

FILED
COURT OF APPEALS
SEP 25 2026

NICHOLAS R. LANZER
CLERK OF COURTS
WILLIAMS CO. OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

STATE OF OHIO

COURT OF APPEALS NO. {86}WM-25-003

APPELLEE

TRIAL COURT NO. CRB2400172

V.

CHRISTOPHER B. AVELL

APPELLANT

DECISION AND JUDGMENT

* * * * *

Robert W. Bohmer, for appellee.

Philip D. Williamson, Stephen D. Hartman, Jeremiah G. Dys,
and Bradley G. Hubbard, for appellant.

* * * * *

ZMUDA, J.

{¶ 1} Appellant, Christopher Avell, appeals the January 24, 2025 judgment of the Bryan Municipal Court sentencing him to 60 days in jail (suspended) with a \$200 fine and \$114 in costs following a conviction for knowingly violating Bryan's fire code under Bryan Municipal Code 1501.06(a), a misdemeanor of the first-degree.¹ For the reasons that follow, we reverse the trial court's judgment, vacate appellant's sentence, and

¹ Section 1501.06(a) states that "[n]o person shall knowingly violate any provision of this Code as adopted herein or any order issued pursuant thereto."

remand the matter to the trial court for consideration of whether the charge in this case violates appellant's religious rights under the Ohio and U.S. Constitutions.

I. Facts and Procedural History

A. Background

{¶ 2} The following facts are derived from the record and testimony in this case. In 2018, appellant Christopher Avell founded a non-denominational Christian church called Dad's Place of Bryan, Ohio ("Dad's Place"), where he serves as the pastor. In 2019, Dad's Place moved to its current location of the first floors of 216 and 226 South Main Street in the downtown area of Bryan, Ohio. Both addresses are located in one building. The building is older with a "mercantile" occupancy designation for the 216 address and an "assembly" occupancy designation for the 226 address. Only the 216 portion of the building has a second floor, which consists of two apartments. The second-floor apartments have a residential occupancy designation. At the time of this case, one apartment was rented by an unrelated tenant, and the other was rented to an onsite caretaker for the church. Relevant to this appeal, no portion of the building has automatic sprinklers.

{¶ 3} Since the church first opened in 2018, it offered overnight shelter "to anyone in the community who needs it." In 2023, Dad's Place formally began an overnight ministry and opened its doors to the public twenty-four hours a day, seven days a week. From 11:00 p.m. to 8:00 a.m. each night, Dad's Place operates a ministry called "Rest and Refresh in the Lord." During this time, anyone in need—homeless or not—is

welcome inside the church for prayer, fellowship, and rest. According to appellant, no one is required to leave absent a “biblically valid reason.”

{¶ 4} Between November 2023 and April 2024, the chief of Bryan’s fire department, Douglas Pool, conducted several inspections of Dad’s Place and reported 18 violations of Bryan’s fire code. Many of the violations were resolved as appellant “took immediate action” to address the violations. Appellant initially sought a preliminary injunction in federal court to enjoin the City’s enforcement against Dad’s Place. See *Dad’s Place of Bryan, Ohio v. City of Bryan*, N.D.Ohio no. 3:24-cv-00122-JZ (July 19, 2024).² Ultimately, in February 2024, Dad’s Place and the City entered an agreement in which the City agreed to stay all enforcement actions while Dad’s Place took measures to

² In July 2024, the U.S. District Court for the Northern District of Ohio denied Dad’s Place’s motion for a preliminary injunction. *Dad’s Place of Bryan, Ohio v. City of Bryan*, N.D.Ohio no. 3:24-cv-00122-JZ (July 19, 2024). Dad’s Place appealed and the U.S. Court of Appeals for the Sixth Circuit affirmed the trial court’s judgment. *Bryan v. City of Bryan*, 2024 U.S. App. LEXIS 22738 (Sept. 5, 2024 ca no. 24-3625).

Less than a month later, the City brought a civil case and preliminary-injunction motion against Dad’s Place in state court. The Williams County Court of Common Pleas granted the City’s motion for a preliminary injunction. In its analysis, the trial court determined that a rational basis test applied to Dad’s Place’s constitutional arguments, stating that “[u]nder the governing standard, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Fire Chief Douglas Pool, City of Bryan Fire Department v. Dad’s Place of Bryan, Ohio*, Williams C.P. No. 24CI100, 10-11 (Dec. 5, 2024) (Emphasis omitted.). This court reversed that decision, finding that the City of Bryan’s enforcement of the fire code against appellant is subject to strict scrutiny review. *Fire Chief Douglas Pool, City of Bryan Fire Department v. Dad’s Place of Bryan, Ohio*, 2025-Ohio-5262, ¶ 59 (6th Dist.). We remanded to have the trial court determine whether the enforcement violated strict scrutiny. *Id.* at ¶ 60. On remand, the Williams County Court of Common Pleas determined that the enforcement of the fire code failed strict scrutiny review. *Dad’s Place*, Williams C.P. No. 24CI100, 8-9 (Apr. 1, 2026). Accordingly, the court denied the City’s request for injunctive relief and dismissed the case with prejudice. *Id.* at 13.

ensure compliance with the fire code—these measures included posting a sign that the Church was not a homeless shelter; preventing people from bringing cots, sleeping bags, or bedding into the Church; and not allowing anyone to live at the Church on a permanent basis. In March 2024, Chief Pool inspected Dad’s Place and determined that it had addressed many of the violations.

