COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 2021-KW-0284

STATE OF LOUISIANA,

RESPONDENT,

VERSUS

MARK ANTHONY SPELL,

DEFENDANT/APPLICANT.

CRIMINAL APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

ACTION NOS. DC-20-01764 THROUGH 01769
THE HONORABLE EBONI JOHNSON ROSE, PRESIDING

CRIMINAL PROCEEDING

AMICUS CURIAE BRIEF OF JEFF LANDRY, ATTORNEY GENERAL OF LOUISIANA, IN SUPPORT OF DEFENDANT'S APPLICATION FOR SUPERVISORY WRIT

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INTEREST OF AMICUS CURIAE

The Attorney General of Louisiana appears as *amicus curiae* in this case to ensure that the constitutional rights of Louisiana citizens are protected. Governments may legitimately take measures to combat public health threats. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905). But even emergencies do not justify suspension of the Bill of Rights. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The right to the free exercise of religion is a key promise of the First Amendment, and courts must be vigilant to guard this right even—or perhaps especially—in the midst of an emergency.

Appellant, Pastor Mark Anthony Spell, is being prosecuted for allegedly violating two of Governor John Bel Edwards' executive proclamations—30 JBE 2020 (issued March 16, 2020) and 33 JBE 2020 (issued March 22, 2020)—which severely limited the number of people who could gather for religious services. Pastor Spell allegedly held church gatherings with more people than allowed under those proclamations. After being charged with violating the orders, he moved to quash the bills of information against him on First Amendment grounds. The district court wrongly denied his motion.

The proclamations violate the First Amendment by restricting religious gatherings more severely than comparable secular gatherings. They disfavor religion and burden people of faith—particularly those whose faith teaches that they should regularly gather together. The Governor's proclamations are unconstitutional as applied to churches and their leaders, such as Pastor Spell. Therefore, this Court should reverse the decision below and quash Spell's bills of information.

ARGUMENT

I. THE GOVERNOR'S PROCLAMATIONS VIOLATE THE FIRST AMENDMENT.

A. Under the First Amendment, laws that treat religious interests less favorably than secular interests are not "neutral" and must survive strict scrutiny, even during an emergency.

The First Amendment guarantees "the free exercise of religion." U.S. Const. amend. I.[1] State laws that are not "neutral" because they treat religious interests less favorably than secular interests are subject to strict scrutiny. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *see also Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (noting that Congress passed the Religious Freedom Restoration Act in response to *Smith* to ensure "very broad protection for religious liberty"); La. R.S. 13:5232 (Louisiana's Preservation of Religious Freedom Act was adopted in response to *Smith*).

The Supreme Court recently confirmed that pandemics do not decrease the First Amendment's protections of religious liberties in *Roman Catholic Diocese of Brooklyn v. Cuomo*. In that case, the governor of New York issued an executive order stating that "a synagogue or church [could] not admit more than 10 persons, [but] businesses categorized as "essential" [could] admit as many people as they wish[ed]." *Roman Catholic Diocese*, 141 S. Ct. at 66; *see also Agudath Israel v. Cuomo*, No. 20A90, 2020 WL 6954120 (U.S. Nov. 25, 2020). In other areas of New York, orders limited religious gatherings to 25 people, but "even non-essential businesses [could] decide for themselves how many persons to admit." *Roman Catholic Diocese*, 141 S. Ct. at 66. The Court concluded that the New York restrictions "[could] not be viewed as neutral because they single[d] out houses of worship for especially harsh treatment." *Id.*

[1] The Louisiana Constitution likewise protects the free exercise of religion. La. Const. art. 1, § 8; *see also Fluker Cmty. Church v. Hitchens*, 419 So. 2d 445, 447 (La. 1982) (applying the federal and state clauses in parallel).

Just last week, the Supreme Court expanded on *Roman Catholic Diocese*'s holding by issuing an injunction in favor of a California pastor who desired to hold prayer meetings in his home, which a State emergency order prohibited. *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507, at *1 (U.S. Apr. 9, 2021). Citing *Roman Catholic Diocese*, the majority held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at *1 (emphasis added). "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.*; *see also Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) ("[T]he more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.").

