No. 20-2936

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY OF BUTLER, et al.,
Plaintiffs-Appellees

v.

GOVERNOR OF PENNSYLVANIA, et al.,
Defendants-Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
No. 2:20-cv-00677 (Hon. William S. Stickman, IV)

BRIEF OF LIBERTY JUSTICE CENTER AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

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DISCLOSURE STATEMENT

The Liberty Justice Center is a nonprofit corporation that has no parent corporation. It issues no stock, and therefore no publicly held corporation owns 10% or more of its stock. The Liberty Justice Center is not aware of any publicly owned corporation not a party to the appeal that has a financial interest in the outcome of the litigation.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a national, 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 Illinois Governor J.B. Pritzker challenging his COVID-19 executive orders that preference certain categories of speech content while shutting down other speakers. *Illinois Republican Party v. Pritzker*, 20-2175 (7th Cir.); *Illinois Right to Life Comm. v. Pritzker*, 1:20-cv-03675 (N.D. Ill.). Liberty Justice Center is interested in this case because Governor Wolf's COVID-19 executive orders similarly and unconstitutionally preference certain speech based on its content.

[1] Counsel for Amicus Curiae secured permission from counsel for Plaintiffs and Defendants to file this brief. *See* Fed. R. App. P. 29(a)(2). Therefore, no motion for leave to file accompanies this brief. No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than Amicus Curiae contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I. The Governor's order is content-based because it provides exceptions to its limits on gatherings based entirely on the message conveyed at such gatherings.

"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)). The Governor of Pennsylvania has violated this fundamental guarantee of equal treatment for ideas, by placing indoor and outdoor gathering limits on speech generally, while explicitly allowing religious gatherings to exceed the limits, allowing gatherings such as Spring Carlisle, an automotive show, to proceed far in excess of the limits, and by allowing protests by intentionally refusing to enforce those limits on such speech. A.22–24.

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 preventing the spread of the COVID-19 pandemic, its method of granting 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.

For this reason, the indoor and outdoor limit on gatherings as applied to Plaintiffs must be struck down as unconstitutional.

II. The District Court should have applied strict scrutiny review to the Governor's content-based order.

The District Court failed to find that the Governor's restrictions on the number of people that may gather was content-based. The District Court ignored the content-based exemption provided by the Governor's order allowing religious gatherings without limit. Further, the District Court dismissed the fact that protests and the Spring Carlisle event were allowed to exceed the limits on gatherings by concluding that the Governor's order on its face restricted protests and events like Spring Carlisle. A.29.

Instead, the District Court found that the limits on gathering were subject to intermediate scrutiny and were unconstitutional under such scrutiny because they were not narrowly tailored by placing more burdens on gatherings than needed to achieve their stated purpose. A.29–32. Specifically, the District Court found that because the Governor placed occupancy restrictions for stores, malls, large restaurants and other businesses based only on the occupancy limit of the building, which allowed for more people to congregate than did the

limits on the size of other gatherings, for the same purpose as limits on the size of gatherings — to prevent the spread of COVID-19 — that it could not be said that the limit on the size of traditional First Amendment gatherings was the least restrictive means of achieving the Governor's goal of preventing the spread of COVID-19. A.30. Further the District Court found that the record failed to establish any evidence that the specific numeric congregate limits were necessary to achieve the Governor's ends. A-31. According to the District Court, the Governor's order creates a "topsy-turvy" world where people are more restricted in areas traditionally protected by the First Amendment than in areas which usually receive far less, if any, protection. A.32.

While Amicus Curiae does not necessarily dispute the District Court's application of intermediate scrutiny to the restrictions on the number of people who may gather for First Amendment purposes, it points out that the Court erred by concluding that the Governor's order restricting the number of people that may gather for First Amendment purposes was content-neutral.

The District Court should have, therefore, applied strict scrutiny review to the Governor's order, and concluded that the restrictions on

the number of people that may gather failed strict scrutiny because the order restricts speech solely on the content of the speech, which has no basis in science to achieve the purported governmental purpose — to prevent the spread of COVID-19. Applying the correct test is absolutely essential. *See Johnson v. California*, 543 U.S. 499, 509 (2005) ("the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest."). *See also Abrams v. Johnson*, 521 U.S. 74, 114 (1997) (Breyer, J., dissenting) (lower court's "use of the wrong test requires vacating its judgment."); *Townsend v. Sain*, 372 U.S. 293, 325 (1963) (Goldberg, J., concurring) (new hearing necessary given "the lack of any indication that the trial court did utilize the correct test.").

