# RELIGIOUS LIBERTY IN THE AGE OF COVID-19: KENTUCKY'S EXPERIENCE

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## I. INTRODUCTION

When I took office in December 2019 as Kentucky's 51st Attorney General, our then-newly formed team never anticipated being thrust into a debate about whether the Free Exercise Clause of the First Amendment protects Kentuckians' ability to gather in houses of worship during a once-in-a-century pandemic. However, the COVID-19 pandemic has forced this debate, as well as many other foundational questions upon Kentuckians. In so doing, COVID-19 has tested our Constitution in ways big and small.

Kentucky law makes the Attorney General the "chief law officer of the Commonwealth of Kentucky."[1] This means that, since COVID-19 arrived in the Commonwealth, it has been the Attorney General's responsibility to grapple with the difficult constitutional questions created by the pandemic and, where necessary, take legal action on behalf of Kentuckians. Our office, for example, has considered when the government can limit Kentuckians' right to travel.[2] We have also weighed whether the government can restrict Kentuckians' right to protest at the seat of government in Frankfort.[3] Furthermore, we have considered whether the government can prohibit in-person worship[4] and in-person religious schooling.[5]

There was no playbook for our office in answering these questions. Sometimes, after great deliberation, our office had legal concerns about a decision made by Governor Andy Beshear, whose Administration has led the Commonwealth's response to the virus. While these disputes led to litigation several times, there is no question that Governor Beshear has faced a formidable task in leading Kentuckians through these unprecedented times.

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[1] KY. REV. STAT. ANN. § 15.020 (West 2012).

[2] *See* W.O. v. Beshear, 459 F. Supp. 3d 833 (E.D. Ky. 2020).

[3] *See* Ramsek v. Beshear, 468 F. Supp. 3d 904 (E.D. Ky. 2020).

[4] *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (per curiam); Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020) (per curiam).

[5] *See* Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527 (2020) (Mem.); Commonwealth v. Beshear, 981 F.3d 505 (6th Cir. 2020); Danville Christian Acad., Inc. v. Beshear, No. 3:20-cv-75-GFVT, 2020 WL 6954650 (E.D. Ky. Nov. 25, 2020); Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, 984 F.3d 477 (6th Cir. 2020).

Even so, our office's work to protect Kentuckians' constitutional rights during the COVID-19 outbreak has reflected our mission to stand up for the rule of law in good times and in bad.

One of the pressing legal issues we confronted due to COVID-19 is what the Free Exercise Clause of the First Amendment means during a pandemic. More specifically, under what circumstances, if any, can the government prohibit in-person worship? In fact, during the early months of the COVID-19 crisis, Kentucky was ground zero for sorting out what religious liberty looks like during a state of emergency. Well before the Supreme Court of the United States settled this issue, district courts in Kentucky and the Sixth Circuit repeatedly considered the Free Exercise Clause with respect to the Beshear Administration's executive orders that closed houses of worship.[6] Ultimately, these courts upheld Kentuckians' right to gather in houses of worship as long as in-person activities that posed a similar risk of spreading the virus also continued.[7]

The legal reasoning that prevailed in these decisions from Kentucky is now the law of the land. Just before Thanksgiving 2020, the Supreme Court issued its decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, which enjoined two occupancy limits on houses of worship imposed by New York's Governor Andrew Cuomo.[8] At bottom, *Cuomo* held that the Free Exercise Clause governs COVID-19 restrictions because "even in a pandemic, the Constitution cannot be put away and forgotten."[9] The *Cuomo* decision was pathbreaking, but for Kentuckians it simply affirmed constitutional principles that had prevailed in the Commonwealth for many months. More than six months before *Cuomo*, the Sixth Circuit enjoined a Kentucky executive order closing houses of worship, holding that "[w]hile the law may take periodic naps during a pandemic, we will not let it sleep through one."[10] Thus, in many respects, judicial decisions from Kentucky applying the Free Exercise Clause to allow houses of worship to re-open foreshadowed the Supreme Court's eventual ruling in *Cuomo*.

What follows is the story of how these rulings from Kentucky showed—very early in the pandemic—how a state can protect its citizens' health and safety while still safeguarding religious liberty. These rulings laid the groundwork for the Supreme Court to ultimately hold that states cannot disfavor houses of worship, even during an emergency.

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[6] *See generally* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (per curiam); Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020) (per curiam).

[7] *See Maryville Baptist*, 957 F.3d at 610; *Roberts*, 958 F.3d at 409.

[8] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (per curiam).

[9] *Id.* at 68.

[10] *Roberts*, 958 F.3d at 414–15.

## II. RE-OPENING HOUSES OF WORSHIP

Most of the litigation concerning Governor Beshear's closure of Kentucky's houses of worship centered on two executive orders his Administration issued in March 2020.

On March 19, 2020, as part of its response to COVID-19, the Beshear Administration severely restricted Kentuckians' ability to gather in groups. This Executive Order—known as the Mass-Gathering Order—purported to prohibit "[a]ll mass gatherings."[11] (We say purported to prohibit because the Order contained many exceptions.) The Order defined a prohibited "mass gathering" as follows:

> Mass gatherings include 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.[12]

Thus, relevant here, the Beshear Administration forbade "faith-based" mass gatherings by name.

Although the Mass-Gathering Order's prohibition swept broadly, the Order also included many exceptions. For example, it allowed "shopping malls and centers," "typical office environments," "factories," and "retail or grocery stores," among others, to remain open as long as social-distancing and hygiene guidelines were followed.[13] As a result, under the Mass-Gathering Order, attending church was illegal, but all manner of other in-person activities continued across the Commonwealth subject to public-health guidelines.

Several days after prohibiting "mass gatherings," on March 25, 2020, Governor Beshear issued a companion executive order closing all organizations that he deemed not "life-sustaining."[14] The March 25th Order listed nearly twenty types of businesses and organizations that were "life-sustaining" and thus allowed to remain open.[15] Houses of worship were not among them, but law firms, accounting firms, real estate firms, hotels, banks, media services, and hardware stores were.[16] While houses of worship could not hold in-person worship services under the March 25th Order, religious

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[11] Ky. Exec. Order ECF No. 1-4 at 1 (Mar. 19, 2020).
[12] *Id.* (emphasis added).
[13] *Id.* at 1–2.
[14] Ky. Exec. Order ECF No. 1-7 at 2 (Mar. 25, 2020).
[15] *Id.* at 2–5.
[16] *Id.*

nonprofit organizations could provide "charitable and social services."[17] Thus, the Beshear Administration effectively determined what religious organizations could and could not do.

