No. _____

IN THE

# Supreme Court of the United States

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

*PETITIONERS*,

*V.*

J.B. PRITZKER, GOVERNOR OF ILLINOIS,

*RESPONDENT.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## PETITION FOR A WRIT OF CERTIORARI

Daniel R. Suhr
*Counsel of Record*
Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
208 LaSalle St., Ste. 1690
Chicago, IL 60604
(312) 637-2280
dsuhr@libertyjusticecenter.org

*Counsel for Petitioners*

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## QUESTION PRESENTED

In *Reed v. Town of Gilbert*, this Court clarified that content-based restrictions are those that apply to particular speech because of the topic discussed or the idea or message expressed, and reaffirmed that content-based restrictions on speech receive strict scrutiny review.

The Governor of Illinois permits religious speakers to speak and gather in groups larger than fifty, but formally bans similarly situated political speakers from doing so. Does this preference for speakers of religious content over speakers of political content survive strict scrutiny?

## RULE 29.6 STATEMENT

Petitioner Illinois Republican Party is a nonprofit corporation organized under the laws of Illinois, and does not have a parent corporation and issues no stock. The other three petitioners are nonprofit unincorporated associations.

## RELATED CASES

- *Illinois Republic Party v. Pritzker*, No. 20 C 3489, Northern District of Illinois, Preliminary Relief Denied July 2, 2020.
- *Illinois Republic Party v. Pritzker*, No. 20-2175, Seventh Circuit, Preliminary Relief Denied July 2, 2020.
- *Illinois Republic Party v. Pritzker*¸ No. 19A1068, Supreme Court, Application for Injunctive Relief denied July 4, 2020.
- *Illinois Republic Party v. Pritzker*, No. 20-2175, Seventh Circuit, Judgment Entered September 3, 2020.

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## INTRODUCTION

"The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting from denial of application). This case poses a similar question: does the First Amendment's free speech clause permit Illinois to favor Calvary Chapel over the Republican Party?

In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), this Court applied strict scrutiny to strike down a municipal ordinance that treated signs with religious content worse than signs with political content. Now comes the reverse: does it survive strict scrutiny for the government to treat religious speech content *better* than political speech content? *Reed* dictates the answer is no, but the Seventh Circuit has answered yes in an opinion that does not even mention, little less apply, strict scrutiny.

The Governor of Illinois has issued an executive order banning gatherings of 50 or more in response to the COVID-19 outbreak. App. 3. The order, however, contains a massive exception: religious organizations may gather in groups of any size. As a result, 1,000 people can lawfully gather for Sunday morning services in any of the score of reopened megachurches across Illinois, but it is a crime for 51 Republicans to hold a rally. Applying *Reed*, the governor's order is content-based and therefore is subject to strict scrutiny. And it fails this test.

Instead, the Seventh Circuit found that religious assemblies are sufficiently unique that religious speakers can speak when no one else can. Nothing in *Reed* permits this special treatment of religious speech; had the Court wanted it to be so, it would have decided *Reed* on very different grounds.

Petitioners respectfully ask this Court to grant their petition.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 931 F.3d 42 and reproduced at App. 1 – 25. The opinion of the district court is reported at 309 F. Supp. 3d 139 and reproduced at App. 28 – 58.

## JURISDICTION

On September 3, 2020, the court of appeals affirmed the district court's decision and order. App. 25. The Court has jurisdiction under 28 U.S.C. § 1254(1). App. 26. The certiorari petition is timely filed due to this Court's order of March 13, 2020, extending timelines for filing to 150 days.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Though not a statute, the Executive Order provision challenged is E.O. 2020-43(4)(a), which is reproduced in the Seventh Circuits opinion at

App 2 – 3.[1] The Governor extended these rules through the date this petition is filed in E.O. 2021-01.[2]

## STATEMENT OF THE CASE

### A. The Governor prefers religious speech and assembly over all other forms of gathering, including political gatherings.