Because the District Court's opinion favored Plaintiffs-Appellees and resulted in the relief they requested, it is not surprising that here, on appeal, Plaintiffs-Appellees do not go into much detail explaining that, although the District Court came to the correct conclusion applying intermediate scrutiny, it should have, nevertheless, applied strict scrutiny to find the Governor's COVID-19 orders violated their First

Amendment rights. (Pls' Br. 37–42). Such a conclusion is constitutionally more sound because it follows neatly within the analysis set forth by the Supreme Court in *Reed*, 576 U.S. at 163–64.

When addressing content-based restrictions on speech, the Supreme Court, this Court, and its sister circuits have consistently applied strict scrutiny analysis. *See, e.g., Barr*, 140 S. Ct. at 2347 (plurality); *id.* at 2364 (Gorsuch, J., concurring/dissenting); *Free Speech Coal., Inc. v. Atty. Gen. United States*, 825 F.3d 149, 164 (3d Cir. 2016); *Reagan Nat'l Advert. of Austin v. City of Austin*, No. 19-50354, 2020 U.S. App. LEXIS 27276, at *26 (5th Cir. Aug. 25, 2020); *Thomas v. Bright*, 937 F.3d 721, 733 (6th Cir. 2019); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015).

The Governor's order imposes limits of 25 people for indoor gatherings and 250 people for outdoor gatherings — applying to any gathering of individuals on public or private property for any purpose, including social gatherings — while explicitly allowing unlimited numbers of people to attend religious gatherings. A.22–23. Defendants have also allowed gatherings such as Spring Carlisle, an outdoor automotive show with thousands of people attending, to proceed far in excess of the limits, and have intentionally refused to enforce the limits

on protests. A.23–24. The implicit and explicit exceptions in the Governor's order are content-based, — i.e., the difference in treatment is "based on the message the speaker conveys." *Reed*, 576 U.S. at 163. The only difference between gatherings where the Governor's limits apply and gatherings where the Governor's limits do not apply is the content of the speech that the gathering is conveying. If the message is religious worship, or if the gathering is to promote automobiles, or if the gathering is a public protest, then the Governor's limits do not apply. In contrast, should Political Plaintiffs — elected Pennsylvania and United States Representatives Mike Kelly, Daryl Metcalfe, Marci Mustello, and Tim Bonner — wish to have a campaign event or political rally, A.246 (Affidavit of Mike Kelly); A.24, the Governor's order limits the number of people that can attend any indoor or outdoor event.

III. The Governor's order cannot survive strict scrutiny review.

Content-based classifications, whether they favor or disfavor a particular category of speech, are subject to strict scrutiny. *Barr*, 140 S. Ct. at 2347 (plurality) (*quoting Reed*, 576 U.S. at 170) ("Laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."); *id.* at 2346 ("Because

the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech."). Such preferences are "presumptively unconstitutional." *Reed*, 576 U.S. at 163.

A. The Governor's content-based exceptions for religious worship, protests, and the Spring Carlisle event are not narrowly tailored to serve a compelling interest.

While the Governor has written an explicit exemption for houses of worship into his executive order, the record unequivocally shows — and Defendants-Appellants concede, (Defs' Br. 68–69) — that the Governor has permitted protests, and that the Governor participated in a protest which exceeded the limits set forth in his order, and did not comply with other restrictions mandating social distancing and mask wearing. A.23. It is fundamentally unfair to say protestors can engage in political speech they believe is timely and important free from fear of arrest, but Political Plaintiffs cannot engage in political rallies or fundraisers they believe are timely and important without risking criminal charges.

Defendants' assertion that the First Amendment does not apply to the order's restrictions on gatherings because the order is generally applicable and applies to non-expressive conduct, (Defs' Br. 57–70), is

clearly erroneous. Defendants assert that because the order only limits the number of people at a gathering, it is a law of general applicability and does not receive First Amendment scrutiny. (Defs' Br. 57–58). 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.