{¶ 5} Nevertheless, on April 24, 2024, the City issued two new citations for unresolved violations—a change in use occupancy from assembly to residential and the lack of an automatic sprinkler system. The City required Dad’s Place to install an automatic-sprinkler system and threatened Dad’s Place with a fine of \$1,000 each day that Dad’s Place continued its ministry without the sprinklers. One day later, the City criminally charged appellant for knowingly violating Bryan’s fire code under Bryan Municipal Code 1501.06(a).

B. The Trial

The December 3, 2024 Motion to Dismiss

{¶ 6} The case went to a bench trial on December 3, 2024 in the Bryan Municipal Court. The record reflects that on the morning of the trial, appellant filed a Motion to Dismiss at 10:15 a.m. arguing that the prosecution violated the Ohio and U.S. Constitutions. His attorney confessed that the motion was late due to “a miscommunication on the part of the courier.” The trial court struck the motion, specifically citing Crim.R. 12(D), which states that “[a]ll pretrial motions except as provided in Criminal Rule 7(E) and 16(M) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier.” The court found as follows:

4.

Arraignment for the Defendants citation occurred on May 23, 2024 and he appeared with counsel. Mr. Avell's case has gone through three (3) pretrials and a thirty (30) day continuance of the original trial date of November 7, 2024. At no time did defense counsel request leave to file any motion from the arraignment to the trial date. On the day of trial, defense counsel files a twenty-eight (28) page motion with memorandum along with ten (10) exhibits and a transcript of the deposition of Fire Chief Pool.

It is the order of the court that the Motion to Dismiss and accompanying exhibits are ordered stricken from the record due to defense counsel failing to obtain permission to file the motion and the motion was not timely filed pursuant to Criminal Rule 12 (D).

{¶ 7} In his appeal to this court, appellant makes no argument with respect to the propriety of the trial court's decision to strike his pretrial motion filed on the morning of the trial.

Opening Statement

{¶ 8} Following the pre-trial motion, the case proceeded with opening statements. In his opening statement, appellant's counsel immediately referenced the constitutional arguments that were presented in his motion to dismiss:

[The enforcement of the fire code] violates, we believe, Article 1, Section 7 of the Ohio Constitution which is the Right of Conscience Clause. And courts have held that that forbids any law that even interferes with the rights of conscience. The party to establish such a violation has to show, and the evidence will, that a religious belief is truly held and that governmental action has a coercive effect on that practice of that religion.

...

The city's application of its laws [is] therefore tantamount to a permanent ban on the church and Pastor Avell operating a ministry at the location and in the fashion they choose to, and we believe that's a violation of the Constitution.

...

The coercive effect that the city's actions are having on Pastor [Avell] is a cognizable interference with his right to practice his religion because the city is targeting him for disparate treatment is what we believe the evidence

will show, and the U.S. Supreme Court has repeatedly held that a per se burden on religious exercise exists where the law treats comparable secular activities more favorably than religious ones. Here, I believe the evidence will show that there are numerous examples of such secular uses that are treated more favorably by the city than Pastor Avell's religious exercise, and the activity that the city creates -- insists creates a risk is people sleeping in a building which Chief Pool will testify makes them more susceptible to the risk of fire than when they are awake, but this risk is the same whether people are upstairs or downstairs, located in a motel, an apartment, a senior living facility, or even the church's sanctuary.

To exempt the -- the latter or former while prohibiting the latter we believe is a per se burden on religion. We also believe it establishes a prima facie violation of the Federal Free Exercise Clause. There can be no greater pressure than criminal prosecution and the risk of losing one's liberty, and that's the pressure the city has brought to bear. And such substantial pressure after all the inspection activity that has been atypical is a burden on the free exercise of religion, and it's particularly substantial in this instance because it's not just threats anymore, they're actually following through with a criminal prosecution for someone who's trying to help people who are desperately in need of it.

{¶ 9} The City did not object to appellant's opening statement, and the trial court took no action to limit the scope of appellant's opening in accordance with its ruling striking appellant's motion to dismiss.

{¶ 10} At trial, the City presented two witnesses—Fire Chief Douglas Pool and Assistant Fire Chief Jeremy Miklovic. Appellant testified as the sole witnesses for the Defense.

Testimony of Chief Douglas Pool

{¶ 11} The City's first witness, Chief Pool, testified that he conducted several inspections of Dad's Place and wrote many of the related inspection reports. He explained that the initial inspections began in November 2023 after a complaint was

made against Dad's Place. At this time, he found several violations, none of which are at issue in this appeal.

{¶ 12} Chief Pool testified that by mid-January 2024, while many of the initial violations from the previous inspections had been corrected, when he came for another inspection, he saw several people sleeping on cots in what he described as a "sleeping area." Chief Pool stated that sleeping in that manner would be considered a change of use for the occupancy designation, and that Dad's Place was informed that they needed to discontinue the sleeping areas without approval from the State.

{¶ 13} On March 5, 2024, Chief Pool returned to Dad's Place for another inspection and this time, found people asleep in makeshift beds—they had pulled chairs together and were using blankets and pillows throughout the 226 part of the building. While Chief Pool noted that all of the other violations had been corrected, the sleeping area continued to be a problem. Despite this continued problem, Chief Pool told the court that he could not cite Dad's Place at this time.

{¶ 14} On April 24, 2024, Chief Pool again went to Dad's Place for an inspection and reported seeing people sleeping in a "sleeping area." In response to these sleeping people, Chief Pool reported that the Dad's Place's occupancy had changed to a "group R" (Residential) because of the ongoing residential use, and that as a residential facility, the fire code required an automatic sprinkler system in the building. This was the first time the automatic sprinkler requirement appeared in a report. Chief Pool issued two violations at this inspection.

