

Case No. 20-5749

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TONY RAMSEK; FRANK HARRIS;
THEODORE JOSEPH ROBERTS; TONY WHEATLEY

Plaintiffs-Appellees

v.

ANDREW G. BESHEAR, Governor of Kentucky;
ERIC FRIEDLANDER, Secretary of the Cabinet
for Health and Family Services; DOCTOR STEVEN
STACK, Commissioner for the Kentucky Department
of Public Health, All defendants sued in their
official capacities only

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 3:20-cv-36

***AMICUS CURIAE* BRIEF OF COMMONWEALTH
OF KENTUCKY IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

Daniel Cameron
Attorney General
Barry L. Dunn
Deputy Attorney General

Office of the Kentucky
Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Matt.Kuhn@ky.gov

S. Chad Meredith
Solicitor General
Matthew F. Kuhn
Deputy Solicitor General
Brett R. Nolan
Special Litigation Counsel
Aaron J. Silletto
Assistant Attorney General

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICUS CURIAE*..... 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT 12

 I. The mass-gathering ban is content-based. 13

 II. The mass-gathering ban cannot survive intermediate scrutiny. 18

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases

ACLU of Ky. v. Wilkinson,
 895 F.2d 1098 (6th Cir. 1990).....3, 12, 21

Adams & Boyle, P.C. v. Slatery,
 956 F.3d 913 (6th Cir. 2020)..... 20

Bullitt Fiscal Ct. v. Bullitt Cty. Bd. of Health,
 434 S.W.3d 29 (Ky. 2014) 3

Calvary Chapel Dayton Valley v. Sisolak,
 140 S. Ct. 2603 (Mem.) (2020)..... 13

Capitol Hill Baptist Church v. Bowser,
 No. 20-cv-02710, 2020 WL 5995126 (D.D.C. Oct. 9, 2020)..... 16

City of Ladue v. Gilleo,
 512 U.S. 43 (1994)..... 23

Connick v. Myers,
 461 U.S. 138 (1983)..... 12

Contributor v. City of Brentwood,
 726 F.3d 861 (6th Cir. 2013)..... 22

Edwards v. South Carolina,
 372 U.S. 229 (1963)..... 12

Holder v. Humanitarian Law Project,
 561 U.S. 1 (2010)..... 14

League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer,
 814 F. App'x 125 (6th Cir. 2020) (order) 20

Lexington H-L Servs., Inc. v. Lexington-Fayette Urban Cty. Gov’t,
 879 F.3d 224 (6th Cir. 2018)..... 21

Lovell v. City of Griffin,
 303 U.S. 444 (1938)..... 23

Maryville Baptist Church, Inc. v. Beshear,
 957 F.3d 610 (6th Cir. 2020) (per curiam) 11, 18, 19, 20

McCullen v. Coakley,
 573 U.S. 464 (2014)..... 18, 20

Members of City Council of City of Los Angeles v. Taxpayers for Vincent,
 466 U.S. 789 (1984)..... 14

Perry Educ. Ass’n v. Perry Local Educators’ Ass’n,
 460 U.S. 37 (1983).....12, 18, 21

Pouillon v. City of Owosso,
 206 F.3d 711 (6th Cir. 2000)..... 12

Ramsek v. Beshear,
 ___ F. Supp. 3d ___, 2020 WL 3446249 (E.D. Ky. June 24, 2020) *passim*

Reed v. Town of Gilbert,
 576 U.S. 155 (2015)..... 13

Roberts v. Neace,
 958 F.3d 409 (6th Cir. 2020) (per curiam) 11, 18

Rosenberger v. Rector & Visitors of Univ. of Va.,
 515 U.S. 819 (1995)..... 13, 17

Saieg v. City of Dearborn,
 641 F.3d 727 (6th Cir. 2011)..... 21

Schneider v. New Jersey,
 308 U.S. 147 (1939)..... 21

Soos v. Cuomo,
 ___ F. Supp. 3d ___, 2020 WL 3488742 (N.D.N.Y. June 26, 2020)..... 16

Spell v. Edwards,
 962 F.3d 175 (5th Cir. 2020)..... 13

St. Clair v. Commonwealth,
 140 S.W.3d 510 (Ky. 2004) 16

Ward v. Rock Against Racism,
 491 U.S. 781 (1989)..... 18

Statutes

Ky. Rev. Stat. 15.020 2

Ky. Rev. Stat. 15.725 16

Other Authorities

Adam Beam, *More than 1,000 Ky. teachers rally against pension changes*, ASSOCIATED PRESS,
 Mar. 13, 2018 5

Apr. 15, 2020 Press Conference, *available at*
<https://www.youtube.com/watch?v=S9wcOhvhR1o> 6

Bruce Schreiner, *Several Kentucky school districts to close for rally*, ASSOCIATED PRESS,
 March 21, 2018..... 5

