

No. 20-5465
In the United States Court of Appeals for the Sixth Circuit

THEODORE ROBERTS, *et al.*,

Plaintiffs-Appellants

v.

ROBERT NEACE, *et al.*,

Defendants-Appellees

On Appeal from the U.S. District Court, Eastern District of Kentucky
No. 2:20-cv-54

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

Barry L. Dunn
Deputy Attorney General

Victor B. Maddox
Assistant Deputy Attorney General

Carmine G. Iaccarino
Assistant Attorney General

Office of the Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601
502-696-5300
Carmine.Iaccarino@ky.gov
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF *AMICUS CURIAE*..... 1

 I. The Appellants are likely to succeed on the merits.3

 II. The remaining injunction factors favor the Appellants.8

CONCLUSION 14

CERTIFICATE OF SERVICE..... 15

CERTIFICATE OF COMPLIANCE..... 16

TABLE OF AUTHORITIES

Cases

In re Salon a La Mode, __ S.W.3d __, 2020 WL 2125844 (Tex. May 5, 2020)..... 10

Maryville Baptist Church, Inc. v. Beshear, __ F.3d __, 2020 WL 2111316 (6th Cir. May 2, 2020) (per curiam) passim

On Fire Christian Ctr., Inc. v. Fischer, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)..... 1

Tree of Life Christian Schools v. City of Upper Arlington, 905 F.3d 357 (6th Cir. 2018)..... 1

Ward v. Polite, 667 F.3d 727 (6th Cir. 2012) 6

Statutes

Ky. Rev. Stat. 15.020..... 1

Other Authorities

Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)..... 1

Rules

Fed. R. App. P. 29..... 1

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. *See Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting). It is one of our Nation’s “most audacious guarantees.” *On Fire Christian Ctr., Inc. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249, at *3 (W.D. Ky. Apr. 11, 2020).

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

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).

ARGUMENT

Just last Saturday, the Court granted a partial injunction pending appeal in another matter, involving the same church service, that concerned the legality of the Beshear administration's orders banning faith-based gatherings. *Maryville Baptist Church, Inc. v. Beshear*, __ F.3d __, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (per curiam). As the Court explained, "the breadth of [Governor Beshear's] ban on religious services, together with a haven for numerous secular exceptions, should give pause to anyone who prizes religious freedom." *Id.* at *5.

But since then, Governor Beshear has not taken heed. Instead, he's doubled down. Yesterday, Governor Beshear affirmed that he "has not announced any voluntary change in his COVID-19 policies or enforcement regarding churches or other mass gatherings (other than not enforcing orders against drive-in services, in violation of [this Court's order]) that would take effect sooner than May 20, 2020." *See Maryville Baptist Church, Inc. v. Beshear*, 3:20-cv-278 (W.D. Ky.) ("*Maryville* District

Court”), R.29, PageID##400–01.² And in his brief from yesterday defending the same orders at issue in this case, the Governor failed to meaningfully address the many problems that this Court identified with his administration’s ban on faith-based gatherings. *See id.*, R.31, PageID##406–34. Rather, he chose to re-litigate issues already rejected by this Court in a published decision.

The Court should grant an emergency injunction pending appeal. The district court failed to follow this Court’s days-old published decision. And the Court’s reasons for declining to grant a full injunction in *Maryville Baptist* no longer exist.

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

This appeal 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.6-4, PageID#99]. The Beshear administration describes

² As explained in the Appellants’ emergency motion to consolidate this appeal with No. 20-5427, this case is closely related to the *Maryville Baptist Church* matter filed in the Western District of Kentucky. In light of the emergency nature of the Appellants’ request for an injunction pending appeal, this *amicus* brief discusses the Governor’s filings in both cases.

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 confined spaces as well as the outdoors. It applies to gatherings in which people remain six feet apart. This order 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.6-7, PageID#108]. The order lists approximately 19 different categories of businesses and organizations that are “life-sustaining.” [*Id.* at PageID##108–11]. 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#109]. Also included are law firms, accounting services, laundromats, liquor stores, and hardware stores. [*Id.* at PageID##108–10].

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#109]. So while the order does not permit religious organizations to hold 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”).