{¶ 15} On cross-examination, Chief Pool was asked several questions regarding what he defined as a “sleeping area” for purposes of residential designation:

- Q: Is sleeping an issue for people that do it during the day?
- A: The sleeping -- for sleeping purposes it is looked at as a residential occupancy. The time of day is not as relevant.
- Q: So, someone sitting in a chair that is sleeping does not necessarily implicate that sleeping generally is -- is occurring? A sleeping area has to be established, isn't that right?
- A: The determination has to be that an area of the building is being used for sleeping purposes. The intent is to sleep.
- Q: Okay, so it's not if somebody goes to church and happens to doze off?
- A: That would -- that would be discretionary, and I think that would be a stretch to say that that was a sleeping area.
- Q: Okay.
- A: Someone fell asleep in a pew, yes.
- Q: Okay. And you had -- people just sitting with a chair with their head down on the table?
- A: Again, it's discretionary, and in my view that does not necessarily constitute a sleeping area.
- Q: Okay. Same for sitting on the floor leaning against the wall?
- A: Again, it becomes a discretionary item. One individual, I am going to view that as not a sleeping area. If the entire room was, I would then take a different light at that. Again, there's some discretion there.
- Q: Yeah. And this -- all -- all of these different activities are subject to your interpretation, correct?
- A: That's correct

Defense counsel pressed Chief Pool further about what the limitations to “sleeping” were for purposes of the designation and violations:

Q: Okay. So, and again, they could have had -- they could have people there 24 hours a day, correct?

A: That's correct.

Q: All right, even resting in a chair?

A: That's correct.

Q: Even meditating, even praying, even doing all sorts of things?

A: None of those, as I would see would constitute sleeping and would not trigger a -- a change of use.

Q: Okay. And the simple fact that someone has a pillow on the ground doesn't mean they're sleeping, correct?

A: That's correct.

Q: Or a blanket same thing, correct?

A: I would say that is correct.

Q: So, it's -- it's not the comfort item aspect of this that's of concern to you, it's specifically the sleeping?

A: Those are all items that help me make that determination of what is going on in -- with those individuals that are there.

{¶ 16} In addition to discussing Dad's Place, when asked about the automatic sprinkler requirement, Chief Pool noted that several other locations within Bryan have buildings that predate the current fire code and have residential use, but do not have automatic sprinkler systems. Chief Pool explained that those residences fall into an exemption to the fire code because they were grandfathered into the current code. When asked more specifically on cross-examination about these buildings, the following exchange occurred:

Q: Okay. In your opinion as fire chief, is it dangerous for people to sleep in the buildings that have been grandfathered into an earlier version of the code and therefore don't have things like sprinklers?

A: They are code compliant and regardless of my opinion, it's legal to do so.

Q: But I'm asking for your --

A: It -- it is less safe than a (inaudible) building, yes.

...

Q: Okay. So, you testified that it can be cost-prohibitive for some older businesses to retrofit sprinkler systems because the code has been updated, so does the code balance the economic cost of that with the safety risk?

A: That is a process, a long process that takes several years to work through, but yes, that is ultimately what is done. It's a balance of cost, risk, and there is a -- a consensus agreement that that is adopted into the code and ultimately into the (inaudible) code.

{¶ 17} Additionally, Chief Pool discussed some of the areas he had discretion in making choices regarding the occupancy and violations. First, he testified that he had the discretion to permit a change of use occupancy if he determined that the new use occupancy presents a lesser hazard than the previously approved use occupancy. Chief Pool explained that the change of use from assembly, which involves gatherings of many people, to residential, which involves sleeping individuals, would present a greater hazard because sleeping individuals are less likely to be aware of a fire. Regarding the sprinkler requirement for residential facilities, Chief Pool admitted that there are alternatives and temporary measures that can be put in place instead of the use of a sprinkler in a residential facility, however, he noted that those exceptions were beyond his scope.

{¶ 18} Notably, although appellant's cross-examination of Chief Pool almost entirely focused on Chief Pool's discretion under the fire code and the exceptions granted to secular businesses, the City did not raise any objections regarding the scope of the cross-examination nor did the trial court act to limit the scope of appellant's cross-examination.

The Testimony of Assistant Fire Chief Jeremy Miklovic

{¶ 19} The City’s second witness, Assistant Fire Chief, Jeremy Miklovic, testified that he saw people sleeping in Dad’s Place over the course of several inspections.

{¶ 20} On cross-examination, Assistant Fire Chief Miklovic admitted that in the case of an emergency, someone could seek shelter at Dad’s Place and that such behavior is not in the fire code. Additionally, he noted that the declaration of an emergency was at his discretion. Assistant Fire Chief Miklovic could not recall if Dad’s place was one of the shelters that opened up during an emergency.

{¶ 21} The City rested following Assistant Fire Chief Miklovic’s testimony.

The Testimony of Appellant, Christopher Avell

{¶ 22} Appellant began his case in chief and testified as his only witness. During appellant’s testimony, he described the creation and mission of Dad’s Place, as well as how he came to open the church to the public as a shelter. Appellant stated that the current location of Dad’s Place was important because it was next door to a homeless shelter and Medicaid clinic; across the street from a local battered person’s shelter; and near Child and Family Services, a hospital, the library, the police department, and the fire department. In appellant’s words, the church was right in the middle of “the people God has called us personally as a church to reach.”