Capitol Rotunda Statuary, Division of Historic Properties, *available at*
<https://historicproperties.ky.gov/hp/ncs/Pages/crs.aspx>..... 3

Carol Marie Cropper, *More than 15,000 teachers vent their anger at Frankfort*, THE
 COURIER-JOURNAL, Mar. 18, 1988 4

July 20, 2020 Order, Cabinet for Health & Family Services, *available at*
https://governor.ky.gov/attachments/20200720_Order_Mass-Gatherings.pdf..... 8

Kentucky State Capitol, Division of Historic Properties, *available at*
<https://historicproperties.ky.gov/hp/ncs/Pages/default.aspx>..... 2

Kentucky’s New State Capitol Building Dedicated at Frankfort, THE CITIZEN, June 2, 1910.. 3

Pam Luecke, *Thousands flock to Capitol to deliver labor’s message*, THE COURIER-JOURNAL, Mar. 20, 1980 4

Robert G. Trautman, *10,000 March on Capitol For Accommodations Bill; Leaders Meet Breathitt*, THE COURIER-JOURNAL, Mar. 6, 1964 4

Tom Loftus & Morgan Watkins, *Bills Draw Ire of Unions, Dems*, THE COURIER-JOURNAL, Jan. 8, 2017 5

Welcome Page, Kentucky State Capitol, *available at* <https://capitol.ky.gov/Pages/default.aspx>..... 2

Rules

Fed. R. App. P. 29 1

INTERESTS OF *AMICUS CURIAE*¹

Over the Commonwealth’s history, Kentuckians have often protested at their state capitol building (the “Capitol”). On any given day, groups big and small come to the Capitol to express their collective views—often loudly. Kentuckians do this for many reasons, not the least of which is that in-person demonstrations can be heard inside elected leaders’ offices and the crowds can be seen outside their office windows. Even if Kentucky’s elected leaders do not ultimately do what the protestors want, the protesters at least know their elected representatives heard their chants and saw their numbers.

The facts at issue here depart sharply from this history. As part of his response to the Covid-19 crisis, Governor Andrew Beshear² banned protests at the Capitol. Not stopping there, he closed the Capitol building to the general public. He roped off the Capitol’s grounds outside his office and threatened violators with criminal penalties. He temporarily closed the public roads surrounding the Capitol. And he told protesters they could protest at the Capitol from inside their cars in a parking lot removed from the building.

After taking these unprecedented steps, Governor Beshear then did the inexplicable: He attended and spoke at an in-person rally on the Capitol grounds for a cause

¹ As the chief law officer of the Commonwealth of Kentucky, the Attorney General may file this brief without consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

² When this brief refers to Governor Beshear, it also refers to his administration.

he supports. Governor Beshear did not hide this fact; rather, he promoted it. The Governor's top public-health appointee later confirmed the obvious: the demonstration that Governor Beshear attended violated his own ban on protests at the Capitol.

Governor Beshear's actions raise profound First Amendment concerns for all Kentuckians. Under Kentucky law, Attorney General Daniel Cameron represents those interests. *See* Ky. Rev. Stat. 15.020. He files this *amicus curiae* brief on behalf of the Commonwealth of Kentucky so that the rich history of Kentuckians going to their Capitol to voice their opinions *continues*. Pandemic or not, Kentuckians have a fundamental right to make their views known where the people's business is done.

STATEMENT OF THE CASE

The Capitol is more than a century old. Kentucky's General Assembly originally planned for the Capitol to be built on the public square in downtown Frankfort—where the old capitol building sits—but the architect's design was “far too immense for the square.”³ So the current site, which overlooks downtown Frankfort, was chosen instead. When the builders laid the cornerstone for the Capitol in 1906, approximately 20,000 Kentuckians came to mark the occasion.⁴ And when the Capitol was dedicated four years later in 1910, “[e]very true Kentuckian viewed with [a] heart full of pride the

³ Kentucky State Capitol, Division of Historic Properties, *available at* <https://historicproperties.ky.gov/hp/ncs/Pages/default.aspx> (last visited Oct. 13, 2020).

⁴ Welcome Page, Kentucky State Capitol, *available at* <https://capitol.ky.gov/Pages/default.aspx> (last visited Oct. 13, 2020).

dedication of the new state capitol.” *Kentucky’s New State Capitol Building Dedicated at Frankfort*, THE CITIZEN, June 2, 1910.

