

No. 20-569

IN THE
Supreme Court of the United States

ELIM ROMANIAN PENTECOSTAL CHURCH, ET AL.

PETITIONERS,

v.

J.B. PRITZKER, AS GOVERNOR OF ILLINOIS,

RESPONDENT.

*On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Seventh Circuit*

**BRIEF OF THE LIBERTY JUSTICE CENTER AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center is headquartered in Chicago, Illinois, and currently has two suits pending against Governor Pritzker challenging his preference for certain categories of speech content while shutting down other speakers. *Illinois Republican Party v. Pritzker*, 1:20-cv-03489 (N.D. Ill.); *Illinois Right to Life Comm. v. Pritzker*, 1:20-cv-03675 (N.D. Ill.).

**SUMMARY OF ARGUMENT
AND INTRODUCTION**

“The First Amendment is a kind of Equal Protection Clause for ideas.” *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2354 (2020) (plurality), (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting)). Governor Pritzker

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. Counsel timely provided notice to all parties of their intention to file this brief and counsel for each party consented.

violated this fundamental guarantee of equal treatment, extending his favor to Black Lives Matter while denying it to Elim Romanian Pentecostal Church and other speakers. This content-based discrimination is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Assuming the government has a compelling interest in fighting the COVID-19 pandemic, its granting of exemptions is not narrowly tailored because it treats speakers differently based solely on the content of their speech, which finds no justification in science or law. The Court should hear this case and make clear that the Governor cannot pick winners-and-losers among those seeking to participate in the public square.

ARGUMENT

The Governor has displayed a clear content preference for gatherings expressing certain speech while barring gatherings expressing other kinds of speech, which violates the First Amendment.

A. Content-based distinctions between speakers are subject to strict scrutiny under *Reed v. Town of Gilbert*.

It is a fundamental constitutional rule, embodied in both the First and Fourteenth Amendments, that “government regulation may not favor one speaker over another.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). The Constitution “[p]rohibit[s . . .] restrictions distinguishing among different speakers, allowing speech by some but not others.” *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010). Phrased differently, “the Government may

commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing and respect for the speaker's voice." *Id.* Such distinctions are especially problematic when they are extended to the politically connected or sympathetic but denied to those who are not part of the "in" crowd. *See Southworth v. Bd. of Regents of the Univ. of Wisconsin*, 307 F.3d 566, 594 (7th Cir. 2002).

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), is this Court's controlling precedent regarding content-based discrimination. A restriction on speech is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Id.* at 2227. To determine whether a restriction is content-based a court must decide whether the government "draws distinctions based on the message a speaker conveys." *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011)). Both obvious facial distinctions, defining speech by particular subject matter, and subtle facial distinctions, defining speech by its function or purpose, are drawn based on the message a speaker conveys, and therefore are content-based restrictions on speech. *Id.*

Content-based restrictions on speech are subject to strict scrutiny. *Id.* Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S.Ct. at 2231 (citation omitted). In applying strict scrutiny, *Reed* was not an aberration. This court has held on more than one occasion that "[c]ontent-based regulations are presumptively

invalid,” *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), such that “[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory.” *Sorrell*, 564 U.S. at 571. Accord Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 873 (1993) (in *R.A.V.*, “the Court struck down a so-called hate speech ordinance, in the process reiterating, in yet strengthened form, the tenet that the First Amendment presumptively prohibits the regulation of speech based upon its content . . .”). And this Court just reaffirmed this line of cases last term. *Barr*, 140 S. Ct. 2335. These cases all establish that if Governor Pritzker preferred one set of speakers over another, such a policy is presumptively unconstitutional.

B. Governor Pritzker has shown a content preference for protest speech and against other forms of speech.

When Governor Pritzker announced his ten-person cap on gatherings, he authorized state and local police to enforce that order.² That same week, the Illinois State Police, who are part of the Governor’s administration, announced their plan for enforcement: “potential violators can face a six-step process with a criminal charge being the final step.” Mike Koziatek, “Plan to violate the stay-at-home order? Here’s what

² Executive Order 2020-10, § 17, <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx> (March 20, 2020).

