No. ______

In the Supreme Court of the United States

REFORM AMERICA; MARK HARRINGTON,
Petitioners,

v.

CITY OF DETROIT, MICHIGAN; DARIN SZILAGY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE COMMANDER, CITY OF DETROIT POLICE DEPARTMENT; KURT WORBOYS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE CAPTAIN, CITY OF DETROIT POLICE DEPARTMENT; RONALD LACH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER, CITY OF DETROIT POLICE DEPARTMENT,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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October 13, 2022

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QUESTIONS PRESENTED

For two days in July, the City of Detroit hosted the 2019 Democratic Party presidential candidate debates, which were held at the Fox Theatre. The City imposed restrictions that prohibited certain demonstrators, including Petitioners Reform America and Mark Harrington, from engaging in First Amendment activity in traditional public fora during the debates. Those restrictions are at issue here.

1. Does the City's viewpoint-based restriction whereby City police officers divided protestors in a public forum based on the officers' subjective determination that the protestor's message was either "left-leaning" or "right-leaning" satisfy strict scrutiny, as the Sixth Circuit held, when the City had no specific, security-based justification for the speech restriction?

2. Does the City's "restricted area" prohibition on free speech in public fora surrounding the Fox Theatre satisfy constitutional scrutiny when (a) there was no specific, security-based justification for the restriction; (b) alternative measures that burdened substantially less speech would have achieved the government's interests, and (c) the City enforced a "candidate support corral" rule within the restricted area to allow supporters of the candidates to displays signs for the CNN News coverage of the event?

PARTIES TO THE PROCEEDING

Petitioners are Mark Harrington and Reform America (d/b/a Created Equal) (collectively referred to as "Petitioners").

Respondents are the City of Detroit ("City"); Darin Szilagy, individually and in his official capacity as a Police Commander, City of Detroit Police Department; Kurt Worboys, individually and in his official capacity as a Police Captain, City of Detroit Police Department; and Ronald Lach, individually and in his official capacity as a police officer, City of Detroit Police Department (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS BELOW

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JURISDICTION

The opinion of the court of appeals was entered on June 17, 2022. App. 1. A petition for rehearing en banc was denied on July 18, 2022. App. 78. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Petitioners' Speech Activity.

As set forth in the Sixth Circuit's opinion:

> Reform America, a nonprofit corporation that does business as Created Equal, is an organization that engages in anti-abortion protests. To that end, the group and its founder, Mark Harrington, sought to demonstrate at the

> Democratic Party's presidential-primary debates in Detroit, Michigan, in the summer of 2019. In response to security concerns, however, the Detroit Police Department ("DPD") imposed and enforced several measures that impeded the group's speech. A "restricted area" blocked access to the debate venue's immediate vicinity. Protestors were divided into "right-leaning" and "left-leaning" camps and were barred from commingling. And Harrington himself was even briefly detained after a confrontation with police.

App. 2-3.

> On July 30 and 31, 2019, candidates for the Democratic Party's nomination in the 2020 presidential election gathered for a pair of televised debates at the Fox Theatre in Detroit. Given the political salience of the event, it attracted many attendees, as well as protestors *of all ideological stripes*. Among the latter was Created Equal. As part of its effort to expose what it terms "the atrocity of abortion," the group says that it often attends public events to display posters with graphic images of aborted fetuses, *distribute anti-abortion literature*, and "*engag*[*e*] *in civil discussions with those who support abortion*." And during the events in question, group members hoped to do so in the debates' immediate vicinity, where they believed their message would have the greatest impact.

App. 3 (emphasis added).

Location was important for Petitioners. Petitioners' *physical* presence at the Fox Theatre, particularly with their signs, presented a lasting and strong visual image of their opposition to the pro-abortion policies and positions of the candidates and those who supported the candidates. This visual image was an essential part of Petitioners' message. Petitioners wanted to be in aural and visual range of the Fox Theatre in order to express their pro-life message to the candidates and to those persons who attended the debates and supported the candidates. App. 83.