The Capitol is an impressive building. It sits on roughly 20 acres of land and is surrounded by over 250,000 square feet of open space. *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1100 (6th Cir. 1990); [Roberts Dec., R.45-1, PageID#717, 732]. Upon entering the Capitol, one immediately sees a towering bronze statue of native son President Abraham Lincoln.⁵ And to one’s right hangs a “large quilt . . . woven together with 120 sections representing the individual identities of each of our Kentucky counties.” *Bullitt Fiscal Ct. v. Bullitt Cty. Bd. of Health*, 434 S.W.3d 29, 31 (Ky. 2014). This conveys that the Capitol belongs not to any one person, but to the people of the Commonwealth’s 120 counties.

The Capitol houses all three branches of Kentucky state government. *Wilkinson*, 895 F.2d at 1100. The Governor’s office is on the first floor, as are the offices of the Attorney General and the Secretary of State. The Supreme Court of Kentucky occupies the second floor. And the legislative chambers of the two houses of the Kentucky General Assembly are on opposite ends of the third floor. Thus, Kentucky’s Governor, Attorney General, Chief Justice, Senate President, House Speaker, and Secretary of State all work in the same building.

⁵ Capitol Rotunda Statuary, Division of Historic Properties, *available at* <https://historicproperties.ky.gov/hp/ncs/Pages/crs.aspx> (last visited Oct. 13, 2020).

Unsurprisingly, the Capitol has seen its share of demonstrations. A few of these events bear mention.

In March 1964, more than 10,000 people—led by Martin Luther King Jr. and Jackie Robinson—rallied at the Capitol on a cold, rainy day. Robert G. Trautman, *10,000 March on Capitol For Accommodations Bill; Leaders Meet Breathitt*, THE COURIER-JOURNAL, Mar. 6, 1964, at 1. Standing under an umbrella in front of the Capitol, Dr. King decried “the immorality of the social system that permits segregation.” *Id.* at 20. At the time, this event was reported to be “the greatest demonstration our capital has ever seen.” *Id.* at 1.

The size of the 1964 demonstration was rivaled roughly 15 years later. In March 1980, between 10,000 and 12,000 union members gathered at the Capitol to show “their outrage” over proposed legislation affecting workers. Pam Luecke, *Thousands flock to Capitol to deliver labor’s message*, THE COURIER-JOURNAL, Mar. 20, 1980, at 1. But even that crowd was surpassed in March 1988, when “[b]etween 15,000 and 20,000 educators and their supporters marched around the Capitol . . . seeking more money for education.” Carol Marie Cropper, *More than 15,000 teachers vent their anger at Frankfort*, THE COURIER-JOURNAL, Mar. 18, 1988, at 1.

Even before the events at issue here, Kentuckians continued to come to the Capitol to air their views. On a Saturday morning in January 2017, “[u]nion workers filled the halls of the Capitol” to oppose right-to-work legislation and legislation repealing Kentucky’s prevailing-wage law. Tom Loftus & Morgan Watkins, *Bills Draw Ire of*

Unions, Dems, THE COURIER-JOURNAL, Jan. 8, 2017, at 1, 6A. And over several days in March 2018, Kentucky teachers rallied at the Capitol to oppose proposed changes to Kentucky's public-pension system. Adam Beam, *More than 1,000 Ky. teachers rally against pension changes*, ASSOCIATED PRESS, Mar. 13, 2018; Bruce Schreiner, *Several school districts to close for Capitol rally*, ASSOCIATED PRESS, March 21, 2018.

This is only a small part of the history of the Capitol. But even this glimpse shows the extent to which the Capitol is, and always has been, a place for Kentuckians to voice their concerns.

This brings us to this case. On March 19, 2020, in response to the Covid-19 crisis, Governor Beshear banned “[a]ll mass gatherings.” [Mar. 19, 2020 Order, R.1-4, PageID#42]. The March 19 order prohibits “any event or convening that brings together groups of individuals” for “community,” “civic,” or “public” purposes, leaving no doubt that protests at the Capitol are illegal. [*Id.*]. Although the mass-gathering order sweeps broadly, it excludes many things from its prohibition. “[N]ormal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers” can continue. [*Id.*]. So can gatherings at “typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.” [*Id.*]. Thus, under the Governor’s mass-gathering ban, many gatherings could continue, but protests at the Capitol could not.

After issuing the mass-gathering order, the Beshear administration issued a spate of further orders shutting down much of Kentucky’s economy. [Verif. Compl., R.1,

PageID#6 (summarizing some of these orders)]. These shutdown orders prompted strong opposition in some quarters. [*Id.* at PageID#8]. On April 15, roughly 100 people rallied outside the Capitol to protest Governor Beshear’s shutdown orders, in violation of the mass-gathering ban. [*Id.* at PageID#9]. This protest was loud enough that it could be heard during Governor Beshear’s daily press conference. Governor Beshear responded in real time: “[T]here’s some noise in the background. We do have some folks up here in Kentucky today, and everybody should be able to express their opinion, that believe we should re-open Kentucky immediately right now. Folks, that would kill people. It would absolutely kill people.”⁶ Thus, although the Governor correctly recognized Kentuckians’ constitutional right to protest his shutdown orders, he did not hide his disagreement with their views.

