No. 22-1093

IN THE
Supreme Court of the United States

MARK ANTHONY SPELL, ET AL.,

Petitioners,

v.

JOHN BEL EDWARDS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the constitutional right to assemble for worship depend on whether the State likewise limits secular gatherings?

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, and has long advocated for religious liberty. *See, e.g.*, *Amicus Brief by Eagle Forum ELDF in McCreary County v. ACLU of Kentucky*, 2004 U.S. S. Ct. Briefs LEXIS 816, Sup. Ct. No. 03-1693 (Dec. 8, 2004) ("To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the

[1] *Amicus* Eagle Forum ELDF provided the requisite ten days' prior written notice to all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Constitution be interpreted according to its original meaning."). *Amicus* has strong interests in the issues implicated by the Petition pending here.

SUMMARY OF ARGUMENT

This Court should recognize a constitutional right to worship independent of whether analogous secular gatherings have been limited by the State. To the extent that *Employment Div. v. Smith* or its progeny implies that discrimination is the test to be used, they should be overruled. 94 U.S. 872 (1990). Now, rather than on the eve of Easter when a ban on church services is imposed, is the optimal time to clarify the strength of this fundamental right to hold and attend religious services.

The Fifth Circuit mistakenly narrowed the constitutional right to worship to the limits that are placed on secular gatherings. But the First Amendment, properly interpreted, is not merely a safeguard against discrimination. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Barrett and Kavanaugh, JJ., concurring) ("difficult to see" why a First Amendment right would be construed to "offer[] nothing more than protection from discrimination").

When laws limit religious activities more than comparable secular ones, then of course they are plainly unconstitutional. Those laws can be easily stricken without further inquiry. But if that were all there were to protecting religious liberty, then this Court's seminal decision in *Wisconsin v. Yoder* in favor of religious liberty for the Amish would have come out the other way, because laws that infringe on Amish religious liberty are not discriminatory. 406 U.S. 205 (1972). "In this country, neither the Amish nor anyone

else should have to choose between their farms and their faith." *Mast v. Fillmore Cty.*, 141 S. Ct. 2430, 2434 (2021) (Gorsuch, J., concurring in the GVR).

This Petition puts that vital, timeless promise to the test. Petitioners here were not asserting an Amish-like right to end formal schooling of their children after 8th grade or to decline to use running water and modern technologies, as the Amish have repeatedly prevailed in their right not to conform. Instead, Petitioners were merely attempting to conduct a traditional church service as commonly held in our land dating back long before the adoption of our Constitution. When holding an Easter worship is treated as a criminal act, as it was below, then that implicates more than the Fifth Circuit was willing to recognize. The Petition should be granted to rectify the failure of the court below to go far enough to protect religious liberty.

ARGUMENT

I. The Right to Worship Is Not Dependent on a Finding of Discrimination, as *Wisconsin v. Yoder* Protects Far More.

Religious liberty is not dependent on a finding of discrimination, and should never be subservient to a threshold finding of whether the State has limited similar secular activities. The clear precedent in favor of the religious rights of the Amish establishes this. The Fifth Circuit's overly narrow understanding was summed up in the concurrence below:

> For decades, it has been clearly established that treating houses of worship worse than comparable secular assemblies—as the district court assumed

> Louisiana did here — violates the Constitution. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67, 208 L. Ed. 2d 206 (2020) (applying *Lukumi*'s disparate-treatment rule to COVID-19 regulations).

Spell v. Edwards, No. 22-30075, 2023 U.S. App. LEXIS 3839, at *7 (5th Cir. Feb. 17, 2023) (Oldham, J., concurring).

It is certainly true that "there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring). But that statement does not, should not, and was surely not intended to be misconstrued to limit the scope of religious freedom, as the Fifth Circuit essentially did below. This comparative analysis cannot properly become the only safeguard enjoyed by the First Amendment right to worship. U.S. CONST. Amend. I. When a State closes the liquor stores and bike shops, there must continue to be a constitutional right to assemble for worship even though there is not any discrimination. The above expression in favor of religious liberty does not imply otherwise.

This Court's defense of religious liberty for Amish parents and farmers has never depended on how secular parents and farmers are treated. The seminal decision by this Court in *Wisconsin v. Yoder*, did not involve any finding of discrimination against the Amish. 406 U.S. at 220 ("Nor can this case be disposed

of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns.").

