In the
United States Court of Appeals
For the Seventh Circuit

No. 20-2175

ILLINOIS REPUBLICAN PARTY, *et al.*,

Plaintiffs-Appellants,

v.

J. B. PRITZKER, Governor of Illinois,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 20 C 3489—**Sara L. Ellis**, *Judge.*

ARGUED AUGUST 11, 2020 –
DECIDED SEPTEMBER 3, 2020

Before WOOD, BARRETT, and ST. EVE, *Circuit Judges.*

WOOD, *Circuit Judge.* As the coronavirus SARS-CoV-2 has raged across the United States, public officials everywhere have sought to implement measures to protect the public health and welfare. Illinois is no exception: Governor J. B. Pritzker has issued a series of executive orders designed to limit

the virus's opportunities to spread. In the absence of better options, these measures principally rely on preventing the transmission of viral particles (known as virions) from one person to the next.

Governor Pritzker's orders are similar to many others around the country. At one point or another, they have included stay-at-home directives; flat prohibitions of public gatherings; caps on the number of people who may congregate; masking requirements; and strict limitations on bars, restaurants, cultural venues, and the like. These orders, and comparable ones in other states, have been attacked on a variety of grounds. Our concern here is somewhat unusual. Governor Pritzker's Executive Order 2020-43 (E043, issued June 26, 2020) exhibits special solitude for the free exercise of religion.[1] It does so through the following exemption:

> a. **Free exercise of religion.** This Executive Order does not limit the free exercise of religion. To protect the health and safety of faith leaders, staff, congregants and visitors, religious organizations and houses of worship are encouraged to consult and follow the recommended practices and guidelines from the Illinois Department of Public Health. As set forth in the IDPH guidelines, the safest

[1] E043 was set to expire by its own terms on August 22, 2020, but the Governor issued E052 on August 21, 2020. See https://www2.illinois.gov/ Pages/Executive-Orders/ExecutiveOrder2020-52.aspx. E052 extends E043 in its entirety through September 19, 2020. For convenience, we refer in this opinion to E043.

> practices for religious organizations at this time are to provide services online, in a drive-in format, or outdoors (and consistent with social distancing requirements and guidance regarding wearing face coverings), and to limit indoor services to 10 people. Religious organizations are encouraged to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures.

See E043, § 4(a), at https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-43.aspx. Emergency and governmental functions enjoy the same exemption. Otherwise, E043 imposes a mandatory 50-person cap on gatherings.

The Illinois Republican Party and some of its affiliates ("the Republicans") believe that the accommodation for free exercise contained in the executive order violates the Free Speech Clause of the First Amendment. In this action, they seek a permanent injunction against E043. In so doing, they assume that such an injunction would permit them, too, to congregate in groups larger than 50, rather than reinstate the stricter ban for religion that some of the Governor's earlier executive orders included, though that is far from assured. Relying principally on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the district court denied the Republicans' request for preliminary injunctive relief against E043. See *Illinois Republican Party v. Pritzker*, No. 20 C 3489, 2020 WL 3604106 (N.D. Ill. July 2, 2020). The Republicans promptly

sought interim relief from that ruling, see 28 U.S.C. § 1292(a)(1), but we declined to disturb the district court's order, *Illinois Republican Party v. Pritzker,* No. 20-2175 (7th Cir. July 3, 2020), and Justice Kavanaugh in turn refused to intervene. *Illinois Republican Party v. Pritzker,* No. 19A1068 (Kavanaugh, J., in chambers July 4, 2020).

We did, however, expedite the briefing and oral argument of the merits of the preliminary injunction, and we heard argument on August 11, 2020. Guided primarily by the Supreme Court's decision *in Winter v. Natural Resources Defense Council,* 555 U.S. 7 (2008), we conclude that the district court did not abuse its discretion in denying the requested preliminary injunction, and so we affirm its order.

I

Before we turn to the heart of our analysis, a word or two about the standard of review for preliminary injunctions is in order. The Supreme Court's last discussion of the subject occurred in *Winter,* where the Court reviewed a preliminary injunction against the U.S. Navy's use of a sonar-training program. *Id.* at 12. It expressed the standard succinctly: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. The question in *Winter,* however, just as in our case, is one

of degree: *how* likely must success on the merits be in order to satisfy this standard? We infer from *Winter* that a mere possibility of success is not enough. *Id.* at 22.

In the related context of a court's power to stay its own judgment (or that of a lower tribunal), the Court returned to this subject in *Nken v. Holder,* 556 U.S. 418 (2009). There, while noting the "substantial overlap" between the analysis of stays and that of preliminary injunctions, *id.* at 434, the Court stopped short of treating them identically. It pointed out that, unlike a preliminary injunction, which is an order directed at someone and that governs that party's conduct, "a stay operates upon the judicial proceeding itself." *Id.* at 428. Before such an order should issue, the Court said, the applicant must make a strong showing that she is likely to succeed on the merits. *Id.* at 434. At the same time, following *Winter*, the Court said that a possibility of success is not enough. Neither is a "better than negligible" chance: the Court expressly disapproved that formula, see *id.*, which appears in many of our decisions, including one the Court singled out, *Sofinet v. INS,* 188 F.3d 703, 707 (7th Cir. 1999). See also, *e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1046 (7th Cir. 2017); *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.,* 549 F.3d 1079, 1096 (7th Cir. 2008); *Intl Kennel Club of Chi., Inc. v. Mighty Star, Inc.,* 846 F.2d 1079, 1084 (7th Cir. 1988). We note this to remind both the district courts and ourselves that the "better than negligible" standard was retired by the Supreme Court.

We understand from both *Winter* and *Nken* that an applicant for preliminary relief bears a significant burden, even though the Court recognizes that, at such a preliminary stage, the applicant need not show that it definitely will win the case. A "strong" showing thus does not mean proof by a preponderance—once again, that would spill too far into the ultimate merits for something designed to protect both the parties and the process while the case is pending. But it normally includes a demonstration of how the applicant proposes to prove the key elements of its case. And it is worth recalling that the likelihood of success factor plays only one part in the analysis. The applicant must also demonstrate that "irreparable injury is likely in the absence of an injunction," see *Winter,* 555 U.S. at 22. In addition, the balance of equities must "tip[ ] in [the applicant's] favor," and the "injunction [must be] in the public interest." *Id.* at 20.

II

With this standard in mind, we are ready to turn to the case at hand. We begin by confirming, as we did in *Elim Romanian Pentecostal Church v. Pritzker,* 962 F.3d 341 (7th Cir. 2020), that the possibility that E043 may change in the coming days or weeks does not moot this case. The Governor has made clear that the virus is a moving target: if possible, he will open up the state (or certain regions of the state) further, but if the criteria to which the state is committed take a turn for the worse, he could reinstate more stringent measures. See

id. at 344-45. Our mootness analysis in *Elim* thus applies with full force to this case.

The next question relates to the overall validity of E043 and orders like it, which have been issued in the midst of a general pandemic. As we noted in *Elim,* the Supreme Court addressed this type of measure more than a century ago, in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). The district court appropriately looked to *Jacobson* for guidance, and so do we. The question the Court faced there concerned vaccination requirements that the City of Cambridge had put in place in response to a smallpox epidemic. The law made an exception for children who had a physician's certificate stating that they were "unfit subjects for vaccination," *id.* at 12, but it was otherwise comprehensive. Faced with a lawsuit by a man who did not wish to be vaccinated, and who contended that the City's requirement violated his Fourteenth Amendment right to liberty, the Court ruled for the City. In so doing, it held that it was appropriate to defer to the City's assessment of the value of vaccinations—an assessment, it noted, that was shared "by the mass of the people, as well as by most members of the medical profession . . . and in most civilized nations." *Id.* at 34. It thus held that "[t]he safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect," and that it "[did] not perceive that this legislation has invaded any right secured by the Federal Constitution." *Id.* at 38.

At least at this stage of the pandemic, *Jacobson* takes off the table any general challenge to E043 based

on the Fourteenth Amendment's protection of liberty. Like the order designed to combat the smallpox epidemic, E043 is an order designed to address a serious public-health crisis. At this stage in the present litigation, no one is alleging that the Governor lacks the power to issue such orders as a matter of state law. Instead, our case presents a more granular challenge to the Governor's action—one that focuses on his decision to subject the exercise of religion only to recommended measures, rather than mandatory ones. We must decide whether that distinction is permissible.

Normally, parties challenging a state measure that appears to advantage religion invoke the Establishment Clause of the First Amendment (assuming for the sake of discussion that the challengers can establish standing to sue). That is emphatically not the theory that the Republicans are pursuing. We eliminated any doubt on that score at oral argument, where counsel assured us that this was not their position. As we explain in more detail below, the Republicans argue instead that preferential treatment for religious exercise conflicts with the interpretation in *Reed v. Gilbert,* 576 U.S. 155 (2015), of the Free Speech Clause of the same amendment. A group of 100 people may gather in a church, a mosque, or a synagogue to worship, but the same sized group may not gather to discuss the upcoming presidential election. The Republicans urge that only the content of the speech distinguishes these two hypothetical groups, and as they see it, *Reed* prohibits such a line.

Our response is to say, "not so fast." A careful look at the Supreme Court's Religion Clause cases, coupled with the fact that E043 is designed to give *greater* leeway to the exercise of religion, convinces us that the speech that accompanies religious exercise has a privileged position under the First Amendment, and that E043 permissibly accommodates religious activities. In explaining that conclusion, we begin with a look at the more conventional cases examining the interaction of the two Religion Clauses. We then take a close look at *Reed,* and we conclude by explaining that a comparison between ordinary speech (including political speech, which all agree lies at the core of the First Amendment) and the speech aspect of religious activity reveals something more than an "apples to apples" matching. What we see instead is "speech" being compared to "speech plus," where the "plus" is the protection that the First Amendment guarantees to religious exercise. Even though we held in *Elim* that the Governor was not compelled to make this accommodation to religion, nothing in *Elim,* and nothing in the Justices' brief writings on the effect of coronavirus measures on religion, says that he was forbidden to carve out some space for religious activities. See *South Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak,* No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020).

A

Although there is a long history and rich literature dealing with the two Religion Clauses, it is enough

here for us to begin with the Supreme Court's more recent decisions upholding legislation that gives religion a preferred position. We start with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327 (1987). In that case, several people who were fired from church-owned corporations solely because they were not church members sued the church under Title VII of the Civil Rights Act of 1964; their theory was that the church had engaged in impermissible discrimination on the basis of religion. The case would have had some legs if an ordinary employer had decided to sack all its Catholic, or Jewish, or Presbyterian employees. After all, section 703(a) of Title VII specifies that it is "an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual [in a variety of ways] because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a).

But that is not all the statute says. Section 702 states that the law does not apply to "a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform [the institution's work]." 42 U.S.C. § 2000e-1(a); see also Civil Rights Act of 1964, Title VII, § 703(e), 42 U.S.C. § 2000e-2(e). The plaintiffs in *Amos* contended that the exemption permitting religious employers to discriminate on religious grounds violates the Establishment Clause. The Supreme Court rejected this theory and held that the Establishment Clause permits accommodations designed to allow free

exercise of religion. The Court's opinion stresses that it is permissible for the government to grant a benefit to religion when the purpose of the benefit is simply to facilitate noninterference with free exercise:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. It is well established, too, that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

483 U.S. at 334 (cleaned up).

Lest there be any doubt, the Court repeated that it had "never indicated that statutes that give special consideration to religious groups are *per se* invalid." *Id.* at 338. Using the rubric of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which was then widely accepted, the Court found that the legislature was entitled to enact a measure designed to alleviate governmental interference with the internal affairs of religious institutions, and that such a law did not have a forbidden primary effect of advancing religion. Finally, and interestingly for our case, the Court rejected Amos's assertion that the religious exemption violated the Equal Protection Clause. A statute otherwise compatible with the

Establishment Clause that "is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion," 483 U.S. at 339, had to satisfy only rational-basis scrutiny for Equal Protection purposes. Section 702, the Court held, easily passed that bar.

Another case in which the Court addressed measures that give special solicitude to the free exercise of religion was *Cutter v. Wilkinson,* 544 U.S. 709 (2005). That case involved a clash between state prisoners who alleged infringements of their right to practice their religion—guaranteed by both the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2)—and prison officials, who asserted that the accommodations required by RLUIPA violated the Establishment Clause. RLUIPA was passed in response to *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), which held that the Free Exercise Clause does not prohibit states from enforcing laws of general applicability that incidentally burden religion.[2] Congress first struck back with the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb2000bb-4), in an effort to require

[2] We are aware that the Supreme Court has granted certiorari in *Fulton v. City of Philadelphia,* No. 19-123, 140 S. Ct. 1104 (2020), and that one of the questions presented in that case is whether *Smith* should be reconsidered. We doubt that the outcome of *Fulton* will have any effect on this case, and in any event, we remain bound by *Smith* until the Supreme Court instructs otherwise.

a more robust justification for laws burdening religious exercise, but the Supreme Court held in *City of Boerne v. Flores,* 521 U.S. 507 (1997), that RFRA could not be applied to the states. Congress's next answer was RLUIPA, which affects only land-use and institutionalized persons, but because of the tie to federal funding, avoids the constitutional flaws the Court found in RFRA as applied to state institutions.

The *Cutter* plaintiffs were Ohio prisoners who adhered to a variety of nonmainstream religions, such as Satanism, Wicca, and Asatru. They complained that the prison was impeding their religious practices in a number of ways, including by denying access to religious literature, restricting opportunities for group worship, withholding the right to follow dress and appearance rules, and not engaging the services of a chaplain. The defendants did not deny these allegations; they argued instead that they were under no obligation to deviate from their general policies. RLUIPA, they said, improperly advances religion to the extent that it required these types of affirmative measures.

As in *Amos,* the Supreme Court held that the state "may . . . accommodate religious practices . . . without violating the Establishment Clause." *Id.* at 713 (alterations in original) (internal quotation omitted). It reiterated its comment in *Walz v. Tax Commission of City of New York,* 397 U.S. 664, 669 (1970), that "there is room for play in the joints" between the Free Exercise and Establishment Clauses. 544 U.S. at 713, 719. RLUIPA, it then said, lies within the "space for legislative action neither compelled by the Free Exercise

Clause nor prohibited by the Establishment Clause." *Id.* at 719. It offered this explanation for its holding:

> Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. See *Board of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 705 (1994) (government need not "be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"). . . .

544 U.S. at 720. It is noteworthy in this connection that the predicate for the religious accommodation is a *legitimate* exercise of state power, albeit one that burdens religion. Much the same can be said of the coronavirus measures now before us.