Governor Beshear quickly made certain that his daily press conferences would not be interrupted again by protesters outside his conference-room window. *Ramsek v. Beshear*, __ F. Supp. 3d __, 2020 WL 3446249, at *1 (E.D. Ky. June 24, 2020) (finding that “[i]n response, Governor Beshear took steps to minimize the impact of the protests during his daily press conference”). At the Governor’s direction, the Kentucky State Police “restricted the public’s access to the area on the southeast side of the Capitol building where the Governor’s briefings take place.” *Id.* As the district court found, the

⁶ Apr. 15, 2020 Press Conference, 38:30–43:53, *available at* <https://www.youtube.com/watch?v=S9wcOhvhR1o> (last visited Oct. 13, 2020).

Kentucky State Police “placed saw-horse barriers on the patio of the Capitol and encircled the lawn outside the Governor’s office suite with yellow tape.” *Id.* The Kentucky State Police also placed a sign on one of the barriers that threatened criminal penalties if anyone crossed into the “restricted zone.” *Id.*

But Governor Beshear did not stop there. As the district court found, on April 16, the Governor’s top public-health appointee “created an alternative option for people to protest on Capitol grounds.” *Id.* at *2. Instead of protesting where they could be seen and heard, the Beshear administration directed protesters to “remain in their vehicles, in designated parking areas” on the top floor of the Capitol parking garage. *Id.* Thus, Governor Beshear not only blocked off the public areas surrounding his office, but he also banished protesters to their cars in a parking lot removed from the building. *Id.*

Yet even this is not all. During Governor Beshear’s daily press conferences, the Kentucky State Police began using police cruisers to block the public roads surrounding the Capitol. *Id.*; [Verif. Compl., R.1, PageID#10]. For example, in early May, the Kentucky State Police blocked individuals from merely “driving around the Capitol, because these streets were closed by Kentucky State Troopers.” [Roberts Dec., R.11-3, PageID#138].

These actions prompted this lawsuit. Shortly after it was filed, Governor Beshear amended his absolute ban on protests to allow protests of 10 persons or fewer.⁷ [May 20, 2020 Order, R.43-7, PageID#598]. After the district court declined to enter a preliminary injunction against the mass-gathering ban [Opinion & Order, R.22, PageID#276–90], the plaintiffs sought an emergency injunction pending appeal from this Court. Governor Beshear vigorously opposed this motion. He warned this Court that “[t]he spread of COVID-19 makes *any* gathering dangerous to the public health regardless of the social distancing and hygiene measures employed.” *Ramsek v. Beshear*, No. 20-5542, R.7 at 18–19 (emphasis added).

This Court granted a partial injunction pending appeal. It found that “[t]he protesters are likely to succeed in showing that the [mass-gathering order] is a content-based restriction.” *Ramsek v. Beshear*, No. 20-5542, R.9-2 at 4 (6th Cir. May 23, 2020). However, the Court did *not* enjoin the mass-gathering order with respect to in-person protests at the Capitol. Instead, the Court only stopped Governor Beshear “from prohibiting protesters from gathering for drive-in and drive-through protests, provided the protesters practice social distancing and otherwise comply with the [mass-gathering order’s] regulations on lawful gatherings.” *Id.* at 5. Thus, as of May 23, Governor Beshear’s mass-gathering order still prohibited in-person protests at the Capitol.

⁷ As the Governor’s brief acknowledges [Br. at 7, 28], to this day, his mass-gathering order prohibits protests at the Capitol that are larger than 10 people. July 20, 2020 Order, Cabinet for Health & Family Services, *available at* https://governor.ky.gov/attachments/20200720_Order_Mass-Gatherings.pdf (last visited Oct. 13, 2020).

This timing is key because less than two weeks later, on June 5, an in-person “Black Lives Matter” rally was held at the Capitol. [Roberts Dec., R.45-1, PageID#718]. This demonstration occurred just outside Governor Beshear’s office—more specifically, on part of the Capital lawn that the Kentucky State Police previously blocked off after the Governor’s press conference was interrupted. Remarkably, Governor Beshear appeared at the “Black Lives Matter” demonstration and spoke to the crowd. [*Id.* at PageID#734–36]. His social-media post about the event appears below:⁸



⁸ This social-media post can be accessed on Governor Beshear’s official Twitter account, located here: <https://twitter.com/GovAndyBeshear/status/1269064159234338816> (last visited Oct. 13, 2020). It also is in the record below at [R.45-1, PageID#735].

