of content as well as discrimination among viewpoints within the same category. *Reed,* 576 U.S. at 163-64.

The Governor has said that the Order is acceptable because political parties can exercise their speech rights through alternative venues, such as online meetings or small gatherings, and that there is no right to one's preferred mode of speaking. Response at 9–10. Again, fair enough. *See Elim Church*, 2020 U.S. App. LEXIS 18862, at *14–15. But the Governor has chosen to permit religious organizations and Black Lives Matter protestors their preferred mode of speaking, and that in-person form is more effective to communicate their message and serve their purposes than online. *See McCullen v. Coakley*, 573 U.S. 464, 488-89 (2014). Again, Plaintiffs do not assert an inherent right to gather in person, but only a right to equal treatment alongside similar expressive activities.

The District Court largely bases its ruling on the fact that the U.S. Constitution, federal law, and state law ascribe special standing to religion. Opinion & Order at 16–17. *Accord* Response at 11–12. But this Court has held that the previous

iterations of the Governor's order that did not exempt churches did not violate the Free Exercise Clause. *See Elim Church*, 2020 U.S. App. LEXIS 18862, at *16. 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.

That said, religious speakers are special under the First Amendment. But so are political speakers. 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.[27]

[27] As evidence of the special status of religious organizations, the Governor cites 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. Response 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.

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. *Compare Elim Church*, 2020 U.S. App. LEXIS 18862, at *13; *S. Bay United Pentecostal Church,* 207 L.Ed.2d at 155 (Roberts, C.J., concurring) (rejecting the comparison) *with id.* at 155-56 (Kavanaugh, J., dissenting); *Roberts*, 958 F.3d at 416; *First Pentecostal Church v. City of Holly Springs*, 959 F.3d 669, 671 (5th Cir. 2020) (Willet, J., concurring) (accepting it). 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. No wonder 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).[28]

Plaintiffs are not here pushing for an exemption for Little League games, car shows, or sales conventions. Those are speakers of different character, with

[28] Moreover, often times churches find that the First Amendment's speech guarantee provides them greater protection than the Free Exercise clause. *See, e.g., Rosenberger*, 515 U.S. at 819; *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 572 (1987).

different constitutional standing. They only seek equal treatment between similar categories of speech that are entitled to the same level of First Amendment protection.

4. The balance of harms favors the Plaintiffs.

The Governor and District Court both lean heavily on the balance of harms in their conclusions, pointing out that more events will lead to more spread of the disease. Response at 14–15; Opinion & Order at 19–20. They both ignore that Plaintiffs have pledged in their affidavits to observe appropriate precautions in the events they hold, including mask-wearing, hand-washing and sanitizing, and observing appropriate distances.[29]

Based on their 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.

The Seventh Circuit should follow the Sixth Circuit in concluding that events that follow "the same risk-minimizing precautions as similar secular 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 free-exercise guarantees." *Roberts*, 958 F.3d at 416.

[29] *See* 3-3, ¶ 7 (Decl. of Pearson); 3-5, ¶ 12 (Decl. of Schneider).

CONCLUSION

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

An injunction pending appeal should issue forthwith because of the substantial likelihood of the Plaintiffs' success in their claim for equal treatment under law.

Dated: July 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, I electronically filed the foregoing Emergency Motion with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by emailing the Clerk's Office, pursuant to a conversation with Court staff held under Cir. Rule 27. I provided a copy of the motion via e-mail to opposing counsel.

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this motion contains 5,118 words and was prepared in Microsoft Word using Century Schoolbook font, size twelve, and is double-spaced with one-inch margins. *See* Fed. R. App. Pro. (d)(1) & (2).

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

APPENDIX

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