In response to the COVID-19 pandemic, Illinois Governor J.B. Pritzker has issued a series of emergency orders affecting the right to speak and assemble. The first such order, issued March 13, 2020, banned all gatherings over 1,000 people. E.O. 2020-04 (March 13, 2020). Three days later, a new order lowered the ban on gatherings to 50, specifying it included "civic" and "faith-based events." E.O. 2020-07 (March 16, 2020). Four days after that, the cap on gatherings was lowered to ten. E.O. 2020-10 (March 20, 2020). This third order contained not only a prohibition but a hammer: "This Executive Order may be enforced by State and local law enforcement." There the limit on gatherings stayed until June 26, when the state's entry into Phase 4 lifted the cap on gatherings up to 50. E.O. 2020-43 (June 26, 2020). There it is expected to remain, as the Governor's plan for entry into Phase 5 requires the widespread distribution of a vaccine, and the Governor has issued an administrative rule with the 50-person cap that runs through at least June.

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[1] Available at https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-43.aspx

[2] Available at https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2021-01.aspx

Greg Bishop, "Pritzker files new emergency COVID-19 rule," *The Alton Telegraph* (Jan. 5, 2021).[3]

As weeks dragged into months of people frozen in their homes, a public outcry developed for a restoration of basic First Amendment rights, leading to litigation that eventually wound its way to this Court, *see, e.g., S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020), and the court below, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020). Under pressure from lawsuits, church leaders, and the general public, on April 30, Governor Pritzker, for the first time, issued an executive order that said "to engage in the free exercise of religion" was an "essential activity," as long as the limit of ten was observed. E.O. 2020-32. 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. *See* "Letter from Cardinal Cupich," Archdiocese of Chicago (May 13, 2020).[4]

On May 29, the Governor's newest order continued the ten-person limit on gatherings in general, but added "free exercise of religion" alongside "emergency functions" and "governmental functions" as the three

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[3] Available at https://www.thetelegraph.com/news/article/Pritzker-files-new-emergency-COVID-19-rule-15848468.php.

[4] Available at https://www.archchicago.org/documents/70111/2665901/051320_Cupich_Letter_ReopeningPlan_ENG+-+PDF/53811f4e-e3c8-4f0e-8fbc-50d519b5af78.

recognized exemptions to the Order. E.O. 2020-38. Religious organizations and houses of worships were "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. App. 2 – 3. "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 v. Pritzker*, 962 F.3d at 344.

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. E.O. 2020-44. There it remains today. E.O. 2020-52.

### B. The Republican Party of Illinois and its local affiliates are similarly situated speakers looking to engage in core First Amendment activity supporting their candidates and platform.

Petitioners are Republican Party organizations that wished to exercise their First Amendment rights to speak about politics in the months leading up to the presidential election in November.[5] They seek to elect

[5] Though the November 2020 election is now passed, the Petitioners are institutional electoral actors who have already begun organizing for future elections, such as the 2022 gubernatorial race. Thus, their claims are not moot. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997).

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, luncheons, and house parties. The Party reaches undecided voters and turns out its own voters through phone banks, door-to-door canvassing, and other assemblies of volunteers. Many of these activities are not possible or not as effective when done through online alternatives. Many can be undertaken with proper precautions in place, such as encouraging masks, spacing seating or tables at least 6 feet apart, frequent cleaning, and providing hand sanitizer.

The months leading up to an election are the busiest and most important for the Party. During this time, it organizes its 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.

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 is the content of the speech delivered at the event.

**C. Proceedings Below.**

In order to secure equal treatment under law, the Plaintiffs filed a complaint against the Governor in the Northern District of Illinois on June 15, 2020 (No. 1:20-cv-03489, Docket 1). They simultaneously filed a motion for a temporary restraining order and a preliminary injunction (Docket 3). The District Court held a hearing on the motion on June 29, and issued an opinion and order denying the motion on July 2 (Docket 16). The District Court reasoned that the Plaintiffs were not likely to succeed on the merits of their claim because of the special standing of religion in our constitutional structure, App. 52 – 53, and because the balance of harms weighed against them in a pandemic, App. 56 – 58. The District Court subsequently denied a motion for an injunction pending appeal (Docket 18), for the same reasons as it denied the preliminary relief.