To pass strict scrutiny, any non-neutral restriction on religion "must be justified by a compelling governmental interest," and the law "must be narrowly tailored to advance that interest." *Lukumi Babalu Aye*, 508 U.S. at 531–32. This is a demanding test by design; laws that are non-neutral with respect to religion "will survive strict scrutiny only in rare cases." *Id.* at 546 (quoted in *Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020) (Ho, J., concurring)). In the COVID-19 context, "narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity *could not* address its interest in reducing the spread of COVID." *Tandon*, 2021 WL 1328507, at *2. "Where the government permits other activities to proceed with precautions, *it must show* that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id.*

B. The Governor's orders are not neutral with respect to religion because they treat religious gatherings less favorably than secular businesses.

The Governor has the power under Louisiana law to declare public health emergencies and to issue orders designed to combat those emergencies—but he has no power to ignore the First Amendment. *See* La. R.S. 29:721 *et seq.*; *Sterling v. Constantin*, 287 U.S. 378, 397 (1932) (explaining that, if executive proclamations could override the Bill of Rights, even in an emergency, then "the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land"). Indeed, even the emergency powers he invokes acknowledge constitutional limitations, though they would exist regardless. *See* La. R.S. 29:736(D).

The Governor's proclamations at issue here are not neutral with respect to religion. Although one of the proclamations allowed people to leave their homes for travel "to and from an individual's place of worship," 33 JBE 2020 § 3(E), this meant little in light of the proclamation's ban on religious "gathering[s]" of more than 10 people—regardless of the size of the building in which they gathered, *id.* § 2.

The proclamations contain many of exceptions for hundreds of businesses that were not extended to religious institutions. "Normal operations" at locations including "office buildings, factories or manufacturing facilities, [and] grocery stores" were not disrupted, even though such buildings frequently hold large crowds of people. *Id.*; *see also* 30 JBE 2020 (exempting "shopping centers or malls, office buildings . . . or grocery and department stores" from capacity limitations). All businesses designated as "essential" remained in full operation, with no capacity limitations. 33 JBE 2020 § 3.[2] These included large retail stores such as Walmart and Lowe's, which occupy buildings that routinely hold hundreds of people at a

[2] The Governor did not expressly designate businesses as essential nor did he create any procedure to do so, leaving that decision vaguely open to interpretation. Instead he referenced federal guidance issued by the Cybersecurity and Infrastructure Security Agency (CISA). Nothing in Louisiana law or regulations adopts or implements this guidance.

time. Meanwhile, church buildings—even cathedrals with space to seat hundreds—could not host gatherings larger than 10 people. The proclamation advanced no scientific explanation for why church gatherings are more dangerous than congregating in the check-out line at a Walmart or Home Depot.

Governor Edwards' proclamations are extremely similar to other States' orders recently found non-neutral by the Supreme Court. The facts of *Roman Catholic Diocese*, which allowed only 10 people to gather in any house of worship but allowed essential businesses to remain open, are directly on point. *See Roman Catholic Diocese*, 141 S. Ct. at 66.[3] By failing to treat religious gatherings on par with business operations, the challenged proclamations reveal themselves as non-neutral toward religion. Accordingly, the proclamations must survive strict scrutiny to pass constitutional muster.

C. The proclamations cannot withstand strict scrutiny because lesser restrictions could have slowed the spread of COVID, as they did in businesses.

The Governor's proclamations cannot survive strict scrutiny because they are not narrowly tailored to further a compelling government interest. There is no doubt that slowing the spread of COVID-19 is a compelling government interest, but the proclamations were not narrowly tailored to serve that interest: They placed restrictions on religious gatherings that were more burdensome than the restrictions on businesses. Neither the Governor nor the prosecution have even tried to meet their burden to prove that the religious gatherings presented a greater danger than the secular gatherings allowed under the proclamations, but they could not meet that burden even if they did.

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[3] Respondent attempts to distinguish *Roman Catholic Diocese* on the grounds that certain comments from the Governor of New York suggested that he "*intended* to target the Orthodox Jewish community," which would make his actions even more egregious. *See* Memorandum in Opposition to Original Application for Supervisory Writ ("Opposition"), at 14. But this argument fails, as the majority in that case made clear that the challenged laws were non-neutral "even if we put those comments aside." *Roman Catholic Diocese*, 141 S. Ct. at 66.

