

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION**

**TABERNACLE BAPTIST CHURCH, INC.
OF NICHOLASVILLE, KENTUCKY**

Plaintiff,

v.

**ANDREW BESHEAR, in his official
capacity as Governor of the Commonwealth
of Kentucky,**

and

**ERIC FRIEDLANDER, in his official
capacity as Acting Secretary of the Cabinet
for Health and Family Services,**

Defendants.

Civil Action No. _____

PLAINTIFF’S ORIGINAL COMPLAINT

Plaintiff Tabernacle Baptist Church, Inc. of Nicholasville, Kentucky (“Tabernacle” or the “Church”) brings this action to stop Governor Andrew Beshear and Acting Secretary of the Cabinet for Health and Family Services Eric Friedlander (collectively, “Defendants”) from violating its rights under the First Amendment to the United States Constitution, Section 1 and Section 5 of the Kentucky Constitution, and Kentucky’s Religious Freedom Restoration Act, and alleges as follows:

I. Preliminary Statement

1. Christianity requires an assembled church. For two millennia, with rare exception, Christians have met together in-person. The bodily assembly of the church, rooted in the scriptural command that believers “not forsak[e] the assembling of ourselves together” (Hebrews 10:25

KJV), is of particular importance and significance for Christians generally and Tabernacle particularly.

2. Unfortunately, the assembly of Christian believers at this time poses unique challenges because of the COVID-19 pandemic that has spread throughout the United States. Still, Tabernacle remains committed to physically gathering for regular services in a manner consistent with social distancing precautions to ensure the safety and well-being of congregants.

3. Tabernacle stopped holding in-person services in its sanctuary after a March 19, 2020 Order from Defendant Eric Friedlander, Acting Secretary of the Cabinet for Health and Family Services, that prohibited certain mass gatherings, including church gatherings. Thereafter, Tabernacle held services online via Facebook each Sunday and Wednesday from March 22 through April 19, 2020.

4. On April 22, 2020, the Church conducted its first drive-in service, for which it broadcast the service via a short-range FM radio transmitter that could reach cars in its parking lot as well as online via Facebook. The Church conducted similar drive-in services on the following dates: April 26, April 29, and May 3, 2020.

5. Tabernacle has a sincerely-held religious belief that online services and drive-in services do not meet the Lord's requirement that the church meet together in person for corporate worship. Tabernacle also believes that online and drive-in church services are not substitutes for real in-person corporate worship.

6. 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.

II. Parties

7. Tabernacle Baptist Church, Inc. of Nicholasville, Kentucky, incorporated in 1982, is a Christian church and religious non-profit organization, the principal office of which is located at 2420 Lexington Road, Nicholasville, Kentucky 40356.

8. Defendant Andrew Beshear is and was at all times relevant hereto the duly-elected Governor of the Commonwealth of Kentucky and as such was responsible for the promulgation and implementation of the policies, procedures, and practices of the Commonwealth of Kentucky. He is named as a defendant in this action in his official capacity as Governor.

9. Defendant Eric Friedlander is and was at all times relevant hereto the Acting Secretary of the Cabinet for Health and Family Services. On March 19, 2020, he issued an Order prohibiting mass gatherings in the Commonwealth. He is named as a defendant in this action in his official capacity as Acting Secretary.

III. Jurisdiction and Venue

10. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 because Tabernacle alleges an imminent violation of its rights under the Constitution of the United States. It has supplemental jurisdiction over Tabernacle's state-law claims under 28 U.S.C. § 1367.

11. The Court may declare the legal rights and obligations of the parties in this action pursuant to 28 U.S.C. § 2201 because the action presents an actual controversy within the Court's jurisdiction.

12. Venue is proper in this judicial district under 28 U.S.C. § 1391(b). All Defendants are residents of and/or perform their official duties in this district. In addition, a substantial part of the events giving rise to the claims in this Complaint arose in this district because the prohibition

of Tabernacle’s midweek and Sunday services will be enforced in this district, because some or all of its members reside in this district, and because some or all of the actions of the Defendants that are the subject of this Complaint occurred in this district.

IV. Facts

A. Plaintiff Tabernacle Baptist Church

13. Tabernacle is “an independent, fundamental, Baptist church, independent of the world but dependent on the Word of God.” Tabernacle Baptist Church, *For the Love of Christ*, <http://www.tbc4u.com> (last accessed May 4, 2020). On a typical Sunday prior to the outbreak of COVID-19, Tabernacle had approximately 100 members and guests in attendance in a church sanctuary that seats approximately 400 people.