The Plaintiffs immediately filed a notice of interlocutory appeal to the U.S. Court of Appeals for the Seventh Circuit. They also filed an emergency motion for an injunction pending appeal. The next day, Friday, July 3, a motions panel issued a brief order denying the request, again citing the special status of religion and the balance of harms.

That night, the Plaintiffs-Appellants filed an emergency application for an injunction pending appeal

with the circuit justice of the United States Supreme Court (S.Ct. 19A1068, Docket 1). That application was denied without comment on July 4 (S.Ct. Docket 2).

For its plenary consideration of the preliminary injunction request, the Seventh Circuit heard argument on August 11, 2020, and decided the case on September 3, 2020. In its decision, the Circuit briefly mentions *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), but recognizes that this particular legal theory is different from all the other pandemic-context cases and therefore must be decided on different grounds. App. 7.

Those grounds are whether the governor's preference for religious speech over-and-against all other forms of speech is permissible under *Reed v. Town of Gilbert*. Without ever mentioning strict scrutiny, compelling interests, or narrow tailoring, the Court held that the First Amendment permits the governor to extend a special solicitude for religious gatherings while denying equal treatment to other categories of speech content.

## REASONS FOR GRANTING THE PETITION

### I. The Seventh Circuit did not even mention, little less apply, the correct test. This error alone warrants summary reversal.

In *Reed v. Town of Gilbert*, this Court held that a restriction on speech that is content-based is subject to strict scrutiny. 576 U.S. 155, 163 (2015). Laws subject to strict scrutiny are "presumptively unconstitutional," *id.*, because the government must prove that

its restriction is narrowly tailored to a compelling interest.

The District Court correctly concluded the governor's order in this case is a content-based restriction. App. 51. Therefore, "[b]ecause the exemption is a content-based restriction, this provision can only stand if it survives strict scrutiny."*Id.*

Even though this was a core holding of the District Court, the Seventh Circuit failed in its duty to apply strict scrutiny to the order. At no point in its analysis of the plaintiffs' claims does the Seventh Circuit mention strict scrutiny, identify a compelling interest justifying the gatherings ban, or ask whether the ban is narrowly tailored to that interest. The opinion below ignores all of that and instead spends most of its opinion discussing the Religion Clauses.

The Seventh Circuit's failure here is in stark contrast to this Court's recent case applying *Reed* and to its sister circuits, all of which have applied strict scrutiny in their post-*Reed* cases as directed. *See, e.g., Barr v. Am. Ass' n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (plurality); *id.* at 2364 (Gorsuch, J., concurring/dissenting); *Reagan Nat'l Advert. of Austin v. City of Austin,* 972 F.3d 696, 702 (5th Cir. 2020); *Thomas v. Bright*, 937 F.3d 721, 733 (6th Cir. 2019); *Free Speech Coal., Inc. v. Atty. Gen. United States*, 825 F.3d 149, 164 (3d Cir. 2016); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015).

The failure to apply the appropriate test alone is sufficient grounds for summary reversal of the decision below. Courts should "begin with the basics." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). In *Munaf*, those basics were the four elements for a preliminary

injunction, one of which is likelihood of success on the merits. "But one searches the opinions below in vain for any mention of a likelihood of success as to the merits of Omar's habeas petition." *Id.* at 690. The total absence of any mention of the relevant test "require[s] reversal and remand . . ." *Id.* at 691.

Quite simply, naming and then applying the correct test is absolutely essential to a solid opinion. *See Johnson v. California*, 543 U.S. 499, 509 (2005) ("the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest."). *See also Abrams v. Johnson*, 521 U.S. 74, 114 (1997) (Breyer, J., dissenting) (lower court's "use of the wrong test requires vacating its judgment."); *Townsend v. Sain*, 372 U.S. 293, 325 (1963) (Goldberg, J., concurring) (new hearing necessary given "the lack of any indication that the trial court did utilize the correct test."). When that error is obvious in light of governing precedent, summary reversal is the appropriate response. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006).