On day 1 (July 30, 2019), Petitioners arrived at a drop off location along Fisher Service Drive in the City. They arrived at approximately 6 pm, which was two hours before the debate was scheduled to commence. App. 83.

Upon arriving at the drop off location, Petitioners tried to go directly to the Fox Theatre via the public sidewalk along Woodward Avenue but were stopped by City police officers, including Officer J. Everitt, who informed Petitioners that they could not enter the "restricted area." App. 84.

B. City's "Restricted Area."

The "restricted area" was marked by barricades and manned at various locations by armed City police officers. The area incorporated boundaries along Fisher Service Drive, Woodward Avenue, Montcalm Street, Witherell Street, Adams Avenue, and Park Avenue. App. 84, 96, 98, 99, 108.

A person with a ticket to the debate could enter the "restricted area." There were no apparent entry points into the "restricted area" for the ticket holders. The City police officers did not require those entering the "restricted area" to undergo a magnetometer-based or other type of security screening. The officers only asked to see a ticket. App. 84.

After being turned away by Officer Everitt, Petitioners proceeded along Fisher Service Drive to the other side of Woodward Avenue and were again stopped by City police officers. More specifically, Petitioners were stopped by Respondent Worboys, who warned Petitioners that they would be "ticketed and arrested" if they attempted to enter the "restricted area." Respondent Worboys told the pro-lifers that they "can stand outside the barriers and talk all day," pointing to several remote areas where Petitioners could go. Petitioners protested, noting that there was no one in those areas for Petitioners to talk to. Respondent Worboys told Petitioner Harrington that "talking to a person is not a right." He proceeded to warn Petitioners that if they did not follow his orders, he would arrest them for disorderly conduct and disobeying a lawful order of a police officer. App. 84-85.

Petitioners did not want to be arrested so they departed the area and continued to walk along the perimeter of the "restricted area" to try and find a location that was within aural and visual range of the Fox Theatre. App. 85.

Petitioners proceeded along Fisher Service Drive and turned right onto Witherell Street. They entered

the parking lot of St. John's Episcopal Church and followed it to an area that they believed was outside of the "restricted area" (there were no barricades, officers, or signs stating "no trespassing") but as close to the Fox Theatre as they could get without breaching the "restricted area." This area was at the corner of Montcalm Street and Woodward Avenue. App. 85.

At this location, Petitioner Harrington noticed that the perimeter of the "restricted area" was outside the steel fence surrounding the church. Petitioner Harrington also noticed several vehicles in the church parking lot, including a radio station vehicle, several other media vehicles (ABC, FOX, Comcast), and a video billboard truck running political ads for Democratic presidential candidate Bill deBlasio. A news reporter was also standing in the parking lot near the fence with his cameraman shooting a video. App. 85-86.

Upon arriving at this location, Respondent Worboys told Petitioners that they could not stand at this location either. Respondent Worboys said that it was private property, and that "they [the church] don't want you here." However, no one from the church, including any occupant or agent of the church, was present. No such person (occupant or agent of the church) told Petitioners to depart from this area. App. 86.

When Petitioner Harrington protested, pointing out the news media and others who were engaging in speech activity on this property, Respondent Worboys claimed that "they were allowed to be here." Petitioner Harrington asked to see proof, and Respondent

Worboys responded, "I don't need to show you anything."[1] Respondent Szilagy, who was the commander on the scene and who said that Respondent Worboys answers to him, stepped in and said that Petitioners have to leave this area and go to the public areas. App. 86.

In response to Respondent Szilagy, Petitioner Harrington pointed to the public sidewalk directly in front of him as a public area, but Respondent Szilagy insisted that Petitioners must go to where the "rest of the protestors are. . . . There is no one [here] doing any type of protesting." App. 87.

Petitioner Harrington responded to Respondent Szilagy by pointing to an individual holding a political sign ("Delaney for President 2020") on the sidewalk right next to them, prompting Respondent Szilagy to assert that he "doesn't have time [for this]." Respondent Worboys indicated that the individual was authorized to be in the "restricted area" because he was a "supporter." App. 87.