The Court has already concluded that these two orders likely violate the Free Exercise Clause of the First Amendment. As the Court held, the March 25 order’s “exception for ‘life-sustaining’ business allows law firms, laundromats, liquor stores, and gun shops to continue operating so long as they follow social-distancing and other health related precautions.” *Maryville Baptist*, 2020 WL 2111316, at *3. The problem with this “exception” is that “the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the

public health guidelines required of essential services and even when they meet outdoors.” *Id.* The Court thus concluded that “[t]he Governor’s orders . . . likely ‘prohibit[] the free exercise’ of ‘religion’ in violation of the First and Fourteenth Amendments, especially with respect to drive-in services.” *Id.*

The district court acknowledged this Court’s decision, but somehow concluded that it has no relevance to the merits inquiry in this matter. [May 4, 2020 Memo. Op. & Order, R.46, PageID#834]. This, respectfully, ignores not only the reasoning of *Maryville Baptist*, but also its bottom-line holding. Taking each in turn, the district court’s rationale for refusing to issue a preliminary injunction cannot coexist with this Court’s opinion in *Maryville Baptist*.

Two examples make this point. Whereas the district court concluded that the Governor’s order does not “have religion within its cross-hairs” [*id.*], this Court concluded that “[t]he Governor’s orders have several potential hallmarks of discrimination,” *Maryville Baptist*, 2020 WL 2111316, at *3. And whereas the district court concluded that Governor Beshear could ban in-person religious gatherings because “they are not *life*-sustaining in the physical sense,” [R.46, PageID#832], the

Court questioned any distinction between “life-sustaining” and “soul-sustaining” activities so long as, during the latter, “groups adhere to all the public health guidelines required of essential services,” *see Maryville Baptist*, 2020 WL 2111316, at *3.

The district court’s conclusion on the merits also is irreconcilable with this Court’s holding in *Maryville Baptist*. The district court determined that the Appellants “have not shown a likelihood of success on [the] merits of their First Amendment claim.” [R.46, PageID#834]. But this Court has already held that a Free Exercise claim in this context is “likely” to succeed. *See Maryville Baptist*, 2020 WL 2111316, at *3. The district court was not at liberty to conclude otherwise.

II. The remaining injunction factors favor the Appellants.

This Court has already concluded that the three remaining injunction factors favor Kentuckians who desire to attend drive-in worship services:

As for harm to the claimants, the prohibition on attending *any* worship service this Sunday and the Sundays through May 20 assuredly inflicts irreparable harm. As for harm to others, an injunction appropriately permits religious services with the same risk-minimizing precautions as similar secular activities, and permits the Governor to enforce social-distancing rules in both settings. As for the public interest, treatment of similarly situated entities in comparable ways

serves public health interests at the same time it preserves bedrock free-exercise guarantees.

Id. at *4 (emphasis added) (internal citation omitted). This reasoning applies with equal force to those who, like the Appellants, desire to attend in-person worship services while following social-distancing guidelines.

Critically, the reasons that this Court declined to extend its injunction in *Maryville Baptist* to in-person worship services no longer exist. In *Maryville Baptist*, the Court urged the parties to “consider acceptable alternatives” to Governor Beshear’s orders as written, *id.* at *5, yet yesterday Governor Beshear affirmed his intent not to change his orders until May 20—two Sundays from now. *See Maryville District Court*, R.29, PageID##400–01.

The Court’s decision in *Maryville Baptist* also envisaged that Governor Beshear would get the opportunity to address the “potential hallmarks of discrimination” in his administration’s orders. *See Maryville Baptist*, 2020 WL 2111316, *4 (“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 the same.” (emphasis added)). Providing the Governor with this opportunity made sense because he had not filed a

merits brief in the *Maryville* District Court matter before the appeal. Yet, since last Saturday, Governor Beshear has had that opportunity and has offered nothing substantive in response.

“Any government that has made the grave decision to suspend the liberties of a free people during a health emergency should *welcome the opportunity* to demonstrate—both to its citizens and to the courts—that its chosen measures are absolutely necessary to combat a threat of overwhelming severity.” *In re Salon a La Mode*, __ S.W.3d __, 2020 WL 2125844 (Tex. May 5, 2020) (Blacklock, J., concurring in the denial of the petition for writ of mandamus) (emphasis added). Governor Beshear should be eager to tell anyone who will listen why his “orders permit people who practice social distancing and good hygiene in one place but not another.” *See Maryville Baptist*, 2020 WL 2111316, at *4.

The Court’s partial injunction in *Maryville Baptist* gave Governor Beshear that opportunity, but he didn’t take it. Most notably, this Court’s decision asked several questions of Governor Beshear:

- “Why can someone safely walk down a grocery store aisle but not a pew?”
- “[W]hy can someone safely interact with a brave deliverywoman but not with a stoic minister?”

- Why has Governor Beshear “refus[ed] to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the same”?

Maryville Baptist, 2020 WL 2111316, at *4.

