No. 20A_____

IN THE

Supreme Court of the United States

ILLINOIS REPUBLICAN PARTY,
WILL COUNTY REPUBLICAN CENTRAL COMMITTEE,
SCHAUMBERG TOWNSHIP REPUBLICAN ORGANIZATION,
AND NORTHWEST SIDE GOP CLUB

APPLICANTS,

V.

J.B. PRITZKER, GOVERNOR OF ILLINOIS,

RESPONDENT.

To the Honorable Brett M. Kavanaugh, Associate Justice and Circuit Justice for the Seventh Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION
RELIEF REQUESTED BY 5:00PM CST ON JULY 4, 2020

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QUESTION PRESENTED

Does the Governor of Illinois, who permits gatherings of 50 or more for religious speech or certain protestors' speech, violate the First Amendment by prohibiting such gatherings for political parties' speech?

PARTIES AND DISCLOSURE STATEMENT

The applicants are the Illinois Republican Party, Will County Republican Central Committee, Schaumberg Township Republican Organization, and Northwest Side GOP Club. The Illinois Republican Party is a nonstock, nonprofit corporation registered in Illinois. The other plaintiffs are unincorporated associations.

The respondent is J.B. Pritzker, who is sued in his official capacity as governor of the State of Illinois.

DECISIONS BELOW

The District Court's opinion and order denying Applicants' request for a preliminary injunction is attached as Exhibit A to this Application (No. 1:20-cv-03489, Northern District of Illinois, Hon. Sara L. Ellis). The District Court's minute order denying their motion for an injunction pending appeal is attached as Exhibit B. The U.S. Court of Appeals for the Seventh Circuit denied Applicants' motion for an injunction pending appeal (No. 20-2175); its order is Exhibit C.

JURISDICTION

Applicants have a pending interlocutory appeal in the U.S. Court of Appeals for the Seventh Circuit. This Court has jurisdiction under 28 U.S.C. § 1651.

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APPLICATION

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit:

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*, 207 L.Ed.2d 154, 155 (U.S. 2020) (Roberts, C.J., concurring); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 U.S. App. LEXIS 18862, at *13 (7th Cir. June 16, 2020) (rejecting the comparison) *with S. Bay United Pentecostal Church,* 207 L.Ed.2d at 155-56 (Kavanaugh, J., dissenting); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020); *First Pentecostal Church v. City of Holly Springs*, 959 F.3d 669, 671 (5th Cir. 2020) (Willet, J., concurring) (accepting 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. Because the State's treatment of a gathering turns on the content of the speech delivered at the event, this classification is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

Though fighting COVID-19 is doubtless a compelling state interest, the Governor's policy fails narrow tailoring because it treats similarly situated speakers differently. The First and Fourteenth Amendments both guarantee equal treatment of similar speakers. Government may no more favor one particular speaker or category of speech than it may target one for disfavor. *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) (the First Amendment "[p]rohibit[s . . .] restrictions distinguishing among different speakers, allowing speech by some but not others."). Yet that is what the Governor does with a policy that bans gatherings, but extends a *de jure* exemption to religious speakers and an *ex cathedra* exemption to Black Lives Matter speakers.

Applicants are political parties whose speech is just as much at the heart of the First Amendment as religious speakers and protestors. They want to gather in groups of 50 or more for rallies, fundraisers, and caucuses in the months leading up to the 2020 presidential election, and they wish to do so while observing both the law and appropriate safety precautions. Because the Governor's order prevents them from doing so, they make this Application for an injunction pending appeal to secure equal treatment when exercising their First Amendment rights.

FACTUAL AND PROCEDURAL BACKGROUND

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.[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 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]

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[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.

[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/.

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 like *South Bay United Pentecostal Church* and *Elim Romanian Pentecostal Church*. 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 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"

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[7] *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.

[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.

the "recommended" "guidelines" and "encouraged to take steps" to follow social distancing, but are not required to obey any part of the Order.[11] "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*, 2020 U.S. App. LEXIS 18862 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.[12]

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

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

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

[12] Executive Order 44, https://www2.illinois.gov/Pages/Executive-Orders/Executive-Order2020-44.aspx.

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 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 defended doing so amidst a pandemic by saying, "Especially at this moment, it's

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[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/.

[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.

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" protest several weeks ago, Mayor Lori Lightfoot tweeted, "[W]hile we respect 1st amendment

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[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), 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/.

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]

C. 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.[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 its message without paying for advertising. The Party raises funds through receptions,

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

[19] 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 (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).

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* Docket 3-3, ¶ 7). 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.

D. The Applicants look to this Court for protection pending appeal.

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 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 Court subsequently denied a motion for an injunction pending appeal (Docket 18).

The Plaintiffs immediately filed a notice of interlocutory appeal to the U.S. Court of Appeals for the Seventh Circuit (Docket 19). 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 (App. Docket 5).

