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

ILLINOIS RIGHT TO LIFE COMMITTEE, Plaintiff, v. J.B. PRITZKER, Defendant.	No. 1:20-cv-03675 **Memorandum of Law Supporting Motion for Preliminary Relief**

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INTRODUCTION

It is a fundamental constitutional rule, embodied in both the First and 14th Amendments, that "government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). The Constitution "[p]rohibit[s . . .] restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010). Such distinctions are especially problematic when they are extended to the politically connected or sympathetic but are denied to those who are not part of the "in" crowd. *See Southworth v. Bd. of Regents*, 307 F.3d 566, 594 (7th Cir. 2002).

Governor Pritzker's executive order violates this foundational guarantee of similar treatment for similar speakers. He has banned gatherings of 10 or more in his most recent COVID-19 order, issued May 29, but included a specific carve-out for houses of worship to gather. A week later he created an informal carve-out, publicly announcing he would not enforce the order against those protesting police brutality and racial injustice.

The Constitution does not permit the governor to limit gatherings of some expressive associations, while allowing religious assemblies and certain protesters to gather without any limitation based solely on the content or viewpoint of such gatherings. An injunction must issue now to protect the plaintiff, whose activities are at the core of the First Amendment and whose speech is timely tied to issues of public concern.

FACTS

Illinois Right to Life (IRL) is the leading pro-life education and advocacy organization in Illinois. It is the quintessential "expressive association" with a goal to educate and advocate around an important issue in our politics and society writ large. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Its mission is to "educate[] on the beauty and value of all human life regardless of a person's size, gender, race, age, or disability. We use a grassroots approach to build a culture of life in Illinois that welcomes and loves all human life from conception through natural death." Knorr Decl. ¶ 3.

In order to advance that mission, IRL undertakes a number of in-person events and activities. To boost its media profile, engage its supporters, and draw attention to its cause, it hosts major events like panels featuring local and national speakers, *id*. at ¶ 4, or hosts rallies near abortion clinics, *id*. at ¶ 5. To equip its supporters with information and to draw in new constituents, it hosts training sessions across Illinois each fall. *Id.* at ¶ 8.

To fund all these activities and the staff it takes to organize and run them, IRL undertakes several major fundraising events every year. IRL already had to cancel its "Rise and Dine Breakfast" this year because of the Governor's order. *Id*. at ¶ 6. The breakfast raises funds for Project Love, which provides grants to low-income women who choose life for their babies but face difficult financial circumstances when doing so. *Id*.

The biggest of IRL's annual fundraising events is its Leaders for Life dinner, 51 years running. *Id.* at ¶¶ 11-12. This dinner always features a nationally prominent speaker who delivers an inspiring message to the crowd of hundreds of attendees. *Id.* It generates approximately one-third of the organization's overall annual budget. *Id.* at ¶ 11. In addition to the messages delivered at the event itself, the funds it raises are used for speech activities such as IRL's training tour and physical speech collateral, such as pro-life bumperstickers and t-shirts. *Id.* at ¶ 15.

IRL had previously scheduled the dinner for the spring, but rescheduled it this year due to the Governor's ban on gatherings during COVID-19. *Id.* at ¶ 12. The dinner is currently scheduled for July 23, 2020, at a large private venue in Illinois. *Id.* at ¶ 13. The staff of IRL and the venue are working diligently to ensure as many best practices as possible for maintaining a safe environment for guests and employees. *Id.* at ¶ 14. IRL already has placed a deposit on the venue and engaged a nationally known speaker who intends to come and share an upbeat pro-life message. *Id.* at ¶ 13.

All these activities are barred by the Governor's executive order. Executive Order 2020-38, § 2.d (issued May 29, 2020) states, "Any gathering of more than ten people is prohibited unless exempted by this Executive Order."[1] The order exempts

[1] Available online at https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-38.aspx.