The third case we find helpful is *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission,* 565 U.S. 171 (2012). There the Court returned to the employment setting, this time examining an action brought by the EEOC against a church and its associated school. The EEOC asserted that the school had fired a teacher in retaliation for her threat to file a lawsuit under disability-discrimination laws; the school responded that its reason for firing her was that her threat to sue was a breach of the tenets of its faith. The central issue, however, involved the teacher's status: if she was properly characterized as a "minister" of the faith, then the First Amendment barred the EEOC's suit; if she was instead

a lay employee, the parties assumed that the case could go forward. See also *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049 (2020) (extending *Hosanna-Tabor* to teachers responsible for instruction in the faith, regardless of their specific title or training).

In this instance, the Court found that the Free Exercise Clause and the Establishment Clause pointed in the same direction—both mandate noninterference "with the decision of a religious group to fire one of its ministers." 565 U.S. at 181. It endorsed the idea of a "ministerial exception" to the otherwise applicable laws regulating employment relationships. *Id.* at 188. But, in responding to the EEOC's argument that no ministerial exception is needed, because religious organizations enjoy the right to freedom of association under the First Amendment, the Court offered guidance on the way the different branches of the First Amendment interact:

> We find this position [*i.e.,* that the general right to freedom of association takes care of everything] untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. . . . That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the

> remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

Id. at 189. In other words, the Religion Clauses are doing some work that the rest of the First Amendment does not. Whether that extra work pertains only to the implied right to freedom of association (not mentioned in so many words in the text of the amendment) or if it applies also to the right to freedom of speech, is the question before us. In order to answer it, we must examine the primary free-speech case on which the Republicans rely, *Reed v. Gilbert*.

B

Reed involved the regulation of signs in the town of Gilbert, Arizona. 576 U.S. at 159. Gilbert's municipal code regulated signs based on the type of information they conveyed, and this turned out to be its fatal flaw. Signs designated as "Temporary Directional Signs Relating to a Qualifying Event" were regulated more restrictively than signs conveying other messages, including signs that were deemed to be "Ideological Signs" or "Political Signs." *Id.* at 159-60. The case arose when a small church and its pastor wanted to erect temporary signs around the town on Saturdays. Because the church had no permanent building, it needed a way to inform interested persons each week about where it would hold its Sunday services. *Id.* at 161.

The problem was that the church's signs did not comply with the Code, which dictated size, permissible placement spots, number per single property, and display duration. This prompted the Town's Sign Czar to cite the church twice for Code violations. After efforts at a mutually satisfactory approach failed, the church sued the Town, claiming that the Code abridged its right to free speech in violation of the First Amendment, made applicable to the states through the Fourteenth Amendment. Both the district court and the court of appeals (over the course of a couple of rounds) ruled in favor of the Town, because as they saw it, the Code "did not regulate speech on the basis of content." *Id.* at 162. The Supreme Court reversed.

The Court recognized two types of content-based regulations: first, regulation based on the content of the topic discussed or the idea or message expressed, *id.* at 163; and second, regulation that is facially content neutral, but that "cannot be justified without reference to the content of the regulated speech," *id.* at 164 (cleaned up). The Town's Code, the Court held, fell in the first category because it treated signs differently depending on their communicative content:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's

> theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech.

Id.

Entirely missing from *Reed* is any argument about, or discussion of, the way in which these principles apply to Free Exercise cases. That is probably because if the Town was doing anything, it was disadvantaging the church's effort to provide useful information to its parishioners, not lifting a burden from religious practice. The only governmental interests the Town offered in support of its Code were "preserving the Town's aesthetic appeal and traffic safety." *Id.* at 171. The Court found those interests to be woefully lacking, falling far short of a compelling state interest and a narrowly tailored response. *Id.* at 172. 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. But that is not what *Reed* was about, and so we must break new ground here.

C

We will assume for the sake of argument that free exercise of religion involves speech, at least most of the time. One can imagine religious practices that do not

involve words, such as a silent prayer vigil, or a pilgrimage or hajj to a sacred shrine, or even the act of wearing religiously prescribed clothing. Perhaps in some instances those actions would qualify as symbolic speech, see, *e.g., Texas v. Johnson,* 491 U.S. 397, 404 (1989), but others would not. Nonetheless, we recognize the importance of words to most religious exercise, whether those words appear in a liturgy, or in the lyrics to sacred music, or in a homily or sermon. And we understand the point the Republicans are making: E043 draws lines based on the purpose of the gathering, and the type of speech that is taking place sheds light on that purpose. Someone sitting in a place of worship for weekly services is allowed to be part of a group larger than 50, but if the person in the front of the room is talking about a get-out-the-vote effort or is giving a lecture on the Impressionists, no more than 50 attendees are permitted. (Some of the Republicans' other hypotheticals are a little more strained: if the 23rd Psalm is the scriptural passage for the Sabbath or a Sunday service for one group, and another group wants to use the identical text for a discussion of ancient poetry, is the different treatment based on content or something else?)

But the Free Exercise Clause has always been about more than speech. Otherwise, why bother to include it at all—the First Amendment already protects freedom of speech, and we know that speech with a religious message is entitled to just as much protection as other speech. See *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 837 (1995). Moreover,

the *Rosenberger* Court held, nondiscriminatory financial support for religious organizations would not run afoul of the Establishment Clause, because the program was neutral toward religion. *Id.* at 840. Indeed, the Court acknowledged, it was "something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought." *Id.* at 831.

However one wishes to characterize religion (including the decision to refrain from identifying with any religion), there can be no doubt that the First Amendment singles out the free exercise of religion for special treatment. Rather than being a mechanism for expressing views, as the speech, press, assembly, and petition guarantees are, the Free Exercise Clause is content based. The mixture of speech, music, ritual, readings, and dress that contribute to the exercise of religions the world over is greater than the sum of its parts.

The Supreme Court made much the same point in *Hosanna-Tabor,* as we noted earlier, when it responded to the argument that the general right to freedom of association sufficed to protect religious groups, and thus there was no need for a ministerial exception to the employment discrimination rules. If that were true, the Court said, then there would be no difference between the associational rights of a social club and those of the Lutheran Church. 565 U.S. at 189. "That result," the Court wrote, "is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.*

Just so here. The free exercise of religion covers more than the utterance of the words that are part of it. And, while in the face of a pandemic the Governor of Illinois was not compelled to make a special dispensation for religious activities, see *Elim,* nothing in the Free Speech Clause of the First Amendment barred him from doing so. As in the cases reconciling the Free Exercise and Establishment Clauses, all that the Governor did was to limit to a certain degree the burden on religious exercise that E043 imposed.

We stress that this does not mean that anything a church announces that it wants to do is necessarily protected. If the church wants to hold a Labor Day picnic, or a synagogue wants to sponsor a "Wednesday night at the movies" event, or a church decides to host a "battle of the bands," the church or synagogue would be subject to the normal restrictions of 50 people or fewer. We have no occasion here to opine on where the line should be drawn between religious activities and more casual gatherings, but such a line surely exists. And it is important to recall that E043 does not say that all activities of religious organizations are exempt from its strictures. Only the "free exercise of religion" is covered, and those words, taken directly from the First Amendment, provide a limiting principle.

Because the exercise of religion involves more than simple speech, the equivalency urged on us by the Republicans between political speech and religious exercise is a false one. *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. Free 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.

III

Before concluding, we must also comment on the Republicans' alternative argument: that the Governor is allowing Black Lives Matter protestors to gather in groups of far more than 50, but he is not allowing the Republicans to do so. They concede that their argument depends on practice, not the text of the executive order. The text contains no such exemption, whether for Black Lives Matter, Americans for Trump, Save the Planet, or anyone else. Should the Governor begin picking and choosing among those groups, then we would have little trouble saying that *Reed* would come into play, and he would either have to impose the 50-person limit on all of them, or on none of them.

The fact that the Governor expressed sympathy for the people who were protesting police violence after the deaths of George Floyd and others, and even participated in one protest, does not change the text of the order. Nonetheless, the Republicans counter, there are *de facto* changes, even if not *de jure* changes. Essentially, they charge that the state should not be leaving enforcement up to the local authorities, and that they are aggrieved by the lax or even discriminatory levels of enforcement that they see. Underenforcement

claims are hard to win, however, as we know from cases such as *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989). It is also difficult to prevail in a case accusing the police of racial profiling. See, *e.g., Chavez v. Ill. State Police,* 251 F.3d 612 (7th Cir. 2001). Although we do not rule out the possibility that someone might be able to prove this type of favoritism in the enforcement of an otherwise valid response to the COVID-19 pandemic, the record in this case falls short. Indeed, the problems of late have centered on ordinary criminal mobs looting stores, not on peaceful protestors.

The Republicans' brief offers only slim support for the proposition that the 50-person ban on gatherings does not apply to the Black Lives Matters speakers. It first points out that the Governor issued a press release expressing sympathy for the protests. But such a document, untethered to any legislative or executive rule-making process, cannot change the law. *Cf. Medellin v. Texas,* 552 U.S. 491, 523-32 (2008) (holding that President George W. Bush's memorandum in response to an international court's decision was "not a rule of domestic law binding in state and federal courts"). The Republicans also complain that the Chicago police stood by idly while the Black Lives Matters protests took place, but that they dispersed "Reopen Illinois" gatherings. Notably absent from these allegations, however, is any proposed proof that state actors, not municipal actors, were engaged in this *de facto* discrimination.

Finally, the Republicans contend that the Governor promised that the National Guard troops he deployed to Chicago would not "interfere with peaceful protesters' first amendment rights." Aside from the fact that this argument appears for the first time in their Reply Brief and is thus waived, it is unpersuasive. The Governor made clear that the National Guard was deployed to protect property against unrest, not to enforce the COVID-19 order. He did not single out any category of protester by message. We conclude that the district court did not abuse its discretion when it found that none of these allegations sufficed to undermine the Governor's likelihood of success on the merits, or for that matter to undercut his showing that the state would suffer irreparable harm if E043 were set aside.

IV

We conclude with some final thoughts. The entire premise of the Republicans' suit is that if the exemption from the 50-person cap on gatherings for free-exercise activities were found to be unconstitutional (or if it were to be struck down based on the allegedly ideologically driven enforcement strategy), they would then be free to gather in whatever numbers they wished. But when disparate treatment of two groups occurs, the state is free to erase that discrepancy in any way that it wishes. See, *e.g., Stanton v. Stanton,* 429 U.S. 501, 504 n.4 (1977) ("[W]e emphasize that Utah is free to adopt either 18 or 21 as the age of majority for both males and females for child-support purposes. The only constraint on its power to choose is . . . that

the two sexes must be treated equally."). In other words, the state is free to "equalize up" or to "equalize down." If there were a problem with the religious exercise carve-out (and we emphasize that we find no such problem), the state would be entitled to return to a regime in which even religious gatherings are subject to the mandatory cap. See *Elim,* 962 F.3d 341. This would leave the Republicans no better off than they are today.

We AFFIRM the district court's order denying preliminary injunctive relief to the appellants.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

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United States Courthouse
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FINAL JUDGMENT

September 3, 2020

Before: DIANE P. WOOD, Circuit Judge
AMY C. BARRETT, Circuit Judge
AMY J. ST. EVE, Circuit Judge

No. 20-2175	ILLINOIS REPUBLICAN PARTY, et al., Plaintiffs - Appellants v. J.B. PRITZKER, Governor of Illinois, Defendant - Appellee
Originating Case Information:	
District Court No: 1:20-cv-03489 Northern District of Illinois, Eastern Division District Judge Sara L. Ellis	

The district court's order denying preliminary injunctive relief to the appellants is **AFFIRMED**.

The above is in accordance with the decision of this court entered on this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 3, 2020

Before

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 20-2175

ILLINOIS REPUBLICAN PARTY, *et al.*, *Plaintiffs-Appellants,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	
J.B. PRTIZKER, as Governor, *Defendant-Appellee.*	No. 1:20-cv-03489
	Sarah L. Ellis, *Judge.*

ORDER

The plaintiff-appellants sued Governor Pritzker, asserting that his executive order in response to the global pandemic caused by the virus COVID-19 violates the First Amendment, the Fourteenth Amendment, and is ultra vires, and they moved in the district court for a temporary restraining order or preliminary injunction preventing the governor from enforcing the order. The district court denied the motion, and the plaintiffs appealed. They have filed this emergency

motion to preliminarily enjoin the governor's executive order pending appeal.

For this court to enter a preliminary injunction, the movants must first demonstrate a likelihood of success on the merits. See *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20 (2008). They must also show the absence of an adequate remedy at law and a threat of irreparable harm without a stay. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1044 (7th Cir. 2017). If they make this showing, we then consider the balance of harms. *Id.*

The plaintiffs argue that they have a likelihood of success because the governor's order is a content-based restriction on speech. Although that may be true, see *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015), that fact is not dispositive by itself. We must then consider whether this distinction can survive strict scrutiny. See *id.* at 171. The plaintiffs concede that the executive order is supported by a compelling state interest, namely, the need to fight COVID-19 effectively. That need necessarily takes into account both the extraordinarily infectious nature of this particular virus and the very high efficiency of transmission. There is thus a very close link between a measure regulating the size of gatherings and the goal of impeding the spread of the virus.

And the adoption of an exception that recognizes the constitutional status of the right to free exercise of religion does not automatically run afoul of the rule in

Reed. The First Amendment already protects the right to freedom of speech and freedom of association. Using the normal canons of interpretation, we would not expect the Free Exercise Clause to be surplusage—it must be doing more work. See *Orgone Capital III, LLC v. Daubenspeck,* 912 F.3d 1039, 1047 (7th Cir. 2019) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 176 (2012)). Our recent opinion in *Elim Romanian Pentecostal Church v. Pritzker,* 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020) (*Elim II*), holds that the governor did not even have to accommodate religion in this way. But *Elim II* does not hold that he was forbidden from doing so. Accordingly, the plaintiffs are unlikely to succeed on the merits.

As for the balance of harms, we see no logical stopping point to the plaintiffs' position here; they seem to want an all-or-nothing rule. COVID-19 is "a novel severe acute respiratory illness that has killed . . . more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). If 100 Democrats or 100 Republicans gather and ten get infected, those ten may go home and infect a local shopkeeper, a local grocery-store worker, their postal carrier, or their grandmother—someone who had no interest in the earlier gathering. Thus, the balance of harms in this instance strongly favors the governor.