In fact, there was a "candidate support corral" that was permitted within the "restricted area" so that "the candidates can have their chosen people in that area to be in the backdrop . . . of the venue, so they could be in front of Fox Theater [sic]." App. 103.

Because he "[didn't] have time for [this]," Respondent Szilagy directed his officers to arrest

[1] Respondents did not produce any lease agreement or other such agreement showing that the church property was leased for this event.

Petitioner Harrington. A City police officer grabbed Petitioner Harrington's wrist, pulled his arms behind his back, and proceeded to place him in handcuffs. After being seized and handcuffed, Petitioner Harrington acquiesced to Respondent Szilagy's demand that he and his fellow pro-lifers leave the area. If they did not obey the officer's command, the pro-lifers would have been formally arrested. Per the officers' direction, Petitioners proceeded to the "free speech area" located at Grand Circus Park. App. 88, 89.

C. City's "Free Speech Area."

As summarized by the Sixth Circuit:

> Created Equal . . . traveled about three blocks south to Grand Circus Park—the location of the "free speech areas." Upon their arrival, group members established a protest site in the park's western portion, labeled "Free Speech Area 2" ("FSA 2") . . . . The group suffered no interference with its protest activities while it remained in FSA 2. Eventually though, group members decided that "Free Speech Area 1" ("FSA 1") to the east was the better protest site, as it had a clearer sightline to the Fox Theatre. Yet when they tried to move eastward across Woodward Avenue, Officer Ronald Lach and other members of DPD told them that they could either turn back to FSA 2 or be arrested. To reduce the potential for violence, DPD officers required that protestors for putatively "right-leaning" causes remain in FSA 2, while protestors for putatively "left-leaning" causes

> had to remain in FSA 1. A group member objected that officers were discriminating against Created Equal's speech because it "ha[d] a right to be over there." But the officers explained that, in fact, they were keeping the respective groups divided to maintain peace and safety. The group member again objected that the division was unconstitutional. Officer Lach responded "let it be unconstitutional then" and reiterated his "legal order" to turn back. After Harrington himself briefly argued with the officers, Created Equal returned to FSA 2.

App. 8-9. This "free speech area" restriction not only denied Petitioners access to what they considered to be the more advantageous location to protest, it also denied them access to distribute anti-abortion literature and engage in civil discussions with large groups of individuals of "all ideological stripes" (*i.e.*, those in the "left-leaning" area) in a traditional public forum.

D. The Brief March.

At one point on July 30, 2019, Respondents permitted protestors, including Petitioners, to briefly enter the "restricted area" and walk past the Fox Theatre. Respondents permitted this "march" only after everyone participating in or attending the debate was inside and unable to view the marchers. App. 92-93.

Respondents permitted this "march" without inspecting each protestor or searching their persons

and property for bombs or other criminal contraband. App. 92.

This "march" was brief, and it was inconsequential because Respondents ensured that the timing of it was such that all of the candidates and debate attendees were inside the Fox Theatre, and the national media, including CNN, were able to turn their cameras and attention away from the theatre for this brief interlude or were already broadcasting from inside so that the media coverage would not be impacted by Petitioners' pro-life message. App. 92.

City police officers also divided the protestors for this "march" based on the viewpoint of their message, permitting those with "left-leaning" messages, as perceived by the officers, to "march" first. Once they were finished, the City police officers then allowed those with "right-leaning" messages, as perceived by the officers, to begin their "march." Respondents required Petitioners to "march" with the second ("right-leaning" message) group. App. 93.

This brief "march" did not permit Petitioners to express their message in any meaningful way because the officers quickly ushered the protestors past the Fox Theatre. While this action (*i.e.*, permitting the brief "march") did nothing to protect or promote free speech, it undermined Respondents' safety concerns for erecting the "restricted area" in the first instance by allowing protestors access to the traditional public forums directly in front of the Fox Theatre without requiring any special security screening or inspections. App. 93.