When asked about this in-person rally, the Governor’s top public-health appointee admitted—under oath—that it violated the Governor’s mass-gathering order. [Stack Depo., R.43, PageID#524; *see also* Depo. Ex. 15, R.43-12, PageID#682–85; Roberts Dec., R.45-1, PageID#718]. As the Governor’s appointee testified five days after this demonstration, “[s]o the collection of people in front there, it is a large collection of -- and a public collection of people that is currently prohibited under the mass gathering guidance, yeah.” [Stack Depo., R.43, PageID#524]. Thus, less than two weeks after convincing this Court to keep in place his ban on in-person protests at the Capitol, Governor Beshear himself participated in a prohibited protest.

Even after violating his own order, Governor Beshear continued to oppose the plaintiffs’ request for a preliminary injunction to allow in-person protests, albeit without mentioning his participation in the June 5 rally. [Gov. Supp. Br., R.44, PageID#686–96]. On June 24, however, the district court granted a preliminary injunction, finding that the Governor’s “blanket prohibition on gathering in large groups to express constitutionally protected speech is unconstitutional.” *Ramsek*, 2020 WL 3446249, at *1. Governor Beshear then appealed to this Court, seeking to reinstate his ban on in-person protests. His opening brief omits mention of his participation in the June 5 rally at the Capitol.

SUMMARY OF ARGUMENT

Governor Beshear should lose this appeal for several reasons. To begin with, his mass-gathering ban is content-based and thus is subject to strict scrutiny. Although this

Court has already held that the Governor's order is content-based on its face, it also is content-based in light of how Governor Beshear has applied it. More specifically, the Governor has repeatedly applied his mass-gathering ban to stifle protests at the Capitol by those with whom he disagrees. Yet, when a protest concerning a cause with which he agrees occurred outside his conference-room window, Governor Beshear proudly participated. Rarely is content-based enforcement of the law so clear.

Even if the Governor's mass-gathering order is content-neutral, it fails intermediate scrutiny for two reasons. First, it is not narrowly tailored. As this Court has twice ruled, the mass-gathering order allows a variety of activities to continue as long as social-distancing and hygiene guidelines are followed. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613–15 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409, 414–16 (6th Cir. 2020) (per curiam). These numerous carve-outs from the mass-gathering ban, which persist to this day, are proof positive that the Governor can do much better in tailoring his mass-gathering order to allow protests at the Capitol. Second, the Governor's order does not leave open ample alternative channels for political speech at the Capitol. Protests at the seat of government occupy a special place in our constitutional jurisprudence and in Kentucky's history. Governor Beshear has gone too far in restricting Kentuckians' ability to come to their Capitol to voice their concerns.

ARGUMENT

Everyone agrees that the First Amendment limits Governor Beshear’s ability to ban protests at the Capitol.⁹ After all, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (cleaned up) (citation omitted). Such speech is “the essence of self-government.” *Id.* (citation omitted). And peaceful protests at state capitols are an exercise of “basic constitutional rights in their most pristine and classic form.” *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). In fact, this Court has recognized that Kentucky’s Capitol is a “recognized public forum” that has “been the site of numerous speeches, demonstrations and other public events.” *See Wilkinson*, 895 F.2d at 1101; *see also Pouillon v. City of Owosso*, 206 F.3d 711, 716–17 (6th Cir. 2000).

As a result, Governor Beshear’s ability to limit protests at the Capitol is “sharply circumscribed.” *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). To enforce a content-based restriction, the Governor must satisfy strict scrutiny. *See id.* Governor Beshear also may enforce “time, place, and manner” restrictions at the Capitol that are content-neutral as long as they satisfy intermediate scrutiny—that is, the restrictions must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *See id.*

⁹ This brief focuses on the plaintiffs’ free-speech claim.

As this Court has already held, the Governor’s mass-gathering ban is content-based and fails strict scrutiny. But even if it is content-neutral, the mass-gathering ban cannot be justified under intermediate scrutiny as a “time, place, and manner” restriction.

I. The mass-gathering ban is content-based.

The Court should conclude—again—that Governor Beshear’s mass-gathering order is content-based. The Governor’s opening brief mostly skips this threshold issue.

A content-based restriction “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Viewpoint discrimination—picking one view over another—is a “more blatant” and “egregious form of content discrimination.” *Id.* at 168–69 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). A law can be content-based on its face or in its purpose or justification.¹⁰ *Id.* at 166. Similarly, even if a law is content-

¹⁰ This Court has already determined that the mass-gathering ban is content-based on its face. It appears that the Court found most significant the fact that the amended mass-gathering ban allows in-person religious services but not in-person protests. *Ramsek v. Beshear*, No. 20-5542, R.9-2 at 4 (6th Cir. May 23, 2020) (“Because the Order permits citizens to gather in retail stores, airports, parking lots, *and churches*, but does not permit them to gather for a protest, it discriminates against political speech.” (emphasis in original)); *see also Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020) (Ho, J., concurring) (“Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are ‘open’ and which remain ‘closed.’”); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607–08 (Mem.) (2020) (Alito, J., dissenting from the denial of application for injunctive relief) (“[R]especting some First Amendment rights is not a shield for violating others.”). Because the Court has already considered this issue, Attorney General Cameron focuses on a further way in which the mass-gathering ban is content-based.

neutral on its face, it can become content-based due to how the government applies it. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (recognizing that a “generally applicable law” that is “directed” at someone “because of what his speech communicated” justifies “more rigorous scrutiny”); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]here is not even a hint of bias or censorship in the City’s enactment *or enforcement* of this ordinance.” (emphasis added)).