Accordingly, IT IS ORDERED that the motion is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS REPUBLICAN PARTY, WILL COUNTY REPUBLICAN CENTRAL COMMITTEE, SCHAUMBURG TOWNSHIP REPUBLICAN ORGANIZATION, and NORTHWEST SIDE GOP CLUB	)	No. 20C 3489
Plaintiffs,	)	Judge Sara L. Ellis
v.	)	
JB PRITZKER, in his official capacity as Governor of the State of Illinois,	)	
Defendant.	)	

OPINION AND ORDER

(Filed Sep. 3, 2020)

In response to the ongoing COVID-19 pandemic, Defendant JB Pritzker, Governor of Illinois, has issued a series of executive orders including Executive Order 2020-43 ("Order"), at issue here.[1] The Order prohibits

[1] Just prior to the hearing in this case, the Governor issued the Executive Order 2020-43 on June 26, 2020, which supersedes all previous Covid-19 Executive Orders. The prior Executive Order, in operation at the time of filing of the lawsuit, was EO 2020-38. The significant difference between the two orders is that EO 2020-38 limited public gatherings to ten persons while EO 2020-43 increases that number to fifty. Both orders provide the same exemption to religious gatherings, which is basis for Plaintiffs'

gatherings greater than fifty people but exempts the free exercise of religion from this limit. Doc. 12 at 3, 6.[2] Plaintiffs Illinois Republican Party, Will County Republican Central Committee, Schaumburg Township Republican Organization, and Northwest Side GOP Club challenge this exemption as violating their rights under the First and Fourteenth Amendments. Plaintiffs allege that by exempting the free exercise of religion from the general gathering limit, the Governor has created an unconstitutional content-based restriction on speech. Plaintiffs also claim that by not enforcing the Order against protestors following the death of George Floyd, the Governor has created another exception. Plaintiffs filed a complaint and a motion for a temporary restraining order ("TRO") and preliminary injunction in this Court on June 15, 2020 [3] because they want to hold political party events larger than fifty people, including a picnic on July 4th. Plaintiffs seek a declaration stating that treating political party gatherings differently than religious gatherings violates the First and Fourteenth Amendments. Plaintiffs also ask the Court to enjoin the Governor from enforcing the Order against political parties. Because Plaintiffs' likelihood of success on the merits is less thar negligible and the balance of harms weighs heavily against Plaintiffs, the Court denies their motion [3].

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complaint. Because the operative order is EO 2020-43, the Court will refer to that Order throughout this Opinion.

[2] The Court uses the internal pagination for the Order.

BACKGROUND

The world is currently facing a major global pandemic – one of the most significant challenges our society has faced in a century. There is no cure, vaccine, or effective treatment for COVID-19. As of June 30, more than 126,739 Americans have died due to the virus,[3] including approximately 6,923 Illinois residents.[4] In Illinois, there are more than 143,185 confirmed cases.[5] Despite efforts to slow the spread of COVID-19, many states are experiencing a rise in new cases. Medical experts agree that to stop the spread of COVID-19, people should practice social distancing and wear face coverings when near other people outside their homes. Federal, state, and local governments have enacted measures to reduce the spread of this highly contagious and easily transferable virus while remaining sensitive to economic concerns and citizens' desire to resume certain activities.

In Illinois, following stay-at-home orders, the Governor developed a multi-stage plan to "safely and conscientiously resume activities that were paused as COVID-19 cases rose exponentially and threatened to overwhelm [the] healthcare system." Doc. 10-1 at 5. On May 29, 2020, the Governor issued an Order related to this plan. The Order provides that "[a]ny gathering of

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[3] *Coronavirus Disease 2019 cases in the U.S.,* Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

[4] *Coronavirus Disease 2019 (COVID-19) in Illinois,* Illinois Department of Public Health, http://www.dph.illinois.gov/covid19.

[5] *See id.*

more than ten people is prohibited unless exempted by this Executive Order." *Id.* at 6. The Order exempts free exercise of religion, emergency functions, and governmental functions. Relevant here, with respect to free exercise of religion, the Order states that it:

> [D]oes not limit the free exercise of religion. To protect the health and safety of faith leaders, staff, congregants and visitors, religious organizations and houses of worship are encouraged to consult and follow the recommended practices and guidelines from the Illinois Department of Public Health. As set forth in the IDPH guidelines, the safest practices for religious organizations at this time are to provide services online, in a drive-in format, or outdoors (and consistent with social distancing requirements and guidance regarding wearing face coverings), and to limit indoor services to 10 people. Religious organizations are encouraged to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures.

Id. at 9. The Governor issued the most recent executive order, EO 2020-43, on June 26, 2020. That order increases the gathering limit to fifty people but retains the exemption for free exercise of religion. *See* Doc. 12 at 3, 6.

Plaintiffs allege that by merely "encourag[ing]" religious organizations and houses of worship to consult the IDPH guidelines, the Order treats religious speech differently. Plaintiffs contend that the Illinois

Republican Party and its local and regional affiliates typically gather in groups greater than ten people for formal business meetings, informal strategy meetings, and other events. Plaintiffs believe there is particular time pressure to conduct meetings and events in the five months leading up to the 2020 general election. Plaintiffs allege that their "effectiveness is substantially hampered by [the Party's] inability to gather in person." Doc. 1 ¶ 14. According to Plaintiffs, "[p]olitics is a people business" that is "most effective when people can connect in person." *Id.* Plaintiffs hope to resume all gatherings greater than ten people, including gatherings amongst "staff, leaders, consultants, members, donors, volunteers, activists, and supporters." *Id.* In their motion for preliminary relief, Plaintiffs specifically reference an outdoor picnic that they hope to have on July 4, 2020, as well as a rally and indoor convention at some point.

Plaintiffs also criticize the Governor's enforcement of the Order. Plaintiffs allege that the Governor has declined to enforce his executive order against protestors following the death of George Floyd. *Id.* ¶ 17. According to Plaintiffs, the Governor has characterized these protestors as "exercising their First Amendment rights" and has engaged in one such protest himself. Plaintiffs allege that the Governor has discriminated in favor of certain speakers based on the content of their speech; "in this case religious speech versus political speech, or protest speech versus Republican speech." *Id.* ¶ 21.

Additionally, Plaintiffs challenge the authority on which the Order rests. Plaintiffs contend that the Illinois Emergency Management Agency Act ("Act") permits the Governor to issue a disaster declaration for up to thirty days in response to a public health emergency. Plaintiffs allege that the Office of the Attorney General of Illinois "has concluded that the text of the Act does not permit successive declarations based on the same disaster." *Id.* ¶ 28. Therefore according to Plaintiffs, the Governor only has authority to issue one thirty-day disaster declaration, rendering any further COVID-19 declaration ultra vires. Consequently, the Order is also ultra vires because it relies on the Governor's authority under the fifth declaration. Plaintiffs' motion for preliminary relief does not address this aspect of their complaint.

LEGAL STANDARD

Temporary restraining orders and preliminary injunctions are extraordinary and drastic remedies that "should not be granted unless the movant, *by a clear showing,* carries the burden o-persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (citation omitted). The party seeking such relief must show: (1) it has some likelihood of success on the merits; (2) there is no adequate remedy at law; and (3) it will suffer irreparable harm if the relief is not granted. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State*

Dep't of Health, 896 F.3d 809, 816 (7th Cir. 2018).[6] If the moving party meets this threshold showing, the Court "must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction." *GEFT Outdoors, LLC v. City of Westfield,* 922 F.3d 357, 364 (7th Cir. 2019) (quoting *Planned Parenthood,* 896 F.3d at 816). "Specifically, the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.,* 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbott Labs. v Mead Johnson & Co.,* 971 F.2d 6, 11-12 (7th Cir. 1992)). The Seventh Circuit has described this balancing test as a "sliding scale": "if a plaintiff is more likely to win, the balance of harms can weigh less heavily in its favor, but the less likely a plaintiff is to win the more that balance would need to weigh in its favor." *GEFT Outdoors,* 992 F.3d at 364 (citing *Planned Parenthood,* 896 F.3d at 816). Finally, the Court considers whether the injunction is in the public interest, which includes taking into account any effects on non-parties. *Courthouse News Serv. v. Brown,* 908 F.3d 1063, 1068 (7th Cir. 2018).

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[6] Although *Planned Parenthood* involved a preliminary injunction, courts use the same standard to evaluate TRO and preliminary injunction requests. *See USA-Halal Chamber of Commerce, Inc. v. Best Choice Meats, Inc.,* 402 F. Supp. 3d 427, 433 (N.D. Ill. 2019) ("The standards for granting a temporary restraining order and preliminary injunction are the same.") (citing cases).

ANALYSIS

In First Amendment cases, the likelihood of success on the merits "is usually the decisive factor." *Wis. Right To Life, Inc. v. Barland,* 751 F.3d 804, 830 (7th Cir. 2014). "The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and 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) (citation omitted); *see also Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Barland,* 751 F.3d at 830 (same). Therefore, the Court limits its analysis to the likelihood of success on the merits and the balance of harms.

I. Likelihood of Success on the Merits

"[T]he threshold for demonstrating a likelihood of success on the merits is low." *D. U. v. Rhoades,* 825 F.3d 331, 338 (7th Cir. 2016). "[T]he plaintiff's chances of prevailing need only be better than negligible." *Id.* In their motion for preliminary relief, Plaintiffs argue that they are likely to succeed on their claims because the Order favors religion and is therefore an unconstitutional content-based restriction on speech. Additionally, Plaintiffs argue that by not enforcing the Order against protestors following the death of George Floyd, the Governor is favoring that speech over Plaintiffs' political speech. The Governor contends that *Jacobson*

v. Massachusetts, 197 U.S. 11 (1905), provides the appropriate standard by which to evaluate the Order. Additionally, the Governor argues that the Order does not distinguish between speakers but instead regulates conduct and therefore strict scrutiny does not apply.

A. *Jacobson v. Massachusetts*

"Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay United Pentecostal Church v. Newsom* (*S. Bay II*), 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson,* 197 U.S. at 38). When state officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Id.* (alteration in original) (quoting *Marshall v. United States,* 414 U.S. 417, 427 (1974)). Over a century ago in *Jacobson,* the Supreme Court developed a framework by which to evaluate a State's exercise of its emergency authority during a public health crisis. There, the Court rejected a constitutional challenge to a State's compulsory vaccination law during the smallpox epidemic. *See generally Jacobson,* 197 U.S. 11. *Jacobson* explained that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. The Court reasoned that the Constitution does not provide an absolute right to be "wholly freed from restraint" at all times, as "[t]here are manifold restraints to which every person is necessarily subject

for the common good." *Id.* at 26 Therefore, while "individual rights secured by the Constitution do not disappear during a public health crisis," the government may "reasonably restrict[]" rights during such times. *See In re Abbott,* 954 F.3d 772, 784 (5th Cir. 2020). Judicial review of such claims is only available in limited circumstances. *See S. Bay II,* 140 S. Ct. at 1613-14 (Roberts, C.J., concurring) (where state officials do not exceed their broad latitude during a pandemic "they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people" (citation omitted)); *Jacobson,* 197 U.S. at 31. If a State implements emergency measures during an epidemic that curtail individual rights, courts uphold such measures unless they have "no real or substantial relation" to public health or are, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.*; *see also In re Abbott,* 954 F.3d at 784.

There is no doubt that Illinois is in the midst of a serious public health crisis, as contemplated in *Jacobson*. *See Elim Romanian Pentecostal Church v. Pritzker* (*Elim II*), No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020) (citing *Jacobson* and explaining that courts do not evaluate orders issued in response to public-health emergencies by the usual standard); *Cassell v. Snyders,* No. 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020) (COVID-19 qualifies as a public health crisis under *Jacobson*). Plaintiffs agree that Illinois has a compelling interest in fighting the pandemic.

However, they suggest *Jacobson* is inapplicable because they do not assert an inherent right to gather but instead request equal treatment when others are permitted to gather. *Jacobson* draws no such distinction and instead provides for minimal judicial interference with state officials' reasonable determinations. The Order undoubtedly relates to public health and safety because it minimizes the risk of virus transmission by limiting gathering size. Additionally, the Order still encourages religious organizations to limit indoor services to fifty people and implement other public health measures Plaintiffs have not shown how this exemption is a plain invasion of their constitutional rights. The Order involves reasonable measures intended to protect public health while preserving avenues for First Amendment activities. Overall, the Court concludes that Plaintiffs have a less than negligible chance of prevailing on their constitutional claims because the current crisis implicates *Jacobson* and the Order advances the Governor's interest in protecting the health and safety of Illinois residents.

B. Traditional First Amendment Analysis

Even if this case falls outside *Jacobson*'s emergency crisis standard, Plaintiffs have failed to show a likelihood of success under traditional First Amendment analysis.[7] The First Amendment, applicable to

[7] The Court limits its analysis to the First Amendment because Plaintiffs' Fourteenth Amendment claim is derivative of their First Amendment claim, and the parties agree that the claims rise and fall together.

the States through the Fourteenth Amendment, prohibits laws that "abridge[e] the freedom of speech." U.S. Const. amend. I. Pursuant to that clause, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972)). Laws that target speech based on its communicative content are "presumptively unconstitutional." *See id.* Here, the parties dispute whether the Governor's actions, through both the Order and his failure to enforce it against protestors, are content neutral. According to Plaintiffs, the Governor has distinguished between speech based on its content (*i.e.,* religious v. political or Black Lives Matter v. Republican), therefore creating a content-based restriction. *See* Doc. 3-1 at 10. The Governor argues that the Order is instead a content-neutral time, place, and manner regulation. The Court evaluates content-based restrictions under strict scrutiny but assesses content-neutral "time, place, or manner" restrictions under an intermediate level of scrutiny. *Price v. City of Chicago* (*Price II*), 915 F.3d 1107, 1109 (7th Cir. 2019).

At the outset, the Court addresses the specific governmental actions that Plaintiffs challenge. The complaint and motion for preliminary relief treat the Order and enforcement of the Order as contributing to the same First Amendment violation. Plaintiffs fail to distinguish between the two governmental actions or acknowledge that each action raises separate and

distinct questions. The Order provides a clear exemption for religious gatherings on its face.