Shortly after this "march," Petitioners departed the area, frustrated by the speech restrictions enforced upon them by Respondents. App. 94.

E. Day 2 Confrontation.

Petitioners returned to the City on July 31, 2019 (day 2) for the second debate. Petitioners proceeded directly to the "free speech area" at Grand Circus Park. There were considerably less protestors on day 2. As a result, Petitioners went to "area 1" because it was the preferred location within the "free speech area." App. 94.

Petitioners occupied "area 1" for approximately 40 minutes without incident. One of the pro-lifers with Petitioners began using a bullhorn. Bullhorns were permitted on day 1. In fact, a rock band was allowed to perform on day 1 in the "free speech area," and its music was much louder than the bullhorn. App. 94.

Shortly after Petitioners began using the bullhorn, City police officers approached and ordered them to stop, telling Petitioners that "the option is to go over there (referring to "area 2") or come with us," meaning that Petitioners had to move to "area 2" or they would be arrested. App. 94.

Rather than face arrest, Petitioner Harrington told the officers that they would move, and they did. Shortly thereafter, Petitioners departed the area for good. App. 94-95.

REASONS FOR GRANTING THE PETITION

There was a time in our nation's history when the application of strict scrutiny meant something. No doubt, when a decision erodes this most demanding test known to constitutional law, it also erodes the fundamental right that it is intended to protect. In this case, that right is the fundamental right to freedom of speech.

There was also a time in our nation's history when the courts understood that

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Terminiello v. City of Chi., 337 U.S. 1, 4 (1949). Unfortunately, the government is no longer permitting speech to serve its "high purpose," and the courts are allowing this demise of the First Amendment. The Sixth Circuit's decision puts yet another nail in the amendment's coffin.

To its credit, the Sixth Circuit properly concluded that the lower court was wrong when it held that the City's "free speech area" regulation was content neutral. The panel correctly held that the restriction "was plainly content based. Indeed, it was viewpoint based." App. 31. Yet, the panel permitted this restriction, concluding that it "withstands even strict scrutiny." App. 32-33. This conclusion erodes the strict scrutiny standard, which protects the First Amendment, thereby eroding the fundamental right to freedom of speech.

Moreover, the Sixth Circuit incorrectly held that the "restricted area" was content-neutral. Nonetheless, the court applied intermediate scrutiny in a manner that similarly erodes the First Amendment. As this Court recently demonstrated in *McCullen v. Coakley*, 573 U.S. 464 (2014), intermediate scrutiny is not a pushover, and for good reason. This level of scrutiny applies when a peaceful demonstrator seeks to engage in the fundamental right to free speech in a traditional public forum.

Review by this Court is necessary because the Sixth Circuit committed precedent-setting errors of exceptional public importance and issued an opinion that directly conflicts with this Court's precedent. Sup. Ct. R. 10(c). Moreover, lower courts do not uniformly apply this Court's First Amendment jurisprudence when reviewing event-related restrictions on free speech activity. And the Sixth Circuit's application of strict scrutiny, the most demanding test known to constitutional law, undermines this standard and thus undermines the fundamental right it is intended to

protect. In this case, it is the right to freedom of speech.

I. The Sixth Circuit's Decision Upholding the City's Viewpoint-Based Restriction under Strict Scrutiny Threatens Fundamental Rights and Conflicts with this Court's Precedent.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). And "[v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

"Content-based laws . . . *are presumptively unconstitutional* and may be justified only *if the government proves* that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (emphasis added). That is, content- and viewpoint-based laws, such as the restriction at issue here, must survive strict scrutiny.

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It "requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That

standard 'is not watered down'; it 'really means what it says.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (internal citation omitted).