The district court’s fact-finding on this issue, which Governor Beshear does not contest, shows that his enforcement of the mass-gathering order has been content-based. As the district court found, this all began when protesters interrupted the Governor’s April 15 press conference. After criticizing the protesters for holding views that would “absolutely kill people,” *see supra* note 6, Governor Beshear responded by using the Kentucky State Police to block the area of the Capitol’s public grounds “where [his] briefings take place.” *Ramsek*, 2020 WL 3446249, at *1. The Kentucky State Police also placed a sign on one of the barriers threatening violators with criminal penalties. *Id.* The next day, the Governor’s top public-health appointee told protesters they were free to protest at the Capitol if they did so at a removed parking garage and remained inside their cars. *Id.* at *2. The Kentucky State Police also began blocking the public roads surrounding the Capitol during the Governor’s daily press conferences. [Verif. Compl., R.1, PageID#10; Roberts Dec., R.11-3, PageID#138].

In the meantime, Governor Beshear defended his ban on protests in court, with repeated warnings about what will happen if protests at the Capitol are allowed. At least initially, he was mostly successful in court. The district court denied a preliminary injunction, and this Court granted only a narrow injunction pending appeal that allowed the Governor to continue restricting in-person protests at the Capitol. Thus, after his first trip to this Court, the Governor's ban on in-person protests larger than 10 persons remained fully in place.

Yet, on June 5, everything changed. After convincing the district court and this Court to allow him to continue to ban in-person protests at the Capitol, Governor Beshear himself attended and spoke at a large, in-person rally at the Capitol. This rally occurred just outside the Governor's office, partially in the area that the Kentucky State Police had previously roped off to prevent individuals from protesting the Governor's press conferences. When the Governor's top public-health appointee was shown a picture of this rally, he admitted that it violated the Governor's mass-gathering order. [Stack Depo., R.43, PageID#524].

This sequence of events demonstrates that the Governor's mass-gathering order has been content-based in its application. Consider the contrast. When protesters opposed Governor Beshear's shutdown orders on April 15, he denounced their views, walled off part of the Capitol grounds, threatened criminal penalties, told protesters to protest in their cars in a removed parking lot, and temporarily closed the public roads

surrounding the Capitol. For a cause the Governor supports, by comparison, he attended and spoke at a large, in-person rally at the Capitol. The Governor did not hide his participation in the “Black Lives Matter” rally, but instead tweeted out his support to the protestors along with a picture of himself at the rally. He did all of this even though the demonstration violated his own mass-gathering order. This can be nothing other than content-based—more specifically, viewpoint-based—enforcement of the law. The First Amendment forbids the Governor from favoring one protest over another based upon the cause at issue. *See Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710, 2020 WL 5995126, at *8 (D.D.C. Oct. 9, 2020) (noting that a government official “appeared at one of the mass gatherings” and holding that “apparent encouragement of these protests also implies that the District favors some gatherings (protests) over others (religious services)”); *Soos v. Cuomo*, ___ F. Supp. 3d ___, 2020 WL 3488742, at *12 (N.D.N.Y. June 26, 2020) (holding that “active encourage[ment]” of protests by high-profile government officials “sent a clear message that mass protests are deserving of preferential treatment” when compared to religious gatherings).

The district court declined to find that Governor Beshear applied his mass-gathering order in a content-based way, reasoning that “[p]erhaps if Plaintiffs had been prosecuted for gathering to protest coronavirus restrictions this argument would be justified.” *Ramsek*, 2020 WL 3446249, at *8. But the Governor does not decide who to prosecute. *See* Ky. Rev. Stat. 15.725; *St. Clair v. Commonwealth*, 140 S.W.3d 510, 531 (Ky. 2004). Neither does the Kentucky State Police. *Ramsek v. Beshear*, No. 20-5542, R.9-2 at

3 (6th Cir. May 23, 2020) (“[T]he state police commissioner does not have authority to determine whether to prosecute violators of the Order.”). Thus, the fact that government officials other than the Governor have not brought criminal charges for violating the mass-gathering order does not somehow forgive the Governor’s content-based enforcement of that order.