STANDARD OF REVIEW & STATEMENT OF EXIGENCY

Recent events have rendered the standard of review for such applications familiar:

> Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status

> quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U. S. 996, 131 S. Ct. 445, 178 L. Ed. 2d 346 (2010) (internal quotation marks omitted). This power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, SUPREME COURT PRACTICE §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

S. Bay United Pentecostal Church, 207 L.Ed.2d at 154 (Roberts, C.J., concurring).

This case is one where the law is clear and the timeliness is critical. 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. *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). That is especially so now for the Will County Republicans, who want to hold a Fourth of July picnic the night of July 4, 2020. A picnic, even with fireworks, on some other day is no substitute for the special patriotic environment created on the Fourth of July. *See S. Bay United Pentecostal Church,* 207 L.Ed.2d at 156 (Kavanaugh, J., dissenting) (considering the need for services on Pentecost Sunday).

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. Thus, even if the Court cannot act in time to clarify that the Will County Republicans can go forward with their fireworks, a decision as soon as practicable will protect all Applicants in the irreplaceable weeks and months leading up to the election. Given the normal briefing schedule for the

Seventh Circuit, the case will not be briefed, argued, and decided until after Election Day, making certiorari practically useless. In other words, this Application is likely this Court's only opportunity to protect Applicants' rights when it matters most. These next five months are the most important out of the entire four-year electoral cycle from the perspective of the Party, making immediate relief essential.

ARGUMENT

This case comes down to three questions, all of which have clear answers. First, do the circumstances of a pandemic give government *carte blanche* to do whatever it will, including imposing unequal treatment on similarly situated persons and speakers? Second, are religious organizations and political parties similarly situated speakers? Third, does the government's special treatment of the Black Lives Matter protestors entitle other political speakers to equal treatment?

I. In a pandemic, the government has great discretion to make medical and scientific judgments. But it does not have *carte blanche* to discriminate among speakers on a non-medical basis.

We are all worried about COVID-19. This Application comes at an especially precarious moment, as we see a second spike in some states. When this case was filed nearly three weeks ago, the trend lines were headed down and we were on the cusp of Phase 4. Now the indicators are headed back up. Government has great discretion "while local officials are actively shaping their response to changing facts on the

ground." *S. Bay United Pentecostal Church*, 207 L.Ed.2d at 155 (Roberts, C.J., concurring). When events are moving fast, government officials enjoy broad latitude "in areas fraught with medical and scientific uncertainties." *Id.* (quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905)).

The key in this case is that government has not made a medical or scientific judgment entitled to deference. Scientifically, 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.

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 talk about 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.

Why has the Governor drawn these lines? In the case of houses of worship, he believes that he is compelled to by the First Amendment's free exercise clause and Illinois Religious Freedom Restoration Act.[20] In the case of Black Lives Matter protests, he believes that the First Amendment again compels him to respect their right to "speak truth" and "express themselves."[21] These are *legal* conclusions, not medical or scientific judgments, and to them the Court owes no deference. They are also political and policy judgments about which speakers can exercise their right to gather at a time when all others are banned from gathering.

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

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[20] Def.'s Response to Motion for a Preliminary Injunction, Docket 10, at 11–12.

[21] *See supra* notes 13-15 and accompanying text.

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. 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, "the forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful."). A pandemic does not mean all the normal rules of fair play go out the window. *See Merrill v. People First of Alabama*, No. 19A1063 (U.S. July 2, 2020) (granting stay).

II. The Applicants have an indisputable right to fair and equal treatment under the First Amendment.

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. at 159. 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 163-64.

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*, 558 U.S. at 340.[22] *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).

Here the Governor's favor turns on the content of the speech being delivered at the gathering. In the same rented high school gymnasium on the same Sunday night, a pastor may preach a sermon, but a congressional candidate may not deliver a stemwinder on a soapbox.

Because the difference in treatment is based on content, the Order is subject to strict scrutiny. *Reed*, 576 U.S. at 163-64. Plaintiffs grant that fighting COVID-19 is a

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[22] The guarantees of the Fourteenth Amendment's equal protection clause provide the same basis for relief as the free speech clause. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). *See Proft v. Raoul*, 944 F.3d 686, 691 (7th Cir. 2019).

compelling state interest. *See S. Bay United Pentecostal Church*, 207 L.Ed.2d at 154 (Roberts, C.J., concurring) (describing the disease's impact). But such an order must still pass narrow tailoring, and in this case it cannot. *Roberts*, 958 F.3d at *12.

III. Narrow tailoring requires similar treatment for similar speakers, and houses of worship and political parties are similar speakers.

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. Opinion & Order at 16–17. 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. *See Elim Church*, 2020 U.S. App. LEXIS 18862, at *16. *See S. Bay United Pentecostal Church*, 207 L.Ed.2d at 554. 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 Seventh Circuit's order denying the motion for an injunction pending appeal has two reasons for treating religious speech differently from political speech. First, the Order says the free exercise clause cannot be mere surplusage; its presence in the First Amendment must do some work. Appeals Order at 2. But the work it does often has nothing to do with speech or assembly. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). 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; *Rosenberger*, 515 U.S. at 819; *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 572 (1987). And this Court has never said that religious speech, particularly because of its religious content, is *more protected* than other kinds of speech because of its content under the free exercise clause.