Circuit courts take the same approach when considering the opinions of district courts: failure to mention, little less apply, the governing test is almost automatically reversible error. *See, e.g., United States v. Heinrich,* 971 F.3d 160, 163 (3d Cir. 2020); *Boone v. Heyns*, 583 F. App'x 543, 544 (6th Cir. 2014); *IES Indus. v. United States*, 253 F.3d 350, 354 (8th Cir. 2001); *New Kayak Pool Corp. v. R&P Pools, Inc.*, 246 F.3d 183, 185 (2d Cir. 2001). Indeed, the Seventh Circuit itself will readily reprimand a district court that "does not even mention, much less discuss, [the correct] test

or how it applies to" the case. *Allen v. Buss*, 558 F.3d 657, 663 (7th Cir. 2009).

Applying the right test is a basic component of any judicial opinion; the Seventh Circuit's failure to do so here should result in summary reversal and reconsideration with the appropriate analysis in place.

## II. The Seventh Circuit decision upholding the governor's preference for religious speech over political speech is fundamentally incompatible with *Reed*.

In his *Calvary Chapel* dissent, Justice Gorsuch highlighted the inconsistency between the Governor of Nevada's decision to permit Black Lives Matter protests of any size while capping religious gatherings. Justice Gorsuch recognizes that the right to assemble for political speech is also protected by the First Amendment, but that is no reason to prefer protesting to church-going: "[R]especting some First Amendment rights is not a shield for violating others." *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2607-08 (Gorsuch, J., dissenting from denial of application). *Accord Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J., concurring) ("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 this case, the Governor of Illinois has committed the same error in reverse: he has respected the right to church-going while denying the right to political gatherings. The Seventh Circuit justifies this preference for religious speech over political speech by saying there exists "space for legislative action neither

compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." App. 13 – 14 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005)).

This is fine as far as it goes; it simply restates the "play in the joints" rule. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). And had this been an Establishment Clause challenge arguing that the executive order unconstitutionally privileged religion, it may well have been dispositive of that claim. But that is, as the Seventh Circuit acknowledges, "emphatically not the theory that the Republicans are pursuing." App. 8. Yet it is nevertheless the one to which the Court devotes almost all of its time and attention.

Instead, the Petitioners focused their argument below on one case: *Reed*. In *Reed*, this Court considered a town sign code that privileged signs with ideological messages over political messages, and signs with political messages over "temporary directional signs" that point people to, among other things, church services. 576 U.S. at 159-61. Finding the town's preference for ideological and political signs over church signs was not content neutral, the Court applied strict scrutiny, which the code flunked.

"In order to make *Reed* comparable to the case before us, we would need to postulate a Sign Code that restricted temporary directional signs for everyone except places of worship, and that left the latter free to use whatever signs they wanted." App. 18.

The Seventh Circuit then entered on precisely this analysis: an executive order that restricted gatherings for everyone except places of worship, and that left the latter free to hold whatever religious gatherings they

wanted. Without applying strict scrutiny, the court concluded that such an exception is entirely acceptable under *Reed* because "the speech that accompanies religious exercise has a privileged position under the First Amendment . . ." App. 9. Elsewhere the Court says that "[f]ree exercise of religion enjoys express constitutional protection, and the Governor was entitled to carve out some room for religion, even while he declined to do so for other activities." App. 22. The Seventh Circuit concludes this section of its opinion by saying, "*Reed* therefore does not compel the Governor to treat all gatherings alike, whether they be of Catholics, Lutherans, Orthodox Jews, Republicans, Democrats, University of Illinois alumni, Chicago Bears fans, or others." App. 21-22.[6]

On this basis, the judges conclude that had those been the facts of *Reed* this Court's decision would have come out completely the opposite — that content-based speech restrictions favoring religion would have been found to be entirely constitutional.

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[6] Obviously the governor must treat Catholics, Lutherans, and Orthodox Jews the same. Nevertheless, in its order denying an injunction pending appeal in this case, the Seventh Circuit's motions panel held that the balance of harms prevented them from issuing an injunction. Under that analysis, the governor could treat Catholics better than Lutherans and Jews, and they would have no judicial recourse because extending the free-exercise treatment to them would lead to more gatherings, creating more harm. App. 30.

The Seventh Circuit's analysis is contrary to both what this Court said in *Reed* and what this Court has said about religion in other cases.