Taken together, these two executive orders meant that big-box stores, liquor stores, offices, and shopping malls, among many others, remained open in Kentucky subject to social-distancing and hygiene guidelines, while houses of worship were shuttered. Those who violated Governor Beshear's executive orders risked steep penalties.[18] At that time, a violation of an emergency executive order could be criminally prosecuted as a Class A misdemeanor.[19] Kentucky law also permits the warrantless arrest of violators.[20]

### *A. Drive-in Worship Services*

Governor Beshear's executive orders prompted a deluge of litigation. The first meaningful ruling came in a case brought by a Louisville church.[21] On Fire Christian Center sued Louisville's Mayor and the City of Louisville so that the church could hold a drive-in worship service in its parking lot on Easter Sunday.[22] On Fire described its planned drive-in worship service as one in which "cars will park six feet apart, and all congregants will remain in their cars with windows no more than half open for the entirety of the service" and "[t]he pastor will preach outside with speakers."[23] Thus, On Fire shifted from its typical in-person worship service to a service that in many ways resembled a drive-in movie theater.

Even with these limitations, On Fire feared the Mayor and the City would arrest those who attended its drive-in worship service.[24] On Fire's concerns proved to be well founded. The day before On Fire sued, Louisville's Mayor announced that "[w]e are not allowing churches to gather either in person or in any kind of drive-through capacity."[25] The Mayor viewed such conduct as "in violation of the mandate from the governor"[26]—a reference to Governor

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[17] *Id.* at 3.

[18] *See* KY. REV. STAT. ANN. § 39A.990 (West 2021); KY. REV. STAT. ANN. § 39A.190 (West 2021).

[19] KY. REV. STAT. ANN. § 39A.990 (West 2021). In early 2021, the Kentucky General Assembly amended this statute to remove potential criminal penalties. *See* 2021 Senate Bill 1, § 6 (amending KY. REV. STAT. ANN. § 39A.990).

[20] KY. REV. STAT. ANN. § 39A.190 (West 2021).

[21] *See* On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020).

[22] Plaintiff's Original Complaint at 1–2, On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (No. 3:20-cv-264-JRW).

[23] *Id.* at 6.

[24] *Id.* at 8.

[25] *Id.* at 7.

[26] *Id.*

Beshear's Mass-Gathering Order. In fact, Governor Beshear "fully support[ed]" local leaders—like Louisville's Mayor—who chose to prohibit drive-in worship services.[27]

On Fire sued on Good Friday and sought an emergency temporary restraining order to allow it to hold a drive-in worship service two days later on Easter.[28] The case was assigned to then-United States District Judge Justin Walker (now a judge on the United States Court of Appeals for the District of Columbia Circuit).[29] Roughly twenty-four hours later, Judge Walker entered a temporary restraining order that prohibited Louisville's Mayor and the City "from enforcing; attempting to enforce; threatening to enforce; or otherwise requiring compliance with any prohibition on drive-in church services at On Fire."[30]

Judge Walker's opinion—written under immense time pressure with Easter fast approaching—was among the first judicial decisions to consider the relationship between the First Amendment's Free Exercise Clause and COVID-19 restrictions.[31] His decision emphatically demonstrated the enduring protections for religious liberty enumerated in our Constitution. Judge Walker deemed the Mayor's and the City's decision to "criminalize[] the communal celebration of Easter" both "stunning" and "'beyond all reason,' unconstitutional."[32]

Judge Walker was careful to situate On Fire's lawsuit in reference to our nation's history—from the Pilgrims "sail[ing] west because west was where they would find what they wanted most, what they needed most" to how "in recent years, an expanding government has made the Free Exercise Clause more important than ever."[33] On the merits, he viewed On Fire's case as a straightforward application of the rule that the government cannot substantially burden sincerely held religious beliefs unless the government's policy is neutral and generally applicable.[34] Judge Walker determined that "Louisville has targeted religious worship by prohibiting drive-in worship services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs—including, for example, drive-through liquor stores."[35] In applying strict scrutiny, Judge Walker explained that Louisville's actions

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[27] Governor Andy Beshear, *Update on COVID-19 in Kentucky - 4.8.2020*, YOUTUBE (Apr. 8, 2020), https://www.youtube.com/watch?v=Rpyq5j-agRU [https://perma.cc/UAC7-VTEB].

[28] *On Fire Christian Ctr.*, 453 F. Supp. 3d at 909.

[29] *See id.* at 904.

[30] *Id.*

[31] *See id.* at 904–05.

[32] *Id.* at 905 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

[33] *Id.* at 905–07.

[34] *Id.* at 910 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993)).

[35] *Id.*

were underinclusive "because they don't prohibit a host of equally dangerous (or equally harmless) activities that Louisville has permitted on the basis that they are 'essential.'"[36] He summarized that "if beer is 'essential,' so is Easter."[37] The City's actions, Judge Walker continued, were likewise "overbroad because, at least in this early stage of the litigation, it appears likely that Louisville's interest in preventing churchgoers from spreading COVID-19 would be achieved by allowing churchgoers to congregate in their cars as On Fire proposes."[38]

Judge Walker's decision, it is fair to say, was a wake-up call for government officials imposing COVID-19 restrictions.[39] He did not simply defer to the judgment of elected leaders about what they consider necessary to fight the virus. Instead, Judge Walker rigorously applied longstanding Free Exercise Clause principles. At the same time, Judge Walker cautioned that his decision should not be "read to imply that the rules of the road in constitutional law remain rigidly fixed in the time of a national emergency."[40] In discussing this tension, he favorably cited the Supreme Court's century-old decision in *Jacobson v. Massachusetts*, which upheld a mandatory vaccination law during a smallpox epidemic.[41] Even so, Judge Walker reasoned that under *Jacobson* "constitutional rights still exist."[42] Thus, while he acknowledged that government officials possess leeway to act during an emergency, he determined the Mayor and the City had overstepped clear constitutional bounds in criminalizing the communal celebration of Easter.[43]

Due to the speed with which the *On Fire* matter unfolded, the Attorney General's office did not become involved in the litigation before Judge Walker's ruling. Yet the decision noted our office's position that "[a]s long as Kentuckians are permitted to drive through liquor stores, restaurants, and other businesses during the COVID-19 pandemic, the law requires that they must also be allowed to participate in drive-in church services, consistent with existing policies to stop the spread of COVID-19."[44] Our office reiterated this point the next week in an amicus brief filed in the *On Fire*

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[36] *Id.* at 911.

[37] *Id.*

[38] *Id.*

[39] *See id.*

[40] *Id.* at 912.

