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

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: No. 21-6028 Case Name: Pleasant View Baptist Church, et al. v. Beshear

Name of counsel: Noel J. Francisco

Pursuant to 6th Cir. R. 26.1, Professor John D. Inazu
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Amicus is not a subsidiary or affiliate of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

There is no other publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

CERTIFICATE OF SERVICE

I certify that on September 18, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Noel J. Francisco

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

MOTION

Pursuant to Federal Rule of Appellate Procedure 29(b), Proposed *Amicus* Professor John D. Inazu moves for leave to file a brief as *amicus curiae* in support of rehearing of the panel's decision. A copy of the proposed brief is attached to this motion. The parties have consented to the filing of the amicus brief.

1. Professor John D. Inazu is the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis and is widely considered one of the nation's leading authorities on the First Amendment's Assembly Clause. As part of his scholarship, 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 also authored twelve articles that analyze the Assembly Clause and related rights. Professor Inazu has lectured on the Assembly Clause at Yale Law School, Harvard Law School, Stanford Law School, Duke Law School, the University of Virginia, the Newseum, the United States Department of State, and the United States

Commission on Civil Rights, and he has written about the Assembly Clause for The Atlantic, The Washington Post, and USA Today.

2. Professor Inazu offers the attached amicus brief to assist the Court in deciding this appeal. This case presents an important opportunity to recognize the role of the Assembly Clause historically and the role it should continue to play in protecting the rights of religious groups. Specifically, Proposed Amicus urges the Court to grant rehearing to enable a fuller analysis under the Assembly Clause.

3. This Court looks to whether a proposed amicus brief can assist the court by elaborating on issues raised by the parties. *See Garner v. Cuyahoga Cty. Juvenile Cour*t, 554 F.3d 624, 636 (6th Cir. 2009); *see also Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) ("'The traditional function of an amicus curiae is to assist in cases of general public interest by supplementing the efforts of private counsel and by drawing the court's attention to law that might otherwise escape consideration[.]'" (quoting 3-28 Moore's Manual—Federal Practice and Procedure § 28.84 (2014)).

Here, Professor Inazu's proposed brief does not repeat the arguments of the parties but elaborates on an issue to "draw[] the court's

attention to law that might otherwise escape consideration[.]" *Id.* Professor Inazu's proposed brief analyzes the basis in history and precedent for a robust interpretation of the Assembly Clause and argues that the panel's decision improperly abridged that important First Amendment analysis.

4. The filing of the proposed amicus brief will not prejudice Defendants-Appellees or delay briefing or argument in this appeal.

CONCLUSION

For the foregoing reasons, Professor John D. Inazu respectfully requests that the Court grant his motion for leave to file the proposed brief *amicus curiae*.

Dated: September 18, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this motion:

(i) complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 477 words, and

(ii) complies with the typeface requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook.

Dated: September 18, 2023

s/ Noel J. Francisco
Noel J. Francisco

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I further certify that all parties in this case are represented by counsel who are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 18, 2023

s/ Noel J. Francisco
Noel J. Francisco

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UNITED STATES COURT OF APPEALS
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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.

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[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 hamstrings 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,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation for an *amicus* brief because it contains 2,486 words. *See* Fed. R. App. P. 29(a)(4) and (b)(4). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Century Schoolbook 14-point type) using Microsoft Word.

Dated: September 18, 2023

/s/ *Noel J. Francisco*
Noel J. Francisco

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Amicus* Brief was filed this 18th day of September, 2023, through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: September 18, 2023

/s/ *Noel J. Francisco*
Noel J. Francisco