Governor Beshear still “has no good answers.” *Id.* Although the Governor has not filed anything in this Court, a recent filing in the *Maryville Baptist* district court tells the Court all it needs to know. In a 30-page brief filed yesterday before the *Maryville Baptist* district court, Governor Beshear proceeded almost as if this Court’s decision never issued. *See Maryville District Court*, R.31, PageID##406–34.³ Governor Beshear’s brief only mentions this Court’s decision in passing, never directly addressing the “potential hallmarks of discrimination” in his administration’s orders.

The most that Governor Beshear does is marshal two sources as “preliminary evidence” that “mass gatherings present a particular risk for the spread of disease, as compared to transitory encounters.” *Id.* PageID#430. These sources in no way endorse the kind of line-drawing

³ Most telling is how Governor Beshear framed his argument, telling the district court that “[n]othing has changed” since it denied a temporary restraining order. *Maryville District Court*, R.31, PageID#422.

that Governor Beshear engages in, where “typical office environments” can continue operating but religious services cannot. So even assuming that this “preliminary evidence” were to pan out, Governor Beshear still has not addressed why he “refus[es] to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the same.” *Maryville Baptist*, 2020 WL 211316, at *4. That is to say, Governor Beshear’s “preliminary evidence” in no way justifies the religious discrimination inherent in his administration’s orders.

Still worse, Governor Beshear’s brief makes assertion after assertion that is directly contrary to *Maryville Baptist*. He claims that his March 19 order “does not provide any exemptions at all.” *Maryville District Court*, R.31, PageID#426. “But that is word play,” as the Court already explained. *Maryville Baptist*, 2020 WL 211316, at *3. The Governor also argues that his March 19 order only “targets any intent to gather in groups.” *Maryville District Court*, R.31, PageID#426. But the Court has squarely held that the Beshear administration’s orders “permit uninterrupted functioning of ‘typical office environments,’ which presumably includes business meetings.” *Maryville Baptist*, 2020 WL

2111316, at *2 (internal citation omitted). By all indications, Governor Beshear is more interested in re-litigating the issues than in explaining why his orders are written as they are.⁴

The closest that Governor Beshear’s brief comes to addressing the “potential hallmarks of discrimination” in his orders is his argument that “faith-based gatherings . . . ‘are not *life*-sustaining in the physical sense,” but “food, medical, and transportation services, as well as places of employment” are, in his opinion, truly life-sustaining. *Maryville* District Court, R.31, PageID#428 (citation omitted). This distinction is belied by Governor Beshear’s decision “to open up faith-based events on May 20, and to permit other events before then such as car washes and dog grooming.” *Maryville Baptist*, 2020 WL 2111316, at *3. And the Court has already expressed doubt that “the reason that a group of people go to one place” matters in terms of spreading the virus. *Id.* at *4. Instead, “[i]f the problem is numbers, and risks that grow with greater numbers, then

⁴ Governor Beshear persists in arguing that the March 19 order does not prohibit drive-in worship services, but instead “encourag[es]” them. See *Maryville* District Court, R.31, PageID#424. “But that is not what the Governor’s orders say.” *Maryville Baptist*, 2020 WL 2111316, at *3.

there is a straightforward remedy: limit the number of people who can attend a service at one time.” *Id.*

CONCLUSION

Governor Beshear has had from Saturday until now to explain the justification for his ban on in-person faith-based gatherings that follow social-distancing guidelines. That’s more than enough time, especially when “no one can fairly doubt that time is of the essence.” *Id.* at *1. With each day that passes, the irreparable harm to the Appellants multiplies. The Court should grant their emergency motion for an injunction pending appeal.

Respectfully submitted,

/s Barry L. Dunn

BARRY L. DUNN

Deputy Attorney General

VICTOR B. MADDOX

Assistant Deputy Attorney General

CARMINE G. IACCARINO

Assistant Attorney General

OFFICE OF THE KENTUCKY

ATTORNEY GENERAL

700 Capital Ave., Suite 118

Frankfort, KY 40601

(502) 696-5300

Barry.Dunn@ky.gov

Attorney for Amicus Curiae,

Commonwealth of Kentucky

CERTIFICATE OF SERVICE

I certify that on May 7, 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.

/s Barry L. Dunn

Barry L. Dunn

*Attorney for Amicus Curiae,
Commonwealth of Kentucky*

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 2,595 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.

/s Barry L. Dunn
Barry L. Dunn
Attorney for Amicus Curiae
Commonwealth of Kentucky

Dated: May 7, 2020