[41] *See* Jacobson v. Massachusetts, 197 U.S. 11, 25–32 (1905).

[42] *On Fire Christian Ctr.*, 453 F. Supp. 3d at 912.

[43] *Id.* at 912–13.

[44] *Id.* at 908 n.38 (quoting Chris Otts, *Fischer: Police Will Collect License Plates of Easter Churchgoers*, WDRB (Apr. 10, 2020), https://www.wdrb.com/in-depth/fischer-police-will-collect-license-plates-of-easter-churchgoers/article_795c708a-7b6d-11ea-8e48-d7138b31add7.html [https://perma.cc/RNZ9-JE9X]).

matter.[45] In our brief, we argued that Governor Beshear's ban on mass gatherings, as written, prohibits drive-in worship services.[46] On the merits, we argued the Mayor and the City had violated the First Amendment because they "continue[] to allow non-religious activities that pose the same risk of harm as drive-in church services do."[47]

Judge Walker never opined further on these issues because the *On Fire* matter settled a short time later.[48] On Fire agreed to take reasonable steps to follow social-distancing guidelines during its drive-in services,[49] while the Mayor and the City of Louisville agreed they would enforce social-distancing guidelines at On Fire's services just like with "other individuals and establishments."[50] The Mayor and the City also agreed to reduced penalties—ranging from educational meetings to fines—for any person who violated social-distancing protocols at On Fire's services.[51]

Although the *On Fire* matter settled less than two weeks after it was filed, Judge Walker's decision has had an outsized effect on how policymakers and courts—both in and outside Kentucky—have thought about the interplay between COVID-19 restrictions and constitutional protections. Throughout 2020, Judge Walker's *On Fire* decision was cited more than twenty times by federal courts across the country.[52] His decision made clear that, even during a pandemic, courts must continue to apply ordinary constitutional principles. While Judge Walker acknowledged that policymakers facing an emergency receive flexibility to act, his opinion refused to allow the right of free exercise to be cast aside.[53]

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[45] Amicus Curiae Brief of Attorney General Daniel Cameron at 1–3, On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (No. 3:20-cv-264-JRW).

[46] *Id.* Governor Beshear disputed this argument in an amicus brief filed in the *On Fire Christian Center* matter. *See* Governor Andy Beshear's Amicus Brief at 1–2, On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (No. 3:20-cv-264-JRW). The Sixth Circuit later rejected Governor Beshear's interpretation of the Mass-Gathering Order. Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 613 (6th Cir. 2020) (per curiam) ("In responding to the state and federal claims, the Governor denies that the ban applies to drive-in worship services, and the district court seemed to think so as well. But that is not what the Governor's orders say.").

[47] Amicus Curiae Brief of Attorney General Daniel Cameron at 6, On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (No. 3:20-cv-264-JRW).

[48] Ben Tobin, *Louisville Mayor, On Fire Christian Church Enter Agreement to End Drive-In Service Lawsuit*, COURIER J. (Apr. 21, 2020, 6:07 PM), https://www.courier-journal.com/story/news/2020/04/21/louisville-mayor-fire-christian-enter-agreement-end-lawsuit/2999818001/ [https://perma.cc/DX7H-AG6T].

[49] Agreed Order at 1–2, On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (No. 3:20-cv-264-JRW).

[50] *Id.* at 2.

[51] *Id.* at 3.

[52] *See On Fire Christian Ctr.*, 453 F. Supp. 3d at 901 (demonstrating 158 citing references during 2020, with 23 of those references being cases).

[53] *See id.* at 910.

### *B. In-Person Worship Services*

While parishioners at On Fire attended Easter service without incident, the same cannot be said for all Kentuckians. On Good Friday, a columnist with a large Kentucky newspaper urged Governor Beshear "to padlock the doors of the churches before members show up on Easter Sunday" or "to arrest the pastors and have police in the churches' parking lots on Easter morning telling those who show up that they can't get out of their cars and must leave."[54] Governor Beshear did not go so far, but he did take the unprecedented step of sending police officers to one church's parking lot on Easter Sunday to record the license plates of cars and threaten parishioners with criminal sanctions.[55]

These actions immediately prompted two lawsuits. The week after Easter, Maryville Baptist Church and its pastor sued Governor Beshear.[56] They alleged that, on Easter Sunday, the church held both a drive-in worship service and an in-person worship service.[57] In response, the Kentucky State Police came to Maryville Baptist Church to enforce Governor Beshear's executive orders.[58] The Kentucky State Police did so by putting notices on the cars in the church's parking lot advising that "[t]his vehicle's presence at this location indicates that its occupants are present at a mass gathering prohibited by orders of the Governor and the Cabinet for Health and Family Services."[59] The notices also stated that the vehicle's "license plate number has been recorded" and that Kentucky law "makes it a Class A misdemeanor to violate an emergency order."[60] Finally, the notices ordered vehicle occupants to self-quarantine for fourteen days, with a threat of "further enforcement measures" if they refused.[61] Maryville Baptist Church and its pastor averred that the Kentucky State Police put these notices on the cars in

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[54] Joseph Gerth, *Gerth: Arrest Pastors Who Hold Services in a Pandemic and Padlock Their Church Doors. Now*, COURIER J. (Apr. 10, 2020, 2:15 PM), https://www.courier-journal.com/story/news/local/joseph-gerth/2020/04/10/coronavirus-easter-close-churches-and-arrest-pastors-who-hold-service/5129045002/ [https://perma.cc/TMU9-X8PJ].

[55] *Maryville Baptist*, 957 F.3d at 611–12.

[56] Billy Kobin, *Kentucky Church That Held Controversial In-Person Easter Service Despite Warnings Sues Beshear*, COURIER J. (Apr. 18, 2020, 6:03 PM), https://www.courier-journal.com/story/news/local/2020/04/18/coronavirus-kentuckys-maryville-baptist-church-sues-gov-andy-beshear/5158611002/ [https://perma.cc/9N5U-73LW].

[57] Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages at 2, Maryville Baptist Church, Inc. v. Beshear, 455 F. Supp. 3d 342 (W.D. Ky. 2020) (No. 3:20-cv-278-DJH-RSE).

[58] *Id.* at 12–13.

[59] *Id.* at 14 (emphasis omitted).

