

No. 21-6028

In the United States Court of Appeals for the Sixth Circuit

PLEASANT VIEW BAPTIST CHURCH, *et al.*,

Plaintiffs-Appellants,

v.

ANDY BESHEAR,

Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Kentucky, No. 2:20-cv-00166

**BRIEF OF *AMICUS CURIAE* PROFESSOR JOHN D. INAZU
IN SUPPORT OF PETITION FOR PANEL REHEARING
OR REHEARING EN BANC**

Eric C. Rassbach
The Hugh and Hazel Darling
Foundation Religious Liberty Clinic
Pepperdine Caruso School of Law
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-4611
eric.rassbach@pepperdine.edu

Noel J. Francisco
Megan Lacy Owen
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*¹

Professor John D. Inazu is the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis.² He is widely considered one of the nation's leading authorities on the First Amendment's Assembly Clause. He has published two books on the subject: *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012) and *Confident Pluralism: Surviving and Thriving Through Deep Difference* (University of Chicago Press, 2016). He has authored twelve articles analyzing the Assembly Clause and related rights and lectured widely in academic and popular settings. This case presents an important opportunity to recognize the role of the Assembly Clause in protecting religious and other assemblies. Amicus offers this brief to explain the proper assembly analysis and expresses no opinion on any other issue.

¹ No party's counsel authored this brief in whole or in part, and no one other than *Amicus* contributed money intended to fund preparing or submitting the brief.

² Professor Inazu submits this brief in his individual capacity, not as a representative of Washington University.

INTRODUCTION

The panel announced an improperly narrow standard for claims under the First Amendment's Assembly Clause. As *amicus* Professor John Inazu's scholarship shows, the Assembly Clause broadly protects against government interference with private assemblies, including religious assemblies. Modern First Amendment doctrine has focused little on the Assembly Clause. But assembly is an independent and freestanding right. The panel's opinion ignores the clear text and history of this right by focusing instead on the separate rights of intimate and expressive association. The Court should grant rehearing to enable a proper and robust Assembly Clause analysis.

ARGUMENT

I. The Court Should Grant Rehearing To Conduct A Proper and Robust Assembly Analysis.

The protections of the Assembly Clause extend more broadly than the First Amendment protections recognized for speech, intimate association, and expressive association. By reducing Pleasant View's Assembly Clause claim to those questions, the panel hamstringing the right to assembly in this Circuit. Rehearing is appropriate to permit a proper and robust Assembly Clause analysis.

A. The Assembly Clause provides broad protection for religious assemblies.

The Assembly Clause protects the freedom of groups, including religious groups, to exist, to gather, and to challenge majoritarian norms. While modern doctrine has focused on a freedom of *association*, Professor Inazu’s scholarship demonstrates that the Assembly Clause provides religious and other groups with far broader protections.

1. Text and history show that the Assembly Clause affords religious groups broad freedom to gather.

The Constitution recognizes “the right of the people peaceably to assemble,”³ ensuring a robust freedom for private groups to exist and gather apart from undue government intrusion. The right of assembly is textually set apart from other First Amendment freedoms, including those of speech, petition, and religious exercise.

The First Congress’s debates over the Bill of Rights show that the right of assembly is an important and freestanding right. For example, House members Theodore Sedgwick and John Page debated whether the right of assembly would be “redundant in light of the freedom of speech.” John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV.

³ U.S. CONST. amend. I.

565, 575 (2010). Sedgwick argued: “If people freely converse together, they must assemble for that purpose; ... it is certainly a thing that never would be called in question[.]” *Id.* (internal quotation marks and citations omitted). But Page retorted: “[I]f the people could be deprived of the power of assembling under *any pretext whatsoever*”—*i.e.*, for some purpose *other* than the purposes expressly specified in the First Amendment—“they might be deprived of every other privilege contained in the clause.” *Id.* (emphasis added and internal citations omitted). In other words, the right of assembly should not be limited to assemblies convened for a certain expressive purpose.

This debate in the First Congress also shows that freedom of *religious* assembly—as distinct from expressive or petitionary assembly—is at the core of the assembly right. In response to Sedgwick, Page invoked William Penn’s famous trial—and acquittal by jury—for gathering to worship at a London Quaker meeting-house in violation of the 1664 Conventicle Act that prohibited assembly for religious meetings not sanctioned by the Church of England. *Id.* at 576 (citing Irving Brant, The Bill of Rights: Its Origin and Meaning 55 (1965)). Penn’s “ordeal had nothing to do with petition”—or speech, for that matter; instead, his

attempted assembly “was an act of religious worship.” *Id.* After Page’s response, Sedgwick’s motion to strike the assembly provision from the draft of what became the First Amendment failed by “a considerable majority.” *Id.* (internal quotation marks and citations omitted).

