No. 20-1569

IN THE

Supreme Court of the United States

DAWN DESROSIERS, ET AL.,

PETITIONERS,

V.

CHARLES D. BAKER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MASSACHUSETTS,

RESPONDENT.

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

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.

Amicus was counsel for the plaintiff in *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020), which Respondent may rely on. Amicus explains below that that case was wrongly decided.

SUMMARY OF ARGUMENT & INTRODUCTION

Governor Baker has chosen to differentiate between essential and non-essential businesses as a way to combat the COVID-19 pandemic in the state of Massachusetts. Governor Baker utilized the Civil Defense Act (CDA) to declare emergency orders to limit assemblages and to institute a 9:30pm curfew for "all gatherings, no matter the size or location." COVID-19 Order No. 54 (Nov. 2, 2020) Pet. App. 194a-200a. These emergency orders had exceptions, however. Religious and outdoor political gatherings were declared exempt from these orders.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondent received notice more than 10 days before its filing that Amicus intended to file this brief, and both consented to its filing.

In creating this exemption, Governor Baker effectively made a policy decision giving precedence to political and religious speech. This creates a policy preference for particular types of assemblies, namely religious and political, over other types of assemblies such as concerts and movie theaters, even though those types of assemblies are also protected under the First Amendment. Contra the Massachusetts Supreme Judicial Court, this content preference is subject to strict scrutiny under *Reed v. Town of Gilbert*, under which it cannot survive. Therefore, the limits placed on assembly for Petitioners should fail.

ARGUMENT

I. The Massachusetts Court ignored this Court's holding in *Reed* and improperly applied a lower level of scrutiny to a content-based restriction on speech.

"Even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese v. Cuomo,* 141 S. Ct. 63, 68 (2020). "There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614-15 (2020) (Gorsuch, J., dissenting from denial of application).

This is precisely what happened here: a state has crossed a constitutional red line by making a content-based judgment about the value of some speech content over and against other speech content. The Gov-

ernor has made a policy choice that political and religious speech content is more valuable or worthy than academic, artistic, literary, or other speech.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws abridging the freedom of speech. Under that Clause, a 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) (quote and citations omitted). Governor Baker has done exactly what this Court in *Reed* said a state government cannot do.

The Governor has used the Civil Defense Act as justification for creating a policy favoring a particular type of assembly over another. This is subject to strict scrutiny under *Reed,* but the Massachusetts Court incorrectly held that the restrictions were entitled to intermediate scrutiny. *Reed* clearly states, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." 576 U.S. at 156. But the Massachusetts Court applied *rational basis* review on the grounds that the Governor's orders do not "collide with a fundamental right." MSJC Opinion, Pet. App. 31a.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). But Governor Baker has effectively done just that, preferring certain speech assemblies over others. Allowing a political rally but not

allowing an outdoor concert is facially discriminatory and not a content-neutral regulation. The Massachusetts Court, in its holding, stated that "Order No. 46[2] exempts political and religious gatherings from its reach, but this exemption does not render the order viewpoint based." MSJC Opinion, Pet. App. 35a. But the problem here is not viewpoint: Republicans and Democrats, Lutherans and Catholics may equally take advantage of the political and religious exemptions. The problem is a content preference: that political and religious speech is permitted, but academic or artistic speech is banned.

100 people may gather in a high school gymnasium on a Sunday morning for a church service. 100 people may gather in the same gymnasium on a Sunday afternoon for a political rally. But those same 100 people may not gather in the same chairs in the same gymnasium at the same time to hear a professor's lecture, listen to a book talk, watch a play, or enjoy a vocal musical performance. That is classic content-based discrimination: the determinative difference between whether the event is legal or illegal under the Governor's order is what the speaker says.

But the Constitution provides no justification for this preference. Academic, literary, artistic, and musical speech is protected by the First Amendment just like political and religious speech. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("live entertainment,

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[2] Order No. 46 was superseded by subsequent orders, but contains similar language exempting religious and political activities. *Compare* COVID-19 Order No. 46 (Aug. 7, 2020), Pet. App. 162a *with* COVID-19 Order No. 63 (Feb. 4, 2021), Pet. App. 234a.

such as musical and dramatic works, fall within the First Amendment guarantee."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975); *Young v. Am. Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring). Yet the Governor only chooses to protect assemblies that share the speech he cares about, while banning assemblies focused on other speech content.

The Massachusetts Court offered two reasons for why the exemptions in Order No. 46 passed constitutional muster: first, because they could be "justified in light of the secondary effect on public health" (MSJC Opinion, Pet. App. 35a, citing *Showtime Entertainment, LLC v. Mendon,* 472 Mass. 102 (2015)); and second, "because religious gatherings are subject to the limitations set forth in the 'Places of worship' guidance and it was social gatherings that the order specifically identified as contributing to the rise in the infection rate." (*Id.*).

In its "secondary effect" analysis, *Showtime Entertainment* cites this Court's opinion in *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986). And *Renton* held that "content-neutral speech regulations [are] those that are justified without reference to the content of the regulated speech." 475. U.S. at 48 (quote and citation omitted). Clearly that is not the case here; religious and some political speech are afforded exemptions other speech is not. Indeed, *Showtime Entertainment* says that the "State interest cannot concern the content of the speech at issue, as that would impermissibly transform the restriction from content neutral to content based." 472 Mass. at 107. And yet that is exactly what happened here.