Illinois State Police will do,” BELLEVILLE NEWS-DEMOCRAT (March 24, 2020).³ Earlier levels of enforcement include regulatory sanctions, fines, and civil liability. *Id.* Pritzker’s police promised in particular to target “[c]rowds of people gathering, especially if packed closely together or not social distancing” and “[f]lagrant violations.” *Id.*

Those flagrant violations by crowds of people packed tightly together came in earnest just a few months later. On May 25, 2020, George Floyd was killed by a Minneapolis police officer. Communities across the country rose up in righteous indignation, and took to the streets.

Governor Pritzker, like many elected officials, faced an unexpected choice: vocally and visibly side with the protestors, even amidst the pandemic; express sympathy but still deploy the police to shut down the protests in the name of public health; or do nothing, and forbear enforcement of the ban on gatherings as a tactical decision to prevent situations from spinning out of control. And the Governor chose: in an official press release, in official press conferences, and in an official event arranged by his official office, Pritzker exempted the protests as legitimate, protected “First Amendment” activity.

In an official press release announcing the deployment of the National Guard to stop looting, he specifically recognized “the First Amendment rights of peace-

³ Available at <https://www.bnd.com/news/coronavirus/article241467266.html>.

ful protesters.” “Pritzker Activates Additional National Guard Members, ISP Troopers to Aid Local Law Enforcement,” NBC-5 (June 1, 2020).⁴

When asked about protests in a pandemic, Governor Pritzker acknowledged that he was permitting protestors to make a free choice whether to gather: “It’s not lost on me that the peaceful protesters who have been out the last few days weighed the risks of the pandemic against coming out to speak the truth. I see you. I hear you. I understand why you made the choice you made.” “National Guard will be in Chicago to support police, protect First Amendment rights, mayor says,” Fox-32 (June 1, 2020).⁵

In fact, the Governor went so far as to personally join one such march, defending doing so amidst a pandemic by saying, “Especially at this moment, it’s important to express ourselves. It’s important to stand up for people’s First Amendment rights, and I’m talking about the peaceful protesters across the state. It’s important to have the governor stand with them . . .” Rick Pearson, “Republicans rip Pritzker as social distancing hypocrite as he joins protests; he hits back on Trump conspiracy tweet,” CHI. TRIB. (June 9, 2020).⁶

⁴ Available at <https://www.nbcchicago.com/news/local/pritzker-activates-additional-national-guard-members-isp-troopers-to-aid-local-law-enforcement/2282229/>.

⁵ Available at <https://www.fox32chicago.com/news/national-guard-will-be-in-chicago-to-support-police-protect-first-amendment-rights-mayor-says>.

⁶ Available at <https://www.chicagotribune.com/politics/ct-coronavirus-pritzker-trump-protests-george>



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⁷ Mike Nolan, “Orland Park sues Gov. Pritzker over COVID-19 restrictions,” CHI. TRIB. (June 19, 2020), available at <https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-orland-park-lawsuit-pritzker-st-0619-20200618-voox5dbrpfe4nilufiwcz-izt4-story.html>.

⁸ Eric Horng, “Gov. JB Pritzker attends unity gathering in memory of George Floyd in south suburban

Of course, the march the Governor personally attended was only one of many such events with huge crowds:

- Javonte Anderson, “Protesters chanting ‘George Floyd’ briefly march onto Chicago highway, decrying Floyd’s death in Minneapolis,” CHI. TRIB. (May 29, 2020) (“the crowd, which had swelled to about 200, began repeating, ‘Let us through’”).⁹
- John Starks and Susan Sarkauskas, “With rallies and walks, suburbanites condemn George Floyd’s death, cry for racial unity,” DAILY HERALD (May 29, 2020).¹⁰
- John Ferak, “Black Lives Matter Rally For George Floyd In Joliet Draws Crowd,” Patch (May 29, 2020) (“Joliet’s Black Lives Matter rally began at 2 p.m. and was scheduled to go

Matteson,” ABC-7 (June 8, 2020), available at <https://abc7chicago.com/society/governor-attends-unity-gathering-in-matteson-in-memory-of-george-floyd/6238234/>.

⁹ Available at <https://www.chicagotribune.com/news/breaking/ct-floyd-protest-bean-downtown-20200529-cz2zy4fuvzaova2lmqycdxe5gi-story.html>.