The historical record reflects a broad conception of the assembly right well into the last century. For example, a “thick[] sense of assembly” persisted “during the Progressive Era in three emerging political movements: a revitalized women’s movement, a surge in political activity among African Americans, and an increasingly agitated labor movement.” *Id.* at 590. Many such assemblies “were not confined to traditional deliberative meetings”; they “appealed not only to reason but also to the emotions of those ... assembled.” *Id.* at 591–92. In this view, the assembly right is not limited to assembly only for the purposes of expression. It instead includes “nonpolitical matters such as religion and ... social, cultural, and other purposes.” Michael W. McConnell, *Freedom by Association, First Things* (Aug. 2012), *available at* <https://tinyurl.com/2d2wxwan>. Assembly in these examples is not just a means to expression but its own end.

2. Precedent supports a robust right of assembly.

Supreme Court precedents that properly interpret the Assembly Clause support the robust interpretation evident in the historical record.

Contrary to the clear textual and historical evidence that assembly is a freestanding right, a pair of pre-incorporation Supreme Court decisions limited that right to situations where “the purpose of the assembly was to petition the [national] government for a redress of grievances.” *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (citing *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

The Court has since attempted to restore the freestanding importance of assembly and “contradicted the view that assembly and petition comprise one right.” *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. at 590 n. 124. For example, *Thomas v. Collins* refers separately to the “rights of the people peaceably to assemble *and* to petition for a redress of grievances.” 323 U.S. 516, 530 (1945) (emphases added). As Justice Scalia later explained, the First Amendment “ha[d] not generally been thought to protect the right peaceably to assemble *only* when the purpose of the assembly is to petition the Government for

a redress of grievances.” *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting).

Supreme Court cases post-incorporation likewise underscore—following the constitutional text—that freedom of assembly is distinct from freedom of speech. See *DeJonge v. Oregon*, 299 U.S. 353 (1937) (incorporating freedom of assembly against the States). In *Herndon v. Lowry*, the Court acknowledged the independence of the assembly right from the freedom of speech by referring to the two separately: “[T]he power of a state to abridge freedom of speech *and of assembly* is the exception rather than the rule,” 301 U.S. 242, 258 (1937) (emphasis added); accord *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 519, 527 (1939) (referring to “freedom of speech and freedom of assembly” as separate “rights”). The Court again highlighted the independence of speech and assembly in *Thomas*: “The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions ... is protected not only as a part of free speech, but as part of free assembly.” 323 U.S. at 532. And while citizens certainly *can* assemble for expressive purposes that link the assembly and speech rights, they can also assemble for other purposes, including religious ones. As Justice Jackson

observed, the “freedom of worship and assembly,” in addition to “free speech,” are among the “fundamental rights” that “may not be submitted to a vote.” *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943).

In 1958, the Court articulated a right of association derivative of the Assembly Clause. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). A unanimous Court held that compelled disclosure of an organization’s membership rolls would likely “affect adversely the ability of [the organization] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” *Id.* at 462–63. The opinion noted the “close nexus between the freedoms of speech and assembly,” but nowhere declared assembly *limited to* speech generally or organizational advocacy in particular. *Id.* at 460.

In the years since *Patterson*, most protections afforded by the Assembly Clause have been analyzed through the lens of “associational” rights. Most notably, in *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), the Court identified two particular categories of those rights: “intimate association” and “expressive association.” In subsequent cases involving the right of association, the Court has seldom looked to earlier case law concerning the Assembly Clause, relying on the *Roberts*

framework instead. That narrow focus on *expression* has, in certain public fora, reduced freedom of association into a free-speech appendage. See, e.g., *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 680 (2010) (“merg[ing]” campus group’s speech and association claims into free-speech doctrine).

But critically, the Court has never limited the protections of the Assembly Clause to intimate and expressive association alone, much less interpreted the Clause to exclude the freedom to assemble for religious purposes as distinct from intimate or expressive ones. Justice Thomas has noted that “[t]he text and history of the Assembly Clause suggest that the right to assemble *includes* the right to associate anonymously”—implying that the right is more capacious than the forms of association identified in *Roberts. Americans for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2390 (2021) (Thomas, J., concurring in part) (emphasis added). And for good reason: limiting assembly to the two forms of association identified in *Roberts* would shortchange the robust right of assembly evident throughout the country’s history and embodied in the First Amendment’s text.