Enforcement of the Order against protestors, however, does not create a *de facto* exemption unless Plaintiffs can show that the Governor has enforced it differently against protestors based on the content of their message. At the hearing, Plaintiffs could not provide a single example of state officials engaging in such discriminatory enforcement. In their brief, Plaintiffs allege that City of Chicago officials dispersed "Reopen Illinois" protestors on one occasion, but that is irrelevant to Plaintiffs' claim because it does not involve State action. Plaintiffs have failed to point to a single instance in which they, or anyone similarly situated, protested with political messages and *state officials* enforced the Order against them because of this content. Thus, the Court has no basis by which to evaluate whether the Governor has selectively enforced the Order. *See Anderson v. Milwaukee Cty.,* 433 F.3d 975, 980 (7th Cir. 2006) (rejecting the plaintiff's argument that discretionary enforcement resulted in discrimination against religious literature in part because the plaintiff did not offer evidence that anyone had been able to distribute nonreligious literature under similar circumstances); *S. Labor Party v. Oremus,* 619 F.2d 683, 691 (7th Cir. 1980) ("An individual must allege facts to show that while others similarly situated have generally not been prosecuted, he has been singled out for prosecution, and that the discriminatory selection of him was based upon an impermissible consideration such as . . . the desire to prevent his exercise of

constitutional rights."); *cf. Hudson v. City of Chicago,* 242 F.R.D. 496, 509 (N.D. Ill. 2007) (for plaintiffs to prevail on their selective enforcement claim, they must show they were exercising their First Amendments rights and were arrested or ticketed under the relevant ordinance when other similarly situated individuals were not). Instead, the facts before the Court indicate that the Governor similarly did not take action against "Reopen Illinois" protests that occurred on state property. And while Plaintiffs emphasize the Governor's decision to march in one demonstration as showing that he has engaged in content-based discrimination, this singular act is not enough to establish such discrimination. *See Tri-Corp Hous. Inc. v. Bauman,* 826 F.3d 446, 449 (7th Cir. 2016) (public officials "enjoy the right of free speech under the First Amendment").[8] Overall, Plaintiffs have failed to point to anything that suggests selective enforcement against protestors based on the

[8] Plaintiffs' reliance on *Soos v. Cuomo* is not persuasive. *Soos v. Cuomo,* No. 20-00651-GLS-DJS, 2020 WL 3488742 (N.D.N.Y. June 26, 2020). *Soos* concluded that plaintiffs were likely to succeed on their free exercise claim when government officials selectively enforced their order against religious groups but not protestors and allowed outdoor graduation ceremonies (with a larger numbers of individuals than allowed to religious gatherings) to occur, finding no compelling justification to treat graduation ceremonies and religious gatherings differently. *Id.* at * 11-12. Further, one official made comments distinguishing between outdoor religious gatherings and protests, indicating that mass protests deserve better treatment than religious gatherings. *Id.* at *5, 12. Here, the Court fords that the Governor has provided a compelling justification for the Order's religious gathering exemption, which is narrowly tailored and outside this exemption, has not indicated a preference for one type of mass gathering over another.

content of their message, and the Governor's participation in one protest does not give rise to content-based discrimination in violation of the First Amendment. Accordingly, the Court will limit its analysis to Plaintiffs' claim that the Order's religious exemption violates their First Amendment rights.

1. Content Neutrality

To determine whether a challenged regulation is content based, the Court first asks whether the regulation "draws distinctions [on its face] based on the message a speaker conveys." *Reed,* 576 U.S. at 163 (citation omitted). *Reed* explained that facial distinctions include those which define regulated speech "by particular subject matter" or "its function or purpose." *Id.* at 163. Laws that are facially content-neutral may still be considered content-based restrictions on speech if they 'cannot be justified without reference to the content of the regulated speech' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at 164 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)); *see also Price II,* 915 F.3d at 1118 (a law is content based "if enforcement authorities must 'examine the content of the message that is conveyed to determine whether a violation has occurred' " (quoting *McCullen v. Coakley,* 573 U.S. 464, 479 (2014))). In other words, following *Reed,* "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Norton v. City of Springfield,* 806 F.3d 411, 412 (7th Cir. 2015).

The Order is a content-based restriction. The Order broadly prohibits any gathering of more than fifty people but exempts the free exercise of religion from this requirement. Instead, religious organizations "are encouraged to consult and follow" the IDPH's recommended guidelines and practices. Doc. 10-1 at 9. On its face, the Order distinguishes between religious speech and all other forms of speech based on the message it conveys. *See Norton,* 806 F.3d at 413 (Manion, J., concurring) ("*Reed* now requires any regulation of speech implicating religion . . . to be evaluated as content-based and subject to strict scrutiny."); *cf. Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118,* 9 F.3d 1295, 1297 (7th Cir. 1993) ("[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time."); *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.,* 63 F.3d 581, 586, 592 (7th Cir. 1995) (prohibition of menorah's message because of religious perspective was unconstitutional under the First Amendment's free speech clause). By providing an exemption, the Order is "endorsing" religious expression compared to other forms of expression. *See Reed,* 576 U.S. at 168-69 (the town's ordinance singled out specific subject matter for different treatment: ideological messages received more favorable treatment than political messages, and political messages received more favorable treatment than messages announcing assemblies of like-minded individuals); *Patriotic Veterans, Inc. v. Zoeller,* 845 F.3d 303, 305 (7th Cir. 2017) (political speech exception from anti-robocall statute would be content discrimination in violation of *Reed*).

Additionally, enforcement of the Order reiterates that it is content based. To determine whether a gathering violates the Order, authorities must look to the content of the message communicated. *See Price II,* 915 F.3d at 1118 ("[D]ivining purpose clearly requires enforcement authorities 'to examine the content of the message that is conveyed.'" (quoting *McCullen,* 573 U.S. at 479)). If the content is religious, a gathering greater than fifty people is permissible; if the content is not religious, such gathering is impermissible. *See Swart v. City of Chicago,* No. 19-CV-6213, 2020 WL 832362, at *8 (N.D. Ill. Feb. 20, 2020) (assessing the speaker's intent requires the City to evaluate the content of the speech, making its enforcement content-based). Overall, the fact that one group of speakers can gather because they are expressing religious content while Plaintiffs cannot gather to express political content causes this restriction to be content based.

The Governor contends that the Order does not distinguish between groups of speakers but instead regulates conduct. This argument is not persuasive because conduct-based regulations are still impermissible under the First Amendment if they draw distinctions based on the speech expressed. *Cf. Left Field Media LLC v. City of Chicago,* 822 F.3d 988, 990 (7th Cir. 2016) (evaluating regulation of conduct under *Reed* and finding it was content-neutral because it regulated all sales alike); *BBL, Inc. v. City of Angola,* 809 F.3d 317, 324 (7th Cir. 2015) (city's zoning rule that required all property owners to seek permit before making changes on land was generally applicable and did

not discriminate based on content of speech); *see also Schultz v. City of Cumberland,* 228 F.3d 831, 841 (7th Cir. 2000) ("[T]he First Amendment tolerates greater interference with expressive conduct, provided that this interference results as an unintended byproduct from content-neutral regulation of a general class of conduct."). The Governor argues that Plaintiffs point to types of events they cannot hold, not expression that the Order prohibits. This confuses the relevant First Amendment inquiry. Again, the Order prevents a group of fifty-one individuals from discussing their political platform in person but allows the same group to discuss their religion in person and is therefore a content-based restriction. The Order does not regulate all gatherings the same but instead distinguishes them based on their expressive conduct. *Cf. Left Field,* 822 F.3d at 990 (ordinance regulating peddling applied equally to sale of bobblehead dolls, baseball jerseys, and printed matter was content neutral); *cf. Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n,* 742 F.3d 282, 288 (7th Cir. 2014) (requirements that small groups obtain permit to gather must comport with First Amendment and be content-neutral); *Marcavage v. City of Chicago,* 659 F.3d 626, 635 (7th Cir. 2011) ("[P]ermit requirement is less likely to be content-neutral and narrowly tailored when it is intended to apply even to small groups.").

Additionally, the Governor's reliance on *Rumsfeld v. Forum for Academic & Institutional Rights,* 547 U.S. 47 (2006), is misplaced. *Rumsfeld* evaluated whether the Solomon Amendment, which denied federal funding to

higher education institutions that had a policy or practice that prevented the military from gaining equal access to campuses for recruiting as other employers, violated the plaintiffs' free speech rights. *See id.* at 55. The Court found that the Solomon Amendment regulated conduct, not speech, because it "affect[ed] what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60. The Court explained that the Amendment did not "limit what law schools may say" and "the conduct regulated by the Solomon Amendment is not inherently expressive." *Id.* at 60, 66. Instead, the law schools had to provide explanatory speech to explain why they were treating military recruiters differently. *Id.* The Governor analogizes this case to *Rumsfeld* because the act of gathering more than fifty people in person does not signal anything unless accompanied by expressive conduct. However, unlike the law at issue in *Rumsfeld,* the Order *does* regulate speech by selecting which speech is permissible for an in-person group larger than fifty people. The Governor's argument that the gathering limit is comparable to a building occupancy limit also fails. A building occupancy limit that did not apply to certain groups based on the content of their speech would similarly be discriminatory. Building occupancy limits and gathering limits are comparable to zoning ordinances for purposes of the Governor's argument, and courts have consistently assessed whether such ordinances are content based. *See BBL,* 809 F.3d at 325 (zoning ordinances that limit where sexually oriented businesses can operate "are content based, and we should call them so" (quoting *City of Los Angeles v.*

Alameda Books, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring))); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F. Supp. 2d 961, 980 (N.D. Ill. 2003) (ordinance that limited locations of religious institutions regulated speech not non-expressive conduct for First Amendment freedom of speed-claim). When a gathering is still allowed based on the speech involved, the government has engaged in content-based discrimination. The Court finds that by exempting free exercise of religion from the gathering limit, the Order creates a content-based restriction.

2. Strict Scrutiny

Because the exemption is a content-based restriction, this provision can only stand if it survives strict scrutiny. *Reed,* 576 U.S. at 171. Therefore, the Governor must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 734 (2011)). Plaintiffs concede that the Governor has a compelling interest in "fighting a pandemic," so the Court limits its analysis to whether the Order is narrowly tailored to further that interest. Doc. 3-1 at 12. It is the Governor's burden to demonstrate that the Order's differentiation between religious gatherings and other gatherings furthers its interest in limiting the spread of COVID-19 and is narrowly tailored to that end. *See id.*

"Generally, 'a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the evil it seeks to remedy.'" *Entm't Software Ass'n v. Blagojevich,* 469 F.3d 641, 646 (7th Cir. 2006) (quoting *Ward,* 491 U.S. at 804). That is, "a statute is not narrowly tailored if 'a less restrictive alternative would serve the Government's purpose.'" *See id.* (quoting *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 813 (2000)). The Governor argues that the Order is narrowly tailored to its compelling interest in fighting a pandemic by exempting free exercise of religion from its gathering limit because the First Amendment, federal law, and state law provide religious organizations unique safeguards against governmental interference with the free exercise of religion. In other words, the Governor contends that by exempting free exercise of religion while still encouraging those organizations to take specific measures to prevent the spread of COVID-19, the Order is narrowly tailored. In support, the Governor references religious exemptions that appear throughout federal and state law. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 188 (2012) (recognizing "ministerial exception" to Title VII's prohibition on religious discrimination in employment and explaining that by imposing an unwanted minister "the state infringes the Free Exercise Clause"); 775 Ill. Comp. Stat. 35/15 (exemption from generally applicable government regulations that "substantially burden a person's exercise of religion"). The Constitution expressly prevents the government from interfering with free exercise of religion. *See* U.S. Const. amend. I ("Congress shall make

no law . . . prohibiting the free exercise [of religion]."); *see also Espinoza v. Mont. Dep't of Revenue,* — S. Ct. —, No. 18-1195, 2020 WL 3518364, at *22 (June 30, 2020) (Gorsuch, J., concurring) (the Free Exercise Clause "protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly"). And numerous state and federal laws reflect the unique protections accorded to religion. *See Gaylor v. Mnuchin,* 919 F.3d 420, 436 (7th Cir. 2019) (noting that "more than 2,600 federal and state tax laws provide religious exemptions" and finding a tax exemption for religious housing constitutional (citation omitted)); *see also Hosannah-Tabor,* 565 U.S. at 189 (the First Amendment "gives special solicitude to the rights of religious organizations"). Across the country, individuals have brought free exercise challenges to similar executive orders issued throughout this public health crisis. Supreme Court Justices and Circuit Court judges have been receptive to such challenges. *See S. Bay II,* 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) (state's 25% occupancy cap imposed on religious worship services but not comparable secular businesses discriminates on the basis of religion in violation of the First Amendment and state lacked compelling justification for such distinction); *Roberts v. Neace,* 958 F.3d 409, 413 (6th Cir. 2020) (the governor's restriction on in-person worship services likely violates free exercise of religion); *S. Bay United Pentecostal Church v. Newsom,* 959 F.3d 938, 946 (9th Cir. 2020) (Collins, J., dissenting) ("By regulating the specific underlying risk-creating behaviors, rather than banning the particular religious

setting within which they occur, the State could achieve its ends in a manner that is the least restrictive way of dealing with the problem at hand." (citation omitted)). The President has even indicated that religious houses of worship are essential services and suggested he would "override the governors."[9] Against this backdrop, the Governor concluded that the least restrictive means by which to protect this constitutional right was to permit free religious exercise but encourage individuals who engage in such practices to adhere to public health guidelines. The Court finds that this is indeed the least restrictive means by which to accomplish both aims.[10]

Plaintiffs contend that the Governor cannot satisfy the least restrictive means test because a political

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[9] *See* Brian Naylor, *Trump Calls on States to Reopen Places of Worship Immediately,* NPR., May 22, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/05/22/861057500/trump-calls-on-states-to-immediately-reopen-places-of-worship.

[10] Although the Court concludes that the exemption satisfies strict scrutiny, such exemption was not necessary under the Free Exercise Clause. The Seventh Circuit upheld the Governor's previous executive order that limited the size of public assemblies, including religious services, against a free exercise challenge. *See Elim II,* 2020 WL 3249062, at *6. And another court in this district recently found that a challenge under Illinois' RFRA statute was also unlikely to succeed on the merits. *Cassell,* 2020 WL 2112374, at * 13 (challenge to previous executive order banning all gatherings greater than ten people under Illinois' RFRA statute unlikely to succeed on the merits). However, this case does not involve a free exercise challenge and neither party suggests that imposing a blanket gathering limit is the least restrictive means by which the Governor could achieve his compelling interest in protecting public health.

party caucus is no more likely to spread COVID-19 than a church service. *See* Doc. 3-1 at 12. However, the Constitution does not accord a political party the same express protections as it provides to religion. *See* U.S. Const. amend. I. And by statute, Illinois has undertaken steps to provide additional protections for the exercise of religion. *See* 775 Ill. Comp. Stat. 35/15.