Under strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden [a fundamental right], it *must* do so." *Fulton v. City of Pa.*, 141 S. Ct. 1868, 1881 (2021) (emphasis added). And "mere speculation about danger is not an adequate basis on which to justify a restriction of speech." *Saieg v. City of Dearborn*, 641 F.3d 727, 739 (6th Cir. 2011) (striking down a speech restriction under intermediate scrutiny) (internal quotations omitted).

Because this was a presidential debate, and not a Ku Klux Klan rally, for example, it did not involve rival, competing, and opposing demonstrations. As the Sixth Circuit noted, the debates attracted "protestors of all ideological stripes." Consequently, someone who is "left-leaning" on immigration or environmental causes may, in fact, be anti-abortion. The situation presented here was a debate amongst candidates running for President of the United States. It was not a "white nationalist" rally or anything of the sort. Accordingly, this case is plainly not *Grider v. Abramson*, 180 F.3d 739, 742 (6th Cir. 1999), upon which the panel relied almost exclusively to uphold the City's viewpoint-based restriction. App. 32 ("And as this circuit has also recognized, 'physical segregation' of potentially hostile groups can be the least-restrictive means of securing the state's interest in the prevention of potential violence" (citing *Grider*, 180 F.3d at 750-51)). Unlike this case, *Grider* involved a constitutional

challenge to "the creation and implementation of an emergency crowd control plan designed to enforce civic order in downtown Louisville on April 13, 1996, during a rally sponsored by the Ku Klux Klan . . . and a second, contemporaneous and geographically proximate counter-demonstration organized by Klan *opponents*." *Id*. (emphasis added). Moreover, in *Grider*, the local police department had specific, security-based justifications for the restrictions. *Grider*, 180 F.3d at 743-44 (setting forth the evidence). The same is not true here.

Remarkably, the Sixth Circuit dismissed the FBI's "key" and most relevant "finding" that it had "*no information to indicate a specific, credible threat to or associated with the 2019 Democratic Presidential Primary Debate*" App. 105 (emphasis added),[2] and favored the non-specific, generalized concern about "international terrorists . . . targeting mass gatherings" and the fact that Detroit is generally a crime-ridden city, App. 18 (noting that the FBI "remain[ed] concerned about the potential for criminal activity in close proximity to the event"). But why are concerns about "international terrorists" or generalized criminal activity justification for *this* challenged restriction? Moreover, the candidates were not at Grand Circus Park, they were safely within the Fox Theatre, which was several blocks away. In short, there is no basis for concluding that the City had a compelling interest for this viewpoint-based restriction—a restriction that prevented Petitioners from speaking with and distributing literature to people of "all ideological

[2] This was the City's understanding as well. App. 105.

stripes" in a traditional public forum. App. 82 ("We also carried pro-life literature that we wanted to distribute."); *McCullen*, 573 U.S. at 488 (noting that the challenged "buffer zones . . . made it substantially more difficult for petitioners to distribute literature" and to have close, personal conversations, thus "depriv[ing] petitioners of their two primary methods of communicating. . ."); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) (invalidating a "floating" buffer zone around people entering an abortion clinic partly on the ground that it prevented protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks").

But it wasn't just the FBI confirming that there was no specific, security-based justification for the viewpoint-based restriction. The Detroit Crime Commission similarly concluded that "[*a*]*nalysts did not see any items to indicate there were any plans for violent actions targeting the debates or protests*." App. 105-106 (emphasis added). This too was the City's understanding. App. 106. And as the facts on the ground demonstrated, protestors on all sides of the issues were peaceful throughout the two debate days. App. 94-95.