{¶ 23} As part of his testimony, appellant contended that providing shelter to those in need was an effective way to spread the Gospel, stating, “[h]ow cruel would it be for me, for someone to come through the door and say I need rest, and I’d say well, I have the ability to give you rest but go and be well. How could the love of Jesus be in my heart

and I do that?” While appellant noted the importance of not turning people away, he clarified that “we’re not a social services organization and we’re not a homeless shelter and we’re not gonna become one.” Instead, appellant and Dad’s Place attempt to connect its members with resources outside of the church for non-spiritual needs while fulfilling spiritual needs within the church.

{¶ 24} Regarding the ministry itself, appellant testified that during the church’s Rest and Refresh hours, the lights are dimmed and a recording of Johnny Cash reading the Bible is played over the speakers. Appellant described this as a time when members can come in and put their heads down and rest, or they can come and engage in activities like playing cards. Appellant confirmed that no one is asked to leave unless there is a “biblical” reason to do so. He further noted that members are permitted to enter the church with their “comfort” items such as a blanket or pillow.

{¶ 25} Appellant additionally testified that there was no automatic sprinkler system at Dad’s Place, and that prior to the April 24, 2024 citation, he could not recall any requirement from the City that said that Dad’s Place needed to have one. Appellant added that he was told that even if he installed a sprinkler system, Dad’s Place would not be in good standing with the City. Regardless, appellant testified that he still looked into a sprinkler system and noted that:

I think the sprinkler system part assuming everything was already in place for it was around 50,000. But the guy who came, real nice guy, and there were two of them, but he said -- he said listen, it’s not even really doable. Yes, it’s doable, okay, but you need a special kind of water line. ... it needs to be 4 inches or something versus what normally comes in, so you need to get city permits and get all that to put the water line in, then you need to do this and this and this, and first, before we even go any further you need to

get an architect in and then he needs to (inaudible), and so he -- he basically just said, you know, I appreciate you calling us. I don't expect to hear from you again, you know. It's just not really realistic in any sense of the word. And -- and so, that was as far as we pursued it at the time.

{¶ 26} Regarding the issues with the sleeping conditions, appellant admitted that there were beds and cots at one time. He noted, however, that after the citations were made, he believed that recliners could be a potential solution to the problematic sleeping areas. Appellant explained that they invested in several recliner chairs to meet the demands of the City as a gesture to appease Chief Pool's concerns about people laying on the floor, pushing chairs together, or making beds. Appellant told the court that he was told that the church could not use the recliners after the recliners were purchased. He stated that he called the Mayor of Bryan three times regarding the issue and never received a return call. Appellant additionally contacted "zoning" and was told to close the doors at 10:00 p.m. and re-open at 8:00 a.m., which appellant stated was "not acceptable for a 24/7 mission." Appellant finished his testimony stating that,

So, you know, this -- this is very confusing. Like you know it -- it seems like -- it seems like every -- every time it's like hey, here here's what we're looking for, like you know here's how you can make this safe and good, and we're like okay, great, we'll do that. It's like no, well, that's not really what we're looking for. Well, it's like just get to the point, say get the people out. That's what was said at the beginning. I'm not this is not at the -- the chief. This is not at any person. This is just the confusion I'm dealing with.

{¶ 27} The City did not object to the subject of appellant’s testimony, nor did the trial court limit the scope of the testimony.

Post-Trial Briefs

{¶ 28} Following the close of trial, the parties agreed to file post-trial briefs instead of conducting closing statements.

{¶ 29} Appellant’s post-trial brief contained no argument concerning the merit of the evidence or the application of any defenses with respect to violations of the fire code. Instead, appellant’s 20-page trial brief exclusively argued that the ordinance was unconstitutional, claiming that the enforcement of the fire code failed strict scrutiny review was a prima facie violation of his federal and state constitutional rights due to the City’s selective targeting of the church. Appellant’s counsel expressed that by

[f]ocusing on the handful of people who sleep for a portion of the Church’s 24/7 ministry, the City says that the ministry converts the entire Church into a “residence” under the state fire code adopted by Bryan. And the remedy, the City says, is to turn people away, to interrupt their rest, or to retrofit the building with a costly sprinkler system. No motel in Bryan has to have a sprinkler system. Neither does the domestic violence shelter near the Church. But rather than extend an exemption to the Church, the City has targeted it for enforcement. The City would be happy for citizens in need of shelter to pay to spend the night in one of the City’s motels-where they would not have whatever protection a sprinkler system provides. Its decision to selectively enforce the fire code against the Church and prosecute Pastor Avell treats “comparable secular activity more favorably than religious exercise,” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021), and ignores less restrictive alternatives.

He contended that the Ohio and U.S. Constitutions forbid this result—“Bryan can enforce its fire code-but it cannot selectively apply the provisions of the code against religious activity.”

{¶ 30} Appellant maintained that the City could not establish a compelling interest in Dad's Place's temporary shelter ministry or in requiring the church to install an automatic sprinkler system. He noted that while the City's alleged interest was to protect public safety, it "turns a blind eye to the host of other buildings that pose the same danger." Appellant argued that the City has several old buildings exempt from the sprinkler requirement, "because the cost of updating them outweighs any safety benefit." He explained that "strict scrutiny does not allow the City to pick and choose when fire safety is important. If the City had a compelling interest, it would be compelling across the board." Appellant further criticized Chief Pool's testimony, noting that Chief Pool refused to say that the "non-sprinkler" facilities were *safe*, only that they were acceptable.