[60] *Id.*

[61] *Id.* (emphasis omitted).

the church's parking lot without regard to whether the occupants were attending the church's in-person worship service or its drive-in worship service.[62]

Around the same time, several parishioners at Maryville Baptist Church filed a separate lawsuit based on these same facts (called the "*Roberts* matter" after the lead plaintiff).[63] In their verified complaint, the *Roberts* plaintiffs alleged that they attended in-person worship at Maryville Baptist Church on Easter Sunday and received the notices placed on their cars by the Kentucky State Police.[64] The plaintiffs further explained their "sincerely held religious belief that in-person church attendance was required, particularly on Easter Sunday."[65]

The *Maryville Baptist* and *Roberts* lawsuits were not immediately successful. A federal district judge in Louisville denied a temporary restraining order in the *Maryville Baptist* matter on April 18, 2020[66]—shortly before Sunday worship services the week after Easter. The court found that the *Maryville Baptist* plaintiffs were unlikely to succeed on the merits of their claims. Relevant here, the court reasoned it did not impermissibly burden the plaintiffs' free-exercise rights to close churches, while allowing liquor stores and big-box stores to remain open.[67] The court reasoned that shopping is "a singular and transitory experience," while a church service "is by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose."[68] Given this distinction, the court reasoned that a "more apt comparison" to in-person worship is "a restaurant or entertainment venue" or "a movie, concert, or sporting event," all of which "are temporarily prohibited" under Governor Beshear's executive orders.[69] The court thus found the Governor's Mass-Gathering Order to be neutral and generally applicable.[70]

The *Maryville Baptist* plaintiffs appealed and sought an emergency injunction pending appeal from the Sixth Circuit.[71] The Attorney General's office weighed in at this point with an amicus brief supporting the plaintiffs.[72]

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[62] *Id.*

[63] Verified Class Action Complaint for Declaratory and Injunctive Relief for Constitutional Violations at 7–9, Roberts v. Neace, 457 F. Supp. 3d 595 (E.D. Ky. 2020) (No. 2:20-cv-54-WOB-CJS).

[64] *Id.*

[65] *Id.* at 7–8.

[66] *Maryville Baptist*, 455 F. Supp. 3d at 344.

[67] *Id.* at 345.

[68] *Id.*

[69] *Id.*

[70] *See id.*

[71] Reply Brief of Plaintiffs-Appellants, Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (per curiam) (No. 20-5427).

[72] Brief of the Commonwealth of Kentucky as Amicus Curiae in Support of Appellants' Emergency

Our brief made two overarching points.[73] First, we explained how the Governor's executive orders were operating on the ground. We pointed out that, while it was illegal to gather in houses of worship, many other in-person activities in Kentucky continued. We urged: "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."[74] We noted the district court's contrary conclusion that the Governor's Mass-Gathering Order has no exceptions, but we argued that "[o]nly wordplay" allows one to reach that conclusion.[75] Our bottom line was: "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."[76]

Second, our amicus brief argued the Governor's ban on mass gatherings failed strict scrutiny because it was not narrowly tailored to serve the compelling interest of limiting the spread of COVID-19.[77] We argued that "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."[78] In making this point, we noted that "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 [Mass-Gathering] Order does, but to target the close contact itself."[79] In other words, we recognized the Governor's ability to restrict gatherings as necessary to fight the spread of COVID-19, but we argued the Governor could not single out religious gatherings for disfavored treatment as compared to other gatherings that pose a comparable risk of spreading the virus.

We filed our amicus brief on Friday, May 1, 2020. The next day, the Sixth Circuit issued a rare Saturday ruling, shortly before Sunday worship services at Maryville Baptist Church. The Sixth Circuit's weekend ruling

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Motion for an Injunction Pending Appeal, Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (per curiam) (No. 20-5427).

[73] We also noted the similarity between Governor Beshear's March 25th Order and Ohio's analogous Order, with the important exception that Ohio expressly identified "religious entities" as essential. *Id.* at 9.

[74] *Id.* at 5–6.

[75] *Id.* at 7.

[76] *Id.* at 8.

[77] *See id.* at 11–12.

[78] *Id.* at 12.

[79] *Id.* at 13 (emphasis omitted).

focused on the drive-in worship service held at Maryville Baptist Church on Easter Sunday. The panel recounted how the "Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act."[80] The panel concluded the Beshear Administration's executive orders "likely 'prohibit[] the free exercise' of 'religion' in violation of the First and Fourteenth Amendments, especially with respect to drive-in services."[81] In reaching this conclusion, the Sixth Circuit observed that "[t]he Governor's orders have several potential hallmarks of discrimination."[82] The panel recognized that "[t]he Governor insists at the outset that there are 'no exceptions at all'" in his executive orders.[83] Adopting language from our amicus brief, the Sixth Circuit determined that this argument is "word play."[84] The Sixth Circuit then rejected the Governor's legal arguments by asking several unanswered questions:

> Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? 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.[85]

Finally, the Sixth Circuit emphasized that Maryville Baptist Church and its minister "do not seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services."[86]

Although the *Maryville Baptist* panel's analysis applied more broadly, the court only granted an injunction to allow drive-in worship services at Maryville Baptist Church.[87] As to in-person worship services, the court reasoned that "[i]n view of the fast-moving pace of this litigation and in view of the lack of additional input from the district court, whether of a fact-finding dimension or not, we are inclined not to extend the injunction to in-person services at this point."[88] Even so, the Sixth Circuit reiterated that "[t]he breadth of the ban on religious services [in Kentucky], together with a haven

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[80] Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th Cir. 2020) (per curiam).
[81] *Id.* at 614.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 615.
[86] *Id.*
[87] *Id.* at 616.
[88] *Id.*

for numerous secular exceptions, should give pause to anyone who prizes religious freedom."[89]

The *Maryville Baptist* decision was a decisive victory for religious exercise early in the pandemic. Like Judge Walker in *On Fire*, the *Maryville Baptist* court applied ordinary free-exercise principles and concluded that, even during an emergency, there are meaningful limits on the government's ability to substantially burden religious exercise.[90] Although *Maryville Baptist* did not extend its injunction to in-person worship, our office believed the principles announced there inescapably led to allowing in-person worship to start again as long as attendees followed social-distancing and hygiene guidelines. As we understood *Maryville Baptist*, its reasoning established that Governor Beshear's Mass-Gathering Order was not neutral and generally applicable, thus triggering strict scrutiny going forward.