In *Reed*, the Supreme Court struck down regulations that restricted the size, number, location, and length of time of signs in the Town because the regulations applied differently based on the content of the signs. 576 U.S. at 159–61. Defendants' argument conflicts with the Supreme Court's decision in *Reed*. The Supreme Court in *Reed* made clear that regulations that limit conduct are impermissible under the First Amendment if they draw content-based distinctions.

Here, the Defendants have admittedly implemented restrictions on the number of people that may gather while drawing exemptions for some gatherings based solely on the content of the speech of such gatherings. Defendants admit that although the order broadly applied to all gatherings, that it did not apply to religious gatherings and they did not enforce the order against political protests. (Defs' Br. 68–69).

"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." *Illinois Republican Party v. Pritzker*, No. 20 C 3489, 2020 U.S. Dist. LEXIS 116383, at *21 (N.D. Ill. July 2, 2020) (rejecting similar arguments that First Amendment analysis did not apply made by Governor Pritzker in challenge to his order limiting the number of people in private and public gatherings, while allowing an exception for religious gatherings).

The Governor's *de jure* protection for religious speech and his *ex cathedra* pronouncements protecting protest speech and the Carlisle Spring event reflect content preferences that are presumptively unconstitutional and can only survive if they pass strict scrutiny. This they cannot do.

The Governor's order is not narrowly tailored if a thousand worshipers can gather inside one of Pennsylvania's megachurches on a Sunday morning, but 26 individuals meeting for the purpose of promoting the political candidacy of any of the Political Plaintiffs is treated like a severe public-health threat that must be stopped on pain

of arrest. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from restrictions on speech can "diminish the credibility of the government's rationale for restricting speech in the first place" and demonstrate that restrictions are not narrowly tailored); *see also Vanguard Outdoor, LLC v. City of L.A.,* 648 F.3d 737, 742 (9th Cir. 2011) (a restriction on speech can be underinclusive, and therefore invalid, when it has exceptions that undermine and counteract the interest the government claims its restrictions further). Similarly, the Governor's order cannot be narrowly tailored if it allows thousands of people to protest or attend the Spring Carlisle event, but, based solely on the content of Political Plaintiffs' proposed campaign gatherings, prevents Political Plaintiffs from meeting with a group of 26 people or more.

In *Reed*, the Supreme Court found that the "Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs." *Id.* Similarly, the Governor has offered no reason to believe that Political Plaintiffs' proposed gatherings pose a greater threat to the spread of COVID-19 than do religious worship, protests, or the Spring Carlisle event. Such a distinction is not

narrowly tailored because there is nothing inherent in the content of religious speech, protest speech, or speech relating to the Spring Carlisle that make such gatherings less likely to spread COVID-19 than gatherings with the proposed content of Political Plaintiffs.

Defendants, as they must, admit that "COVID-19 spreads through large gatherings," (Defs' Br. 67) and "COVID-19 spreads exponentially through large gatherings of people standing next to each other in close, sustained contact" (Defs. Br. 69). Moreover, Defendants' Brief provides multiple examples of gatherings resulting in the spread of COVID-19. (Defs' Br. 69–70). Yet, inexplicably, Defendants, on the same page of their brief that lists examples of gatherings resulting in the spread of COVID-19, admit that they exempted religious gatherings and protests from the general gathering limits, while offering no explanation of why religious gatherings and protests do not offer the same risk of spreading COVID-19 as do other gatherings. (Defs' Br. 69).

The exemptions do nothing to further the government's interest. Rather, they exist for the governor's political convenience or policy preference. And having chosen to extend it, he must recognize that other similar speakers with similar status under the First Amendment

are entitled to similar treatment. Assuming that allowing any more exceptions to the Governor's order would undermine the prevention of the spread of COVID-19 is error because the Governor has already undermined that purpose by allowing the exception in the first place. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488–89 (1995).

The Third Circuit should join the Sixth Circuit in its conclusion that events that follow "the same risk-minimizing precautions as similar . . . activities" permit no greater harm to others than the Governor already allows, and "treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock [constitutional] guarantees." *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020).

The Supreme Court concluded *Reed* on a cautionary note: "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." 576 U.S. at 167. Here, the Governor's motives for the executive order that preferences religious gatherings over secular gatherings may be innocent, but still

the order is content-based, fails strict scrutiny, and therefore must be struck down.