Additionally, there is no basis to conclude, as the Sixth Circuit did, that "keeping the peace" among groups that were subjectively designated by the City as "left-leaning" and "right-leaning" "would have required a massive infusion of officers into Grand Circus Park." App. 33. As noted, even the designation itself in the

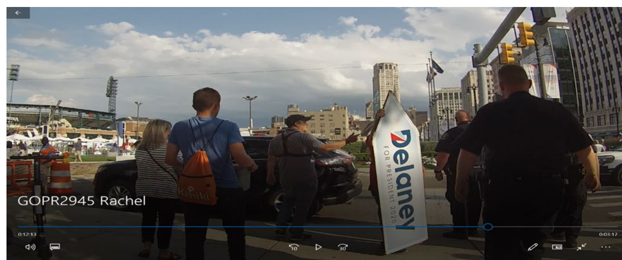
context of these debates did not ensure that "rival" groups remained separated as someone who is "left-leaning" on minimum wage issues may very well be anti-abortion. Moreover, there is nothing in the record demonstrating that the officers assigned to make the "left/right" designation and who were already present on the ground to maintain the "physical segregation" were incapable of keeping the peace in an already peaceful assembly of groups of "all ideological stripes." It is the government's burden to satisfy strict scrutiny. The burden does not belong to Petitioners. At the end of the day, the Sixth Circuit's "watered-down" application of strict scrutiny ultimately undermines the First Amendment. Indeed, Democracy is undermined by the panel's deplorable result. Summary reversal is warranted.

II. The Overbroad "Restricted Area" Is Unconstitutional.

A. The "Restricted Area" Fails Strict Scrutiny.

The Sixth Circuit was wrong to conclude that Respondents' "restricted area" was a content-neutral regulation of First Amendment activity. App. 15-16. The restriction was not only content-based, which is prohibited in a public forum, it was viewpoint-based, which is prohibited in all forums, including nonpublic forums. *See Matal v. Tam*, 137 S. Ct. 1744 (2017).

The "Delaney sign" holder issue is just one example. This individual was obviously permitted into the restricted area, which was lined with barricades and police officers, and he was on the public sidewalk.



App. 84, 85, 87-88. Respondent Worboys is heard on video defending the sign holder's presence within the "restricted area" because he was a "supporter." App. 87. The presence of the deBlasio sign truck in the Church parking lot is additional evidence of the City favoring "supporters" within the "restricted area."[3] App. 85-86. And there is no dispute that a "candidate support corral" was permitted within the "restricted area" so that "the candidates can have their chosen people in that area to be in the backdrop . . . of the venue, so they could be *in front of Fox Theater* [sic]."[4] App. 103 (emphasis added).

The First Amendment is implicated here with regard to the restrictions, including the "candidate

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[3] Respondents permitted news reporters to shoot video from the church parking lot (*see* App. 86), and shooting video is First Amendment activity, *see ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.").

[4] The "candidate support corral" encompassed portions of the public sidewalk. That is, the public sidewalk and street to the front of the Fox Theatre were *cleared by the City* to facilitate the uninhibited free speech activity of the "supporters."

support corral" and the use of the church parking lot for favored speech, because *the City was enforcing these restrictions*. *See, e.g.*, *Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012) (enforcement of event policy by City police constitutes state action); *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005) (same); *see also Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the government cannot enforce "private" rights that infringe upon constitutional rights). *All* of the restrictions at issue here—including the "candidate support corral" restriction, whereby "supporters" are permitted within the restricted area and given a prime location in the "corral," and the church parking lot restriction, which similarly favored the speech of "supporters"—are *state action*, thereby triggering First Amendment protection, including the prohibition on viewpoint-based restrictions.[5]

Viewpoint discrimination by the government is unlawful regardless of the nature of the forum or whether a forum was created in the first instance. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), for example, this Court held that the Patent and Trademark Office violated the free speech rights of the lead singer of the rock group, "The Slants," when it found that the mark could not be registered on the principal register because it was used as a derogatory term for Asian persons. The Court found that the restriction on the petitioner's commercial speech was viewpoint based

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[5] This case is nothing like *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972), which simply involved the issue of whether protestors could distribute literature at a privately owned shopping center because the public was generally invited to use it.

and thus offended the First Amendment. *See id.* There was no public forum involved.

In sum, government speech restrictions on content in a public forum or viewpoint *regardless of the forum* must survive strict scrutiny. *Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is . . . an egregious form of content discrimination."). As set forth above, Respondents cannot satisfy this "most demanding" test. *Reed,* 576 U.S. at 163 ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

As discussed below, the restriction also fails intermediate scrutiny.

