

No. 20-5427
In the United States Court of Appeals for the Sixth Circuit

MARYVILLE BAPTIST CHURCH, *et al.*,

Plaintiffs-Appellants

v.

ANDY BESHEAR, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY,

Defendant-Appellee

On Appeal from the U.S. District Court, Western District of Kentucky
No. 3:20-cv-00278

**BRIEF OF THE COMMONWEALTH OF KENTUCKY
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS'
EMERGENCY MOTION FOR AN INJUNCTION
PENDING APPEAL**

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INTEREST OF AMICUS CURIAE¹

Kentucky law vests Attorney General Daniel Cameron with the authority to represent the Commonwealth of Kentucky in any case “in which the Commonwealth has an interest.” Ky. Rev. Stat. 15.020.

This is one of those cases. The freedom to practice one’s faith is a defining feature of American liberty. “Since the founding of this nation, religious groups have been able to ‘sit in safety under [their] own vine and figtree, [with] none to make [them] afraid.’” *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (quoting Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)). This protection is one of our Nation’s “most audacious guarantees.” *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264, 2020 WL 1820249, at *3 (W.D. Ky. Apr. 11, 2020).

But in the wake of executive orders shutting down in-person worship services in Kentucky in response to the Covid-19 crisis, this guarantee is on shaky ground. Kentucky Governor Andy Beshear has

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

allowed certain secular activities to continue in Kentucky if social-distancing guidelines are followed, but has refused the same treatment for religious entities. Pandemic or not, the Constitution prohibits the targeting of religious exercise for disfavored treatment.

ARGUMENT

I. An injunction pending appeal is necessary to prevent irreparable harm.

The Court should enter an injunction pending appeal “to prevent irreparable harm.” *Overstreet v. Lexington-Fayette Urban Cty. Gov’t*, 305 F.3d 566, 572 (6th Cir. 2002) (citation omitted). Ordinarily, that requires weighing the same factors that go into a decision to grant a preliminary injunction. *Id.* at 572. But when an injunction is necessary to prevent “a potential constitutional violation, ‘the likelihood of success on the merits often will be the determinative factor.’” *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam) (citation omitted).

This case raises such constitutional concerns. Every week that passes is another irreparable infringement on the constitutional rights of the Appellants. Because, as discussed below, the Appellants are likely to

succeed on their constitutional challenge, the Court should enter an injunction pending appeal to prevent further irreparable harm.²

II. The Appellants are likely to succeed on the merits.

A. The Beshear administration's orders target religious activity for disfavored treatment.

This case concerns two executive orders that Governor Beshear's administration issued in response to the Covid-19 pandemic. The first order, issued on March 19, prohibits "[a]ll mass gatherings." [Mar. 19, 2020 Order, R.1-5, PageID#66]. The Beshear administration describes the scope of this prohibition as "includ[ing] any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, *faith-based*, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." [*Id.* (emphasis added)]. The broad sweep of this prohibition is undeniable: It applies to gatherings of any number of people. It applies to gatherings in

² The Court has jurisdiction. The district court's decision to deny the temporary restraining order was "tantamount to a ruling on a preliminary injunction." *Overstreet*, 305 F.3d at 572. Here, "the denial of the [temporary restraining order] effectively decided the merits of the case." *Graham v. Teledyne-Continental Motors, Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (9th Cir. 1986). Every week that passes imposes additional, irreparable harm, transforming the district court's initial decision into "a de facto denial of a permanent injunction." *Id.*

confined spaces as well as the outdoors. It applies to gatherings in which people remain six feet apart. This order is written as broadly as possible, and it leaves no doubt that *all* “faith-based” gatherings are illegal.

That’s not to say the order is without exception. It in fact contains two. First, the order states that “a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit.” [*Id.*]. Second, the order provides that a mass gathering “does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.” [*Id.*]. Religious activities are not included in either exemption.

Several days after prohibiting “mass gatherings,” Governor Beshear issued another executive order closing all organizations that are not “life-sustaining.” [Mar. 25, 2020 Order, R.1-7, PageID#73]. The order lists approximately 19 different categories of businesses and organizations that are “life-sustaining.” [*Id.* at PageID##73–76]. Religious organizations are not among them.

What does Governor Beshear consider life-sustaining? “Media,” is one example, which he defines as “[n]ewspapers, television, radio, and other media services.” [*Id.* at PageID#74]. Also included are law firms, accounting services, laundromats, liquor stores, and hardware stores. [*Id.* at PageID##73–75].