¹⁰ Available at <https://www.dailyherald.com/news/20200529/with-rallies-and-walks-suburbanites-condemn-george-floyds-death-cry-for-racial-unity>.

until 4:30 p.m. By 3 p.m., the rally had attracted nearly 100 people . . .”).¹¹

- Ben Pope, et al., “Lightfoot announces curfew as police SUVs flipped, set on fire in clashes with rioters during George Floyd protests in downtown,” CHI. SUN-TIMES, (May 30, 2020) (“the crowd swelled into the thousands and spilled throughout the Loop, splintering into groups.”).¹²
- Leslie Renken, “More than 1,000 Peorians protest police brutality during the We Matter March,” PEORIA J. STAR (May 30, 2020) (“Officers from the Peoria Police Department cleared the way for the rally to fill city streets . . .”).¹³
- Andrew Carrigan, “Rockford Police District 1 vandalized during George Floyd protests,” WREX (May 30, 2020) (“At least 1,000 people have gathered so far in Rockford on Saturday to hold a rally in response to the death of George Floyd”).¹⁴

¹¹ Available at <https://patch.com/illinois/joliet/george-floyd-black-lives-matter-rally-joliet-draws-crowd>.

¹² Available at <https://chicago.sun-times.com/2020/5/30/21275575/chicago-protest-george-floyd-federal-plaza-loop-police-arrests>.

¹³ Available at <https://www.pjstar.com/news/20200530/more-than-1000-peorians-protest-police-brutality-during-we-matter-march>.

¹⁴ Available at <https://wrex.com/2020/05/30/rockford-police-district-1-vandalized-during-george-floyd-protests/>.

- Mark Busch, “Video: Hundreds chant ‘Black lives matter’ at peaceful protest in DeKalb Saturday,” DEKALB DAILY CHRON. (May 30, 2020).¹⁵
- Talbot Fisher, “George Floyd protest draws over 200,” GALESBERG REGISTER-MAIL (May 30, 2020) (“The crowd at 10 a.m. stood at about 80, but within 45 minutes just over 200 were counted”).¹⁶
- Heather Robinson, “CU community protests in wake of George Floyd murder,” THE DAILY ILLINI (May 30, 2020).¹⁷

Governor Pritzker’s actions went beyond benign neglect or tacit support for these protests. He gave his full-throated endorsement, his official imprimatur, even personally showing up at one. A federal district court, evaluating similar behavior by the leaders of another state, reached the right conclusion: “[B]y acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of preferential treatment.” *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at *32 (N.D.N.Y. June 26, 2020).

¹⁵ Available at <https://www.daily-chronicle.com/2020/05/30/video-hundreds-chant-black-lives-matter-at-peaceful-protest-in-dekalb-saturday/aarl0bm/>.

¹⁶ Available at <https://www.galesburg.com/news/20200530/george-floyd-protest-draws-over-200>.

¹⁷ Available at <https://dailyillini.com/news/2020/05/30/cu-community-protests-in-wake-of-george-floyd-murder/>.

Two other district judges reached the same conclusions as to leaders in other communities. *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY, 2020 U.S. Dist. LEXIS 122542, at *274 n.38 (D.N.M. July 13, 2020) (“Governor Lujan Grisham’s comments [about Black Lives Matter] create a *de facto* exemption for outdoor protests”); *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710 (TNM), 2020 U.S. Dist. LEXIS 188324, at *25 (D.D.C. Oct. 9, 2020) (“The Mayor’s apparent encouragement of these protests also implies that the District favors some gatherings (protests) over others (religious services).”).

Though the Governor permitted people to make a free choice to exercise their First Amendment right to come out and speak truth and express themselves about racial injustice and police brutality, his executive order at issue here denied others that choice to exercise their First Amendment right to gather for religious services. First Amendment rights were available for some, but not others: Participation in the protests is at the option of the participant, based on his or her weighing of the risks and safety precautions. But for everyone else, the Governor’s order is a blanket ban that is enforceable by police, preventing a free choice for Elim Romanian Church and its members.

In other words, the Governor has discriminated in favor of one type of content — protest speech — while banning all other gatherings communicating different kinds of content, such as the religious gatherings held by Elim Romanian Church. That sort of preferential treatment, with “freedom for me, but not for thee, has no place under our Constitution.” *Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J., concurring).

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

November 24, 2020

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