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RIGHTS OF CHURCHES TO MEET FOR RELIGIOUS SERVICES

INTRODUCTION

After weeks of being closed due to the Coronavirus, many churches are considering and/or doing some form of in-person worship service.

Liberty Counsel provides information on the website ReOpenChurch.org. ReOpening Church should include appropriate measures of sanitization and appropriate social distancing between families. Churches may also consider reopening with a variety of service options, which may include a combination of: (1) reduced seating inside the church; (2) parking lot services for those who cannot get inside or do not want to participate inside the church; and (3) online service for those who are unable to attend or who are in a higher risk category due to age or predisposed health conditions.

The Trump administration guidelines for “Opening Up America Again” outline three phases for states to gradually ease their lockdowns. Phase 1 set the target date of May 1 to systematically reopen the nation, but some states may be able to reopen earlier. Phase 1 includes churches.

State and local executive orders have imposed restrictions that essentially command all churches (no matter the denomination or form of worship) how to worship – online versus in-person religious service, with some approving parking lot services and some not. The First Amendment to the U.S. Constitution prohibits government from prescribing the *form* or *manner* of worship.

The Greek word for church is “ekklesia,” which means “assembly.” The word “synagogue” is also derived from the Greek word, “sunagoge,” meaning “an assembly of people” or a “place of meeting.”

Hebrews 10:24-25 says, “Let us consider how to stimulate one another to love and good deeds, not forsaking our own assembling together, as is the habit of some, but encouraging one another; and all the more as you see the day drawing near.”

QUESTION PRESENTED

Are COVID-19 Executive Orders throughout the country purporting to declare churches “non-essential” and therefore subject to mandatory closure or other significant restrictions on the number of people who may attend a religious service or which direct the manner in which religious services must be conducted constitutional?

LEGAL DISCUSSION

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. Const. Amend. I. That prohibition is also applicable to state and local government authorities. In short, churches, pastors, and believers have a constitutionally protected right to gather together to worship God and to do so without government interference. Even in a time of crisis or disease, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the First Amendment does not evaporate. **The First Amendment is as applicable during a pandemic, or any other crisis, as it is every other day. There is no pause button on the Constitution.** The government interest is weighed against the indisputable First Amendment right, and any restriction on that right must be the least restrictive, which, in the case of the COVID-19 restrictions, means *at a minimum that the restrictions on religious gatherings cannot be stricter than on secular gatherings.*

The prohibition on religious assembly and church worship services under various government’s COVID-19 closure orders have been challenged as a violation of the First Amendment. In two of these cases, the federal district courts have stated unequivocally that the government has no right to close churches, even in times of a so-called pandemic. *See, e.g., On Fire Christian Center, Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020) (“*On Fire*”); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020) (“*First Baptist*”). A copy of the court opinions in *On Fire* may be found at <http://lc.org/042920OnFireOpinion.pdf>, and in *First Baptist* may be found at <http://lc.org/042920FirstBaptistTRO.pdf>. Both of these cases recognize that – even during COVID-19 – the government may not prohibit churches from hosting drive-in and parking lot worship services (*On Fire*) and may not prohibit churches from hosting in-person worship services on equal terms with other businesses and organizations that are permitted to remain open provided certain guidelines are practiced (*First Baptist*).

A. The Government May Not Prohibit Drive-In or Parking Lot Services.

In *On Fire*, a church in Louisville, Kentucky had been threatened with criminal sanctions for holding a drive-in or parking lot worship service **on Easter Sunday**. 2020 WL 1820249, *1. In fact, the court specifically stated that: “On Holy Thursday, an American mayor criminalized the communal celebration of Easter,” and noted that it was a sentence the “Court never expected to see outside the pages of a dystopian novel.” *Id.* The government there had stated that “if you are a church or you are a churchgoing member and you [attend worship on Easter], you’re in violation of the mandate from the governor,” and we will “use the police to deter and disburse drive-in religious gatherings.” *Id.* at *2. Yet, at the same time, citizens in Kentucky were permitted to park

in the parking lots of so-called “essential businesses” and could even go to “drive-thru” liquor stores. *Id.* at *6.