This Court warned in *Turner Broadcasting Systems*: "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660 (1994). The Court struck down such regulations because they "targeted a small number of speakers, and thus threatened to distort the market for ideas." *Turner Broad. Sys.*, 512 U.S. at 661. This order has the same effect: it discriminates between different speakers in a particular medium (namely live, in-person events) based only on the content of the speech delivered at that event, and in doing so distorts the marketplace of ideas. Under the Governor's order, a politician can hold a campaign rally extolling the virtues of the free market, but a comic cannot give a satire of politicians. A pastor can preach a sermon about pro-life principles, but an atheist playwright cannot see a performance of her play artistically critiquing the life of faith. That is content-based discrimination, and it is unconstitutional.

II. This Court must reaffirm the principle that *all* content-based restrictions on speech are subject to strict scrutiny.

By exempting only religious and certain political gatherings, and not other modes of free speech and assembly such as movie theaters and concerts, from the limits on assembly, the Governor is effectively engaging in preference for religious and political assembly over other types of assembly that are also protected by the First Amendment. Under the Governor's orders, religious gatherings and outdoor political gatherings are not subject to the same restrictions as all other types

of gatherings. COVID-19 Order No. 63 (Feb. 4, 2021) Pet. App. 234a. However, academic lectures, book authors, plays, movie theaters, concerts, and other forms of otherwise protected assemblies under the First Amendment must adhere to the guidelines. Here, the Governor is clearly engaging in content-based discrimination. In *Reed v. Town of Gilbert*, this Court held that a restriction on speech that is content-based is subject to strict scrutiny. 576 U.S. 155, 163 (2015). Laws subject to strict scrutiny are "presumptively unconstitutional," *Id*., because the government must prove that its restriction is narrowly tailored to a compelling interest.

The Governor may reply that it is constitutional for him to prefer religious assemblies, citing *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020) ("*Pritzker"*). Amicus was counsel for the plaintiffs in that case, and believes it was wrongly decided and is an untrustworthy guide to this Court.

There, as here, the court considered a COVID mitigation order that contained a special carve-out for religious speech. And there, as here, the court failed in its duty to apply strict scrutiny to the Governor's order. The District Court in *Illinois Republican Party* correctly determined that the governor's order in that case was a content-based restriction, because it "distinguishe[d] between religious speech and all other forms of speech based on the message it conveys." *Ill. Republican Party v. Pritzker,* 470 F. Supp. 3d 813, 823 (N.D. Ill. 2020). Therefore, "because the exemption is a content-based restriction, this provision can only stand if it survives strict scrutiny." *Id.* at 825, citing *Reed,* 576 U.S. at 171.

But the Seventh Circuit failed to follow *Reed*. Instead of identifying a compelling interest justifying the gatherings ban, or asking whether the ban is narrowly tailored to that interest, the Seventh Circuit determined that the discriminatory treatment was a generous boon to religion: "If there were a problem with the religious exercise carve-out, . . . the state would be entitled to return to a regime in which even religious gatherings are subject to the mandatory cap." *Pritzker,* 973 F.3d at 771. In other words, the government had benignly granted a special carve-out to religious speech. The Seventh Circuit failed to understand one of the most important points in *Reed:* "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." *Reed*, 576 U.S. at 167. *Reed* also makes it clear strict scrutiny must be applied regardless of the government's motivations and justifications. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive." 576 U.S. at 165. *Accord id.* at 164-65 ("We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny . . ."); *id.* at 167 ("the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them.").

The Seventh Circuit attempted to distinguish *Reed* by stating that the municipal ordinance at issue in *Reed* "was disadvantaging the church's effort to provide useful information to its parishioners, not lifting a burden from religious practice." *Pritzker,* 973 F.3d. at 768.

This distinction would make sense if this Court had ever held that religious speech is so special that the government may discriminate in favor of religious speech over other types of speech. It has not. It has only held that religious speech cannot be treated *worse* than other types of speech. *See., e.g., Rosenberger v. Rectors & Visitors of the Univ. of Va.,* 515 U.S. 819 (1995).

The Seventh Circuit's decision in *Pritzker* is in stark contrast to this Court's most recent case applying *Reed*. *Barr v. Am. Ass' n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (plurality) (government-debt exception to law's robocall restriction was content-based subject to strict scrutiny); *id.* at 2364 (Gorsuch, J., concurring/dissenting). It is also in conflict with its sister circuits, all of which have applied strict scrutiny as directed in their post-*Reed* cases. *See, e.g., Reagan Nat'l Advert. of Austin v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) (sign code discrimination between "on-premise" and "off-premise" signs was content-based and subject to strict scrutiny); *Thomas v. Bright*, 937 F.3d 721, 733 (6th Cir. 2019) (same); *Free Speech Coal., Inc. v. Atty. Gen. United States*, 825 F.3d 149, 164 (3d Cir. 2016) (statute requiring pornographers to keep identification documents of their performers was content-based and subject to strict scrutiny); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (statute prohibiting only robocalls for commercial or political purposes was content-based and subject to strict scrutiny). None of these cases concern religious speech, or elevate religious speech above all other speech. Indeed, the pornography case is about as far from religion as one can get.

This Court should grant certiorari and lay down a clear rule that *Reed* applies to *any* content-based restriction on speech before more courts repeat the mistakes made by the Massachusetts Court and the Seventh Circuit.

CONCLUSION

"The First Amendment is a kind of Equal Protection Clause for ideas." *Barr*, 140 S. Ct. at 2354 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting)).

The Governor is violating that promise of equal treatment of ideas by permitting the communication of political and religious ideas to in-person audiences while denying the same permission to artistic, academic, literary, and musical ideas. This he cannot do.

Reed is not simply a "religious carve-out" that can be ignored when considering a content-based restriction against non-religious speech. Policy preferences for a particular type of speech over other types are content-based restrictions that are subject to strict scrutiny. This Court should grant certiorari to reaffirm that principle.

Respectfully submitted,

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