The lone reference to religious organizations in the March 25 order allows for religious charities to continue operating to “provid[e] food, shelter, and social services, and other necessities of life for economically disadvantaged or special populations, individuals who need assistance as a result of this emergency, and people with disabilities.” [*Id.* at PageID#74]. So while the order does not permit religious organizations to conduct religious services, it does allow them to provide the kinds of services that Governor Beshear has pre-approved.

The March 19 and March 25 orders impose a sweeping prohibition against religious activity in Kentucky. Even though these orders broadly permit individuals to work in law offices and newsrooms and to visit hardware stores, liquor stores, laundromats, and grocery stores, they do not permit people to attend religious services at a church, mosque, synagogue, or other house of worship—even if they follow social-

distancing guidelines. This is, without question, an unconstitutional targeting of religious activity. *See Ward v. Polite*, 667 F.3d 727, 738–39 (6th Cir. 2012) (discussing the problem of “permitting secular exemptions but not religious ones and failing to apply the policy in an even-handed, much less a faith-neutral, manner”).

Targeting is even more evident following the Governor’s April 29 press conference. In it, the Governor announced categories of his Phase I reopening. Car dealerships and dog grooming may reopen on May 11, but houses of worship are delayed until May 20:³

Healthy at Work PHASE 1 RE-OPENING		TEAM KENTUCKY
May 11 <ul style="list-style-type: none"> • Manufacturing • Construction • Vehicle or Vessel Dealerships • Professional Services (50%) • Horse Racing (No Fans) • Dog Grooming / Boarding 	May 20 <ul style="list-style-type: none"> • Retail • Houses of Worship 	May 25 <ul style="list-style-type: none"> • 10 Person Social Gatherings • Barbers, salons, cosmetology businesses, and similar services
HEALTHYATWORK.KY.GOV		

³ See Kevin Wheatley, *Horse racing, other industries to begin first phase of May 11 economic reopening*, WDRB, available at https://www.wdrb.com/news/horse-racing-other-industries-to-begin-first-phase-of-may-11-economic-reopening/article_1f7597ca-8a60-11ea-90ae-6ff44099a8df.html (last visited May 1, 2020).

The district court mistakenly found that the executive orders do not target religious conduct because “[r]eligious expression is not singled out.” [Order, R.9, PageID#225]. The court went on to state that “there are no identified exceptions to the prohibition on mass gatherings.” [*Id.*]. This is, respectfully, not accurate. As explained above, the mass-gathering ban permits gatherings in airports, grocery stores, office spaces, and other places “where large numbers of people are present.” [R.1-5, PageID#66].

Only wordplay allows one to reach a different conclusion. The district court explained that to “gather” ordinarily means “to come together in a body,” and that a “gathering” is an “assembly” or “meeting.” [R.9, PageID#225 n.1]. So, the Court reasoned, “uncoordinated shopping trips by unrelated individuals” at a grocery store or liquor mart do not qualify. [*Id.*]. That conclusion, however, overlooks a significant carve-out from the order. The order permits people to continue their daily routine in “typical office environments,” which surely includes “meetings” as the district court explains it. [R.1-5, PageID#66]. In a “typical office,” employees show up together, working together for a common purpose during similar hours and often in close proximity. It is exactly the kind

of coordinated activity that the district court said *is* a prohibited mass gathering.

“If the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions . . . the law satisfies the First Amendment only if it advances interests of the highest order and is narrowly tailored in pursuit of those interests.” *Ward*, 667 F.3d at 738 (cleaned up). The Beshear administration’s orders single out faith-based activities for prohibition, while simultaneously allowing exemptions for similarly risky secular activities. This is quintessential discrimination against religion requiring the state to meet the high burden of strict scrutiny.

Just as troubling is Governor Beshear’s refusal to define religious activity as “life-sustaining” for those Kentuckians with sincerely held religious beliefs about communal worship. *See Walker v. Mintzes*, 771 F.2d 920, 930 (6th Cir. 1985) (“Most religious faiths give a central role to congregate religious services. It is an important aspect of religious socialization, and it imparts a sense of religious fellowship which deepens religious conviction.”).

Not every state has taken the same path. Ohio, for example, recognized the danger in categorizing some activities as essential but excluding religion from that list:⁴

Ohio's March 22 order defining essential businesses

- d. Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;
- e. Religious entities.** Religious facilities, entities and groups and religious gatherings, including weddings and funerals.
- f. Media.** Newspapers, television, radio, and other media services;
- g. First amendment protected speech.**
- h. Gas stations and businesses needed for transportation.** Gas stations and auto supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities and bicycle shops and related facilities;

Governor Beshear issued a similar order three days later, when he set out 19 different categories of “life-sustaining” businesses that can remain open. While much of the wording is the same as the Ohio order, Governor Beshear *excluded* religious organizations from the list of permissible activity:

⁴ Ohio’s order is available at <https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf> (last visited Apr. 28, 2020). Ohio’s revised order retained the exemption for religious entities. *See* Ohio April 2, 2020 Order, available at <https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf> (last visited Apr. 28, 2020).