The court said this was a step the Constitution did not permit. Indeed, the court said that prohibiting churches from hosting – and members from attending – a worship service on Easter Sunday was unconstitutional “**beyond all reason.**” *Id.* at *2 (emphasis added). The reason the court held such actions unconstitutional was because – while prohibiting churches from hosting drive-in or parking lot worship services as “non-essential” – the government was permitting “a host of equally dangerous (or equally harmless) activities that Louisville has deemed ‘essential.’” *Id.* at *6. But, as the court said, “**if beer is ‘essential,’ so is Easter.**” *Id.* (emphasis added).

The court also noted that though the government may consider online and other forms of worship sufficient, “it is not the role of [the government] to tell religious believers what is and isn’t important to their religion.” *Id.* at *7. In fact, as the court noted, “many religions reinforce their faith and their bonds with the faithful through religious assemblies, many Christians take comfort and draw strength from Christ’s promise that “where two or three are gathered together in My name, there am I in the midst of them.” *Id.* at *8. Indeed,

the public has a profound interest in men and women of faith worshipping together [at church] in a manner consistent with their conscience. You do not have to share On Fire’s faith to believe that celebrating that faith – while gathered together in praise of the One they believe healed the sick and conquered death – will bring hope to many in need of hope.

Id. at *10 (emphasis added).

Put simply, when it comes to religious assembly and church worship, Believers and churches “owe no explanation for why they will gather together [on] Sunday to celebrate what they believe . . . The reason they will be there for each other is the reason they believe He was and is there for us.” *Id.*

Because of that simple truth, grounded in established constitutional law, the federal court in Kentucky enjoined the government from enforcing, threatening to enforce, and imposing criminal penalties on believers who merely attended church. *Id.* As such, the federal courts have recognized that the government may not prohibit drive-in or parking lot worship services.

B. The Government Must Treat In-Person Worship Services and Religious Assemblies the Same as Non-Religious Gatherings.

In *First Baptist*, the Governor of Kansas has imposed a prohibition on gatherings including more than 10 individuals, and specifically mentioned churches and religious gatherings. 2020 WL 1910021, *2. Yet, at the same time, the gathering of more than 10 individuals was permitted at certain non-religious businesses provided certain social distancing and personal hygiene practices were followed. *Id.* The federal court in Kansas stated that this, too, was unconstitutional as a violation of the First Amendment.

The court held that because the Governor’s Executive Orders had “carve[d] out broad exemptions for a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious gatherings,” the government had unconstitutionally discriminated against religion. *Id.* at *5. Indeed, by permitting similarly situated non-religious gatherings while prohibiting religious gatherings of like kind, “these executive orders expressly target religious gatherings on a broad scale, and are, therefore, not neutral.” *Id.* at *7. In fact, as the court noted, “churches and religious activities have been singled out . . . for stricter treatment.” *Id.*

As is true in churches and communities across the country, there is no evidence to suggest that “gatherings at churches pose unique health risks that mass gatherings at commercial or other facilities do not, or [that] the risks at religious gatherings cannot be adequately mitigated with safety protocols.” *Id.* Yet, the government in Kansas had targeted churches for discriminatory treatment. The federal court in Kansas said that was a violation of the First Amendment. Indeed, as the court stated, “**it goes without saying that the government could not lawfully expressly prohibit individuals from meeting together for religious services.**” *Id.* at *6 (emphasis added).

Thus, the court held that if the government permits certain non-religious and commercial gatherings to continue if certain safety, social distancing, and personal hygiene practices are followed, then it must treat religious gatherings and churches the same. This holding therefore recognizes that churches may also to continue to gather in-person on an equal basis with all other gatherings.

C. The United States Attorney General has also Stated That Churches Must Be Treated the Same as Non-Religious or Commercial Gatherings.