First, nothing in *Reed's* analysis depended on the fact that Pastor Reed sought to put up a sign for a specifically religious event. Had a Cub Scout troop sued seeking to put up a sign rather than a church, the outcome would have been exactly the same.[7]

Moreover, if the Seventh Circuit's analysis were correct, *Reed* should have been decided not as a free-speech case but as a Religion Clause case. The Town of Gilbert's error, under the Seventh Circuit's view, was that it discriminated against religion, not that it treated political speech better than other types of speech. But obviously that is not *Reed's* holding.

Second, none of this Court's cases have ever held that religious speech may be treated *better* than other

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[7] *Reed's* decision not to grade categories of content based on their constitutional priority may make for a broad rule, but it is an intentional one. *Reagan Nat'l Advert. of Austin v. City of Austin*, 972 F.3d 696, 707 (5th Cir. 2020) ("The rule in *Reed* is broad, but this is not an unforeseen consequence."). Justice Breyer's dissent in *Barr* hammers on the inability to distinguish the Catholics from the Republicans from the Bears fans under *Reed*, but he recognizes that is the result compelled by *Reed's* rule. *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2358-62 (2020) (Breyer, J., concurring/dissenting). Incidentally, under Justice Breyer's framework, the Republicans would have a strong claim for strict scrutiny because "core political speech" receives "heightened protection." *Id.* at 2359.

kinds of speech. This Court has routinely held that religious speech cannot be treated *worse* than other categories or viewpoints of speech. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). But no case has held that religious speech is so special that government may discriminate in favor of religious speech over other types of speech.[8]

Certainly the government may preference religion in some contexts. In his *Calvary Chapel* opinion, Justice Kavanaugh posits three types of laws affecting religion: those that expressly discriminate against religion, those that expressly favor religious organizations over secular organizations, and those that are entirely neutral between the religious and the secular. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2611 (Kavanaugh, J., dissenting from denial). None of the examples given in Justice Kavanaugh's second category, where this Order would fall, concern speech-based activities. We would have a different case if a campaign committee were asserting a right to a property tax exemption because churches are also exempted. *Cf. Walz v. Tax Comm'n of City of New York*, 397 U. S. 664 (1970).

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[8] Even in Justice Breyer's concurring opinion in *Reed* — where he specifically mentions several examples of speech regulated by government that inevitably involves content discrimination but where he believes a strong presumption against constitutionality has no place and exceptions to the rule that content-based restrictions on speech receive strict scrutiny — he does not mention regulations favoring religious speech over non-religious speech. 576 U.S. at 155.

But here, the political party is seeking the right to assemble and speak on the same basis as a religious group. If the free exercise clause commands that churches be allowed to meet even during a pandemic, the free speech clause demands that a government must pass strict scrutiny to deny the right to meet to expressive gatherings around other content. "[L]aws favoring some speakers over others demand strict scrutiny . . . " *Reed*, 576 U.S. at 170.

And if such a line among expressive activities had been drawn, a political rally in the months immediately preceding an election is much closer in constitutional stature to a religious service than to a purely social or sporting event. *See Barr*, 140 S. Ct. at 2358-62 (Breyer, J., concurring/dissenting). *See also McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014) ("the First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Indeed, taking *Reed* at its word, the Seventh Circuit's conclusion is simply incorrect.

Elsewhere, the Seventh Circuit characterizes a religious service as "'speech plus,' where the 'plus' is the protection that the First Amendment guarantees to religious exercise." App. 9. This "speech plus" characterization makes two fundamental mistakes. First, regardless of whether free exercise encompasses more than speech generally, this particular case centers on a ban on *gatherings*, and gatherings are core speech activities. *See, e.g., Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557, 568-70, (1995). *See also* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) (documenting how the Court

has merged the First Amendment's "freedom of assembly" clause into the free speech clause).

Here, the disparate treatment is specific to gatherings, where the only difference is the content of speech given at the gathering. 100 people assemble in two high school gymnasia at 6pm on a Sunday evening. At one high school, the man behind the podium delivers a sermon followed by the singing of a hymn. At the other, a woman at the podium gives a speech about free enterprise, after which the assembly sings "God bless America." One is legal, the other is illegal. The difference in treatment is only the expressive content of the speech.