Additionally, the Order's limited exemptions reinforce that it is narrowly tailored. The Order only exempts two other functions from the gathering limit: emergency and governmental functions. These narrow exemptions demonstrate that the Order eliminates the increased risk of transmission of COVID-19 when people gather while only exempting necessary functions to protect health, safety, and welfare and free exercise of religion. Therefore, the Governor has carried his burden at this stage in demonstrating that the Order is narrowly tailored to further a compelling interest, and the Order survives strict scrutiny. *See also Amato v. Elicker,* No. 3:20-CV-464 (MPS), 2020 WL 2542788, at *11 (D. Conn. May 19, 2020) (restriction on gathering size with specific exemption for religious services was narrowly tailored under intermediate scrutiny in part because it involved spiritual needs the state may deem more pressing); *Talleywhacker, Inc. v. Cooper,* No. 5:20-CV-218-FL, 2020 WL 3051207, at *13 (E.D.N.C. June 8, 2020) (executive order was narrowly tailored under intermediate scrutiny because the government's interest in preventing the spread of COVID-19 would be achieved less effectively if other facilities were able to open). In conclusion, Plaintiffs have failed to show a

likelihood of success on the merits of their First and Fourteenth Amendment claims under *Jacobson* or traditional First Amendment analysis.

II. Balance of Harms

The balance of harms further confirms that Plaintiffs are not entitled to preliminary relief. Under the sliding scale approach, the less likely Plaintiffs' chance of success the more the balance of harms must weigh in their favor. *Valencia v. City of Springfield,* 883 F.3d 959, 966 (7th Cir. 2018). Because Plaintiffs' claims have little likelihood of succeeding on the merits, they are not entitled to preliminary relief unless they show that the scales weigh heavily in their favor.

The scales weigh significantly against Plaintiffs. The number of COVID-19 infections continues to rise across the United States, which has led some states to recently impose greater restrictions on gatherings and activities. COVID-19 is highly contagious and continues to spread, requiring public officials to constantly evaluate the best method by which to protect residents' safety against the economy and a myriad of other concerns. *See Elim Romanian Pentecostal Church v. Pritzker,* No. 20 C 2782, 2020 WL 2468194, at *6 (N.D. Ill. May 13, 2020) ("The record clearly reveals how virulent and dangerous COVID-19 is, and how many people have died and continue to die from it"), *aff'd,* No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020); *Cassell,* 2020 WL 2112374, at * 15 ("While Plaintiffs' interest in holding large, communal in-person worship

services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic."). Granting Plaintiffs the relief they seek would pose serious risks to public health. Plaintiffs contend that in-person speech is most effective, and their communications are hampered by gathering limits. But the current state of our nation demands that we sacrifice the benefits of in-person interactions for the greater good. Enjoining the Order would risk infections amongst members of the Illinois Republican Party and its regional affiliates, as well as their families, friends, neighbors, and co-workers. *See Cassell,* 2020 WL 2112374, at *15. Plaintiffs ask that they be allowed to gather—without limitation—despite the advice of medical experts and the current rise in infections. The risks in doing so are too great. The Court acknowledges that Plaintiffs' interest in gathering as a political party is important, especially leading up to an election. But this interest does not outweigh the Governor's interest in protecting the health of Illinois' residents during this unprecedented public health crisis. Moreover, Plaintiffs may still engage in a number of expressive activities like phone banks, virtual strategy meetings, and, as of Friday, June 26, gatherings like fundraisers and meet-and-greet coffees that do not exceed fifty people. *See* Doc. 3-1 at 4. As the Governor suggested, allowing Plaintiffs to gather would open the floodgates to challenges from other groups that find in-person gatherings most effective. It would also require that the Court turn a blind eye to the increase in infections across a high majority of states,

which as of July 1, 2020 includes Illinois.[11] An injunction that allows Plaintiffs to gather in large groups so that they can engage in more effective speech is simply not in the public interest. Such relief would expand beyond any gatherings and negatively impact non-parties by increasing their risk of exposure. Thus, the harms tilt significantly in the Governor's favor as he seeks to prevent the spread of this virulent virus.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiffs' motion for preliminary relief [3].

Dated: July 2, 2020 /s/ Sara L. Ellis
SARA L. ELLIS
United States District Judge

[11] *Illinois Coronavirus Map and Case Count,* N.Y. Times, July 1, 2020, https://www.nytimes.com/interactive/2020/us/illinois-coronavirus-cases.html (Illinois reported 768 new cases on June 29, compared to 581 on June 28).

No. 20-2175

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS REPUBLICAN PARTY, WILL COUNTY REPUBLICAN CENTRAL COMMITTEE SCHAUMBURG TOWNSHIP REPUBLICAN ORGANIZATION, and NORTHWEST SIDE GOP CLUB, Plaintiffs-Appellants, v. J.B. PRITZKER, in his official capacity as Governor of the State of Illinois, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois No. 1:20-cv-3489 The Honorable SARA L. ELLIS, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE GOVERNOR J.B. PRITZKER

(Filed Jul. 27, 2020)

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[1] JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiffs-Appellants Illinois Republican Party, Will County Republican Central Committee, Schaumburg Township Republican Organization, and Northwest Side GOP Club is not complete and correct. Defendant-Appellee J.B. Pritzker, Governor of the State of Illinois, provide: this statement pursuant to Seventh Circuit Rule 28(b).

Plaintiffs filed this action in the district court against the Governor in his official capacity for injunctive and declaratory relief, alleging that his temporary 10-person limit on in-person gatherings (which has since expired and been replaced with a 50-person limit) violated their rights to free speech and equal protection under the First and Fourteenth

Amendments to the United States Constitution, as secured by 42 U.S.C. § 1983, and was entered in excess of his authority under the Illinois Emergency Management Agency Act ("IEMAA"), 20 ILCS 3305/1 *et seq*. Doc. 1 at 5-9.[1] The district court had subject matter jurisdiction over plaintiffs' federal claims under 28 U.S.C. § 1331. To the extent that the Eleventh Amendment to the United States Constitution affects a court's subject matter jurisdiction, *see Wis. Dep't of Corrs. v. Schacht*, 524 U.S. 381, 391 (1998), the district court lacked jurisdiction over plaintiffs' IMEAA claim, which asked the court to compel a state [2] official to follow state law in violation of the Eleventh Amendment, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). Otherwise, the district court had supplemental jurisdiction over plaintiffs' state claim under 28 U.S.C. § 1367.

On July 2, 2020, the district court denied plaintiffs' motion for a temporary restraining order ("TRO") and preliminary injunction under Federal Rule of Civil Procedure 65(a) and (b). A57. That same day, plaintiffs filed a notice of appeal from the district court's July 2, 2020 order. A35. While the denial of a TRO usually is not appealable, the denial of a preliminary injunction is an interlocutory order that may be immediately appealed. *See Wheeler v. Talbot*, 770 F.3d 550, 552 (7th

[1] Citations to the district court docket, which is the record on appeal, are identified by the docket number and page number if applicable, *e.g.*, Doc. 2 at 1. Plaintiffs' opening brief is cited as "AT Br. ___." The appendix attached to that brief is cited as "A," and because it is not separately paginated, the cited page number indicates the page's location in the entire filing.

Cir. 2014). This appeal was timely under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A) because it was filed within 30 days of entry of the district court's order. This court, therefore, has jurisdiction over this appeal from an interlocutory order under 28 U.S.C. § 1292(a)(1).

[3] ISSUES PRESENTED

1. Whether the district court correctly concluded that plaintiffs are unlikely to succeed on the merits of their First Amendment claim, where the Governor's limitation on in-person gatherings satisfies the deferential standard of review that governs during public health emergencies and, alternately, where that limitation satisfies any level of First Amendment scrutiny.

2. Whether the district court acted within its discretion in determining that the equities did not weigh in favor of granting preliminary injunctive relief, where plaintiffs failed to articulate any irreparable harm and where any purported harm pales in comparison to the public health risk presented by the COVID-19 pandemic.

[4] STATEMENT OF THE CASE

A. The COVID-19 pandemic and the Governor's response

COVID-19 is a novel acute respiratory illness that continues to infect and claim the lives of individuals in

Illinois and across the globe.[2] As of July 26, 2020, 7,398 people in Illinois had died of the disease, and 171,424 had tested positive for the virus.[3] And this public health crisis is far from over. Infection numbers are rising nationwide,[4] A38, with the country experiencing a record single-day increase in new COVID-19 cases on July 16.[5] The crisis is particularly acute in several States that undertook reopening measures earlier than Illinois did, with those States seeing significant increases in cases and deaths in recent weeks.[6] By taking [5] a more cautious approach, Illinois has achieved

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[2] *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://nyti.ms/2Vet0Yo. All websites were last visited on July 26, 2020. This court may take judicial notice of this information and other external sources cited in this brief, as they are public records "not subject to reasonable dispute." *Ennenga v. Starns*, 677 F.3d 766, 774 (7th Cir. 2012); *see* Fed. R. Evid. 201(b)(2) (permitting judicial notice of facts "whose accuracy cannot reasonably be questioned"); Fed. R. Evid. 902(6) (official documents and newspapers are self-authenticating); Fed. R. Evid. 101(b)(6) (rules on printed information apply to electronic sources of information).

[3] *Coronavirus (COVID-19) Response*, State of Illinois, https://bitly/2Dan9Nm.

[4] *See, e.g.*, *U.S. Coronavirus Cases Soar as 18 States Set Single-Day Records This Week*, N.Y. Times (July 25, 2020), https://nyti.ms/3f1n6ku.

[5] David Begnaud & Janet Shamlian, *U.S. breaks record for new coronavirus cases with over 77,000 in one day*, CBS News (July 17, 2020), https://www.cbsnews.com/news/coronavirus-usa-record-cases-77000/.

[6] *See 6 States Report Record-High Jumps in Coronavirus Cases As Reopening Plans Weighed*, CBS News (June 17, 2020), https://cbsn.ws/30ZJN4T; Julie Bosman & Mitch Smith, *Coronavirus Cases Spike Across Sun Belt as Economy Lurches into Motion*, N.Y. Times (June 18, 2020), https://nyti.ms/2ASujoH.

some relative progress in recent weeks, with lower daily numbers of new cases and deaths compared to previous months.[7] But even Illinois is now experiencing an uptick in new cases,[8] and there is still no vaccine or approved treatment,[9] A38, or evidence that recovered individuals are immune to a second infection.[10]

The relatively positive trends in Illinois are the hard-earned product of social distancing measures. On March 20, 2020, the Governor issued an executive order directing Illinois residents to stay home except to engage in essential activities and prohibiting "[a]ll public and private gatherings of any number of people occurring outside a single household or living unit" except where specifically exempted. Ill. Exec. Order No. 2020-10 (Mar. 20, 2020) ¶ 3.[11] Exempted essential activities included emergency services and essential government functions. *Id.* ¶¶ 5, 10. The Governor issued subsequent orders on April 1 and April 30 continuing the limitation on in-person gatherings and the

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[7] *See COVID-19 Statistics*, Ill. Dep't of Pub. Health, https://www.dph.illinois.gov/covid19 (see graphs "Cases Change All Time" and "Deaths Change All Time").

[8] *Id.*

[9] FDA, *COVID-19 Frequently Asked Questions* (July 24, 2020), https://bit.ly/20XkVnl; Dr. Caitlin Rivers, *Coronavirus Is Not Done with Us Until We Have a Vaccine for COVID-19: Q&A*, USA Today (June 17, 2020), https://bit.ly/2UYc48b.

[10] *See* Apoorva Mandavilli, You *May Have Antibodies After Coronavirus Infection. But Not for Long*, N.Y. Times (June 18, 2020), https://nyti.ms/2YTOA1Z.

[11] All of the Governor's executive orders are available at https://bit.ly/32NQSq9.

stay-at-home directive, among other [6] requirements. Ill. Exec. Order No. 2020-18 (Apr. 1, 2020); Ill. Exec. Order No. 202032 (Apr. 30, 2020).

On May 29, 2020, the Governor issued Executive Order 2020-38 ("E038"), which noted that the number of new COVID-19 cases in Illinois had "stabilized and potentially begun to decrease in recent weeks." Ill. Exec. Order No. 2020-38 (May 29, 2020) (preamble). As such, the order sought to "safely and conscientiously resume activities" without "backslid[ing] on the progress" made. *Id.* ¶ 1. Relying or epidemiological modeling, the Governor lifted the ban on in-person gatherings but at the same time continued to require social distancing measures by capping in-person gatherings to 10 people, mandating six-foot distancing in public places, and instructing people to wear face coverings when maintaining distance was not possible. *Id.* ¶ 2. The order, however, exempted three categories from its reach—emergency functions, government functions, and religious gatherings. *Id.* ¶ 4. Relevant here, E038 did "not limit the free exercise of religion," but encouraged religious organizations to follow state guidance, which recommended holding services in a drive-in format, online, or outdoors; limiting indoor services to 10 people; practicing social distancing; and using face coverings. *Id.* ¶ 4(a).

On June 26, 2020, the Governor issued Executive Order 2020-43 ("EO43"), which increased the limit on in-person gatherings to 50 people in light of the recent "steep decline" in COVID-19 cases and deaths in Illinois. Doc. 12 at 3-4. EO43 continued the exemptions for

emergency and governmental functions, as well as for [7] "the free exercise of religion." *Id.* at 7. The Governor has since extended EO43 in its entirety through August 22, 2020. Ill. Exec. Order No. 2020-48 (July 24, 2020).

B. Plaintiffs' lawsuit

On June 15, 2020—when E038 was still in effect—plaintiffs filed an action in the district court seeking declaratory and injunctive relief against the Governor. Doc. 1. Plaintiffs alleged that the 10-person limitation on in-person gatherings violated their free speech and equal protection rights and that the Governor exceeded his authority under the IEMAA. *Id.* at 5-8. That same day, plaintiffs filed a motion for a TRO and preliminary injunction on their federal constitutional claims. Doc. 3. According to plaintiffs, they were likely to succeed on those claims because E038 impermissibly favored religious services over political gatherings. Doc. 3-1 at 8-9. Plaintiffs also claimed that the Governor had selectively enforced E038 by exempting gatherings protesting racial injustice and police brutality, also known as Black Lives Matter protests, but not those organized by a political party. *Id.* at 9-11.

On July 2, 2020, the district court denied plaintiffs' motion because their likelihood of success on the merits was "less than negligible" and "the balance of harms weigh[ed] heavily against" them. A38. On the merits, the district court limited its analysis to plaintiffs' First Amendment claim, because their equal

protection claim was "derivative" of that claim, and thus the two would "rise and fall together." A45 n.7. And the court held that plaintiffs were unlikely to succeed on their First Amendment claim because the 50-person gathering restriction in [8] EO43—which had issued before the hearing and decision on plaintiffs' motion—satisfied the deferential standard articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and applied by this court to a restriction on in-person gatherings in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020) ("*Elim*"). A43-44.