The Seventh Circuit's order goes on to say that though *Elim Church* does not require the Governor to grant an exemption, *Elim Church* does not prohibit him from doing so anyway if he wishes to honor the spirit of the free exercise clause. Appeals Order at 2. But allowing the governor to favor religious speech over non-religious speech based on nothing more than its content where the free exercise clause does not require him to do so runs afoul of the Establishment Clause by favoring religious speech over non-religious speech. *See Mitchell v. Helms*, 530 U.S. 793, 810 (2000); *Bowen v. Roy*, 476 U.S. 693, 707 (1986).

Further, if the Governor is simply making a policy choice to go beyond the baseline of the free exercise clause, then this policy classification must stand up to strict scrutiny. Here, the lack of narrow tailoring is especially evident because the Governor's order exempts not only religious services, but *all* religious activity. 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.

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, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (internal citation omitted)).

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.[23] And their speech on public issues "belong[s] on the highest rung of

[23] 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

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. 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).[24]

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.

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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.

[24] *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.")

Such a distinction is not narrowly tailored because there is nothing inherent in the content of religious speech that helps the government prevent the spread of COVID-19. In short, the exemption does nothing to further the government's interest. Rather, the exception exists for the governor's political convenience or policy preference.

Plaintiffs are not here pushing for an exemption for Little League games, car shows, or sales conventions. Those are speakers of different character, with different constitutional standing. They only seek equal treatment between similar categories of speech by similarly situated speakers who are entitled to similar levels of First Amendment protection.

IV. The Governor may not extend special treatment to Black Lives Matters' protest speech while denying it to similar speakers.

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.[25] The Court of Appeals' Order has zero discussion of the special treatment extended to certain protestors but denied to all other political speakers. This is truly the apples-to-apples comparison.

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[25] *See supra* notes 13-15 and accompanying text.

Below, the District Court said that the Republicans have no reason to fear that if they also gathered in defiance of the order, the Governor would sic the State Police on them having forborne to do so against the Black Lives Matter protestors. Opinion & Order at 10. Because Republicans have not shown discriminatory enforcement, Judge Ellis concluded Applicants lack an argument here.

But this is the problem with wink-and-nod policing policies. Chicago Mayor Lori Lightfoot didn't get the hint; she sent the cops to bust up a political protest.[26] The Republicans can't know whether their event will be protected; the Governor's public comments recognizing the First Amendment rights of protestors were all specific to the Black Lives Matter protests.[27] It's unfair to say they have to risk arrest to find out the precise contours of the Governor's *de facto* exemption, whether it's for all political protestors or just for Black Lives Matter protestors. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014).

But even if the exemption covers all protestors, this does nothing to solve the *Reed v. Town of Gilbert* problem inherent in the Governor's policy. If all protest speech has joined religious speech as an exempt category, then this is just another category of favored speech. But if the Republicans advocate a proactive agenda at an event or rally in favor of a candidate rather than gather to protest against something, is that

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[26] *See supra* notes 13-15 and accompanying text.

[27] *Id.*

positive speech constitutionally different from protest speech? If they have a fund-raising reception or a caucus to elect delegates rather than a rally or protest, does the Constitution permit the Governor to treat those gatherings differently? Or if the speech takes place outside in the public square on the streets or sidewalks in the form of a protest, does that somehow give the speech more constitutional protection than speech that takes place inside or in a private farm field? The obvious answer is no. The Governor may not hold Republicans' political speech to "a different standard" than the speech from Black Lives Matter he has promised protection.[28]

V. The balance of harms is no reason to deny the injunction.

The District Court and Circuit Court lean heavily on the balance of harms in their conclusions, pointing out that more events will lead to more spread of the disease. Opinion & Order at 19–20; Appeals Court Order at 2. 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 observing appropriate distances. And both posit a straw-man as the end of all regulations on gatherings,

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[28] 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). *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.").

id., and ignore the clear limiting principle Applicants have offered distinguishing core political speech from entertainment or commercial or other types of speech.

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 Appellate Court ignore the fact that it is the governor's exemption of religious speech and protest speech that has undermined its compelling interest in preventing the spread of COVID-19. 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 U.S. at 172 (*quoting Republican Party of Minn. v. White*, 536 U. S. 765, 780 (2002)). In *Reed*, this 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 Appellate Court 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. The lower courts' reasoning simply allows the Governor to double down on his mistake by discriminating against certain speakers based on the content of their message.

The Sixth Circuit correctly concluded 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 last week in *Spell v. Edwards*, No. 20-30358, 2020 U.S. App. LEXIS 19148, at *11–15 (5th Cir. June 18, 2020) is a fitting 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."

These are not only apt words, but they reflect indisputable rights, to fair and equal treatment under law. The Application should be granted.

Respectfully submitted,

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