Second, in this particular case, one could just as easily characterize a political rally as "speech plus." It is not only the physical act of delivering speech, or waiving a sign with a message on it. A political party's rally is the physical manifestation of its right to associate as a common cause of its members. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). It is where the party not only speaks, but also recruits volunteers, signs up new members, and fundraises. And it is where current and future candidates not only speak, but meet voters one-on-one, delivering that personal touch or developing the individual relationship that is the special sauce that leads to victory for some over their less genial competitors.

Moreover, the inability to hold such events interferes not only with the party's rights to speak and associate, but also the voters' "right to receive information" by attending or watching news coverage of the events to learn about the party and its candidates. *See Eu v. S.F. Cty. Democratic Cent. Comm.,* 489 U.S. 214, 223, 228, 109 S. Ct. 1013, 1023 (1989); *Hynes v. Mayor*

*& Council of Oradell,* 425 U.S. 610, 621 n.5 (1976). All of this concerns the "fundamental political right to vote," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), which lies at the heart of our republic and is certainly a "plus" unique to political gatherings in election season.

This Court concluded *Reed* on a cautionary note: "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." 576 U.S. at 167. *Reed* warns, "one could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." *Id*. at 167-68.

Prophecy has become reality in Illinois. The governor may have an innocent, even noble, motive in granting an exception to religious gatherings. But once exceptions begin, they are hard to deny others equally sympathetic or powerful. So we should not be surprised that like the hypothesized compliance manager, police in Chicago permitted Black Lives Matter protestors to gather in large groups, while "Reopen Illinois" protestors were subject to enforcement. *Compare* "Thousands Pack Chicago Streets, Parks to Support Black Lives Matter," NBC-5 (June 7, 2020),[9] *with* "Police Break Up Rally Protesting Stay-At-Home Order

[9] Available online at https://www.nbcchicago.com/news/local/thousands-pack-chicago-streets-parks-to-support-black-lives-matter/2285752/.

At Buckingham Fountain," CBS-2 (May 25, 2020).[10] In the latter case, 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."[11] No one, that is, except churches and Black Lives Matter protestors. This is just the sort of content preference *Reed* warned against.

## III. The Court cannot permit the Seventh Circuit to gut the strict-scrutiny test by allowing the government to "balance" various "competing" compelling interests.

While defending its exemption for religion, the government offered a simple explanation for its policy. The governor said that he had a compelling interest in fighting COVID-19 but also a compelling interest in extending a special solicitude toward the free exercise of religion (one that goes beyond the minimum required by the free exercise clause). App 97. In other words, the Order's exemption for religion is a policy decision, not the result of constitutional command. As the Seventh Circuit acknowledges, the governor's decision to extend this exemption was not compelled by the free exercise clause. App. 21. It was, in the governor's words below, a matter of "executive grace," App. 95, n.17, supposedly extended to honor the special

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[10] Available online at https://chicago.cbslocal.com/2020/05/25/police-break-up-rally-protesting-stay-at-home-order-at-buckingham-fountain/.

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

place of religion in our society. The governor is, in his view, "balancing" two competing compelling interests: his interest in fighting COVID with his interest in honoring religious exercise. App. 95.

The governor's approach to defending this makes two errors. First, the governor's "benign motive" in wishing to honor religion is irrelevant to *Reed's* test. The governor's decision to grant a special standing to religion may have been motivated by his policy preference for religion, a desire to avoid being sued, or political pressure from cardinals and constituents. Whatever motivated it, that rationale doesn't matter under *Reed* because "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive . . ." 576 U.S. at 165. The Court reiterates later in *Reed* it has "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny . . ." *Id.* at 164-65. And for a third time the Court says, "the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them." *Id.* at 167.

Second, allowing government officials to "balance" "competing compelling interests" would gut the strict scrutiny test and doom any challenge to an underinclusive law.

