AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Advocacy

**Illinois Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On June 26, Illinois Governor J.B. ordered sharp restrictions on public gatherings in response to the public health emergency. Executive Order 43 made special accommodations for religious services, encouraging churches to consult with the state department of public health on guidelines for safe practices and encouraged churches to take such steps as using masks and social distancing. The order did not set a specific limit on the number of people who could attend indoor services (though it encouraged churches to adhere to a limit of ten people). Other social gatherings, however, faced a specific cap of fifty participants. Early orders had limited religious services in terms that were similar to those limiting secular gatherings. The Illinois Republican Party filed suit in federal court seeking an injunction on the limit on gatherings on the grounds that the political activities of the party were being treated differently than religious services in violation of the party’s free speech rights. A federal district court did not issue a preliminary injunction, and the circuit court upheld that decision. The court concluded that religious services could be accommodated without necessitating that the state similarly accommodate other expressive activities.*

JUDGE WOOD.

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. . . . 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 v. City of Gilbert* (2015) 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 EO43 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 EO43 permissibly accommodates religious activities. . . .

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. . . . In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987), 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. . . .

. . . . 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].” 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. . . . 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.” . . .

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*Reed* involved the regulation of signs in the town of Gilbert, Arizona. . . . 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.

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. . . .

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; and second, regulation that is facially content neutral, but that “cannot be justified without reference to the content of the regulated speech.” The Town’s Code, the Court held, fell in the first category because it treated signs differently depending on their communicative content. . . . 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.

. . . . we understand the point the Republicans are making: EO43 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. . . .

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. *Rosenberg v. Rector and Visitors of the University of Virginia* (1995). . . .

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 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, 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 EO43 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 EO43 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.

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. . . . 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.

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*Affirmed*.