{¶ 31} Additionally, appellant argued that the City did not show that shutting down Dad's Place or requiring it to install automatic sprinklers was the least-restrictive means of achieving its interest. Appellant contended that there were no alternative locations in either Bryan or the surrounding county, where he could operate this ministry. Furthermore, he believed that even if such an alternative *did* exist, appellant could afford to make the necessary changes to be in full compliance with the fire code. Finally, appellant took issue with Chief Pool's "enormous discretion to make multiple individualized assessments that are at the heart of this case."

{¶ 32} In its brief, the City primarily reviewed the evidence against appellant, listing the permissible occupancy of the building, summarizing the results of the various inspections, and citing appellant's testimony regarding his knowledge of the building's permissible occupancy and the violations. The City did not contend that appellant's

constitutional arguments were untimely or otherwise object to appellant's assertion of those arguments. Instead, the City addressed the merits of appellant's "constitutional claims," arguing that they were without evidentiary support, the City's use of grandfathering involved no discriminatory animus, and appellant had to follow the fire code just like everyone else.

{¶ 33} On January 21, 2025, the court found appellant guilty of knowingly violating Bryan's fire code under Bryan Municipal Code 1501.06(a) and sentenced him to 60 days in jail, which it suspended, with a \$200 fine and \$114 in costs. The trial court's decision did not address appellant's constitutional arguments.

Assignment of Error

{¶ 34} Appellant appealed to this court. He presents one assignment of error for our review:

The trial court erred when it criminally convicted Pastor Christopher Avell—sentencing him to 60 days in jail (suspended) and over \$300 in fines and costs—for exercising his sincerely held religious beliefs by operating a 24/7 ministry at the Church he founded and leads.

II. Law and Analysis

{¶ 35} Appellant does not challenge the underlying facts supporting his conviction. Instead, to support his assignment of error that the trial court erred in convicting him, appellant argues that under both U.S. and Ohio constitutional law, the enforcement of the fire code is unconstitutional.

A. Waiver

{¶ 36} The City argues that because appellant’s constitutional argument was first raised in an untimely motion to dismiss at the start of trial and was stricken from the record, and because appellant failed to appeal that decision, appellant has waived his constitutional argument and as such, the judgment of the trial court must be affirmed.

{¶ 37} “It is well established that ‘the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court.’” *State v. Alexander*, 2020-Ohio-3838, ¶ 8 (12th Dist.), quoting *State v. Buttery*, 2020-Ohio-2998, ¶ 7. As such, the “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state’s orderly procedure, and therefore need not be heard for the first time on appeal.” *Wakeman v. Smith*, 2024-Ohio-1067, ¶ 12, quoting *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. For example, the Tenth District held that an appellant’s unconstitutional-as-applied argument was waived because it was first raised in a motion for reconsideration after final judgment, which made the motion a nullity. *State v. Am. Bail Bond Agency*, 129 Ohio App.3d 708, 716 (10th Dist. 1998).

{¶ 38} Moreover, certain defenses must be raised before trial. Crim.R. 12(C) provides that, “[p]rior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue.” However, some of these issues *must* be raised before trial, including “[d]efenses and objections based on defects in the indictment, information, or complaint

17.

(other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding).” Crim.R. 12(C)(2). Pretrial motions pursuant to Crim.R. 12(C), like most other pretrial motions, must be made “within thirty-five days after arraignment or seven days before trial, whichever is earlier,” unless the trial court extends the deadline “in the interest of justice.” Crim.R. 12(D). Failure to timely raise a defense based on a defective indictment before trial results in waiver of the defense. Crim.R. 12(H).

{¶ 39} The Ohio Supreme Court has characterized a defense based on the unconstitutionality of the charging statute as a defense based on a defect in the indictment. In *State v. Palmer*, 2012-Ohio-580, the issue was whether the trial court erred in considering a pretrial motion to dismiss an indictment based on the unconstitutionality of the charging statute. *Id.* at ¶ 20. In that case, the appellant was previously convicted of a sex offense, and the indictment charged appellant with violating sex offender registration requirements that were imposed by the Adam Walsh Act of 2007, which was enacted after appellant’s sex conviction. *Id.* at ¶ 5-9. The Ohio Supreme Court had previously held that the provision of the Adam Walsh Act that retroactively imposed sex-offender registration requirements on offenders whose convictions predated the law’s enactment was unconstitutional. *State v. Bodyke*, 2010-Ohio-2424, ¶ 58. In *Palmer*, the Ohio Supreme Court concluded that because the appellant alleged the indictment would result in the unconstitutional application of law, it could be raised in a pretrial motion to dismiss pursuant to Crim.R. 12(C)(2), explaining as follows:

Under Crim.R. 12(C)(2), trial courts may judge before trial whether an indictment is defective. Without a doubt, an indictment is defective if it alleges violations of [Adam Walsh Act of 2007] by a person who is not subject to that [law]. There is no set of circumstances under which such a person can violate the law's requirements. This is especially so where, as in [this] case, an indictment depends on the unconstitutional application of law. Therefore, dismissal is appropriate.

...

The general issue for trial in this context is whether the accused violated the law as set forth in the indictment. Where the law simply does not apply, the trial court is well within its authority to dismiss the indictment before trial.

Palmer at ¶ 23-24. Accordingly, a defense based on the unconstitutionality of the charging statute or ordinance is a defense based on a defective indictment pursuant to Crim.R. 12(C)(2), which must be raised before trial. *See id.*

{¶ 40} Here, appellant's sole defense is that the Bryan fire code is unconstitutional as applied to him because it violates his religious rights under the Ohio and U.S. Constitutions. As explained in *Palmer*, a charging instrument that "depends on the unconstitutional application of law" is defective. *Id.* at ¶ 23. Accordingly, because Crim.R. 12(C)(2) requires that a defendant raise defenses based on a defective charging instrument before trial, appellant was required to raise his unconstitutionality defense before trial within the time prescribed by Crim.R. 12(D). Because he did not do so, he waived the defense pursuant to Crim.R. 12(H).