"It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Lukumi Babalu Aye*, 508 U.S. at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–542 (1989) (Scalia, J., concurring in part and concurring in judgment)); *see also Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002) (significantly underinclusive laws fail strict scrutiny, as underinclusiveness proves that any restriction on First Amendment rights is not vital and casts doubt on the purported reasons for enacting such restrictions). The fact that several businesses continued operating—with few or no capacity restrictions—undercuts the argument that having a large number of people within one building was an unacceptable risk. The Governor did not decide to prohibit all large gatherings of people under one roof as categorically dangerous. Thus, targeting and shutting down religious services cannot have been necessary to contain the spread of COVID-19.

Other federal courts have recently struck down or granted injunctions blocking the enforcement of similar COVID-19 restrictions on narrow tailoring grounds. *See Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020) ("The Directive—although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*—is not narrowly tailored."); *First Pentecostal Church of Holly Springs v. City of Holly Springs, Miss.*, 959 F.3d 669, 670 (5th Cir. 2020); *Roberts*, 958 F.3d at 413–14; *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 459 F. Supp. 3d 847, 855 (E.D. Ky. 2020) ("If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection."). These cases all reach similar conclusions: While slowing the spread of COVID-19 is a legitimate interest, any law that restricts religious gatherings more harshly than necessary is constitutionally doomed.

The Governor has further undermined his emergency proclamations by not only allowing, but commending, large protests during the COVID-19 pandemic. "It is common knowledge, and easily proved, that protestors do not comply with social distancing requirements." *Spell v. Edwards*, 962 F.3d at 182 (Ho, J., concurring). But when Louisianans publicly protested in the aftermath of George Floyd's death, the Governor praised citizens for "'appropriately expressing their concerns and exercising their First Amendment Rights.'" *Id.* (quotation omitted).

The Governor correctly stated that those protestors were exercising their constitutional rights. Spell - and his congregation - simply wished to do the same. If a large-scale political protest can take place and be justified in the midst of a pandemic, so can a church service. The proclamations were not narrowly tailored to further the government's compelling interest. They effectively picked "winners and losers" based not on objective safety factors, such as the presence or absence of social distancing, but rather on the motivation behind a gathering. They cannot stand under the First Amendment.

D. The prosecution's counterarguments are unavailing in light of recent Supreme Court opinions.

The prosecution is wrong to argue that Pastor Spell's First Amendment challenge has already been settled in other courts. *See* Opposition at 10–11. It cites only one decision from the Middle District of Louisiana—*Spell v. Edwards*, No. CV 20-00282-BAJ-EWD, 2020 WL 6588594, (M.D. La. Nov. 10, 2020). But that case is distinguishable on two grounds. First, the case concerned an attempt by Pastor Spell and others to seek *damages* and *injunctive relief* against the Governor—a far cry from the criminal prosecution of a pastor before this court. *Spell*, 2020 WL 6588594, at *4. Second, that case noted explicitly that the two proclamations challenged here, 30 JBE 2020 and 33 JBE 2020, had "expired." *Id.* The federal district court therefore found the plaintiffs' request for injunctive relief "moot." *Id.*

Also, the court's analysis focused on a much later proclamation that allowed larger religious gatherings. *See id.* at *6 (discussing 117 JBE 2020 (issued on Sept. 11, 2020)). And the court's constitutional analysis did not cite the two proclamations challenged here *at all*. Therefore, the court did not settle the question of whether 30 JBE 2020 and 33 JBE 2020 are constitutional for the purposes of sustaining a criminal conviction. And the federal court did not address state statutory limits at all.

In any event, even if the federal court *had* purported to resolve the constitutionality of the Governor's proclamations, the United States Supreme Court's recent opinions—as discussed above—would necessarily overrule the district court's order. *Tandon*, 2021 WL 1328507, at *1; *Roman Catholic Diocese*, 141 S. Ct. at 66. The prosecution's reliance on the district court case is therefore misplaced. The Governor's orders cannot survive strict scrutiny.