Our office took this position several days later. We did this in two fora. On the Monday after the *Maryville Baptist* ruling, the district judge in the *Roberts* matter denied the plaintiffs' motion for a preliminary injunction, which sought to allow them to attend in-person worship services.[91] The court reasoned that "unless a law can be shown to have religion within its cross-hairs, either facially or in application, the fact that religious practices are impinged by it does not contravene the First Amendment."[92] Shortly after this ruling, the plaintiffs sought an emergency injunction pending appeal from the Sixth Circuit to allow them to attend in-person worship services the following Sunday, May 10, 2020.[93]

Our office filed an amicus brief to support that effort.[94] We viewed the matter as almost entirely controlled by the Sixth Circuit's days-old decision in *Maryville Baptist*. We argued that, in continuing to ban in-person worship, Governor Beshear had not "taken heed" of *Maryville Baptist*, but had "doubled down" and "chose[n] to re-litigate issues already rejected by [the Sixth Circuit] in a published decision."[95] We also emphasized that—following *Maryville Baptist*—the Governor had offered no reason not to extend its principles to allow in-person worship services to resume. We pointed out that "Governor Beshear has had from [the previous] Saturday

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[89] *Id.*

[90] *See id.*

[91] Roberts v. Neace, 457 F. Supp. 3d 595, 601 (E.D. Ky. 2020).

[92] *Id.*

[93] Reply Brief of Plaintiffs-Appellants Theodore J. Roberts, Randall Daniel, and Sally O'Boyle, Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020) (per curiam) (No. 20-5465).

[94] Brief of the Commonwealth of Kentucky as Amicus Curiae in Support of Appellants' Emergency Motion for an Injunction Pending Appeal, Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020) (per curiam) (No. 20-5465).

[95] *Id.* at 2–3.

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.'"[96]

Around the same time we filed our amicus brief in *Roberts*, our office joined another church's legal challenge to Governor Beshear's Mass-Gathering Order. This lawsuit—which was filed by Tabernacle Baptist Church in Nicholasville several days after the Sixth Circuit's *Maryville Baptist* decision—emphasized that the church "has a sincerely-held religious belief that its congregants are called by the Lord to begin, at this time, meeting in person in the sanctuary the Lord provided them for this purpose."[97] The church sought an emergency temporary restraining order to allow it to meet in-person.[98] Unlike the other lawsuits in which the Attorney General's office merely participated as an amicus, we moved to intervene as a plaintiff in the *Tabernacle Baptist* lawsuit on behalf of the Commonwealth[99] and sought immediate relief so that in-person worship could resume.[100] We chose this tack for several reasons, one of which was that, as the Attorney General's office, we could seek statewide relief on behalf of the Commonwealth rather than relief limited to Tabernacle Baptist Church.[101] Put differently, we wanted to ensure that if the court allowed in-person worship services to resume at Tabernacle Baptist, all houses of worship in the Commonwealth would benefit from such a ruling.

United States District Judge Gregory Van Tatenhove presided over the *Tabernacle Baptist* matter. On Friday, May 8, 2020, he held an emergency hearing in the matter and, later that day, entered a statewide temporary restraining order against Governor Beshear's Mass-Gathering Order as applied to in-person religious worship.[102] For reference, Judge Van Tatenhove took this step just six days after the *Maryville Baptist* decision. As

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[96] *Id.* at 14 (quoting Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 612 (6th Cir. 2020) (per curiam)).

[97] Plaintiff's Orginal Complaint at 2, Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

[98] Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order at 1, Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

[99] Commonwealth of Kentucky *ex rel.* Attorney General Daniel Cameron's Motion to Intervene and Memorandum of Law in Support, Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

[100] Commonwealth of Kentucky *ex rel.* Attorney General Daniel Cameron's Motion for Emergency Hearing and Temporary Restraining Order at 1–2, Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

[101] Transcript of Telephonic Motion Hearing Conference Before U.S. District Judge Gregory F. Van Tatenhove at 40–41, Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

[102] Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847, 856 (E.D. Ky. 2020).

a result of Judge Van Tatenhove's temporary restraining order, every house of worship in the Commonwealth could open its doors if it "adhere[d] to applicable social distancing and hygiene guidelines."[103]

Like Judge Walker's *On Fire* ruling and the Sixth Circuit's *Maryville Baptist* decision, Judge Van Tatenhove provided a reasoned opinion in *Tabernacle Baptist* on almost no notice. "It would be easy," the court explained, "to put [the Constitution] on the shelf in times like this, to be pulled down and dusted off when more convenient."[104] Yet for our Constitution to be "enduring," it "must be protected not only when it is easy but when it is hard."[105] Even so, Judge Van Tatenhove acknowledged the difficulty of "identifying precedent in unprecedented times."[106] In this regard, he discussed the Governor's reliance on *Jacobson v. Massachusetts* (the case discussed by Judge Walker in *On Fire*). During oral argument, the Governor urged that *Jacobson* gave him flexibility to act "even if that flexibility sometimes comes [at] the cost of individual liberties."[107] Judge Van Tatenhove responded that even though *Jacobson* "gives states considerable leeway in enacting measures during public health emergencies, . . . constitutional rights still exist" under *Jacobson*.[108]

On the merits, Judge Van Tatenhove leaned heavily into the Sixth Circuit's *Maryville Baptist* decision. As he put it, "*Maryville Baptist* does not decide this case, but it is indicative of what might come."[109] Following *Maryville Baptist*'s lead, Judge Van Tatenhove reasoned that "evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection."[110] Judge Van Tatenhove also adopted our office's position that statewide relief was justified. Relying on case law we cited,[111] he concluded that "the scope of

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[103] *Id.*

[104] *Id.*

[105] *Id.* at 850.

[106] *Id.* at 853–54.

[107] Telephonic Motion Hearing Conference, supra note 101, at 44.

[108] *Tabernacle Baptist*, 459 F. Supp. 3d at 854 (quoting On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901, 912–13 (W.D. Ky. 2020)).

[109] *Id.* at 855.

[110] *Id.*

[111] Transcript of Telephonic Motion Hearing Conference Before U.S. District Judge Gregory F. Van Tatenhove at 41, Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."[112]

In sum, less than one week after the Sixth Circuit ruled in *Maryville Baptist*, the *Tabernacle Baptist* litigation led to a statewide temporary restraining order allowing houses of worship across Kentucky to meet in-person if they adhered to social-distancing and hygiene guidelines. While the relief in *Maryville Baptist* was limited to the parties before the court, the *Tabernacle Baptist* ruling extended to every corner of the Commonwealth.[113] For this reason, the *Tabernacle Baptist* ruling was a crucial victory in the path to re-opening Kentucky's houses of worship, but even it was not the final word on the matter that week.