{¶ 41} Nonetheless, if the prosecution fails to object to an untimely motion under Crim.R. 12(C), the prosecution may waive a defendant's waiver. For example, in *State v. Kier*, 2002-Ohio-2619 (2d Dist.), the Second District explained that although a criminal defendant's mid-trial motion to suppress was untimely pursuant to Crim.R. 12(C)(3) and

thus waived pursuant to Crim.R. 12(H), the prosecution's failure to object resulted in a waiver of the untimeliness of the motion. *Id.* at *2, citing *State v. Johnson*, 2000-Ohio-276.

{¶ 42} Here, although appellant initially raised the constitutionality of the fire code as applied to him in an untimely motion to dismiss, appellant then repeatedly raised the constitutionality of the Bryan fire code throughout the trial. His opening statement, his cross-examination of Fire Chief Pool—which focused on Pool's discretion in interpreting and enforcing the fire code, issues only relevant to the constitutionality issue—and his own direct testimony regarding his religious beliefs, and his 20-page post-trial brief that solely argued that his conviction would violate his religious rights were exclusively related to the constitutionality of his prosecution. At no point did the City object or raise appellant's waiver of the issue. Accordingly, the City waived appellant's waiver. Moreover, although the trial court struck as untimely appellant's pretrial motion to dismiss, the trial court did not take any action to preclude appellant from arguing that the ordinance was unconstitutional as applied and developing evidence in support of that argument during trial. Accordingly, appellant's constitutionality defense was before the trial court for its consideration.

{¶ 43} Despite having permitted appellant to argue the constitutionality of his prosecution, the trial court did not rule on appellant's argument. The trial court's order merely found appellant guilty. Significantly, this was a bench trial, so the trial court's final order did not contain any conclusions of law, nor could it have. *See State v. Crawford*, 1986 WL 1715, *7 (10th Dist. Feb. 6, 1986) (explaining that in a bench trial, 20.

“the trial court should only enter[] findings of guilty [or not guilty] based upon the evidence [and] [s]eparate findings of fact and conclusions of law are neither countenanced nor permitted”). Accordingly, the court’s finding of guilt cannot be construed as a ruling on appellant’s constitutionality arguments, and without a separate ruling regarding constitutionality, we cannot conclude that the trial court ruled on whether the application of the fire code to appellant in this case is unconstitutional.

{¶ 44} Because the trial court did not rule on the constitutionality of the application of the fire code to appellant in this case, we must remand the matter to the trial court. An appellate court is “a court of review, not of first view.” *McOmber v. Liebrecht*, 2023-Ohio-2019, ¶ 42 (3d Dist.), quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 (2005), fn. 7. As such, “a reviewing court will not ordinarily address issues that were not tried by the trial court.” *Eichenberger v. Woodlands Assisted Living Residence, L.L.C.*, 2013-Ohio-4057, ¶ 30 (10th Dist.), citing *State ex rel. Pitz v. Columbus*, 56 Ohio App.3d 37, 45 (10th Dist.1988). Where a trial court has not decided an issue raised and argued by a party, “the appellate court should reserve judgment until such time as the undecided issues are considered by the trial court and that decision is appealed.” *Id.*, citing *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 935 (10th Dist. 2000), citing *Warner v. Uptown-Downtown Bar*, 1996 WL 748181, *5 (6th Dist. Dec. 20, 1996). Because the trial court did not decide whether the Bryan fire code is unconstitutional as applied to appellant, we must remand the case to the trial court for further proceedings. See *Pool v. Dad’s Place*, 2025-Ohio-5262, ¶ 60 (6th Dist.). On

remand, the trial court is directed to consider whether the Bryan fire code is unconstitutional as applied to appellant.

{¶ 45} Appellant's assignment of error is well-taken.

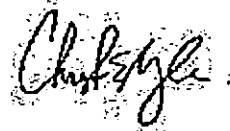
III. Conclusion

{¶ 46} We find appellant's assignment of error well-taken and we reverse the judgment of Bryan Municipal Court, vacate appellant's conviction, and remand the case for consideration of whether the enforcement of the fire code and thus appellant's conviction would violate appellant's religious rights under the Ohio and U.S. Constitutions. The City is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed
and remanded.

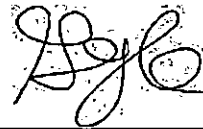
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.

Christine E. Mayle, J.



JUDGE

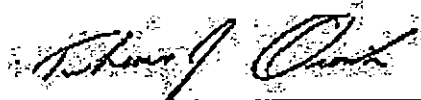
Gene A. Zmuda, J.



JUDGE

CONCUR.

Thomas J. Osowik, P.J.



JUDGE

CONCURS, IN PART,
DISSENTS, IN PART, AND
WRITES SEPARATELY.

OSOWIK, P.J., concurring in part and dissenting in part.

{¶ 47} I agree with the majority's decision to reverse Avell's convictions.

However, since I would vacate appellant's convictions at this point in the proceedings rather than reversing and remanding this matter for further proceedings, I concur in part and respectfully dissent as follows.

I. Waiver

{¶ 48} To begin, while I do agree with the majority that appellant waived his constitutional argument, I disagree that the City "waived appellant's waiver" by, in essence, failing to continue to object to a constitutional argument that it had previously objected to, and was no longer properly before the court.