The Amish parents objected there to a general law requiring education of children beyond 8th grade, and this Court granted to the Amish a religious exemption from that generally applicable law. *See id.* at 220-21. This *Yoder* decision has been cited thousands of times, and can hardly be seriously doubted. This Court itself in *Yoder*, though highly divisive among the nine Justices on many issues in 1972, was virtually unanimous as to the outcome of recognizing the right of Amish to disobey a generally applicable law. Apparently no Justice has questioned that result in a Court opinion ever since, although its reasoning can be revisited and could be clarified if the Petition were granted here.

Notably, and less well-known, is how the Amish have since thrived prodigiously in this space of religious liberty that this Court recognized for them. The Amish have brought population growth and prosperity to their communities and the 32 States into which they have expanded. If current trends continue, the Amish could remarkably become a majority of the total population in the United States within about two centuries. *See* Matthew Diebel, "The Amish: 10 things you might not know," *USA Today* (Aug. 15, 2014) (the Amish population "more than tripled" between 1984

and 2014,[2] which at that rate would grow more than a 1,000-fold in 200 years, to 370 million from 373,620 in 2022).[3] The possibility of a religious minority becoming a majority should not alarm anyone as long as the First Amendment is properly interpreted to protect the religious liberty of all. The "Plain People" of the Amish need not ever conform to Hollywood, or vice-versa; the First Amendment provides space for each approach to thrive or fail. Dozens of counties and States today welcome the population growth and prosperity that the burgeoning Amish settlements provide, which boosts the regional tax bases and property values, while helping to keep the prices of goods lower to the extent the Amish sell them competitively in the market.

A crimped view of First Amendment religious liberty as merely protecting against discrimination would foreclose the Amish and other religious belief systems that are the wellspring of our country. The First Amendment religion clauses, interpreted jointly as they should be, properly protects against generally applicable laws that demand conformity. "Compulsory unification of opinion achieves only the unanimity of the graveyard." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

Given that Amish have a First Amendment right to decline to obey mandatory schooling laws, surely

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[2] https://www.usatoday.com/story/news/nation/2014/08/15/amish-ten-things-you-need-to-know/14111249/ (viewed May 31, 2023).

[3] Amish Studies, "Amish Population Profile, 2022," Young Center for Anabaptist and Pietist Studies at Elizabethtown College https://groups.etown.edu/amishstudies/statistics/amish-population-profile-2022/ (viewed June 2, 2023).

worshippers can hold an Easter service despite a generally applicable law prohibiting it. This Court's unanimous embrace of the religious liberty of the Amish was the high watermark of jurisprudence in this field. It has been chaotic and downhill ever since, not because anyone questioned the result in *Yoder*, but because its limited rationale should be expanded. This Court explained nearly a decade ago that:

> *Smith* largely repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder*, and *Sherbert v. Verner*, 374 U.S. 398 (1963).

Holt v. Hobbs, 574 U.S. 352, 356-57 (2015) (citations omitted, emphasis added). But it is clear that "the method of analysis" in *Smith* was not correct, either.

The time is now to address what the method of analysis should be in this field, which is arguably the most important of all constitutional issues. A future government could, based on the interpretation of religious liberty adopted below, wipe out religious worship for a generation and thus virtually forever through enactment of suffocating, but non-discriminatory, laws. The First Amendment, properly interpreted, stands against that. The mistake made in *Smith* and other First Amendment decisions since *Yoder* is to parse the protection of religious freedom in the First Amendment into subparts rather than viewing them as a robust whole, as jurisdiction arguments properly do.

Yoder reached the right outcome but is better understood through a jurisdictional lens, similar to how cases are handled concerning Native American sovereignty, rather than trying to sustain a religious right by severing and shrinking the Free Exercise

Clause. *See, e.g.*, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, Breyer, Sotomayor, and Kagan, JJ., dissenting) ("In 1831, Georgia arrested Samuel Worcester, a white missionary, for preaching to the Cherokee on tribal lands without a license. Really, the prosecution was a show of force—an attempt by the State to demonstrate its authority over tribal lands," which the Supreme Court properly rejected).