In addition, the court held that plaintiffs were not likely to succeed even "under traditional First Amendment analysis," A45, because EO43 was narrowly tailored to further the State's compelling interest in protecting its residents from the COVID-19 pandemic, A51-55. The court reasoned that EO43's exemption for the free exercise of religion, while not constitutionally required, satisfied narrow tailoring because of the "unique safeguards" afforded to the free exercise of religion by the First Amendment as well as federal and state statutes. A52-55. In addition, the court determined that the Governor had not created a "*de facto* exemption" by not enforcing EO43 against Black Lives Matter protestors, noting that plaintiffs failed to show even a "single instance" of state officials enforcing the order differently based on the content of speech. A46.

Finally, the court ruled that, when balancing the harms, the "scales weigh significantly against Plaintiffs." A55. Although the court recognized that plaintiffs' "interest in gathering as a political party is

important, especially leading up to an election," the court concluded that this interest did not "outweigh the Governor's interest in protecting the health of Illinois' residents during this unprecedented public health crisis." A56. Indeed, the court explained, an injunction was "simply [9] not in the public interest," as it would "negatively impact non-parties by increasing their risk of exposure." *Id.*

That same day, plaintiffs sought an injunction pending appeal, Doc. 17, which the district court denied, Doc. 18. Plaintiffs then filed a notice of interlocutory appeal, A35, as well as a motion for an injunction pending appeal with this court, 7th Cir. Doc. 4. This court denied the motion, determining that plaintiffs "are unlikely to succeed on the merits" even under strict scrutiny because an exemption for religious exercise does not "automatically" violate the First Amendment given the protections secured by the Free Exercise Clause. A59. The court also determined that "the balance of harms in this instance strongly favors the governor." *Id.* As the court explained, if large political gatherings were permitted, the virus could easily spread among those in attendance and beyond, such as to "a local shopkeeper, a local grocery-store worker, their postal carrier, or their grandmother—someone who had no interest in the earlier gathering." A59.

Plaintiffs then filed an emergency application for injunctive relief with Justice Kavanaugh, which he

denied without calling for a response.[12] And now, plaintiffs ask this court to reverse the district court's order denying them preliminary injunctive relief based on their First Amendment claim, but not their [10] equal protection claim, so that they may hold in-person gatherings without any numerical limit. *See* AT Br. 9.

[11] SUMMARY OF ARGUMENT

The world is in the throes of a pandemic brought on by COVID-19, "a novel severe acute respiratory illness," *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613, 1613 (2020) (Roberts, C.J., concurring), that has killed more than 146,000 nationwide.[13] The virus spreads easily from person to person, including by asymptomatic individuals. Without an approved treatment or vaccine, the threat of the virus looms large, and "[r]educing the number of people at gatherings" remains a critical tool in fighting the virus. *Elim*, 962 F.3d at 342. Illinois, fortunately, has seen relative progress in recent weeks, particularly during the month of June. The virus, however, continues to infect and take the lives of many Illinois residents. In recognition of these evolving circumstances, EO43 increased the number of individuals permitted to attend in-person gatherings from 10 to 50, and continued the narrow exemptions for essential services, government services, and free exercise of religion.

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[12] The application and the Court's denial are available at https://bit.ly/2CxFGDG.

[13] *Coronavirus in the U.S.*, *supra* note 2.

Plaintiffs seek to expand the scope of these limited exemptions to include political gatherings. This request should be rejected for several reasons. To begin, plaintiffs cannot show a likelihood of success on the merits of their First Amendment claim. The Governor's efforts to protect Illinois residents by temporarily limiting the size of in-person gatherings, with an exemption for religious exercise, satisfies the deferential standard the Supreme Court applies in [12] public health emergencies. In these circumstances, state action undertaken to protect the public health and safety may be invalidated only if it lacks a substantial relationship to the public health crisis or constitutes a palpable invasion of constitutional rights. Plaintiffs, however, concede that the State has an important interest in protecting the public during the COVID-19 pandemic, and the district court rightly concluded that plaintiffs failed to demonstrate that EO43 plainly invades their right to free speech.

And even if traditional First Amendment analysis were to apply, plaintiffs still are unlikely to prevail. As an initial matter, this court need not resolve what level of scrutiny applies because the district court correctly held that EO43 survives strict scrutiny. In line with the special solicitude afforded religious exercise by the First Amendment, governments have long enacted generally applicable laws that serve compelling interests while providing a narrow exception for religious exercise. Requiring these exemptions to be extended to secular entities whenever those entities engage in protected speech would nullify these unique safeguards

for religious exercise. Plaintiffs, moreover, are incorrect that the Governor has selectively enforced EO43 by not enforcing the limit on in-person gatherings against Black Lives Matter protestors. In fact, plaintiffs have not provided a single example of the State bringing an enforcement action against them or anyone similarly situated.

Should this court choose to determine the proper level of scrutiny, however, EO43 is at most subject to intermediate scrutiny. EO43 "concern[s] conduct (social [13] distancing), not what anyone may write or say," *Morgan v. White*, --- F.3d ---, No. 20-1801, 2020 WL 3818059, at *1 (7th Cir. July 8, 2020) (per curiam), and so it does not regulate speech. And even if EO43 does regulate speech in addition to conduct, it is a constitutional time, place, and manner restriction, as it draws distinctions based on the activity, not speech, involved; serves an important government interest; and leaves open additional channels of communication.

Finally, the district court acted well within its discretion by concluding that the balance of harms weighs against a preliminary injunction. Plaintiffs do not contend that they will suffer irreparable harm, and, at any rate, EO43 leaves plaintiffs numerous other means to communicate, including through in-person gatherings of up to 50 people, as many times per day as plaintiffs wish. But entry of an injunction could expose members of the public—including those who avoid such gatherings—to the virus and threaten the relative progress Illinois residents have achieved through months of diligent effort.

[14] **ARGUMENT**

I. Plaintiffs Must Show That They Were Entitled To A Preliminary Injunction, Which Is Granted Only In Exceptional Circumstances.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (internal quotations omitted). The plaintiff "must establish that it has some likelihood of success on the merits; that it has no adequate remedy at law; [and] that without relief it will suffer irreparable harm." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019) (internal quotations omitted). If the plaintiff satisfies all three requirements, then the court must weigh the harm that the plaintiff will incur without an injunction against the harm to the defendant if one is entered, and "consider whether the injunction is in the public interest." *Id.* (internal quotations omitted). This analysis is done on a "sliding scale"—if the plaintiff is less likely to win on the merits, the balance of harms must weigh more heavily in its favor, and vice versa. *Id.* (internal quotations omitted).

When reviewing a district court's ruling on a preliminary injunction motion, this court reviews legal conclusions *de* novo and findings of historical or evidentiary fact for clear error. *Id.* Meanwhile, the court reviews the balancing of the injunction factors for an abuse of discretion, *id.*, in particular affording the district court "substantial deference" as to the weighing of

harms, *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 845 (7th Cir. 1999).

[15] Under these standards, this court should uphold the district court's order denying plaintiffs' request for preliminary injunctive relief. As described below, plaintiffs are unlikely to succeed on the merits of their First Amendment claim under any standard of review. The district court, moreover, acted well within its discretion by determining that the equities counsel against entering an injunction that would expose plaintiffs and their communities to a virus from which 7,398 Illinoisans have already perished.

II. Plaintiffs Are Unlikely To Succeed On The Merits Of Their Free Speech Claim Under Any Level Of Scrutiny.

Plaintiffs sought a preliminary injunction on the basis that the Governor allegedly violated their First Amendment right to free speech by exempting the free exercise of religion from the 50-person limit on gatherings and purportedly selectively enforcing the limit against political groups generally, but not against Black Lives Matter protests.[14] This court should deny

[14] Before the district court, plaintiffs also based their request for a preliminary injunction on an alleged equal protection violation. *See* Doc. 3-1 at 13. They have forfeited this contention on appeal by not raising it in their opening brief, *Scheidler v. Indiana*, 914 F.3d 535, 540 (7th Cir. 2019), and, in any event, it fails for the same reasons as their First Amendment claim, *see* 7th Cir. Doc. 4 at 11 n.20 (plaintiffs' acknowledgement that "equal protection

plaintiffs' request for injunctive relief because, as the district court correctly determined, plaintiffs are unlikely to succeed on the merits of their claim under the deferential *Jacobson* standard that this and other courts have applied to the executive orders issued to address the COVID-19 pandemic. But even if this standard did not apply, plaintiffs [16] have not demonstrated a likelihood of success under traditional First Amendment analysis because EO43 is narrowly tailored to serve the State's compelling interests in protecting its residents from COVID-19 while also protecting religious exercise and because the Governor has not created an exemption for Black Lives Matter protests.

A. EO43 is constitutional under the deferential *Jacobson* standard that applies to public health emergencies.

"Our Constitution principally entrusts '[t]he safety and health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38) (brackets in original). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)) (brackets in original). And because actions taken within these

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clause provide[s] the same basis for relief as the free speech clause") (citing *Proft v. Raoul*, 944 F.3d 686, 691 (7th Cir. 2019)).

"broad limits" should not be "second-guess[ed] by an 'unelected federal judiciary,'" *id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)), this court and others have applied a deferential standard of review to executive actions undertaken to protect the public health and safety during the COVID-19 pandemic, *see, e.g.*, *Elim*, 962 F.3d at 347; *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, No. 201581, 2020 WL 3468281, at *2 (6th Cir. June 24, 2020).

This deferential standard derives from *Jacobson*, in which the Supreme Court upheld a state law requiring compulsory vaccinations enacted during the smallpox epidemic. 197 U.S. at 27. The Court explained that "a community has the [17] right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* In such situations, "the safety of the general public may demand" regulations that restrict individual rights, *id.* at 29, and the State may enact such regulations pursuant to its police power, *id.* at 25. The Court further stated that "[t]he mode or manner in which those results are to be accomplished is within the discretion of the state." *Id.* In practice, this means that state actions undertaken to protect the public during an epidemic will be upheld if they (1) have a "real or substantial relation" to public health and safety and (2) do not constitute, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. Put another way, unless the executive or legislature exercises its authority in "an arbitrary, unreasonable manner" or "go[es] so

far beyond what was reasonably required for the safety of the public," courts will not "usurp the functions of another branch of government." *Id.* at 28.

The district court properly invoked *Jacobson, see* A43, because, as plaintiffs concede, *Jacobson* allows the executive to "constitutionally suspend the exercise of constitutional rights during a pandemic," AT Br. 22. This deference is particularly appropriate "where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (invoking *Jacobson* to deny injunctive relief from numerical limit on in-person religious gatherings). Indeed, in *Elim*, this court relied on *Jacobson* to deny a preliminary injunction in a First Amendment challenge to the Governor's now-expired limitation [18] on in-person religious gatherings, explaining that the court "do[es] not evaluate orders issued in response to public-health emergencies by the standard that might be appropriate for years-long notice-and-comment rulemaking." 962 F.3d at 347.

And, as the district court rightly determined, A44, plaintiffs are unlikely to succeed on the merits of their free speech challenge to EO43 under the deferential *Jacobson* standard. To start, as plaintiffs acknowledge, AT Br. 25; 7th Cir. Doc. 4 at 12, EO43 serves the compelling state interest in protecting the public health and safety from the dangers of COVID-19. It accomplishes this goal in many ways, including by "minimiz[ing] the risk of virus transmission by limiting

gathering size." A44. Indeed, EO43 explains that social distancing measures—which include restrictions on the size of most in-person gatherings—have "proven to be critical in slowing and stopping the spread of COVID-19," and that States that did not take similar precautions or lifted them earlier "are now experiencing exponential growth and record high numbers of [COVID-19] cases." Doc. 12 at 3.

Additionally, EO43 does not "beyond all question" invade the right to free speech, *Jacobson*, 197 U.S. at 31, or "go so far beyond what was reasonably required for the safety of the public," *id.* at 28. The order does not limit the ideas that plaintiffs may express; instead, it merely regulates the number of people who can gather at once, in-person, for these communications. Furthermore, the limitation itself is not unduly restrictive: it allows gathering in groups of up to 50 people as often as plaintiffs wish. Consistent with EO43, one plaintiff has held a press conference, while another has opened its office to collect signatures for a political [19] candidate. Doc. 10 at 9. And plaintiffs are free to express their ideas through other means, such as by using the internet, phone, and radio. Indeed, plaintiffs have employed those means, including holding a convention and conducting trainings and discussions online. *Id.*

Nonetheless, plaintiffs insist that they must hold in-person gatherings in groups exceeding 50 people for their speech to be effective. AT Br. 7-8. But courts "have never presumed to possess either the ability or the authority to guarantee the citizenry the most effective

speech." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973). Instead, the "possession and enjoyment of all rights"—including the right to free speech—"are subject to such reasonable conditions as may be deemed necessary by the [government to be] essential to the safety [and] health . . . of the community." *Jacobson*, 197 U.S. at 26. And in the context of a global pandemic, the temporary restriction on gatherings at issue here is a "reasonable condition": it allows plaintiffs to meet in person in groups as large as 50 people while also curbing the spread of a virus that passes easily, including by asymptomatic individuals.

Plaintiffs admit that "*Jacobson* grants tremendous power to the executive in a crisis" but nevertheless contend that the Governor exceeded the limits of this power because EO43 favors religious gatherings and (purportedly) Black Lives Matter protests over political gatherings. AT Br. 22-23. They reason that because these activities are comparable except for the content of speech involved, the alleged differential treatment is unconstitutional. *Id.* They also assert that although some [20] exceptions are permissible, there is no "compelling reason, medical or otherwise," for treating religious gatherings and (purportedly) Black Lives Matter Protests differently from political gatherings. *Id.* at 23-24. Plaintiffs are incorrect.

At the outset, plaintiffs' contention rests on the faulty premise that religious and political gatherings cannot be treated differently under the First Amendment. If that were true, then, as the motions panel recognized, religious exercise would be adequately

protected by the Free Speech Clause, and the Free Exercise Clause would be "surplusage." A59. But the Free Exercise Clause "gives special protection to the exercise of religion." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981). Accordingly, as the district court noted, federal and state laws permissibly afford unique safeguards to religious organizations. A52-54 & n.10; *see, e.g.*, U.S. Const. amend. I (preventing government from prohibiting free exercise of religion); Ill. Const. art. I, § 3 (same); 775 ILCS 35/15 (government action that "substantially burden[s]" free exercise of religion must pass strict scrutiny). These special protections include exemptions from statutes that apply generally to other organizations, including political ones. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (exemption from prohibition against employment discrimination based on religion for religious organizations); 42 U.S.C. § 12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990); *see also infra* pp. 26-27. Thus, religious exercise can—and often does—enjoy special treatment compared to activity by political organizations.