Though this limit may escalate to a 50-person cap in Phase 4, this mild increase makes no difference to IRL's planned activities. *See* "Illinois moving into Phase 4 of coronavirus reopening plan Friday: Here are the full guidelines," WGN-9 (June 22, 2020), https://wgntv.com/news/coronavirus/illinois-moving-into-phase-4-of-

religious organizations. *Id.* at § 2.j.a. Churches and other faith-based associations are "encouraged to consult and follow the recommended practices and guidelines from the Illinois Department of Public Health," which means "limit[ing] indoor services to 10 people." *Id.* But they are only "encouraged" to "consult" the "recommended" "guidelines"; they are not required to obey them.

Governor Pritzker also has declined to enforce his executive order against protestors assembling in groups of hundreds or more in response to recent police brutality. The Governor has characterized these gatherings as "exercising their First Amendment rights." Cole Lauterbach, "Pritzker stresses National Guard in Chicago is only 'support' for police," TheCenterSquare.com (May 31, 2020).[2] In fact, he has gone so far to march with them himself, engaging in civil disobedience of his own order. Mike Nolan, "Gov. Pritzker marches with hundreds in Matteson, demanding racial equality," Chi. Trib. (June 9, 2020).[3]

Thus, houses of worship and politically allied protestors are granted favored status, while other expressive associations are banned from meeting. While abortion

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coronavirus-reopening-plan-friday-here-are-the-full-guidelines/?fbclid=IwAR0kV_RUKHw7b9DpLKo0Pao0XcmzPJUhfClBJHNorloFC3gr__mN4Gg6IhM ("Meetings and events: Venues and meeting spaces can resume with the lesser of up to 50 people OR 50% of overall room capacity. . . . This includes activities such as conferences and weddings.").

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

[3] Available online at https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-matteson-march-pritzker-st-0610-20200609-dig6tag4bzezhnoftw537hxxde-story.html.

clinics' doors remain open, IRL feels compelled to continue its vibrant, active pro-life speech, and thus must bring this case to safeguard its rights.

STANDARD OF REVIEW

The U.S. Court of Appeals for the Seventh Circuit has established a two-stage test for the issuance of preliminary relief. First, the movant must show (1) irreparable harm in the period before resolution on the merits; (2) traditional legal remedies are inadequate, and (3) there is at least some likelihood of success on the merits. *HH-Indianapolis, LLC v. Consol. City of Indianapolis*, 889 F.3d 432, 437 (7th Cir. 2018). If a party meets these thresholds, the court moves to "weigh[] the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to other parties or the public is sufficiently weighty that the injunction should be denied." *Id.*

Because this case arises in the First Amendment context, the focus is on the likelihood of success on the merits, as the other factors are generally presumed. *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). This Court should conclude that IRL has made the requisite showings, and that the balance of harms favors its request.

ARGUMENT

The Court should issue a temporary restraining order and preliminary injunction enjoining the Governor from enforcing Executive Order 2020-38 against IRL. IRL is suffering irreparable harm without an injunction because it is prevented by the order from exercising its First Amendment rights, traditional legal

remedies are inadequate to resolve this harm, and it is likely to succeed on the merits of its claims.

I. IRL suffers irreparable harm by being prevented from holding gatherings larger than 10 people.

It is blackletter law that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a TRO and preliminary injunction. *Backpage.com, LLC v. Dart,* 807 F.3d 229, 239 (7th Cir. 2015) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

IRL feels a particular sense of urgency to continue its speech despite the pandemic because abortion clinics remain open during this time, and so IRL wants to reach women considering abortion with its pro-life views and resources for women in crisis. Associated Press, "Abortion clinics: Pandemic boosts demand, heightens stress," Chicago Sun-Times (April 13, 2020).[4] *See In re Perry*, 859 F.2d 1043, 1047 (1st Cir. 1988) ("Without question, the right to free speech includes the right to timely speech on matters of current importance.").

II. Traditional legal remedies are inadequate to resolve the irreparable harm caused by the Governor's executive order.

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.