Moreover, recent opinions of the Supreme Court emphasize that the First Amendment protects the right to gather for religious purposes—a category of assembly that does not neatly qualify as either intimate or expressive association. In cases addressing other pandemic restrictions, the Supreme Court has explained that *gathering* for the purpose of “attending religious services” is “at the very heart of the First Amendment’s guarantee of religious liberty.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (invalidating restrictions on religious gatherings under the Free Exercise Clause).

The right of religious assembly remains as much at the heart of the First Amendment as it was when the First Congress recalled William Penn’s trial. The Supreme Court has increasingly “focus[ed] on history” in “assess[ing] many ... constitutional claims.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022). Courts would do well to recognize the importance of religious assembly in interpreting Assembly Clause consistent with the history and tradition behind it.

B. The Court should grant rehearing to ensure correct and uniform interpretation of the Assembly Clause in this Circuit.

When it considered only whether EO 2020-969 (the “Order”) infringed Petitioners’ rights of intimate or expressive association, the panel completely ignored the Assembly Clause’s protections for religious assembly, creating tension with other opinions of this Court.

1. The panel took an improperly narrow view of the Assembly Clause.

In addressing Pleasant View’s assembly claim, the panel considered only whether the Order ran afoul of the Constitution’s protections for intimate and expressive association and never addressed Petitioners’ assembly claim. *See Pleasant View Baptist Church v. Beshear*, 78 F.4th 286, 301–02 (6th Cir. 2023). As to intimate association, it considered whether the Order interfered with parents’ rights to participate in the education of their children. *Id.* at 302. As to expressive association, it considered whether the Order imposed a penalty based on membership in a disfavored group or infringed on membership decisions such as the anonymity of their membership lists. *Id.*

That analysis failed to consider whether the Order invaded the right of assembly, as distinct from the limited purposes of intimate or

certain expressive association. Worse, the panel unnecessarily limited the types of association protected under *Roberts*. As to expressive association, the panel considered only whether Petitioners asserted claims based on group membership decisions or the contents of a membership list. *Id.* It did not consider whether the act of gathering to worship might itself be an act of expressive association—even if that act were not a separately protected form of assembly. The result is an improperly narrow view of the assembly right that protects only intimate associations and some acts of expressive association. But as explained, *see supra* I.A, the Assembly Clause should not be interpreted in such a limited way.

2. The panel’s analysis introduces tension in Assembly Clause doctrine within the Sixth Circuit.

The panel’s novel and improper neglect of assembly also introduces tension in the precedents of this Court and courts in this Circuit. In other recent cases, this Court has recognized the importance of gathering for purposes of speech and religious exercise—not just for the limited expressive purposes of making membership decisions or keeping them confidential. In *Ramsek v. Beshear*, this Court recognized a challenge to

the enforcement of pandemic restrictions as a claim based on the “right to assemble *and* to free speech”—“bedrock constitutional guarantees.” 989 F.3d 494, 498 (6th Cir. 2021) (emphasis added). This Court has also recognized the importance of *gathering* in group settings to the First Amendment right of free exercise. *See Maryville Baptist Church v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (per curiam) (finding likelihood of success on statutory and constitutional free exercise claims challenging “[o]rders prohibiting religious *gatherings*”); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam) (similar); *cf. Catholic Healthcare Int’l, Inc. v. Genoa Charter Twp.*, 2023 WL 5838792, at *5 (6th Cir. Sept. 11, 2023) (holding under RLIUPA “a ban on organized gatherings” substantially burdened religious exercise).

Nor have district courts understood this Court’s precedents to confine the right of assembly narrowly to questions of intimate association or membership-based expressive association. *See, e.g., InterVarsity Christian Fellowship v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 826 (E.D. Mich. 2021) (“Gatherings for expressive activity implicate rights to assemble, speak, and associate. In order to effectively express a message or associate with others,

individuals must in some way assemble.”). The Court should grant rehearing to conduct a more robust Assembly Clause analysis, ensuring a consistent and correct approach to religious assembly cases in this Circuit.

CONCLUSION

This Court should grant rehearing to enable a proper Assembly Clause analysis.

Dated: September 18, 2023

Respectfully submitted,

/s/ Noel J. Francisco

Noel J. Francisco

Megan Lacy Owen

JONES DAY

51 Louisiana Ave., NW

Washington, DC 20001

(202)-879-3939

njfrancisco@jonesday.com

Eric C. Rassbach

The Hugh and Hazel Darling

Foundation Religious Liberty Clinic

Pepperdine Caruso School of Law

24255 Pacific Coast Highway

Malibu, CA 90263

(310)-506-4611

eric.rassbach@pepperdine.edu

Counsel for *Amicus Curiae*