Decided more than 50 years ago, *Yoder* stands as a shining success in the jurisprudence of religious liberty, and one to be followed and expanded rather than undermined. Given space to grow by a full application of the First Amendment that reins in secular interference with religious liberty, the flourishing Amish communities today enrich their neighbors with population growth, fresh affordable farm produce, and finished goods like tables and cabinets. Meanwhile, few scoff at the Amish today while many question how secular living has devolved into an online one. Tish Harrison Warren, "We Should Be More 'Amish' About Technology," *New York Times* (May 23, 2023) ("I will probably never join the Bruderhof community, but I think their way of approaching technology with skepticism and caution, seeking the good of the whole community and the flourishing of human beings, is something we can all learn from."). *Yoder* was a crowning achievement of this Court with its wise deference to the exercise of religious liberty, which should be followed here by not allowing the State to shut down Easter services.

Shackling ministers to prevent and punish them for holding worship services that have been conducted in this country since long before the Constitution

cannot properly be a matter of balancing interests, or merely an inquiry into whether there was any discrimination. Rather, this is overreach in government power that has the effect of snuffing out religion, which the First Amendment safeguards against. This Court need not go as far as the Amish issue of rejecting formal education after eighth grade. Here the modest issue is protecting assembly for a religious service, for which the Petition should be granted.

II. The Petition Should Be Granted as This Weighty Issue of Banning Church Services Is Better Addressed in Calm than in Crisis.

Due to this case and others like it, every future Easter there is the risk of a town, county, State, or even a president shutting down church services. Harsh criminal sanctions can then apply to any minister who puts his religion first. Under the ruling by the Fifth Circuit, as long as such an order is generally applicable without discriminating against churches, the State can prevent church bells from ringing and its congregants from attending what would be the last Easter for some of the believers. This interference with Petitioners to prevent them from gathering in worship presents an ideal case for clarifying the full right of religious liberty, before another crisis arises. *See, e.g.*, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (resolving the issue of the "faithless elector" during a period of calm, without waiting until a rushed political crisis that might depend on the judicial outcome).

What happened in this case to Petitioners was not rare, and is certain to recur. The evening before Easter in 2020, the State of New Mexico suddenly prohibited

any in-person worship services consisting of gatherings of more than five people. A church did its best to challenge this under existing precedents, but the district upheld it because:

> where government regulates within its prerogative, it may enact general laws and apply them neutrally without inquiry into the extent to which the law incidentally burdens religious exercise. Only where the government acts with religious animus or requires case-by-case determination of the merits or sincerity of religious beliefs as a condition of governmental benefits or exemption from legal requirements will the government violate the First Amendment.

Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100, 1139 (D.N.M. 2020). The Tenth Circuit affirmed on appeal. *Legacy Church, Inc. v. Collins,* 853 F. App'x 316 (10th Cir. 2021).

The extensive judicial inquiry made in that case on an expedited manner was typical of similar cases during Covid-19, concerning similar interferences with religious services. The people of New Mexico and many other States were denied the ability to attend Easter services in-person, which for many of them was the last opportunity in their lives to participate in an Easter ceremony. The federal court in New Mexico imposed its view that this did not constitute irreparable harm, which is not an inquiry a federal court should be making about the impact of shutting down Easter or other religious services. *Legacy Church*, 455 F. Supp. 3d at 1142-43 ("[T]he Court concludes that Legacy Church has not demonstrated that it will suffer irreparable harm in a TRO's absence ….''). This ban could be compared to the denial of Last

Rites to a dying person, which is a sacrament of enormous significance for many. Judicial inquiry into irreparable harm for this cannot be the right approach.

Moreover, when the State shuts down a religious service on the eve of Easter, typically judicial review is not even possible in a timely way. In the New Mexico case where a State issued an order the night before Easter services to block them, a hearing based on thorough briefing could not possibly be held until Easter was over, and thus after the harm occurred. The current legal standard is too unwieldy, complicated, and malleable to apply. A court is less likely to declare *ex post facto* that the State caused irreparable harm before the court could sort through the conflicting precedents. A strong presumption, as found in the cases against a prior restraint on free speech, should apply when government attempts to block peaceful assemblies of worship. "Our cases have heavily disfavored all manner of prior restraint upon the exercise of freedoms guaranteed by the First Amendment." *Morse v. Republican Party*, 517 U.S. 186, 244 (1996).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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