In a federal case in Mississippi, the United States Attorney General filed a statement of interest in which he confirmed the position of the United States that all churches and religious gatherings must be treated equally to non-religious or commercial gatherings, even during the COVID-19 period. A copy of the Attorney General’s Statement of Interest may be found at <https://www.justice.gov/opa/press-release/file/1268651/download>. In that Statement of Interest, the Attorney General stated that “[t]here is no pandemic exception . . . to the fundamental liberties the Constitution safeguards.” (Statement of Interest at 4 (emphasis added)). He also noted that if the government permits non-religious gatherings without numerical limitation, it must afford similar treatment to churches and religious gatherings. If the government permits non-religious gatherings with certain guidelines, the treatment must be similarly available to churches and religious gatherings.

D. The Kentucky Attorney General Concludes that Banning Worship Services is Unconstitutional.

In Liberty Counsel’s lawsuit against Governor Beshear, *Maryville Baptist Church v. Beshear*, the Kentucky Attorney General filed an [amicus brief](#) stating that the prohibitions on religious gatherings in Kentucky is a gross violation of the Constitution. A copy of that amicus brief may be found at <http://lc.org/042920KYAmicusMaryvilleBaptist.pdf>. In that amicus brief, the Attorney General states that “[t]he freedom to practice one’s faith is a defining feature of

American liberty [and] is **the promise of America.**” (Brief at 2 (emphasis added)). Pointedly, Attorney General Cameron stated that the “exclusion of religious organizations from the list of ‘life-sustaining’ activities is no small matter. Governor Beshear has publicly declared that attending worship service is not life-sustaining, while allowing liquor stores and retailers to continue operating. **It is mind-boggling discrimination.**” (Brief at 8 (emphasis added)). Indeed, “Governor Beshear does not get to decide whether a virtual gathering is sufficient for every person of every faith.” (*Id.*). “Singling out religious activity for disfavored treatment is the kind of palpable invasion of rights that even a pandemic cannot justify.” (*Id.* at 13).

Simply put, permitting worshippers to attend a service where everyone typically remains in the same spot throughout (all the while social distancing) will logically place fewer Kentuckians within six feet of one another than shopping at a grocery store, hardware store, or other retail businesses where they will continuously pass one another, stand in line together, or bump into one another as they turn the corner . . . **So what is it that permits Governor Beshear to treat religious services differently than professional offices, retail establishments, factories, libraries, or any number of other entities that remain open? The short answer is nothing.**

(*Id.* at 13-14 (emphasis added)).

The brief of the Kentucky Attorney General also states:

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 fig tree, [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 is the promise of America. It is one of the Nation’s “most audacious guarantees.” *On Fire Christian Ctr., Inc. v. Fischer*, Civ. A. No. 3:20-cv-264, 2020 WL 1820249, at *3 (W.D. Ky. Apr. 11, 2020).

(*Brief* at 2).

The Kentucky Attorney General’s Brief continues:

Nor does it lessen the discriminatory sting that Governor Beshear has recommended Kentuckians attend virtual services as an alternative. With respect, **the point of First Amendment is that Governor Beshear does not get to decide whether a virtual gathering is sufficient for every person of faith.** On this issue, Governor Beshear has gone remarkably far in dictating how Kentuckians should exercise their religion. At his Good Friday daily press conference, the Governor chastised people about what a true “test of faith” is. He proclaimed: “It is not a test of faith in whether you’re going to an in-person service, it’s a test of faith that you’re willing to sacrifice to protect your fellow man, your fellow woman, your fellow Kentuckian,

and your fellow American. ... Yet, the First Amendment exists precisely to protect beliefs of those who disagree.

(*Brief* at 8, fn.3) (emphasis added).

CONCLUSION

The government is not empowered to command under criminal or civil penalties religious worshippers *when* and *how* they should worship. Indeed, this sacred right preexisted government and therefore supersedes any dictates such government may issue. These rights are protected by both the Constitutions of the United States of America and every state constitution, and are also protected by federal and state laws.