{¶ 49} As a reminder, prior to the start of trial, appellant filed a motion to dismiss on the grounds that the prosecution violated the Ohio and Federal Constitutions—specifically, the Right to Conscience Clause in the Ohio Constitution, and the Free Exercise Clause in the United States Constitution. The court acknowledged that the filing was "real late" and gave the City the opportunity to speak. The City objected to the motion, stating:

Your Honor, I mean number one I would take issue with the lateness of the filing, that this is something that could have been done long ago and wasn't. Number two, a lot of the matters in a brief review of the motion are issues that were raised in a unrelated yet related Federal case which has been unsuccessful for this defendant and Dad's Place. I don't think the motion has merit, but I think given the lateness I -- I would ask that the court deny that motion.

{¶ 50} After hearing from both parties, the court struck the motion finding that "it was not properly filed within the timeframe set up by the criminal rules, especially

Criminal Rule 12.” The court explained that “I’m striking it from the record and not allowing it to be filed, not even going to address it for that reason” and began the criminal trial.

{¶ 51} Like the majority, I find that the record is clear that appellant’s constitutional claim was never properly raised before the trial court, and consequently, is waived on appeal. However, unlike the majority, I do not believe that the City went on to “waive appellant’s waiver” with its actions for the remainder of the trial.

{¶ 52} To support their finding, the majority looks to appellant’s opening statement, his cross-examination of Fire Chief Pool, his own direct testimony, and his post-trial brief and concludes that appellant “repeatedly raised the constitutionality of the Bryan fire code throughout the trial.” Therefore, the majority concludes that because the City did not object or raise appellant’s waiver of the issue, the City waived appellant’s waiver and the constitutional issue is now properly before this court. Contrary to this finding, I do not believe that appellant ever properly raised the issue of constitutionality and therefore, the City did not need to continue to renew its objection.

{¶ 53} Looking at the trial chronologically, first, appellant’s motion to dismiss was defective pursuant to Crim.R. 12. The prosecution objected to this motion and the motion was stricken. From this moment on, appellant had waived the issue.

{¶ 54} Turning next to the opening statement, Ohio courts have consistently held that arguments made by attorneys in opening and closing statements are not evidence. *See Potts v. Durrani*, 2023-Ohio-4195, ¶ 16 (1st Dist.); *Torres v. Concrete Designs Inc.*, 2019-Ohio-1342, ¶ 18 (8th Dist.); *State v. Fannon*, 2018-Ohio-5242, ¶ 58 (4th Dist.);

24.

L&N Partnership v. Lakeside Forest Assn., 2009-Ohio-2987, ¶ 38 (10th Dist.). And more generally, “statements of counsel are not evidence.” *State ex rel. Shubert v. Breaux*, 2024-Ohio-2491, ¶ 24, quoting *RNG Properties, Ltd. v. Summit Cty. Bd. of Revision*, 2014-Ohio-4036, ¶ 28, fn. 1, quoting *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision*, 82 Ohio St.3d, 297, 299 (1998). Therefore, while I agree with the majority that appellant *did* bring up the issue of constitutionality in his opening argument, I disagree that the City had a duty to object to the statements made by counsel.

{¶ 55} The majority additionally believes that appellant “repeatedly raised the constitutionality of the Bryan fire code throughout the trial” through the cross-examination of Fire Chief Pool and appellant’s own direct testimony. I disagree—not only is this a stretch of the broad testimony presented at trial, but even if the vague mentions of discretion and religious beliefs could be considered sufficient to raise a constitutional claim, that issue was still already barred by the untimely motion—which the City *had* objected to. See majority opinion, ¶ 39, citing *State v. Palmer*, 2012-Ohio-580, ¶ 23-24 (“[A] defense based on the unconstitutionality of the charging statute or ordinance is a defense based on a defective indictment pursuant to Crim.R. 12(C)(2), which must be raised before trial.”). The only direct references to sincerely held beliefs occur in appellant’s opening statement, in a question during the cross-examination of Chief Pool:

Q: Now, you don’t dispute that Pastor Avell has a sincere religious belief that he must provide temporary shelter for those in need, do you?

A. I do not.

Q. As far as you're aware, does the city dispute that?

A. As far as I'm aware, within my scope there is no objection to that.

And in a reference from appellant that refusing a place to rest to someone in need is "so counter to my faith." Additionally, while Chief Pool does discuss discretion and appellant does describe how God led him to Dad's Place and to this ministry, at no point do either actually discuss any of the constitutional arguments.

{¶ 56} Furthermore, because I do not believe that appellant "repeatedly raised the constitutionality of the Bryan fire code throughout the trial," I also believe the post-trial brief, which substituted a traditional closing statement, amounts to nothing more than an unsupported non-evidentiary closing argument. *See Potts* at ¶ 16; *Torres* at ¶ 18; *Fannon* at ¶ 58; *L&N Partnership*, at ¶ 38.

{¶ 57} Accordingly, in my review of the record, it appears that appellant made multiple improper attempts to preserve his argument. Therefore, unlike the majority, I do not believe that the City had a duty to object to appellant's improperly raised constitutional argument. As such, I do not believe that (1) the City waived appellant's waiver and (2) as a consequence, the constitutional argument is now before this court. That being said, I do not believe that the analysis of appellant's constitutional claim should end at the waiver.

