

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

<p>ILLINOIS REPUBLICAN PARTY, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>J.B. PRITZKER,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">No. 1:20-cv-03489</p> <p style="text-align: center;">Memorandum of Law Supporting Motion for Temporary Restraining Order and Preliminary Injunction</p>
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INTRODUCTION

It is a fundamental 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 powerful 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 caved to popular outcry and media pressure and 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 him to create special exceptions for churches and protestors because of their high media profile — or in the case of the protestors, his agreement with their political viewpoint — but to deny permission to gather to other fundamental First Amendment institutions like political parties, especially those opposed to him and his party. An injunction must issue now to protect the plaintiff political parties and others whose activities are at the core of the First Amendment and who face a fast-approaching presidential election.

FACTS

The Illinois Republican Party is the recognized organization of Republicans in Illinois (Schneider Declaration at ¶ 3). Its mission is to elect Republican candidates to local, state, and federal office (*Id.* at ¶ 4). It also advocates for its platform, which consists of policy positions set by the delegates to its convention (*Id.*). As the major party opposite the party currently in power in state government, the Illinois Republican Party provides an integral civil-society counterweight to the Governor and his administration (*Id.* at ¶ 3). It has multiple local regional and county-based units that are independent but integrated into its operations (*Id.* at ¶ 5). Several of those local parties are also plaintiffs (*See* Declarations of Folisi, Pearson & Podgorski).

In-person gatherings are foundational to the Party's activities. The Party's leaders, staff, and consultants meet to develop and discuss strategy (*Id.* at ¶ 7). The Party's grassroots activists meet for caucuses and conventions to conduct the business of the party, elect officers, adopt platforms, and allocate resources (*Id.* at ¶ 6). The Party's elected officials meet with incumbent legislators and candidates to present a unified front to the electorate (*Id.*). 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 permit the Party to amplify its message without paying for advertising (*Id.* at ¶ 8). The Party raises funds through receptions, luncheons, and house parties (*Id.*). The Party reaches undecided voters and turns out its own voters through phone banks, door-to-door canvassing, and

other assemblies of volunteers (*See* Pearson Declaration at ¶ 9). Many of these activities are not possible or not as effective when done through online alternatives (*Id.*). Many can be undertaken with proper social distancing and hygiene procedures in place, such as encouraging masks, spacing seating or tables at least 6 feet apart, frequent sanitizing, and providing hand sanitizer (Schneider Declaration at ¶ 12).

The months leading up to a presidential election are the busiest and most important for the Party (*Id.* at ¶ 13). During this time, it organizes its staff, volunteers, voters, and donors to maximum effect (*Id.*). It undertakes numerous meetings and public events, including rallies, bus tours, strategy meetings, training sessions, phone banks, fundraising receptions, press conferences, headquarters ribbon-cuttings and meet-and-greet coffees (*Id.* at ¶¶ 7-8). In-person interaction is vital to ensuring the full effectiveness of these events (*Id.* at ¶ 11).

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. The Northwest Side GOP Club, for instance, wants to host a rally for the Republican candidate for Cook County State's Attorney (Podgorski Affidavit at ¶ 6). The Will County Republicans have already canceled their Juneteenth Day celebration for June 19, but are instead going to hold a July 4 celebration with picnic food and fireworks (Pearson Affidavit at ¶ 7). They are planning to hold the festivities on a farm to allow plenty of room for people to spread out and maintain safe distances if they wish as they watch fireworks and listen to speakers from their blankets and lawn chairs (*Id.*).

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 10 people is prohibited unless exempted by this Executive Order."¹ The order exempts 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 has also declined to enforce his executive order against protestors assembling in large 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 as 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

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

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>.

Thus, houses of worship and politically allied protestors are granted favored status, while the political party aligned against the governor is barred from meeting. As the 2020 general election marches inexorably closer every day, the Party must act now to vindicate its rights and ensure its maximum effectiveness in the months before voting begins.

STANDARD OF REVIEW

The Court of Appeals for the Seventh Circuit has established a two-stage test for the issuance of a temporary restraining order (TRO) and preliminary injunction. 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 the Illinois Republican Party has made the requisite showings, and that the balance of harms favors their request.

ARGUMENT

The Court should issue a TRO and preliminary injunction enjoining the Governor from enforcing Executive Order 2020-38. The Party 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. The Party 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)).

Here, the party seeks to advance its mission in the five months leading up to the 2020 general election, which is the crucial time when the need for in-person organizing and outreach is at its zenith. *See 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...”). These next five months are the most important out of the entire four-year electoral cycle from the perspective of the Party.

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.

And these circumstances are particularly dire. The Party is never more active than in the months leading up to a presidential election. 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 the Party’s First Amendment rights exactly when they need them the most.

The Party asks for no damages in its complaint. It seeks only equal and fair treatment like other organizations of a similar character at the heart of the First Amendment.

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

The Party is likely to succeed on the merits of its 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. The Party is likely to succeed on its 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. *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. political, or Black Lives Matter vs. Republican, 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 he did so because of a constant, insistent, powerful drumbeat of popular demand and media pressure from across Illinois to restore the right of the people to gather and worship. *See, e.g.*, John Kass, "Is Pritzker's coronavirus levee about to break?," *Chi. Trib.* (May 21, 2020).⁴

And more recently, he has forbore 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

⁴ Available online at <https://www.chicagotribune.com/columns/john-kass/ct-coronavirus-illinois-churches-kass-20200521-o2pk6tvcprhwvblo5mvfntuwoa-story.html> ("Pritzker allowed worship services but imposed social distancing guidelines and limited the free exercise of religion to only 10 or fewer people at a time. The people are pushing back. The pressure builds like a rain-swollen river pushing on a levee.").

⁵ Available online at <https://www.nbcchicago.com/news/local/pritzker-activates-additional-national-guard-members-isp-troopers-to-aid-local-law-enforcement/2282229/>.

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



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-bifn4ekl6bewdhxtujmdplkfa-story.html>.

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/>.

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 in opposition to his policies and political machine. 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 the Party and its supporters. *See* Exec. Order 2020-38, 1 (“This Executive Order may be enforced by State and local law enforcement...”).

This sort of favoritism cannot stand, at least as applied to political parties. Fighting a pandemic is clearly a compelling state interest, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905), but the government must still meet 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: A political party caucus is no more likely to spread COVID-19 than a church service, and a political party 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, political parties are not. Political parties exist alongside churches and protestors “at the very heart of the freedom of assembly and association.” *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring). And their speech about politics and public affairs “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). 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).

Political parties and houses of worship are “entities of similar character” that are entitled to similar treatment. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48 (1983). See also *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) (listing churches and political parties as similar under the First Amendment).

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. 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 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 favors. That cannot stand.

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

B. The Party 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 Department 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. The Party 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, the Party 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). 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 enforced.

CONCLUSION

The harm suffered by the Illinois Republican Party is immediate and irreparable, monetary damages are inadequate to resolve its injury, and it is very likely to succeed on its complaint. Further, the Party and the public will suffer a substantial harm by the squelching of political discourse in the state in the months preceding a general election. The Illinois Republican Party respectfully requests that its motion be granted.

Dated: June 15, 2020

Respectfully Submitted,

ILLINOIS REPUBLICAN PARTY

**WILL COUNTY REPUBLICAN
CENTRAL COMMITTEE**

**SCHAUMBURG TOWNSHIP
REPUBLICAN ORGANIZATION**

NORTHWEST SIDE GOP CLUB

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