B. Protecting religious exercise is not a license for the Governor to treat religious speech more favorably than non-religious speech.

Nor may the Governor treat religious speech more favorably than non-religious speech based on the idea that the Governor can protect religious exercise by extending more favorable treatment to religious conduct than secular conduct. The free exercise clause primarily serves to prevent "special disabilities on the basis of religious status," *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020), not to require grants of special benefits based on religious status, *see Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citations omitted)).

Even if the government can generally provide additional protection to religious exercise, it does not follow that religious speech, because of its religious content, may be treated better than other kinds of speech

under the free exercise clause. The Supreme Court has routinely held that religious speech cannot be treated worse than other categories or viewpoints of speech. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). But none of its cases have held that religious speech is so special that government may discriminate in favor of religious speech over other types of speech. As the Supreme Court has recognized, "the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion" *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005), and "content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional." *Reed*, 576 U.S. at 163. It would be strange, therefore, to conclude that religious speech, based on nothing more than its content, can be treated more favorably than non-religious speech.[2]

[2] Even in Justice Breyer's concurring opinion in *Reed* — where he specifically mentions several examples of speech regulated by government that inevitably involves content discrimination but where he believes a strong presumption against constitutionality has no place and exceptions to the rule that content-based restrictions on speech receive strict scrutiny should apply — he does not mention regulations favoring religious speech over non-religious speech. *Reed*, 576 U.S. at 177–78. (Breyer, J., concurring).

IV. Protecting First Amendment rights is most important during a crisis.

Justice Gorsuch wrote recently, "[t]he world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting). The Constitution equally does not permit the Governor of Pennsylvania to favor Calvary Chapel over Political Plaintiffs. If the Governor makes a policy choice to extend his special solicitude to one, he must treat the other fairly as well with a neutral policy that protects all First Amendment expressive activity equally.

Amicus Curiae recognizes and appreciates this Court's hesitance to permit events to go forward in these turbulent times. Caution and humility are laudable hallmarks of judicial restraint, especially in the face of uncertainty. But fear of the consequences is no excuse for judges to forgo following the law where it leads. The judge's job is to apply the law without fear or favor, and to do so even when she may personally, privately, find the policy outcome distasteful. *See* A. Scalia, SCALIA SPEAKS 206–07 (Crown Forum 2017).

History has proven time and again that the need for constitutional rights is at its zenith during a crisis. The Constitution was written to endure through all times, including "the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). When the courts do what seems popular in the moment rather than what is right by the law, history's judgment is harsh. *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919); *Korematsu v. United States*, 323 U.S. 214 (1944).

Of course, at the time of those cases, the world wars were serious and the stakes were high. Looking back on history knowing the end result, it's easy to take it for granted, but at the time, no one knew what the outcome would be. Today, we are facing a similar crisis, and no one knows the outcome. And here the Court is faced with a similar dilemma: follow the principles of the First Amendment or abandon them in the name of safety and security. But this case is easier than *Korematsu* and *Schenk*. The Governor has already made the choice to start handing out exceptions to the speakers he finds worthy as a matter of policy preference or political expedience. Now it falls to this Court to rule in favor of Plaintiffs, and give Plaintiffs the same

opportunities that the Governor has already allowed to religious groups and protestors: to speak in the public square on a level playing field. The reality is that ruling in Plaintiffs' favor will no more spread COVID-19 than the Governor's exceptions already allow. Meanwhile, this Court can be certain that should it rule against Plaintiffs, the consequences will linger even after the COVID-19 crisis is over and that future speakers' rights will be less safe than they have been. The Court should follow the principles of *Reed* and find that the Governor's restriction on speech is content-based and fails strict scrutiny.

CONCLUSION

Judge Ho's concurring opinion in *Spell v. Edwards*, 962 F.3d 175, 181–83 (5th Cir. 2020) is an apt coda to this case:

> Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are 'open' and which remain 'closed.' . . . The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution.

For these reasons, this Court should affirm the District Court, but in doing so should apply the correct scrutiny analysis to Plaintiffs' First Amendment claims — strict scrutiny.

Dated: December 30, 2020

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

Certificate of Bar Admission

I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,627 words, excluding the items exempted by Fed. R. App. P. 32(f).

The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

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On December 30, 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 30, 2020

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