14. Dr. Lonnie Moore, the Church’s pastor, is the founder of the Church. *See* Tabernacle Baptist Church, *Staff*, <http://www.tbc4u.com/staff.html> (last accessed May 4, 2020).

B. The Significance of Gathering

15. For more than 2,000 years, Christians have gathered physically each Sunday throughout the year in observance of Christ’s resurrection from the dead on the first day of the week, and the physical gathering of the church is central to that celebration. Indeed, the Greek word translated as “church” in our English versions of the Christian scriptures is “ekklesia,” which literally means “assembly.” A.T. Robertson, *A GRAMMAR OF THE GREEK NEW TESTAMENT IN THE LIGHT OF HISTORICAL RESEARCH* (3d ed. 1919).

16. As with other communities of Christian faith around the country, Tabernacle believes that a central part of following Christ is worshipping together in the same physical space. Indeed, the Christian scriptures exhort believers in “not forsaking the assembling of ourselves together.” Hebrews 10:25 (KJV).

17. Tabernacle and its members have a sincerely held religious belief that physical, corporate gathering of believers each Sunday is a central element of religious worship commanded by the Lord. Tabernacle and its members desire to gather for a physical, corporate gathering of believers on Sunday, May 10, 2020, and on subsequent Sundays, and would do so but for those actions of the Defendants that are the subject of this Complaint.

C. Prohibition of Drive-In and In-Person Church Services

18. Together, Governor Beshear and Acting Secretary Friedlander have declared a blanket, statewide ban on religious worship gatherings within the Commonwealth. Violations of this ban are enforceable through the criminal laws of Kentucky, which render violations of the ban a misdemeanor crime punishable through fines and imprisonment. *See* Ky. Rev. Stat. §§ 39A.190; 39A.990.

19. On March 19, 2020, Acting Secretary Friedlander and the Cabinet for Health and Family Services, a branch of Governor Beshear’s administration, issued an order prohibiting mass gatherings due to the COVID-19 outbreak. The term “mass gatherings” was defined to 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.” Excluded from the definition of “mass gatherings” were “normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit,” as well as “typical office environments, factories, or retail or grocery stores *where large numbers of people are present*, but maintain appropriate social distancing.” (Emphasis added).

20. On March 25, 2020, Governor Beshear issued Executive Order 2020-257, which required organizations that are not “life-sustaining” to close. According to the order, religious

organizations are not “life-sustaining” organizations, except when they function as charities by providing “food, shelter, and social services.” Laundromats, accounting services, law firms, hardware stores, and many other entities count as life-sustaining.

21. Both Acting Secretary Friedlander’s March 19 and Governor Beshear’s March 25 orders were promulgated pursuant to authority under KRS Chapter 39A. Ky. Rev. Stat. § 39A.190 gives police officers authority to “arrest without a warrant any person violating or attempting to violate in the officer’s presence any order or administrative regulation made pursuant to” KRS Chapter 39A. Ky. Rev. Stat. § 39A.990 makes violating any order promulgated pursuant to KRS Chapter 39A a Class A misdemeanor. In Kentucky, a Class A misdemeanor is punishable by a fine of up to \$500 or up to twelve months’ imprisonment. *See* Ky. Rev. Stat. §§ 534.040(2)(a); 532.090(1).

22. On Easter Sunday (April 12, 2020), Maryville Baptist Church in Hillview, Kentucky held an Easter service in which some congregants parked their cars in the church’s parking lot and listened to a sermon over a loudspeaker. *See Maryville Baptist Church, Inc. v. Beshear*, --- F.3d ---, 2020 WL 2111316, at *1 (6th Cir. May 2, 2020). 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. *Id.* The officers recorded congregants’ license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction. *Id.* On information and belief, no similar actions by the Kentucky State Police were taken with regard to shoppers at local stores.

23. The exception in Governor Beshear’s order for “life-sustaining” businesses allows shopping malls, grocery stores, hardware stores, law firms, laundromats, liquor stores, and gun shops to continue to operate without fear of state police taking adverse action against participants

in such endeavors, so long as they follow social-distancing and other health-related precautions. Businesses allowed to operate (like retail stores, for instance) have no numerical limitations or other restrictions that would cap the number of people who can gather together indoors. Defendants have thus deemed it safe to walk down an aisle in a grocery store, but not an aisle between pews, and to interact with a deliverywoman, but not with a minister.

24. In short, Defendants have not imposed a generally-applicable law prohibiting significant numbers of individuals from congregating in indoor gatherings. Rather, Defendants have allowed indoor gatherings to occur in numerous, specifically-enumerated circumstances so long as social distancing precautions are observed.