[4] Available online at https://chicago.suntimes.com/coronavirus/2020/4/13/21219255/abortion-clinics-pandemic-boosts-demand-heightens-stress-texas-coronavirus-covid-19-womens-health.

Even if money damages could make an ordinary First Amendment plaintiff whole — and they cannot, *see generally 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") — they would not suffice here, where the Defendant is infringing on IRL's First Amendment rights during these days when women continue making the decision whether or not to choose an abortion. No pro-life message six months from now will reach a woman making that decision right now.

III. IRL is likely to succeed on the merits of its First and 14th Amendment claims.

IRL is likely to succeed on the merits of it First and 14th Amendment claims. At a minimum, it exceeds the "low threshold" that its claims have a "better than negligible" chance of success. *HH-Indianapolis, LLC*, 889 F.3d at 437.

A. IRL is likely to succeed on it First Amendment claim against Defendant for violating its right to equal treatment among speakers. (Count I)

Usually cases come before courts because government has punished, burdened, or barred a particular class of speech or speakers. Though less common, the reverse principle is equally true: "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger,* 515 U.S. at 828 (emphasis added). Phrased differently, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the

disadvantaged person or class of the right to use speech to strive to establish worth, standing and respect for the speaker's voice." *Citizens United*, 558 U.S. at 340.

The First Amendment "[p]rohibit[s . . .] restrictions distinguishing among different speakers, allowing speech by some but not others." *Id. Accord Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659 (1994) ("Regulations that discriminate . . . among different speakers within a single medium, often present serious First Amendment concerns."); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (similar). These concerns are especially pronounced when favor is conferred on politically powerful or sympathetic speakers and denied to speakers on the political outs. *See Southworth*, 307 F.3d at 594.

This is a *de facto* content-based restriction on speech — the type that is "presumptively unconstitutional." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015). Because the distinction turns on the content of the speaker's speech, religious vs. educational, or Black Lives Matter vs. Pro-Life, it is subject to strict scrutiny. *Id.*

The Governor's executive order violates this axiomatic First Amendment principle: It favors one class of speakers, houses of worship, while barring all others from gathering. *See* Exec. Order 2020-38, § 2.j.a.

And more recently, he has forborne enforcing his ban on gatherings against those protesting racial injustice and police brutality, crediting "the First Amendment rights of peaceful protesters." "Pritzker Activates Additional National Guard Members, ISP Troopers to Aid Local Law Enforcement," NBC-5 (June 1,

2020).[5] In fact, the Governor acknowledged that he was permitting protestors to make a free choice whether to gather amidst the pandemic: "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." "National Guard will be in Chicago to support police, protect First Amendment rights, mayor says," Fox-32 (June 1, 2020).[6]

And he himself has marched with them, 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 . . ." 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).[7]

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[5] Available online at https://www.nbcchicago.com/news/local/pritzker-activates-additional-national-guard-members-isp-troopers-to-aid-local-law-enforcement/2282229/.
[6] Available online at https://www.fox32chicago.com/news/national-guard-will-be-in-chicago-to-support-police-protect-first-amendment-rights-mayor-says.
[7] Available online at https://www.chicagotribune.com/politics/ct-coronavirus-pritzker-trump-protests-george-floyd-congress-20200609-bifn4ekl6bewdhxtujmdplkfpa-story.html.

[8]

Though the Governor permits people to make a free choice to come out and speak truth and express themselves about racial injustice and police brutality, his executive order prevents people from making a free choice to gather to learn about or advocate for pro-life views. Participation in the protests (or attendance at church for that matter) is at the option of the participant, based on his or her weighing of the risks and safety precautions. But for everyone else, the Governor's order is a blanket ban that is enforceable by police, preventing a free choice for IRL and its supporters. *See* Exec. Order 2020-38, l ("This Executive Order may be enforced by State and local law enforcement . . .").