B. The "Restricted Area" Fails Intermediate Scrutiny.

Respondents' enforcement of the "restricted area" also fails under intermediate scrutiny, which is not a pushover. *See McCullen*, 573 U.S. at 495 (stating that "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier").

In *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990), for example, the Coast Guard imposed a 75-yard security zone around a pier during the Navy Fleet Week Parade. The court held that the zone burdened substantially more speech than was necessary because there was no tangible threat to

security. *Id*. at 1227-29. Further, the court held that there were no ample alternative means of communication because the intended audience was not accessible by land or any other means. *Id*. at 1229-30.

In *Service Employee International Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966 (C.D. Cal. 2000), during the Democratic National Convention ("DNC"), the City of Los Angeles set up a secured zone that only people with a ticket to the convention or Secret Service credentials could enter, and a demonstration zone 260 yards from the DNC. The court held that the secured zone was not narrowly tailored to serve a significant government interest because the secured zone covered much more area than was necessary to ensure safety. *Id*. at 971-72. Further, the court held that the demonstration zone was not an adequate alternative because the speakers could not reach their intended audience from 260 yards away. *Id*. at 972-73.

Finally, in *Saieg*, the Sixth Circuit correctly struck down a content-neutral restriction on leafletting at a festival, applying intermediate scrutiny and concluding as follows:

> Even though the leafleting restriction is content neutral and might provide ample alternative means of communication, the policy is not a reasonable time, place, and manner restriction. Within the inner perimeter, *the restriction does not serve a substantial governmental interest, as evidenced by the defendants' willingness to permit sidewalk vendors and ordinary*

> *pedestrian traffic on the same sidewalks where they prohibited Saieg from leafleting*.

641 F.3d at 740-41 (emphasis added); *see also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

Regarding the government's "substantial interest" for imposing the challenged restrictions in the first instance, the record reveals that there was no credible security threat to justify the broad restriction that prevented Petitioners and other peaceful protestors from accessing the public sidewalks in front of Fox Theatre. App. 104-06 (affirming that there was no specific, security-based justification for the restriction). The fact that Respondents permitted the same protestors to "march" along this sidewalk without requiring searches, restricting backpacks or other bags, using a metal detector, or employing other similar security measures before allowing the march is fatal to the claim that the restrictions were necessary or narrowly tailored. As stated by this Court, "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, *not simply that the chosen route is easier*." *McCullen*, 573 U.S. at 495 (emphasis added).

As further noted by the Court:

> The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

Id. at 486. Here, Respondents plainly "sacrificed" Petitioners' speech "for efficiency" in violation of the First Amendment.

The claim that ample alternatives existed for Petitioners to express their message also fails for at least two reasons. First, as this Court has long held, "the streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. N.J.*, 308 U.S. 147, 163 (1939); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access. . . ."). And second, the fact that *other* places were available to Petitioners for their protest activity does not license the government to prevent them from being where *Petitioners wanted to protest*, particularly when there were options available to Respondents to permit this, as we saw with the permitted "march" and

the permitted "corral." Simply put, because the restrictions were not narrowly tailored, the availability of ample alternatives is irrelevant. Laws regulating public fora cannot be held constitutional simply because they leave speakers alternative fora for communicating their views. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1974); *Schneider*, 308 U.S at 163; *NAACP, W. Region v. Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir. 2005) ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . .").

In the final analysis, there was no substantial (let alone compelling) government interest for completely closing off the public sidewalks across the street and in front of Fox Theatre for peaceful protestors carrying signs and distributing literature (*i.e.*, there was no identified safety threat), and this is further evidenced by the exceptions permitted. The restriction was overbroad in its size and scope and thus not narrowly tailored. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."). And the alternative "free speech area" was inadequate because Petitioners were unable to reach their intended audience with their message. The "restricted area" fails constitutional scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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