More importantly, the district court overlooked that criminal prosecution is not the only way in which the mass-gathering ban has been enforced. As discussed above, after protesters opposed to the Governor’s shutdown orders interrupted his daily press conference, a wave of enforcement by the Kentucky State Police—which reports to the Governor—quickly followed, ranging from blocking the Capitol grounds near where the Governor held his press conferences, to temporarily closing public roads, and to directing protestors to protest in their cars in a removed parking lot. *Id.* (“There appears to be a history of previous enforcement of the Order against the plaintiffs and other citizens because on at least one occasion the police blocked protesters from conducting a drive-through protest on public roads around the state Capitol.”). This enforcement of the mass-gathering ban against those opposing the Governor’s shutdown orders, compared with the Governor’s celebrated attendance at the June 5 rally, is an unmistakable instance of the government targeting “particular views taken by speakers on a subject.” *See Rosenberger*, 515 U.S. at 829.

II. The mass-gathering ban cannot survive intermediate scrutiny.

Even if the Court deems the mass-gathering order to be content-neutral, it still violates the First Amendment. This is so because the order is not “narrowly tailored to serve a significant government interest,” nor does it “leave open ample alternative channels of communication.” *See Perry Educ. Ass’n*, 460 U.S. at 45.

A. To be narrowly tailored to serve a significant government interest, a law must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). This is not a least-restrictive-means test, but it prohibits the government from “regulat[ing] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.* (citation omitted).

The mass-gathering order is not narrowly tailored. This Court’s prior decisions in *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam), and *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam), get the Court most of the way to this conclusion. Those cases involved the same mass-gathering order at issue here, but considered that order as applied to religious services. On back-to-back Saturdays—just in advance of Sunday worship services—this Court granted emergency injunctions pending appeal allowing, first, drive-in worship services and, second, in-person worship services in the Commonwealth. Key to the Court’s decisions was that the mass-gathering order prohibited worship services while simultaneously allowing secular

activities to continue. The Court reasoned: “Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers.” *Maryville Baptist Church*, 957 F.3d at 615. The Court continued: “The Governor has offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do so the same.” *Id.*

This same reasoning applies here. The mass-gathering order restricts protests at the Capitol while Governor Beshear simultaneously permits all manner of other activities to continue as long as social-distancing and hygiene rules are followed. As the district court correctly summarized, “[t]he Commonwealth has required implementation of [social-distancing and hygiene rules] in places like restaurants, office buildings, and auctions, but continues to wholly prohibit gatherings for political protest above a set number [of people] no matter the circumstance.” *Ramsek*, 2020 WL 3446249, at *10. That is to say, Governor Beshear has found ways to allow other activities to continue safely, but has undertaken no effort to allow meaningful in-person protests at the Capitol. “But it is the right to protest—through the freedom of speech and freedom of assembly clauses—that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction.” *Id.* Governor Beshear, the district court aptly emphasized, “must do better than prohibiting large gatherings for protest outright.” *Id.* This case, then, is analogous to *McCullen*, where a law was not narrowly tailored because

the state had “available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.” *See McCullen*, 573 U.S. at 494. For this simple reason, the mass-gathering order burdens substantially more speech than necessary to achieve Governor Beshear’s goals.

The Governor responds by arguing that “states are not required to employ equal measures to all walks of public life.” [Br. at 17]. In his view, he can “target the spread of COVID-19 at protests, while neglecting the spread of COVID-19 in churches.” [*Id.*]. For this proposition, the Governor principally relies on this Court’s unpublished order in *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125 (6th Cir. 2020) (order). True, *Whitmer* applied rational basis review to allow Covid-19 restrictions to stay in place, but that case arose because of a restriction that treated indoor fitness facilities differently from bars, restaurants, and salons. *Id.* at 127–28. That is to say, fundamental constitutional rights, like freedom of speech and assembly, were not at stake in *Whitmer*. The Court even made this point clear, noting that other cases that have considered Covid-19 restrictions “involve[d] individual rights for which precedent requires courts to apply a heightened level of scrutiny to government actions.” *Id.* at 126 (citing *Maryville Baptist Church*, 957 F.3d at 614–15; *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925–26 (6th Cir. 2020)). This of course is one of those cases where heightened scrutiny applies.

The Governor also argues that his order is narrowly tailored because political protests pose “unique risks in the context of mass gatherings.” [Br. at 18]. The Governor’s participation in the June 5 in-person rally at the Capitol belies this assertion. As does the Governor’s allowance of other outdoor activities without size restrictions. [See Appellee Br. at 15–19]. But even setting those things aside, the Capitol rests on approximately 20 acres of land, *Wilkinson*, 895 F.2d at 1100, with more than 250,000 square feet of open space immediately surrounding it, [Roberts Dec., R.45-1, PageID#717]. Although one cannot truly appreciate how expansive the Capitol grounds are without a walking tour, the pictures in the record are the next-best thing. [*Id.* at PageID#719–32]. The Governor has offered no explanation—and none exists—for why the alleged “unique risks” presented by in-person protests cannot be addressed by making full use of the Capitol’s ample grounds. Narrow tailoring requires much more of the Governor.