And the Governor's decision to confer special solicitude on the free exercise of religion here by exempting it from a generally applicable gathering limit is justified. [21] As Chief Justice Roberts explained, the Governor is entitled to deference when navigating these novel circumstances, because "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."

S. Bay, 140 S. Ct. at 1613. When EO43 was entered, the number of COVID-19 cases in Illinois was declining.[15] Doc. 12 at 3. Responding to these "changing facts on the ground," *S. Bay*, 140 S. Ct. at 1613, the Governor made the policy choice to balance two compelling state interests—the free exercise of religion and the protection of public health from a novel virus—by exempting religious organizations from the limit on in-person gatherings while maintaining the limit for most other gatherings. In this way, the Governor has cautiously allowed more personal activity as the situation improved, and requiring him to accelerate this process by extending the exemption for religious exercise to other groups would likely endanger the public health. Plaintiffs are thus incorrect that the Governor lacked a "compelling reason" for his action, AT Br. 24, and this court should not "usurp the functions of another branch of government," *Jacobson*, 197 U.S. at 28, by second guessing a decision left "to the politically accountable officials of the States," *S. Bay*, 140 S. Ct. at 1613.

Likewise, plaintiffs' argument that EO43 unconstitutionally favors Black Lives Matter protests through selective enforcement lacks merit. EO43 includes no [22] exemption for such gatherings and plaintiffs have provided no evidence that the Governor brought enforcement actions against them or anyone similarly situated. *See* A46-47. Instead, plaintiffs cite actions

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[15] Similarly, the number of cases had stabilized and was potentially decreasing when E038, which lifted the restrictions on religious gatherings, was entered. E038 (preamble).

brought by City of Chicago officials, who are not party to this lawsuit. *See* AT Br. 5-6. Meanwhile, the Governor has not brought enforcement actions against many large gatherings that violated the limit on in-person gatherings, including gatherings to protest his orders and/or featuring Republican officials. Doc. 10 at 13. Accordingly, it is of no moment that the Governor has not brought enforcement actions against the Black Lives Matter protests. Thus, plaintiffs are incorrect that the Governor has selectively enforced the gathering limitation, and so his authority to protect the public health was not exercised in "an arbitrary, unreasonable manner." *Jacobson*, 197 U.S. at 28.

Finally, before this court, plaintiffs have recast the selective enforcement argument they pressed before the district court as an argument that the Governor has created an "explicit exemption" for Black Lives Matter protests by "recognizing the 'First Amendment rights' of Black Lives Matter protestors." AT Br. 21. But because plaintiffs did not present this argument before the district court in seeking preliminary injunctive relief, *see* Doc. 3-1 at 9-11; Doc. 11 at 4-6, they should not be heard to raise it for the first time on appeal, *cf. Russian Media Grp. v. Cable Am., Inc.*, 598 F.3d 302, 309 (7th Cir. 2010) ("It is not appropriate for this court to overturn an injunction on the basis of a defense that the district court had no opportunity to consider."). And in any event, neither the Governor's comments recognizing the First Amendment rights of Black Lives Matter protestors nor his [23] personal participation in one such gathering amounts to an exemption from EO43.

The Governor "enjoy[s] the right of free speech," *Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446, 449 (7th Cir. 2016), and his "singular act" of participating in one protest "is not enough to establish . . . discrimination," A47. Rather, this limited occurrence in a moment of social strife did not create a lasting exemption to gatherings for such protests.

In short, plaintiffs are unlikely to succeed on the merits of their First Amendment claim under *Jacobson*, and the district court's decision should be affirmed on this basis. But even if this court were to conclude that the *Jacobson* standard does not apply, the court should still affirm the decision below because, as now explained, plaintiffs cannot prevail even under heightened First Amendment scrutiny.

b. EO43 withstands traditional First Amendment scrutiny.

Plaintiffs argue, and the district court agreed, *see* A47-48, 51, that strict scrutiny applies to their challenge to EO43 because the order is a content-based regulation of speech, *see* AT Br. 10-13. The district court, however, concluded that EO43 passes strict scrutiny, as it is narrowly tailored to serve the undisputed compelling interest in protecting Illinois residents from the COVID-19 pandemic. A51-55. Because the district court correctly concluded that E042 satisfies strict scrutiny, this court need not resolve what level of scrutiny applies. *See* A59. But, if this court chooses to

address this question, it should hold that EO43 is subject to, and satisfies, intermediate scrutiny.

[24] **1. EO43 satisfies strict scrutiny.**

Both the district court and this court's motions panel correctly concluded that plaintiffs are unlikely to succeed on their First Amendment free speech claim even under strict scrutiny. *See* A51-55, A59.[16] A content-based restriction on speech satisfies strict scrutiny when it is narrowly tailored to achieve a compelling government interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). As plaintiffs acknowledge, AT Br. 20-21, while strict scrutiny is a demanding standard, it can be met, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). Plaintiffs also concede that the State has a compelling interest in combatting the spread of COVID-19, *see* AT Br. 25, and that the Governor "may put in place a ban on all gatherings . . . to stop the spread of a disease," 7th Cir. Doc. 4 at 13. They assert, however, that EO43 is not narrowly tailored because it exempts religious services and (purportedly) Black

[16] To the extent that plaintiffs assert that the exemption for religious gatherings violates the Establishment Clause by favoring religion, *see* AT Br. 17, that argument was not raised below and thus should not be considered by this court, *see Scheidler*, 914 F.3d at 540. In any event, it "run[s] contrary to the teaching of [the Supreme Court's] cases that there is ample room for accommodation of religion under the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987). In fact, EO43 "effectuates a more complete separation of [church and State]," by easing a regulation that could "burden[ ] the exercise of religion." *Id.* at 338-39.

Lives Matter protests, but not political meetings, from that prohibition. AT Br. 13.

"Narrow tailoring requires a close match between the evil against which the remedy is directed and the terms of the remedy." *Midwest Fence Corp. v. U.S. Dep't* [25] *of Transp.*, 840 F.3d 932, 942 (7th Cir. 2016) (cleaned up). A government regulation is not narrowly tailored when the government could achieve the same compelling goal through a less restrictive alternative. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The First Amendment, however, does not require the regulation to be 'perfectly tailored.'" *Williams-Yulee*, 575 U.S. at 454 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (plurality opinion)).

This court has recognized, and plaintiffs do not disagree, that limiting the number of people at gatherings is an effective means of preventing the spread of COVID-19. *See Elim*, 962 F.3d at 342 ("many epidemiologists recommend limiting the maximum size of gatherings"); 7th Cir. Doc. 4 at 13 (conceding Governor "may put in place a ban on all gatherings"). There appears to be no dispute, then, that a 50-person gathering limit is narrowly tailored to curb the spread of COVID-19. Rather, the question before this court is whether this limit ceases to be a "close match" for the goal of curbing an easily transmitted virus when it contains a narrow exemption for religious exercise and, allegedly, Black Lives Matter protests. *Midwest Fence Corp.*, 840 F.3d at 942 (narrow tailoring requires "close match" between remedy and compelling interest). The district court correctly rejected both arguments,

because EO43 serves the State's twin interests in protecting the public health and religious exercise and because the Governor has not selectively enforced EO43.

[26] **a. EO43 is narrowly tailored to serve the State's overlapping interests in protecting the public health and the free exercise of religion.**

EO43's exemption for free exercise is narrowly tailored because it strikes a balance between the State's dual compelling interests in protecting the free exercise of religion and preventing the spread of COVID-19. The State's compelling interest in accommodating religious exercise is rooted in the "the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012). Specifically, the First Amendment's Free Exercise Clause provides a floor of protection by preventing the government from "prohibiting the free exercise" of religion, while the Establishment Clause creates a ceiling by preventing the government from making any "law respecting an establishment of religion." U.S. Const. amend. I, cl. 1.

The Supreme Court has "long recognized" that "there is room for play in the joints between the Free Exercise and Establishment Clause, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment

Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (internal quotations omitted). Operating in this space, the government may exercise "benevolent neutrality" towards religion by protecting it more than the Free Exercise Clause requires. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970) (upholding tax exemptions for religious organizations); *see, e.g.*, 42 U.S.C. § 2000bb-1 (federal Religious Freedom Restoration Act); 775 ILCS 35/15 (Illinois [27] Religious Freedom Restoration Act ("IRFRA")); *Cutter*, 544 U.S. at 719-20 (upholding Religious Land Use and Institutionalized Persons Act).

Like EO43, many laws serve a significant government interest unrelated to religion while containing an exemption for free exercise. For example, there is "a lengthy tradition of tax exemptions for religion." *Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019) (noting "more than 2,600 federal and state tax laws provide religious exemptions"); *see, e.g.*, 26 U.S.C. §§ 1402(g), 3121(r), 3127. Numerous other statutes include religious exemptions. *See, e.g.,* 7 U.S.C. § 1906 (exemption from regulations on animal slaughter); 18 U.S.C. § 3597(b) (exemption from death penalty prosecution and execution); 20 U.S.C. § 7908(c) (exemption from access of military recruiters to secondary schools); 42 U.S.C. § 290bb-36(f) (exemption from youth suicide assessment); 42 U.S.C. § 12113(d)(1) (exemption from Americans with Disabilities Act); 50 U.S.C. § 3806(j) (exemption from training and service in armed forces).

These laws are not fairly characterized as failing to serve their intended compelling governmental interests merely because they contain exemptions for

religious exercise. Rather, the State will often face several compelling interests at once, and such exemptions enable it to serve these interests in tandem. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (Title VII exemption from prohibition on employment discrimination for religious organizations had "permissive legislative purpose to alleviate significant government interference with [religious activity]"); *Walz*, 397 [28] U.S. at 669 (tax exemption for religious organizations "constitutes a reasonable and balanced attempt to guard against those dangers" that a tax may impose on religious activity).

EO43 fits comfortably within this longstanding practice of balancing the protection of religious exercise with the service of other compelling interests. While the Governor was not required by the First Amendment to exempt free exercise from EO43's limit on in-person gatherings, *Elim*, 962 F.3d at 347,[17] he recognized that religious exercise often involves "assembling with others for a worship service" and participating in group sacraments and rituals, *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Accordingly, once the number of COVID-19 cases in Illinois began to steadily decline, *see* E038 (preamble); Doc. 12 at 3, the Governor eased the burden

[17] The Governor has not, as plaintiffs claim, claimed that IRFRA (or any other law) requires this exemption. *See* AT Br. 15. Instead, following the path of many federal and state laws before it, this act of "executive grace," *id.*, permissibly surpassed the constitutional minimum to permit religious exercise when the COVID-19 situation in Illinois improved.

that a limit on in-person gatherings might place on religious activity while continuing to regulate such gatherings outside this narrow context. And to further the compelling interest in protecting the public from COVID-19, he emphasized that the safest means of religious exercise continued to be online, drive-in, or outdoor gatherings; encouraged participants in in-person religious gatherings to undertake social distancing measures and wear face coverings; and referred places of worship to detailed guidance to this effect. EO38 [29] ¶ 4(a); Doc. 12 at 7. Accordingly, the limited exemption for religious exercise does not undermine the State's interest in fighting the pandemic, but rather enables the State to simultaneously serve its dual interests in protecting both the public health and religious exercise. That was a reasonable line to draw, because allowing more large in-person gatherings increases the risk of spreading COVID-19. And the higher the risk of spreading COVID-19, the greater the risk that individuals—including those who have no interest in attending such gatherings—will be sickened by the virus, and the greater the likelihood that the State will have to return to more restrictive measures in the future.

Plaintiffs overlook the unique and deeply rooted tradition of accommodating religious exercise, and ask this court to extend EO43's exemption to include politica] gatherings. They acknowledge that the Free Exercise Clause cannot, as the motions panel recognized, be "mere surplusage." AT Br. 15 (citing A59). Nonetheless, they argue that the protections offered by this clause do not "give religious speech greater

protection," because "[o]ften its work has nothing to do with speech or assembly." *Id.* But, as the motions panel recognized, the Free Exercise Clause "must be doing more work." A59. When religious speech is used as a form of religious exercise, it is protected by both the Free Speech and Free Exercise Clauses. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (discussing "private speech endorsing religion, which the Free Speech and the Free Exercise Clauses protect") (cleaned up). EO43 does not exempt all gatherings involving speech about religion, but rather exempts the free exercise of religion, [30] which can take many forms, including religious speech.[18] For example, an academic lecture about religion likely does not involve the free exercise of religion and does not fall within EO43's exemption. Thus, the exemption the order provides for religious speech is consistent with the "special protection [given] to the exercise of religion." *Thomas*, 450 U.S. at 713.

Plaintiffs also contend that the exemption for free exercise should be extended to gatherings involving political speech because such speech enjoys unique protection under the Free Speech Clause. AT Br. 18-20. But the Supreme Court has stated that when the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption comes

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[18] That is why, as plaintiffs recognize, EO43 exempts "not only religious services, but all religious activity." AT Br. 17. Exempting only religious services would not account for the other forms of religious exercise.

packaged with benefits to secular entities." *Amos*, 483 U.S. at 338; *see Cutter*, 125 S. Ct. at 2124 ("[r]eligious accommodations need not come packaged with benefits to secular entities") (internal quotations omitted); *see also Hosanna-Tabor*, 132 S. Ct. at 706 (rejecting argument that First Amendment analysis is the same for "religious and secular groups alike" because the Amendment "gives special solicitude to the rights of religious organizations"). That is because "[t]here is no requirement that [governmental] protections for [31] fundamental rights march in lockstep." *Cutter*, 125 S. Ct. at 2124 (internal quotations omitted).

Plaintiffs' claim that the exemption for religious exercise must be extended to protect their right to political speech, *see* AT Br. 18-20, thus is foreclosed by Supreme Court precedent. Moreover, accepting plaintiffs' position would render EO43 a *less* narrowly tailored means of fighting COVID-19, as it would expand the exemption to all speech that constitutes "the essence of the speech clause." *Id.* at 18.[19] As the motions

[19] Plaintiffs characterize their request as narrow, claiming that political speech "belong[s] on the highest rung of the hierarchy of First Amendment values." AT Br. 19-20 (alteration in original and internal quotations omitted). But in a similar case that this court has stayed pending resolution of this appeal, *see Ill. Right to Life Comm. v. Pritzker*, No. 20-2275, 7th Cir. Doc. 5, plaintiffs' counsel argued before the district court that gatherings by all groups that speak to "issues of major social concern" should be exempt from the limitation on in-person gatherings, because such speech also "belong[s] on the highest rung of the hierarchy of First Amendment values," *see Ill. Right to Life Comm. v. Pritzker*, No. 20-cv-03675, Dist. Ct. Doc. 2-1 at 11 (alteration in original and internal quotations omitted). Thus, arguments by plaintiffs'

panel recognized, there is "no logical stopping point to the plaintiffs' position," which would require "an all-or-nothing rule." A59. Indeed, adopting plaintiffs' position would have the result of discouraging governments from making accommodations for religious exercise, if doing so required parallel exemptions for other activities, which in this context would heighten the risk of spreading a highly infectious disease.