D. Minimal COVID-19 Infections in Jessamine County

25. Tabernacle maintains a church sanctuary in Nicholasville, Kentucky, which is located in Jessamine County.

26. On March 6, 2020, Governor Beshear, in his official capacity as the Governor of Kentucky, signed Executive Order 2020-215, instituting a state of emergency due to the COVID-19 outbreak. Since that declaration, the Kentucky Department of Public Health has been tracking and reporting the incidence of COVID-19 infections on a county-by-county basis within the Commonwealth.

27. Unlike the urban areas of Kentucky, Jessamine County is a relatively rural area that has experienced minimal COVID-19 infections. According to the Department of Public Health website, Jessamine County has a population of approximately 54,637 residents and has, to date, reported only 40 confirmed cases of infection with COVID-19, none of which have resulted in death.

E. Tabernacle's Best Practices for In-Person Church Services

28. Defendants' statewide ban on religious worship services is a substantial burden on the religious exercise of Tabernacle and its members if they cannot meet for in-person corporate worship. For six weeks, since March 22, 2020, Tabernacle and its congregants have been unable to gather for religious worship in person in their sanctuary for fear of criminal prosecution despite their willingness to abide by social distancing precautions.

29. To address the challenges posed by the COVID-19 outbreak, Tabernacle is committed to physically gathering its congregants in person in its sanctuary in a manner consistent with social distancing precautions in order to ensure the safety and well-being of congregants. Specifically, Tabernacle will observe the following best practices put forward by the Centers for Disease Control and Prevention guidelines on mass gatherings (<https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html>):

- a. Require households to be at least six feet apart from other households at all times;
- b. Encourage all attendees to wear masks unless they have a health reason that prevents them from wearing a mask;
- c. Encourage all attendees to practice appropriate hygiene, including frequent hand washing, and ensure all attendees have access to hand sanitizer; and
- d. Regularly disinfect frequently touched objects and surfaces.

30. These precautions will provide strong protection for the health of the Church community and others by limiting potential for contact and thereby mitigating risks of disease transmission.

V. First Cause of Action
The Free Exercise Clause of the First Amendment to the U.S. Constitution

31. Paragraphs 1 through 30 are hereby incorporated as if set forth fully herein.

32. The First Amendment to the Constitution protects the “free exercise” of religion. Fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts . . . [such as the] freedom of worship and assembly.”). The Free Exercise Clause was incorporated against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

33. As the Supreme Court has noted, “a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

34. Defendants prohibit in-person religious services, under penalty of law, and have thus substantially burdened Plaintiff’s religious exercise.

35. “[T]he minimum requirement of neutrality is that a law not discriminate on its face.” *Id.* at 533.

36. Defendants’ restrictions have specifically and explicitly targeted in-person religious gatherings and people of faith and are thus not neutral on their face.

37. Relatedly, government action is not generally-applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect. *Id.* at 542–46.

38. Defendants’ prohibition of in-person church services in the name of social distancing is not generally-applicable. There are numerous business organizations and other entities that Defendants are not cracking down on where far more people come into closer contact with less oversight.

39. Laws and government actions that burden religious practice and are either not neutral or not generally-applicable must satisfy a compelling governmental interest and be narrowly tailored to achieve that end. *See id.* at 546.

40. Defendants’ mandate is not “narrowly tailored” because the ban on in-person gatherings for religious services is absolute, not accounting for services, like Plaintiff’s, where social distancing precautions are carefully adhered to, and thus satisfy the public health concerns to which the guidelines are directed.

41. Requiring Plaintiff to abstain from its religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates Plaintiff’s Constitutional right to free exercise of its religion.

VI. Second Cause of Action
The Freedom of Assembly Clause of the First Amendment to the U.S. Constitution

42. Paragraphs 1 through 41 are hereby incorporated as if set forth fully herein.

43. The First Amendment to the Constitution protects the “right of the people peaceably to assemble.” The Freedom of Assembly Clause was incorporated against the states in *De Jonge v. Oregon*, 299 U.S. 353 (1937).

44. The Supreme Court has long recognized that the First Amendment’s freedom of assembly includes religious assemblies. *See NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958). “Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment ‘Peaceably to assemble’ as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically.” *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (Douglas, J., concurring) (noting that while, historically, the right to assembly was considered part of the right to petition the government for a redress of grievances, the right to assembly has since become “equally fundamental” with the right to free speech and thus applies to “attending a church”).