The next day, on Saturday, May 9, 2020, the Sixth Circuit issued another weekend ruling that extended its *Maryville Baptist* injunction to allow in-person worship services that followed social-distancing and hygiene guidelines.[114] The *Roberts v. Neace* decision largely tracked the *Maryville Baptist* decision. *Roberts* summed up that "[i]n the week since our last ruling, the Governor has not answered our concerns that the secular activities permitted by the Order pose the same public-health risks as the kinds of in-person worship barred by the Order."[115] In extending its injunction to allow in-person worship, the Sixth Circuit emphasized that "all [its] preliminary injunction does is allow people—often the same people—to seek spiritual relief subject to the same precautions as when they seek employment, groceries, laundry, firearms, and liquor."[116] The Governor's ban on mass gatherings, the Sixth Circuit emphasized, "cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment."[117]

The Sixth Circuit's *Roberts* decision, in our view, settled whether Governor Beshear's Mass-Gathering Order violated the Free Exercise Clause as applied to both drive-in worship services and in-person worship services. Governor Beshear apparently agreed (at least at first, as discussed below). Rather than seeking relief from the United States Supreme Court, the next day (a Sunday), Governor Beshear notified the *Tabernacle Baptist* court that

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[112] *Tabernacle Baptist*, 459 F. Supp. 3d at 856 (quoting Rodgers v. Bryant, 942 F.3d 451, 458 (8th Cir. 2019)).

[113] *Id.*

[114] Roberts v. Neace, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam). In addition, the week following the Sixth Circuit's *Maryville Baptist* decision, the district judge handling the case entered an injunction pending appeal to allow in-person worship services at Maryville Baptist Church. Maryville Baptist Church, Inc. v. Beshear, 3:20-cv-278-DJH-RSE, 2020 WL 2393359, at *3–4 (W.D. Ky. May 8, 2020).

[115] *Roberts*, 958 F.3d at 416.

[116] *Id.*

[117] *Id.*

his Administration had entered a new executive order that, in his words, "expressly provides that the prohibition on mass gatherings shall not apply to in-person services of faith-based organizations."[118] That is, the Governor withdrew his Order as applied to houses of worship in the face of repeated injunctions against it. As a result, because of *Maryville Baptist*, *Tabernacle Baptist*, and *Roberts*, houses of worship in Kentucky were able to re-open their doors in early May.[119]

The quick sequence of rulings from *Maryville Baptist*, to *Tabernacle Baptist*, and ultimately to *Roberts*—all issued in one week's time—shows how seriously the judiciary takes the rule that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[120] As Judge Walker recognized in *On Fire*, when the First Amendment was ratified, "religious liberty was among the American experiment's most audacious guarantees."[121] That "audacious guarantee" remains intact today, in part because of the rulings ensuring Kentucky's houses of worship were treated at least as well as other activities that pose a similar risk of spreading COVID-19.

### *C. Re-opening Houses of Worship Outside Kentucky*

Kentucky's experience with in-person worship during the COVID-19 pandemic was not every state's experience. While houses of worship in the Commonwealth could re-open in early May 2020, those in other states spent the summer and fall of 2020 under severe restrictions because of executive orders similar to Governor Beshear's Mass-Gathering Order.[122] As in Kentucky, these orders prompted lawsuits, several of which made their way to the United States Supreme Court.[123] However, while the Sixth Circuit quickly ensured equal treatment for houses of worship, the Supreme Court did not take such a step until many months later.

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[118] Governor Andrew Beshear's and Secretary Eric Friedlander's Notice of Filing of Supplemental Authority at 1, Tabernacle Baptist Church of Nicholasville v. Beshear, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (No. 3:20-cv-33-GFVT).

[119] In early 2021, the Kentucky General Assembly adopted legislation over Governor Beshear's veto that, as a matter of state law, limited the Governor's ability to "[p]lace restrictions on the in-person meeting . . . [of] [p]laces of worship." *See* 2021 Senate Bill 1, § 2(2)(a) (amending KY. REV. STAT. ANN. § 39A.090); *see also id.* § 3(4)–(5) (amending KY. REV. STAT. ANN. § 39A.100).

[120] Elrod v. Burns, 427 U.S. 347, 373 (1976).

[121] *On Fire Christian Ctr.*, 453 F. Supp. 3d at 906.

[122] *See* Jesse McKinley & Liam Stack, *Cuomo Attacks Supreme Court, but Virus Ruling is Warning to Governors*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/11/26/nyregion/supreme-court-churches-religious-gatherings.html [https://perma.cc/L67H-5VGM].

[123] *See id.*

The first lawsuit the Supreme Court considered was *South Bay United Pentecostal Church v. Newsom*, which challenged California Governor Gavin Newsom's order limiting attendance at places of worship to twenty-five percent of building capacity or a maximum of one hundred people, whichever was lower.[124] That lawsuit arrived at the Supreme Court on an application for injunctive relief roughly two weeks after the Sixth Circuit's *Roberts* decision.

The Supreme Court declined to enjoin the California Governor's actions. Of the justices who voted to deny relief, only Chief Justice Roberts explained his reasoning in a concurring opinion that no other justice joined. He reasoned that "[a]lthough California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment."[125] This was so, the Chief Justice explained, because "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[126] In reaching this conclusion, the Chief Justice cited *Jacobson v. Massachusetts* for the proposition that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"[127] The Chief Justice concluded by emphasizing the unique circumstances under which *South Bay* came to the Court—"a party seek[ing] emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground."[128]

While the other justices who voted to deny relief in *South Bay* did not explain their reasoning, three of the dissenting justices did. Speaking for the dissenters, Justice Kavanaugh relied heavily on the Sixth Circuit's *Roberts* decision.[129] Quoting *Roberts*, Justice Kavanaugh concluded that "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.'"[130] Justice Kavanaugh also quoted some of the unanswered

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[124] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

[125] *Id.* (Roberts, C.J., concurring in denial of application for injunctive relief).

[126] *Id.* (Roberts, C.J., concurring in denial of application for injunctive relief).

[127] *Id.* (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).

[128] *Id.* at 1614 (Roberts, C.J., concurring in denial of application for injunctive relief).

[129] *Id.* at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (citing Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020) (per curiam)).