If this is so, then the Town of Gilbert should have won its case by arguing that its ordinance balanced its compelling interest in aesthetics and traffic safety with a compelling interest in honoring political speech near in time to an election (even if this solicitude for political signage wasn't mandated by the free speech

clause). The general ordinance was justified by the first compelling interest, and the exception was justified by the second compelling interest, and the ordinance was the government's best effort to strike a balance. That is the logic of the governor's position.

Similarly, the U.S. Government should have told this Court that it was balancing its compelling interest in preventing annoying phone calls with its compelling interest in minimizing the tax burden by collecting debts owed to the Treasury. *See Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020). The City of Hialeah should have said that though it had a compelling interest in preventing animal cruelty, it had competing compelling interests in avoiding the spread of disease by stray animals and advancing medical science, so its underinclusive regime was really just a thoughtful balancing of competing interests. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543-44 (1993). Other examples of underinclusive regimes that could have been recharacterized as balancing abound. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 362 (2010); *Republican Party v. White*, 536 U.S. 765, 783 (2002).

As the foregoing cases illustrate, to permit this style of analysis is to eviscerate the strict-scrutiny test. Under the governor's framework, the government may undermine its compelling interest in any policy for any reason that it also deems compelling enough to justify the exception it desires. Virtually any regime that is underinclusive can be justified by such an approach, which would undermine numerous precedents of this Court. The government's approach to justifying its exception is dangerous to the entire foundation of First Amendment jurisprudence.

## IV. After this Court's decision in *Roman Catholic Diocese of Brooklyn*, this Court should make clear that ALL of the First Amendment, the free speech clause as well as the free exercise clause, remains in force during a pandemic.

In this Court's *per curiam* opinion, *Roman Catholic Diocese of Brooklyn* reminds us that "even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L.Ed.2d 206, 210 (U.S. 2020).

The Justices of this Court have made very clear that governments may not discriminate against houses of worship while permitting so-called "essential" businesses to operate with impunity. *Id. See Calvary Chapel Dayton Valley*, 140 S. Ct. at 2603 (Alito, J., dissenting); *id.* at 2609 (Gorsuch, J., dissenting); *id.* (Kavanaugh, J., dissenting); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J. dissenting). *See also Danville Christian Acad., Inc. v. Beshear,* No. 20A96, 2020 U.S. LEXIS 6104, at *8 (Dec. 17, 2020) (Gorsuch, J., dissenting from denial of application).

The governor's restrictions here have the same effect as to political speech that the Court condemned in *Roman Catholic Diocese*: they effectively ban many from attending political events, which are at the very heart of the First Amendment's guarantee of free

speech. If gatherings in houses of worship are at the heart of free exercise, gatherings for political rallies are at the heart of free speech. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, (2011) ("The Free Speech Clause exists principally to protect discourse on public matters."); *Hill v. Colorado*, 530 U.S. 703, 715, 120 S. Ct. 2480, 2488 (2000) ("leafletting, sign displays, and oral communications are protected by the First Amendment."); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring) ("The right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate candidates for political office is at the very heart of the freedom of assembly and association.").

This right to free speech and fair treatment for political parties is just as deserving of this Court's attention and protection as the right to free exercise and fair treatment for houses of worship. This case presents this Court an invaluable opportunity to remind government officials that they are "not free to disregard the First Amendment in times of crisis," *Roman Catholic Diocese of Brooklyn*, 208 L.Ed.2d at 211 (Gorsuch, J., concurring), neither its free exercise nor its free speech clause. If services at houses of worship are protected because of their standing at the core of free exercise, then rallies by political parties in the weeks immediately preceding an election must be protected because of their standing at the core of free speech.

## CONCLUSION

"There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech." *Calvary*

*Chapel Dayton Valley*, 140 S. Ct. at 2614-15 (Gorsuch, J., dissenting from denial of application). The Governor of Illinois has crossed this red line, suppressing some speech but permitting other speech based only on its content. Because the Seventh Circuit has approved this discrimination in contravention of *Reed*, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

Daniel R. Suhr
*Counsel of Record*
Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
208 LaSalle St., Ste. 1690
Chicago, IL 60604
(312) 637-2280
dsuhr@libertyjustice-center.org

*Counsel for Petitioners*

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