45. “The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights.” *Whitney v. California*, 274 U.S. 357, 373 (1927). When a government practice restricts fundamental rights, it is subject to “strict scrutiny” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

46. By denying Plaintiff the ability to assemble via an in-person church service, Defendants are in violation of the Freedom of Assembly Clause. Defendants cannot meet the no-less-restrictive-alternative test. Social distancing precautions are appropriate to limit the spread of COVID-19. Imposing more-restrictive requirements that target only churches and their services is not the least restrictive means of achieving Defendants’ public safety goal.

47. Requiring Plaintiff to abstain from its religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates Plaintiff’s Constitutional right peaceably to assemble.

**VII. Third Cause of Action
Sections 1 and 5 of the Kentucky Constitution**

48. Paragraphs 1 through 47 are hereby incorporated as if set forth fully herein.

49. Sections 1 and 5 of the Kentucky Constitution provide the right to “worship” and the right to “religious freedom.” KY. CONST. §§ 1, 5.

50. In *Gingerich v. Commonwealth*, 382 S.W.3d 835, 839 (Ky. 2012), the Kentucky Supreme Court held that the free exercise of religion protections afforded by the Kentucky Constitution offer the same protection that the federal Constitution provides.

51. For the reasons stated in Section V, requiring Plaintiff to abstain from its religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates Plaintiff’s free exercise rights under the Kentucky Constitution as well.

**VIII. Fourth Cause of Action
Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350.**

52. Paragraphs 1 through 51 are hereby incorporated as if set forth fully herein.

53. The Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350 (“KRFRA”), states that “[g]overnment shall not substantially burden a person’s freedom of religion” unless the government “proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.” Ky. Rev. Stat. § 446.350.

54. In short, the KRFRA imposes strict scrutiny on all government actions that “substantially burden a person’s freedom of religion.” *Id.*

55. The KRFRA defines a “burden” as including “indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.” *Id.*

56. The KRFRA is “equivalent” to the federal Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb *et seq.* *Moorish Sci. Temple of Am., Inc. v. Thompson*, No. 2014-CA-001080-MR, 2016 WL 1403495, at *4 (Ky. App. Apr. 8, 2016). Like RFRA, the KRFRA “is a codification by the legislature of the strict scrutiny test applied in case law.” *Id.* Because the statutes are substantially similar, cases interpreting RFRA are instructive in interpreting the KRFRA.

57. RFRA broadly defines the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000bb–2(4) (citing 42 U.S.C. § 2000cc–5). In *Burwell v. Hobby Lobby Stores, Inc.*, the United States Supreme Court stated that the exercise of religion involves “not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reason.” 573 U.S. 682, 710 (2014) (citing *Employment Division v. Smith*, 494 U.S. 872, 877 (1990)).

58. A compelling interest includes “only those interests of the highest order.” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). And the least-restrictive-means standard is “exceptionally demanding.” *Hobby Lobby*, 573 U.S. at 728. To pass the least-restrictive-means test, the government must show “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion” by the religious objector. *Id.*

59. By denying Plaintiff the ability to hold an in-person church service, Defendants are in violation of the KRFRA. Assuming *arguendo* that Defendants have a compelling government interest in protecting public health and safety during a state of emergency, Defendants still cannot meet the least-restrictive-means test. Social distancing precautions are appropriate to limit the spread of COVID-19. Imposing more-restrictive requirements that target only churches and their services is not the least restrictive means of achieving Defendants’ public safety goal.

IX. Prayer for Relief

WHEREFORE, Plaintiff requests this Court enter an order:

- a. Declaring that Defendants have unlawfully burdened Plaintiff's religious free exercise rights in violation of the Free Exercise Clause of the First Amendment to the U.S. Constitution;
- b. Declaring that Defendants have unlawfully burdened Plaintiff's right to peaceably assemble in violation of the Freedom of Assembly Clause of the First Amendment to the U.S. Constitution;
- c. Declaring that Defendants have unlawfully burdened Plaintiff's religious free exercise rights in violation of Sections 1 and 5 of the Kentucky Constitution;
- d. Declaring that Defendants have unlawfully burdened Plaintiff's religious free exercise rights in violation of the Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350;
- e. Entering a temporary restraining order, temporarily enjoining, and permanently enjoining Defendants from prohibiting Plaintiff from physically gathering via an in-person church services in its sanctuary if conducted with appropriate social distancing practices;
- f. Awarding Plaintiff costs and reasonable attorneys' fees and expenses; and
- g. Granting Plaintiff all such other and further relief as the Court deems just and proper.

Dated: May 6, 2020

Respectfully submitted,

/s/ Joseph A. Bilby

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