[130] *Id.* at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (quoting *Roberts*, 958 F.3d at 414).

questions the *Roberts* court asked of Governor Beshear: "Assuming all of the same precautions are taken, 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?"[131] Ultimately, Justice Kavanaugh determined that California "has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion."[132]

Although no other justice joined Chief Justice Roberts' *South Bay* opinion, many courts adopted the reasoning from his concurrence. One law professor calculated that, over the next several months, "114 cases have cited the Chief's concurrence" and "only one of those case[s] has negatively referenced the opinion."[133] Put simply, the Chief Justice's *South Bay* concurrence immediately became a favored precedent for state executives seeking judicial deference regarding COVID-19 restrictions that curtailed constitutional rights. In fact, Governor Beshear tried to use the Chief Justice's *South Bay* concurrence as a basis to lift the injunction against his Mass-Gathering Order.[134]

This effort never succeeded. Several months after *South Bay*, the Sixth Circuit held that *Maryville Baptist* and *Roberts* were "each still binding in the circuit."[135] However, other courts agreed with the Chief Justice's reasoning from *South Bay*. For example, shortly after *South Bay*, the Seventh Circuit upheld Illinois's restrictions on houses of worship, explaining that "[w]e line up with Chief Justice Roberts."[136]

The Supreme Court followed up *South Bay* with *Calvary Chapel Dayton Valley v. Sisolak*.[137] In that case, Nevada's Governor ordered that houses of

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[131] *Id.* (Kavanaugh, J., dissenting from denial of application for injunctive relief) (quoting *Roberts*, 958 F.3d at 414).

[132] *Id.* (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[133] Josh Blackman, *The Chief Justice's Unexpected Super Precedent from the Shadow Docket*, VOLOKH CONSPIRACY (Nov. 17, 2020, 2:04 PM), https://reason.com/volokh/2020/11/17/the-chief-justices-unexpected-super-precedent-from-the-shadow-docket/ [https://perma.cc/4NVK-76RZ].

[134] Motion to Dissolve the Preliminary Injunction and Injunction Pending Appeal and Notice of Supplemental Authority at 1, Maryville Baptist Church, Inc. v. Beshear, 455 F. Supp. 3d 342 (W.D. Ky. 2020) (No. 3:20-cv-278-DJH-RSE) (arguing that "[t]he Supreme Court has issued intervening law clarifying that enjoining the Mass-Gathering Order was improper").

[135] *Maryville Baptist*, 977 F.3d at 563. The Sixth Circuit did note that Governor Beshear could press his *South Bay* argument on remand if he so chose. *Id.* at 566.

[136] Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020).

[137] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020). Later in the life of this case, our office led a nineteen-state amicus brief in support of the Nevada church in the Supreme Court. Amicus Brief of Kentucky, *et al.* as Amicus Curiae in Support of the Petitioner, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (No. 20-639).

worship could not admit more than fifty persons.[138] By contrast, Nevada permitted its casinos to admit fifty percent of their building capacities, which "mean[t] that thousands of patrons" could enter "to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance."[139] A Nevada church sought injunctive relief from the Supreme Court, which the Court denied by a 5–4 vote without comment.[140] The dissenters, however, explained their views, with separate dissents from Justices Alito, Gorsuch, and Kavanaugh.

Justice Alito's dissent made a compelling point about the role of courts during a crisis like the COVID-19 outbreak. Justice Alito summarized that "[f]or months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion."[141] Justice Alito viewed the states' initial response to COVID-19 as "understandable" because "[a]t the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules."[142] That said, as time passes, the judiciary must expect more from the states in tailoring their COVID-19 restrictions. As Justice Alito put it, "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."[143]

This line of thinking parallels our office's approach to Governor Beshear's Mass-Gathering Order. After the Order had been in place for several weeks, our office opposed the Louisville Mayor's use of it to prevent drive-in worship services.[144] And two or so weeks later, our office publicly asked Governor Beshear to rescind his Mass-Gathering Order to allow houses of worship to re-open for in-person services that follow social-distancing and hygiene protocols. At that time, our office noted that we had been "patient in light of this pandemic" given the "difficult task" facing Governor Beshear and other policymakers.[145] Even so, we emphasized that "[t]he Constitution does not disappear in the midst of a pandemic or any situation."[146] As

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[138] *Calvary Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting from denial of application for injunctive relief).

[139] *Id.* at 2603–04 (Alito, J., dissenting from denial of application for injunctive relief).

[140] *Id.* at 2603.

[141] *Id.* at 2604–05 (Alito, J., dissenting from denial of application for injunctive relief).

[142] *Id.* at 2605 (Alito, J., dissenting from denial of application for injunctive relief).

[143] *Id.* (Alito, J., dissenting from denial of application for injunctive relief).

[144] On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901, 908 n.38 (W.D. Ky. 2020).

[145] *Apr. 28, 2020 Press Conference*, FACEBOOK, https://www.facebook.com/lex18/videos/266101788119387/ [https://perma.cc/Y4ZY-5J8E] (last visited Jan. 12, 2021).

[146] *Id.*

summarized above, the judiciary immediately responded. Four days after we called on Governor Beshear to allow in-person worship services, the Sixth Circuit decided *Maryville Baptist*. Six days later, Judge Van Tatenhove entered a statewide temporary restraining order in *Tabernacle Baptist*. Finally, one day after that, the Sixth Circuit decided *Roberts*. As this sequence of events shows, our office gave Governor Beshear latitude to act after the pandemic hit, but as time passed, we brought to bear the clear dictates of the Free Exercise Clause.

After *South Bay* and *Calvary Chapel*, houses of worship continued to seek relief from the Supreme Court. This ultimately led to the Supreme Court's landmark decision in *Cuomo*, handed down on November 25, 2020—more than six months after the Sixth Circuit decided *Roberts*. *Cuomo* concerned ten and twenty-five person occupancy limits on houses of worship imposed by New York's Governor.[147] The Supreme Court enjoined these restrictions throughout the case by a 5–4 vote. The Court held that "[t]he applicants have made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion" under the Free Exercise Clause.[148] Relevant here, the Court so concluded because New York's regulations "cannot be viewed as neutral[,]" as "they single out houses of worship for especially harsh treatment."[149] In this regard, the Court emphasized New York's comparably lesser restrictions on "acupuncture facilities, camp grounds, [and] garages" as well as "plants manufacturing chemicals and microelectronics and all transportation facilities."[150] To the Court, "[t]hese categorizations lead to troubling results."[151] For example, a "large store in Brooklyn" could "literally have hundreds of people shopping there on any given day," while "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service."[152] For these reasons, the Supreme Court applied strict scrutiny to review New York's restrictions, which they failed to meet.[153]

In enjoining New York's capacity restrictions, the *Cuomo* majority did not once mention *Jacobson v. Massachusetts*—the case that Governor Beshear and other state executives had relied on so heavily to justify their COVID-19 restrictions.[154] True, the Court acknowledged in *Cuomo* the