B. The mass-gathering order also fails intermediate scrutiny because it does not “leave open ample alternative channels of communication.” *See Perry Educ. Ass’n*, 460 U.S. at 45. “An alternative is not ample if the speaker is not permitted to reach the intended audience.” *Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011) (citation omitted). Moreover, “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. New Jersey*, 308 U.S. 147, 163 (1939); *see also Lexington H-L Servs., Inc. v. Lexington-Fayette Urban Cty. Gov’t*, 879 F.3d 224, 233–34 (6th Cir. 2018).

Under the initial mass-gathering order, protests at the Capitol were illegal. This left no alternative for those desiring to rally at the Capitol, much less the “ample” alternatives required by the First Amendment. Nor does the Beshear administration’s after-the-fact “alternative” of protesting in cars on the top floor of the Capitol’s parking garage suffice. In-person protests at the Capitol enable protestors to express their views in ways that are hard for government officials to overlook. With in-person protests at the Capitol, elected leaders cannot avoid hearing the chants while working in their offices. And if elected leaders happen to look out their office windows, they cannot miss the crowds. Governor Beshear’s experience during his April 15 press conference, where the protest was so loud that he commented about the “noise in the background,” demonstrates this simple point. Banishing protesters to their cars in a parking lot that is removed from the Capitol—where they can be neither seen nor heard—robs protesters of the ability to reach their intended audience. This makes the Capitol parking garage an unsuitable First Amendment alternative. *See Contributor v. City of Brentwood*, 726 F.3d 861, 866 (6th Cir. 2013) (emphasizing the importance of “speakers’ ability to reach the intended audience”).

The Governor responds by arguing that, under the mass-gathering order, protestors “may voice their complaints through the Governor’s Office of Constituent Services.” [Br. at 28]. Governor Beshear, it seems, views constituent letters and phone calls as an adequate First Amendment alternative to in-person protests outside his office window. If that is true here, then it also was true for the 10,000 people who marched

with Dr. King on the Kentucky Capitol in 1964 and for the 15,000–20,000 Kentucky teachers and their supporters who rallied at the Capitol in 1988 in support of more education funding. To state the obvious, constituent letters and phone calls were no alternative then, and they are no alternative now. The Commonwealth’s rich history of protests at the Capitol demonstrates that in-person protests at Kentucky’s seat of government are a uniquely persuasive way of directly reaching elected leaders for which there is no substitute. *See City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (rejecting an attempt to “almost completely foreclose[] a venerable means of communication that is both unique and important”); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (rejecting an attempt to ban the distribution of pamphlets and leaflets, which “have been historic weapons in the defense of liberty”). In short, the First Amendment does not permit Governor Beshear to relegate Kentuckians who desire to rally on the Capitol steps to letters and phone calls to his office that may go unanswered.

The Governor’s only further response is that the mass-gathering order currently permits in-person protests in “smaller groups, not exceeding—at this time—ten people.” [Br. at 28]. But, as the district court recognized, there is a “message implicit in the size of the crowd.” *See Ramsek*, 2020 WL 3446249, at *7. Obviously, an elected leader is more likely to notice—and respond to—a 10,000-person protest than a 10-person one. Moreover, while allowing a 10-person protest on the Capitol’s grounds offers at least some alternative to the 10 persons who are lucky enough to participate, it offers no alternative to the hundreds, or more likely the thousands, of Kentuckians who desire

to protest Governor Beshear’s shutdown orders. Bottom line: Governor Beshear cannot justify his almost total ban on protests by allowing protests that are so small that Kentuckians cannot show the Governor—by the size of the crowd and the volume of their chants—how deeply they disagree with his actions.

CONCLUSION

The Court should affirm the district court’s grant of a preliminary injunction.

Respectfully submitted by,

s/ Matthew F. Kuhn

Daniel Cameron

Attorney General

Barry L. Dunn

Deputy Attorney General

Office of the Kentucky

Attorney General

700 Capital Avenue, Suite 118

Frankfort, Kentucky 40601

(502) 696-5300

Matt.Kuhn@ky.gov

S. Chad Meredith

Solicitor General

Matthew F. Kuhn

Deputy Solicitor General

Brett R. Nolan

Special Litigation Counsel

Aaron J. Silletto

Assistant Attorney General

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because the brief contains 5,839 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief 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 the has been prepared in 14-point Garamond font using Microsoft Word.

s/Matthew F. Kubn

CERTIFICATE OF SERVICE

I certify that on October 14, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kubn