II. THE GOVERNOR'S PROCLAMATIONS VIOLATE LOUISIANA'S PRESERVATION OF RELIGIOUS FREEDOM ACT.

Louisiana adopted the Preservation of Religious Freedom Act to provide protections to religion "in addition to the protections granted by the state and federal constitutions." La. R.S. 13:5242. This statute reinforces the State and Federal Constitutional protections of religious liberty and provides that "Government shall not substantially burden a person's exercise of religion, *even if the burden results from a facially neutral rule or a rule of general applicability*" unless two conditions are met: (1) the application of the burden must be "in furtherance of a compelling governmental interest" and (2) it must be "the least restrictive means of furthering that compelling governmental interest." La. R.S. 13:5233 (emphasis added). In short, any state rule or law burdening religious exercise must survive strict scrutiny.[4]

[4] The emergency powers acts permit certain enumerated actions to have the "force and effect of law" when included in an emergency proclamation, but the proclamation itself is not a law, would require presentment and bicameral approval. This distinction is not central to deciding the issue before this Court because the state PRFA restrictions apply no matter how the restrictions are characterized.

The proclamations burden Pastor Spell's religious exercise and therefore must survive strict scrutiny under Louisiana law.[5] As described above, the prosecution cannot meet its heavy burden to show that the 10-person limit on religious services was "the *least* restrictive means" available to further its interest in containing COVID. The Governor's proclamations themselves contain no justification for such a burden. Thus, if there was any doubt, state law expressly reinforces the limits imposed by the state and federal constitutions. The challenged proclamations violate Pastor Spell's right to free exercise of religion—a "fundamental right of the highest order in this state." La. R.S. 13:5232.

III. STATE STATUTES PROHIBIT THE GOVERNOR FROM ISSUING PROCLAMATIONS THAT DIMINISH CONSTITUTIONAL RIGHTS OR CREATE CRIMES, EVEN DURING AN EMERGENCY.

Louisiana law expressly states that, even in an emergency, the Governor's powers cannot supersede the Constitution: "Nothing in this Chapter shall be interpreted to diminish the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution." La. R.S. 29:736. This exception applies to public health emergencies. La. R.S. 29:772. Furthermore, under state law, "[n]o executive order, proclamation, or regulation shall create or define a crime or fix penalties." La. R.S. 29:724(E).[6] Additionally, the constitutional separation of powers doctrine remains in *full force* during emergencies. La. R.S. 29:736(D). It is thus clear that emergencies do not permit the Governor to usurp legislative power.

This circuit has previously recognized the limits on the Governor's emergency powers. *La. Hosp. Ass'n v. State*, 2013-0579 (La. App. 1 Cir. 12/30/14), 168 So. 3d

[5] As argued above, the proclamations are not neutral, but *even if they were*, strict scrutiny would apply anyway under Louisiana's Preservation of Religious Freedom Act.

[6] While violating a valid emergency proclamation carries possible criminal penalties, *see* La. R.S. 29:724(E), here Pastor Spell violated proclamations that the Governor had no power to issue in the first place. As applied to Pastor Spell, the proclamations infringed on his constitutional rights, and therefore the emergency powers statute itself did not permit the Governor to issue them.

676, 687 (emphasis added), *writ denied sub nom. La. Hosp. Ass'n v. State ex rel. Dep't of Ins.*, 2015-0215 (La. 5/1/15), 169 So. 3d 372. Emergencies demand prompt action, but they do not destroy limited, constitutional government.

Therefore, even putting Pastor Spell's right to religious freedom aside, the prosecution lacks the power to prosecute him under these proclamations. Interpreting the challenged proclamations here to restrict Pastor Spell's behavior would be contrary to Louisiana's own statutes limiting the Governor's emergency powers. Pastor Spell cannot have committed any *crime*. If the Governor claims authority to create laws with criminal penalties, he exceeds the scope of his power.

To prosecute Pastor Spell, the prosecution must first discard his religious liberties guaranteed by the First Amendment, the Louisiana Constitution, and the Louisiana Preservation of Religious Freedom Act. The prosecution would also have to imbue Governor Edwards with broad executive authority to create criminal penalties—something that state law and the state constitution expressly forbids. *See Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 64, 90 So. 2d 343, 347 (1956) ("It is fundamental that legislative power, conferred under constitutional provisions, cannot be delegated by the Legislature either to the people or to any other body or authority."). In the words of Justice Gorsuch, "while the pandemic poses many grave challenges, 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 Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

CONCLUSION

This Court should reverse the 21st Judicial District Court and quash the bills of information against Pastor Spell.

Respectfully submitted:

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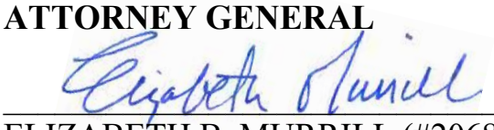
By: 

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