This sort of favoritism cannot stand, at least as applied to expressive associations. Fighting a pandemic is clearly a compelling state interest, *see* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), but the government must still meet

[8] Eric Horng, "Gov. JB Pritzker attends unity gathering in memory of George Floyd in south suburban Matteson," ABC-7 (June 8, 2020), https://abc7chicago.com/society/governor-attends-unity-gathering-in-matteson-in-memory-of-george-floyd/6238234/.

the requirements of narrow tailoring / least-restrictive-means. *Roberts v. Neace*, 958 F.3d 409, *12 (6th Cir. 2020) (per curiam). This the government cannot do here: IRL's annual dinner is no more likely to spread COVID-19 than a church service, and a pro-life rally is no more likely to do so than a protest march.

And though commercial businesses may be substantively different in form and character from churches or protestors, expressive associations like IRL are not. Indeed, "[r]eligious groups are the archetype of associations formed for expressive purposes," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring). *Accord IDK, Inc. v. Cty. of Clark*, 836 F.2d 1185, 1195 (9th Cir. 1988) (listing churches alongside civil rights and lobbying organizations as examples of expressive associations); *A.M. v. N.M. Dep't of Health*, 117 F. Supp. 3d 1220, 1258 (D.N.M. 2015) (religious, political, and civic groups all recognized together as expressive associations). And their speech about issues of major social concern "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), just like religious speech. And this speech is most effective and persuasive when delivered in person. *McCullen v. Coakley*, 573 U.S. 464, 488-89 (2014); *Hill v. Colorado*, 530 U.S. 703, 780 (2000) (Scalia, J., dissenting). Given that religious associations are a subset of expressive associations, these "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).

Under the executive order, 100 people may go to a church sanctuary on Sunday morning, sit inside in pews, shake sanitized hands at the passing of the peace, and listen to a 20-minute homily about faith, sandwiched between announcements and prayers. But the same 100 people may not go to the same church's fellowship hall, sit inside in rows of folding chairs, shake sanitized hands before the event begins, and listen to a 30-minute training about pro-life outreach, sandwiched between announcements and prayers. The only difference between permitted and proscribed speech is the content. That is impermissible under *Reed*.

Similarly, the Governor permits hundreds of people to 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 parking lot near an abortion clinic, listen to speakers talk about pro-life views, and wave pro-life signs. Again, the difference between permitted and proscribed speech is the content the Governor favors. That cannot stand.

The governor's decision cannot survive strict scrutiny; he has denied other expressive associations the favored status currently conferred on churches and protestors, even though they all exist at the heart of the First Amendment.

B. IRL is likely to succeed on its claim for equal protection of the laws under the 14th Amendment. (Count II)

The guarantees of the 14th Amendment's equal protection clause provide the same basis for relief as the free speech clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). *See 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." Underlying citation omitted). Because the Governor's policies violate the First Amendment, they also necessarily violate the 14th Amendment.

IV. IRL and the public will suffer substantial harm without a preliminary order while there would be no harm to Defendant should the Court enter a preliminary order.

As explained above, IRL will suffer irreparable harm if an injunction is not issued. The converse is not true of the governor; there is no harm to being prevented from enforcing an unconstitutional policy. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 991 (7th Cir. 2019). The public, however, benefits from "preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Higher Soc'y of Ind. v. Tippecanoe Cty.*, 858 F.3d 1113, 1116 (7th Cir. 2017). And though the public benefits from a safe environment, there is no basis to believe that pro-life speakers, as opposed to pro-Black Lives Matter speakers or religious associations, are any more likely to spread COVID-19. Moreover, "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). This principle applies as well here as in any other circumstance: The public benefits when the First Amendment is honored.

CONCLUSION

The harm suffered by Illinois Right to Life is immediate and irreparable, monetary damages are inadequate to resolve its injury, and it is very likely to succeed on its complaint. Further, IRL and the public will suffer a substantial harm

by the squelching of public discussion of an important issue with real-world implications. Illinois Right to Life respectfully requests that its motion be granted.

Dated: June 23, 2020

Respectfully Submitted,

ILLINOIS RIGHT TO LIFE COMMITTEE

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