Kentucky's March 25 order defining "life-sustaining" businesses

- d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or special populations, individuals who need assistance as a result of this emergency, and people with disabilities. These organizations have a special responsibility to implement social distancing to the fullest extent possible, and to take all necessary actions to stop the spread of disease, including by stopping in-person retail operations.
- e. **Media.** Newspapers, television, radio, and other media services.
- f. **Gas stations and businesses needed for transportation.** Gas stations and auto-supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities; bicycle repair shops and related facilities; and motorcycle repair shops.

The exclusion of religious organizations from the list of “life-sustaining” activities is no small matter. Governor Beshear has publicly declared that attending a worship service is not life-sustaining, while allowing liquor stores, laundromats, and retailers to continue operating. This cannot stand. Or as a Kentucky federal district court noted in a similar case, “if beer is ‘essential,’ so is Easter.” *On Fire Christian Ctr.*, 2020 WL 1820249, at *7.⁵ In short, the Beshear administration has failed to adopt neutral and generally applicable orders to address the current

⁵ Governor Beshear has gone remarkably far in dictating how Kentuckians should exercise their religion. At his Good Friday press conference, the Governor chastised people about what a true “test of faith” is when recommending online services. April 10, 2020 Beshear Press Conference at 34:48, available at https://www.youtube.com/watch?v=G_JL0P_mgKk (last visited Apr. 28, 2020). The First Amendment exists precisely to protect the beliefs of those who disagree.

crisis, instead choosing to target religious organizations for disfavored treatment. This is “beyond all reason,’ unconstitutional.” *Id.* at *2 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

B. The ban on religious worship is not narrowly tailored.

The law governing Free Exercise claims is straightforward. The First Amendment prohibits states from burdening one’s “free exercise” of religion. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In practice, that means the government cannot implement laws “targeting religious beliefs as such.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). But it also means that “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *Id.* at 534. Public officials, in other words, cannot target religion through selective enforcement of otherwise neutral laws. *See id.* at 543. Rather, laws must be neutral and generally applicable in both text and reality to survive constitutional scrutiny. *See Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990). And “[a] law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases.” *Lukumi*, 508 U.S. at 546.

No one doubts that the state currently has a compelling interest in preventing the spread of Covid-19. But so far, Governor Beshear has offered no explanation as to why it is necessary to prohibit religious activities that pose exactly the same risk as non-religious activities that are permitted. And in denying the Plaintiffs' request for injunctive relief, the district court never addressed the issue. Instead, the court reasoned in a conclusory fashion that Governor Beshear was likely to prevail because the broad prohibitions against all religious gatherings are the least-restrictive means of stopping the spread of Covid-19. [R.9, PageID#226].

The district court's error on this point is most pronounced in its assessment of what it means to "gather." The court explained that a "gathering" is distinct from an "uncoordinated shopping trip[] by unrelated individuals." [*Id.* at PageID#225 n.1]. But presumably, the coronavirus does not care about whether people are "coordinating." And it does not care whether they are in a store as friends, neighbors, or strangers. Rather, as the district court explained, Covid-19 "is widely understood to be transmitted through person-to-person contact," [*id.* at PageID#226], regardless of whether those people came into contact in a

“meeting” or in a grocery aisle. So the obvious, least-restrictive means of preventing the spread of Covid-19 is not to target the *purpose* for which people come into close contact, as the March 19 order does, but to target the close contact itself. By simply implementing the same social-distancing measures for religious gatherings as for liquor stores, retail chains, laundromats, and offices, Governor Beshear could achieve the same state interest in a less-restrictive manner.

Nor can Governor Beshear find support in *Jacobson v. Massachusetts*. Even under *Jacobson*, a law is invalid if “purporting to have been enacted to protect the public health, the public morals, or the public safety, [the law] has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” 197 U.S. at 31. That is precisely the problem with the executive orders here. Singling out religious activity for disfavored treatment is the kind of “palpable invasion of rights” that even a pandemic cannot justify. *See On Fire Christian Ctr.*, 2020 WL 1820249, at *8 n.73.

CONCLUSION

The Court should grant the Appellants' emergency motion for an injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 1, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 27(d)(2)(A) because the brief contains 2,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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