In sum, just as the Governor may place limits on how many people can gather at one time to protect public health, he can also treat religious exercise more [32] favorably when the circumstances allow it. EO43, which permissibly exempts the free exercise of religion from its limitation on in-person gatherings, is narrowly tailored to the compelling state interests in protecting Illinois residents from a deadly global pandemic while at the same time protecting religious exercise.

b. There is no exemption for Black Lives Matter protests.

The district court also correctly concluded that plaintiffs are unlikely to succeed on their argument that the Governor has discriminatorily applied EO43. A46-47. Plaintiffs appear to raise a selective enforcement claim, arguing that the Governor has favored Black Lives Matter protests by failing to bring enforcement actions against them even though Chicago police have dispersed other gatherings that exceeded the

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counsel elsewhere confirm the motions panel's conclusion that "there is no logical stopping point" to plaintiffs' position. A59.

limit on in-person gatherings. *See* AT Br. 5-6, 10, 22. To prevail on a selective enforcement claim, plaintiffs "must allege facts to show that while others similarly situated have generally not been prosecuted, [they have] been singled out for prosecution" based on "the desire to prevent [their] exercise of constitutional rights." *U.S. Labor Party v. Oremus*, 619 F.2d 683, 691 (7th Cir. 1980); *see Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (finding "not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Anderson v. Milwaukee Cty.*, 433 F.3d 975, 980 (7th Cir. 2006) (plaintiff provided "no factual basis" for claim that prohibition had been enforced in discriminatory manner).

Here, the district court correctly found that plaintiffs "failed to point to a single instance in which they, or anyone similarly situated, protested with political [33] messages and *state officials* enforced the Order against them because of this content." A46 (emphasis in original). Instead, plaintiffs alleged only that the City of Chicago had dispersed a protest against the Governor's stay-at-home orders, but, as the court explained, that dispersal did not involve state action. *Id.* And, on appeal, plaintiffs again cite only enforcement actions taken by City of Chicago officials. *See* AT Br. 5-6 (listing actions taken by Chicago police). But the City of Chicago is not a party to this lawsuit. And plaintiffs have provided no evidence of any enforcement actions taken by state officials, let alone actions taken against plaintiffs or those similarly situated to them. And the

evidence is otherwise: the state police have not interfered with large public gatherings that protested the Governor's policies, including one featuring a member of plaintiffs' party. Doc. 10 ai 13. In short, plaintiffs have not shown clear error or provided any other reason to undo the district court's findings on this issue. *See GEFT*, 922 F.3d at 364 (district court's findings of evidentiary fact reviewed for clear error); *Archie v. City of Racine*, 847 F.2d 1211, 1218 n.7 (7th Cir. 1988) (district court's findings of fact revealed no evidence of selective enforcement in violation of First Amendment).[20]

For their part, plaintiffs argue that they are entitled to assume that they the law will be enforced against them, AT Br. 11 (citing *ACLU v. Alvarez*, 679 F.3d [34] 583, 593-94 (7th Cir. 2012)), and that they face a "'credible threat'" of enforcement, *id.* at 12 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). But unlike the cases on which plaintiffs rely, the question here is not whether they have standing; rather, it is whether they are likely to succeed on the merits of their First Amendment claim. And as discussed, they are unlikely to do so, because they have been unable to provide even a "single instance" of selective enforcement against them or any entity comparable to them. A46. The cases cited by plaintiffs—which discuss the showings necessary to

[20] The Supreme Court recently denied an emergency application for an injunction pending appeal that was based, in part, on a claim that the Governor of Nevada had selectively enforced the limitation on in-person gatherings to favor Black Lives Matter protests. *Calvary Chapel Dayton Valley v. Sisolak*, --- S. Ct. ---, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020).

establish standing in pre-enforcement challenges—are thus inapposite. *See Driehaus*, 573 U.S. at 159 ("credible threat of prosecution" establishes injury-in-fact); *Alvarez*, 679 F.3d at 593 ("no reason to doubt standing" where "credible threat of prosecution").

Plaintiffs, moreover, are incorrect on their contention, submitted for the first time on appeal, that the Governor has somehow created an "explicit exemption by public pronouncement, recognizing the 'First Amendment rights' of Black Lives Matter protestors to gather even during a pandemic." AT Br. 21-22.[21] But, as noted, "[p]ublic officials . . . enjoy the right of free speech." *Tri-Corp Hous.*, 826 F.3d at 449. Indeed, "[s]peech is a large part of any elected official's job," and can be used for a variety of reasons, such as to get "elected (or re-elected)" or to "urge their constituents . . . to act in particular ways." *Id.* Accordingly, the Governor had [35] "every right" to exercise his free speech rights by reflecting on the Black Live Matter protests and to personally join one protest. *Id.* This exercise of free speech did not, however, result in a policy change, nor did the Governor take any steps to exempt Black Lives Matter protests—for example, by amending the operative executive order, including an additional exemption in subsequent orders, issuing guidance allowing protests, or even stating that the orders could not

[21] Plaintiffs raised the Governor's public comments in their district court pleading, but as support for their argument that the Governor had "forborne enforcing his bar on gatherings against those protesting racial injustice and police brutality." Doc. 31 at 9.

be enforced against protestors. As a result, the Governor's exercise of free speech did not create an exemption for Black Lives Matter protestors. Plaintiffs, therefore, are unlikely to succeed on their new contention that EO43 is unconstitutional because it favors Black Lives Matter protestors.

2. EO43 is subject to, and satisfies, intermediate scrutiny.

As discussed, it is unnecessary for this court to determine the appropriate level of scrutiny because EO43 satisfies strict scrutiny. But if this court reaches that question, it should apply intermediate scrutiny because EO43 does not regulate speech and, even if it does, it is a reasonable time, place, and manner restriction.

At the threshold, the limitation on in-person gatherings in EO43 "concern[s] conduct (social distancing), not what anyone may write or say." *Morgan*, 2020 WL 3818059, at *1 (per curiam). Conduct is entitled to protection under the First Amendment only if plaintiffs demonstrate that it is "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984) (burden on plaintiffs). That is, "the conduct in question must comprehensively communicate its [36] own message without additional speech." *Tagami v. City of Chi.*, 875 F.3d 375, 378 (7th Cir. 2017).

Plaintiffs have made no showing that EO43 regulates expressive conduct, and in-person gatherings themselves are not "inherently expressive." Instead, any communication is accomplished by the speech delivered at those gatherings. Plaintiffs, therefore, "have not established that the Governor's order[] limit[s] their speech," *Morgan*, 2020 WL 3818059, at *1 (per curiam), as they are free to communicate the same message to a group of 50 people as they would have delivered to a group of 100. Consequently, the Governor may regulate the size of gatherings "without regard to the First Amendment." *Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000).

And even assuming that EO43 regulates speech as well as conduct, it is constitutional as a reasonable time, place, and manner restriction. Such regulations are subject to a less stringent form of scrutiny, and they will be upheld as long as they (1) are content-neutral, (2) are "narrowly tailored to serve a legitimate governmental objective," and (3) "leave open ample channels of alternative communication" of the information." *CLUB v. City of Chi.*, 342 F.3d 752, 765 (7th Cir. 2003) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989)).

The primary dispute here is whether EO43 is content-neutral. Content-based laws "target speech based on its communicative content." *Reed*, 576 U.S. at 163. And, contrary to the district court's conclusion, *see* A48, EO43 does not draw [37] "distinctions based on the message a speaker conveys," *Reed*, 576 U.S. at 163. Rather, EO43 generally limits all gatherings, and it

carves out an exemption for religious exercise based on the activity, not messages, involved. Indeed, the same messages may be communicated in both the religious and secular context. For example, both a sermon and an academic lecture on the Ten Commandments could cover the same material, but the latter would not involve religious exercise. Whether a gathering is subject to EO43's exemption, then, turns not on the substance of what is being communicated but rather on whether the gathering involves the activity of the free exercise of religion. For this reason, other courts analyzing similar executive orders containing exemptions for religious exercise have found them to be content neutral. *See, e.g.*, *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 WL 3051207, at *13 (E.D.N.C. June 8, 2020); *Amato v. Elicker*, No 3:20-CV-464, 2020 WL 2542788, at *11 (D. Conn. May 19, 2020).

And the remaining two prongs are easily met for the same reasons that EO43 satisfies the higher burden of strict scrutiny. *See supra* pp. 24 to 35. Narrow tailoring is less demanding in this context, as the order need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation," even it is not the "least intrusive means of doing so." *Ward*, 491 U.S. at 798-99 (internal quotations omitted). And EO43 left open "ample channels of alternative communication," such as over the internet, phone, and radio, and during in-person gatherings of 50 or less. *CLUB*, 342 F.3d at 765. Plaintiffs may prefer in-person communication in larger groups, but "an adequate alternative does not have [38] to be the

speaker's first or best choice, or one that provides the same audience or impact for the speech." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (cleaned up). In short, even if EO43 regulates speech, *but see Morgan*, 2020 WL 3818059, at *1 (per curiam), it easily survives intermediate scrutiny as a reasonable time, place, and manner restriction.

III. The District Court Acted Well Within Its Discretion In Determining That The Balance of Harms Weighs Against Entering An Injunction.

"Because Plaintiffs' claims have little likelihood of success on the merits," they must show "that the scales [of harm] weigh heavily in their favor." A55; *see GEFT*, 922 F.3d at 364. "The district court's balancing of harms is a highly discretionary matter and therefore one to which this court must give substantial deference." *Ind. High Sch. Athletic Ass'n*, 181 F.3d at 845. The court should not disturb the district court's determination that "the harms tilt significantly in the Government's favor," A56—with which the motions panel agreed, A59—because plaintiffs have not carried their heavy burden of showing that the balance of harms favors a preliminary injunction.

To start, plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (emphasis in original). A "possibility of irreparable harm" is insufficient. *Id.* In plaintiffs' opening brief, however, they do

not argue that they will suffer irreparable harm absent an injunction. They have thus forfeited any such argument. *See Scheidler*, 914 F.3d at 540. In any event, any harm suffered by plaintiffs absent an injunction is modest. They claim that "[i]n person gatherings are foundational to the [39] [Republican] Party's activities," which include "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." AT Br. 7.

But, again, the First Amendment does not "guarantee to the citizenry the most effective speech," *San Antonio Indep. Sch. Dist.*, 411 U.S. at 36, and plaintiffs can communicate through various formats other than in-person gatherings exceeding 50 people. For starters, many of their proposed activities can be held online—for example, plaintiffs have already conducted training sessions and discussions, as well as held their annual convention, online. Doc. 10 at 9. Others could be held in-person in groups of up to 50 people while reaching broader audiences. For example, a phone bank can be set up to reach thousands of people without more than 50 operators being situated in one room. As another example, training sessions could be broken out into multiple groups of 50 people, with the sessions simultaneously being broadcast online. And while plaintiffs insist that they must gather in-person because the presidential election is approaching, AT Br. 19, President Trump recently cancelled the portion of the Republican National Convention that was scheduled to

be held in-person in Florida due to the spike of COVID-19 cases in that State.[22]

[40] Plaintiffs, then, will face little to no harm without a preliminary injunction. On the other side of the ledger, however, entry of an injunction would likely carry devastating consequences for the public health and safety. Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal quotations omitted). This is especially true when an injunction is sought against the government, because "the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis in original) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

Because COVID-19 is highly infective and can be spread by asymptomatic persons, allowing additional gatherings without a limitation on the number of persons present could cause infection and death rates to skyrocket—as has been the case in States that have not implemented social distancing measures or have eased them sooner than the Governor did in Illinois.[23] As the motions panel recognized, the virus could easily spread to those in attendance at a political gathering, and then to "a local shopkeeper, a local grocery-store worker, their postal carrier, or their grandmother—

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[22] Alana Wise, *President Trump Cancels Jacksonville Component of Republican National Convention*, NPR (July 23, 2020), https://n.pr/3gghXGk.

[23] *See supra* note 6.

someone who had no interest in the earlier gathering." A59.

Plaintiffs downplay this danger by insisting that their requested exemption would apply only to political gatherings, and that they will take social distancing precautions, "including mask-wearing, handwashing and sanitizing, and social [41] distancing." AT Br. 24. But political gatherings is a broad category, and granting plaintiffs' request "would open the floodgates to challenges from other groups that find in-person gatherings most effective," A56; *see also* A59, such as the group behind another challenge brought by plaintiffs' counsel that is currently pending before this court, *see Ill. Right to Life Comm. v. Pritzker*, No. 20-2275. Moreover, while social distancing precautions are crucial in slowing the spread of the virus, they are not foolproof, and the risk of spreading the virus is greater in large groups. That is why "many epidemiologists recommend limiting the maximum size of gatherings." *Elim*, 962 F.3d at 342.

Finally, plaintiffs argue that affirmance of the decision below would "give[] the Governor a free pass to discriminate based on whatever classifications he wishes without any possibility of judicial intervention"—such as, they posit, exempting Catholics but not Lutherans. AT Br. 25. This argument ignores the sliding scale approach that guides the decision whether to grant or deny a preliminary injunction. If plaintiffs could show that the Governor enacted an unconstitutionally discriminatory policy (which they

cannot), then a court would find that they are likely to succeed on the merits, lessening their burden to show that the balance of harms tilts in their favor.

The bottom line remains that the public has not only the "right to," but also a substantial interest in, "protect[ing] itself against an epidemic of disease." *Jacobson*, 197 U.S. at 27. And when a crisis such as the COVID-19 pandemic befalls the residents of Illinois, the State acts as the "guardian of the public [42] interest." *Yakus v. United States*, 321 U.S. 414, 442 (1944); *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasizing "historic primacy of state regulation of matters of health and safety"). The Governor has done so by following the advice of medical experts in restricting the size of most in-person gatherings. And for month now, most Illinois residents have followed the Governor's directives with resolve, limiting activity outside their homes to protect themselves, their loved ones, their communities, and essential workers with whom they interact. Granting plaintiffs a preliminary injunction would threaten to undo these sacrifices by exposing Illinoisans to infection and further slowing a return to normal activity.

[43] CONCLUSION

For the foregoing reasons, Defendant-Appellee Governor J.B. Pritzker respectfully requests that this

court affirm the district's order denying Plaintiffs-Appellants' motion for a preliminary injunction.

Respectfully submitted,

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