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147 Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 65 (2020) (per curiam).
148 *Id.* at 66 (quoting Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 533 (1993)).
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.* at 67 (citation omitted).
153 *Id.*
154 *Id.*

obvious point that "[m]embers of this Court are not public health experts" and accordingly reasoned that courts "should respect the judgment of those with special expertise and responsibility in this area."[155] However, the *Cuomo* decision made clear that "even in a pandemic, the Constitution cannot be put away and forgotten."[156] This echoes the Sixth Circuit's earlier conclusion in *Maryville Baptist* that "[w]hile the law may take periodic naps during a pandemic, we will not let it sleep through one."[157] *Cuomo* thus held that courts must closely review COVID-19 restrictions if they affect religious liberty.[158]

In his concurrence in *Cuomo*, Justice Gorsuch explained why, in his view, the Court did not give *Jacobson* any weight. To Justice Gorsuch, "*Jacobson* hardly supports cutting the Constitution loose during a pandemic" because it "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction."[159] In making this point, Justice Gorsuch pointed out that "[t]ellingly[,] no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic."[160] Even though no other justice joined Justice Gorsuch's discussion of *Jacobson*, there can be little doubt that, going forward, *Jacobson* has no purchase in a case involving religious liberty.

Stepping back, *Cuomo* will no doubt stand the test of time as a towering authority about the unbreakable strength of the Free Exercise Clause. Unmistakable from *Cuomo* is the rule that, even during an emergency, the judiciary must carefully scrutinize restrictions that affect religious freedom. *Cuomo* decisively rejected the argument that the Constitution allows policymakers to impose months-long infringements on free exercise rights that ordinarily would be unconstitutional. Before COVID-19, it would have been unthinkable for a state to close or impose significant capacity restrictions on houses of worship while leaving many secular venues open with lesser restrictions. The take-home point from *Cuomo* is that such a paradigm remains improper even as we battle COVID-19. As Justice

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[155] *Id.* at 68.

[156] *Id.*

[157] *Maryville Baptist*, 957 F.3d at 615.

[158] *Cuomo*, 141 S. Ct. at 68 ("The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.").

[159] *Id.* at 70 (Gorsuch, J., concurring).

[160] *Id.* at 71 (Gorsuch, J., concurring).

Gorsuch put it, after *Cuomo*, "courts must resume applying the Free Exercise Clause."[161]

While *Cuomo* quickly reverberated in some of the states with severe restrictions on houses of worship,[162] its effect in the Commonwealth was far more limited. That was because *Cuomo* built on legal principles that had prevailed in the Commonwealth for many months. The mode of analysis in *Cuomo* bears many similarities to the reasoning from *Maryville Baptist* and *Roberts*. In particular, the Supreme Court's emphasis on the "troubling results" created by the New York Governor's "categorizations" pairs well with the Sixth Circuit's discussion of Governor Beshear's inability to offer a satisfactory answer "for refusing 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."[163] In fact, as noted above, three of the justices who eventually comprised the *Cuomo* majority joined the *South Bay* dissent that extensively quoted from *Roberts*.[164] The point here is that, in many ways, the rulings in *Maryville Baptist* and *Roberts* paved the way for the Supreme Court to establish the law of the land in *Cuomo*. Put differently, for Kentuckians, *Cuomo* simply extended the religious freedom they had experienced for many months to the rest of the United States.

## III. CONCLUSION

Although the full effects of *On Fire*, *Maryville Baptist*, *Tabernacle Baptist*, and *Roberts*, as affirmed by *Cuomo*, will not soon be realized, there are two immediate takeaways from our office's efforts to ensure houses of worship were treated in accordance with the Free Exercise Clause during the COVID-19 pandemic.

First is the importance of courts "say[ing] what the law is"[165] in times of crisis. From Judge Walker's *On Fire* decision early in the pandemic, to the Sixth Circuit's back-to-back Saturday rulings, to Judge Van Tatenhove's statewide ruling in *Tabernacle Baptist*, and finally to the Supreme Court's definitive decision in *Cuomo*, the judiciary has zealously guarded our Constitution in these unprecedented times. Moreover, these judges undertook

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[161] *Id.* at 70 (Gorsuch, J., concurring).

[162] *See* Agudath Isr. v. Cuomo, 983 F.3d 620 (2d Cir. 2020); Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (Mem.).

[163] *Compare Cuomo*, 141 S. Ct. at 66–67, *with* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 615 (6th Cir. 2020) (per curiam).

[164] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614–15 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[165] Marbury v. Madison, 1 Cranch 137, 177 (1803).

this task on remarkably short timelines. Recall that Judge Walker issued his opinion in *On Fire* in roughly twenty-four hours. The Sixth Circuit issued its weekend rulings in *Maryville Baptist* and *Roberts* on tight turnarounds just before Sunday worship services. Judge Van Tatenhove likewise worked with extraordinary speed in *Tabernacle Baptist*. Even more remarkably, these judicial decisions were not just summary orders issued with no explanation, but reasoned decisions with clear rules for policymakers to follow.

That is not to say, to quote Justice Gorsuch in *Cuomo*, that the judiciary should never indulge the "impulse to stay out of the way in times of crisis."[166] As Justice Gorsuch explained, such an impulse "may be understandable or even admirable in [certain] circumstances."[167] However, when enumerated constitutional rights like religious liberty are at stake, the Constitution cannot yield.

One other upshot from our office's efforts is the importance of Kentucky's constitutional design—namely, having an Attorney General who does not report to the Governor and who is empowered to represent the people's interests. Kentucky's Attorney General is—as the Supreme Court of Kentucky has put it—the "attorney for the people of the State of Kentucky."[168] Under Kentucky law, "the source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people."[169]

During the COVID-19 pandemic, this duty required our office to review every executive order issued by Governor Beshear's Administration in real time to determine how the directive measured up against applicable law, be it the federal Constitution, Kentucky's Constitution, or Kentucky law. After study and much reflection, this process ultimately led to several legal challenges to Governor Beshear's executive orders. While our office prevailed in the litigation discussed in this Article, not every result was favorable.[170] The point, however, is not our office's or Governor Beshear's win-loss record, but that our office—along with countless Kentuckians—served as an important check on executive power. More to the point, the wisdom of empowering the Attorney General's office to represent Kentuckians' interests in court apart from the Governor was borne out during the COVID-19 pandemic.

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[166] *Cuomo*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

[167] *Id.* (Gorsuch, J., concurring).

[168] Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d 152, 173 (Ky. 2009) (citation omitted).

[169] Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin, 498 S.W.3d 355, 363 (Ky. 2016) (citation omitted).

[170] *See* Beshear v. Acree, 615 S.W.3d 780 (Ky. 2020).