II. Plain Error Review

{¶ 58} Even though I believe that appellant waived his constitutional argument, "[t]his court may exercise its discretion to review whether the trial court committed plain

error with respect to forfeited constitutional arguments.” *Wakeman v. Smith*, 2024-Ohio-1067, ¶ 13, citing *State v. Barber*, 2023-Ohio-2991, ¶ 28 (6th Dist.). This matter is especially complicated, given our recent decision on the civil companion case, *Fire Chief Douglas Pool, City of Bryan Fire Department v. Dad’s Place of Bryan, Ohio*, 2025-Ohio-5262 (6th Dist.), where this court determined that the City’s enforcement of the fire code against Dad’s Place was subject to strict scrutiny review under the U.S. Constitution. *Id.* Accordingly, given these exceptional circumstances and *only* to prevent a manifest miscarriage of justice, I would have reviewed appellant’s constitutional arguments for plain error. *See State v. Jones*, 2026-Ohio-634, ¶ 37 (6th Dist.).

{¶ 59} “In order to establish plain error, appellant must show that but for the error, the outcome of the trial clearly would have been otherwise.” *Id.*, quoting *State v. Jones*, 2009-Ohio-6501, ¶ 37 (6th Dist.), quoting *State v. Herrera*, 2006-Ohio-3053 (6th Dist.). “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.*, quoting *Jones* at ¶ 37 (additional citations omitted.).

For an error to be “plain” or “obvious,” the error must be plain “under current law” “at the time of appellate consideration.” *Johnson v. United States*, 520 U.S. 461, 467, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); accord *Barnes*, 94 Ohio St.3d at 27, 759 N.E.2d 1240; *State v. G.C.*, 10th Dist. Franklin No. 15AP-536, 2016-Ohio-717, 2016 WL 764409, ¶ 14. Thus, an “error cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal.” *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (Stucky, J., concurring), citing *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455-56 (5th Cir. 2005); *United States v. Diaz*, 285 F.3d 92, 96 (1st Cir. 2002); *see also State v. Harden*, 4th Dist. Pickaway No. 21CA2, 2022-Ohio-1436, 2022 WL 1301951, ¶ 36 (“If the standard is unsettled, then an error in applying, or failing to apply, a particular standard could not, by definition, be an obvious error.”); *United*

States v. Gonzalez, 792 F.3d 534, 538 (5th Cir. 2015) (“A lack of binding authority is often dispositive in the plain-error context.”).

State v. Johnson, 2024-Ohio-1163, ¶ 29 (8th Dist.).

{¶ 60} In his sole assignment of error, appellant argues that convicting him for exercising his sincerely held religious beliefs violates both the Ohio and U.S. Constitution.

{¶ 61} “The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that ‘Congress shall make no law ... prohibiting the free exercise’ of religion.” *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 532 (2021). To establish that strict scrutiny applies under the U.S. Constitution, the party challenging the law must show “that a government entity has burdened [his] sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

A. Our Strict Scrutiny Determination in Dad’s Place

{¶ 62} To begin, this court recently determined that the City’s enforcement of the fire code was not generally applicable and therefore, strict scrutiny applied to Dad’s Place’s Free Exercise claim under the U.S. Constitution in *Dad’s Place*, 2025-Ohio-5262, ¶ 55 (6th Dist.). Because appellant’s arguments in this case regarding the constitutionality of the enforcement of the fire code stem from the same code, investigation, and analysis, our previous decision would guide us to the extent it is directly applicable to the review in the current matter.

{¶ 63} In *Dad's Place*, there was no dispute that appellant sincerely believed that he was called to operate a 24/7 ministry. Accordingly, we looked to whether Dad's Place's religious exercise was burdened by the enforcement of the fire code and determined that it was, noting that Dad's Place did not have the financial means to install a sprinkler system, that the installation of said sprinkler system would require Dad's Place to cease its religious exercise for a significant period of time, that Dad's Place could not open a second location for sleeping accommodations, nor would that satisfy its religious beliefs, because they required Dad's Place to welcome all people into the *church*, not an offsite homeless shelter, among other reasons. *Dad's Place* at ¶ 45. Ultimately, this court concluded that, "[o]utside of a fire official exercising discretion in favor of appellant, appellant is left with only one option to comply with the fire code: cease permitting individuals to sleep in its premises, which would violate appellant's religious beliefs." *Id.*

{¶ 64} Next, we found that the enforcement of the fire code was not generally applicable because "it allows the government to exercise significant discretion in the enforcement of the code." *Id.* at ¶ 48. Specifically, we looked to the significant discretion given to Fire Chief Pool and the City, and the lack of objective criteria in determining when a "sleeping area" exists and when a change of use had occurred. *Id.* at ¶ 49. We noted that because the fire code granted Fire Chief Pool and the City the discretion to determine when a change of use had occurred and to permit a change of use occupancy in certain circumstances, the fire code therefore permitted individualized exemptions at the City's discretion. *Id.* Overall, we concluded that "[t]he lack of objective criteria in the

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fire code to categorize appellant's use as residential combined with appellee's shifting interpretations throughout the matter's pendency demonstrates that the fire code provisions at issue are not generally applicable." *Id.* at ¶ 54.

{¶ 65} In sum, in *Dad's Place*, this court held that strict scrutiny review applied to Dad's Place's Free Exercise claim under the U.S. Constitution. *Id.* at ¶ 55.

B. Scrutiny Determination in this Case

{¶ 66} In essence, the review in this case would be nearly identical to *Dad's Place*. First, there is no dispute that appellant sincerely believes that he was called to operate a 24/7 ministry. Accordingly, I would look to whether appellant's religious exercise was burdened by the enforcement of the fire code. Here, given that appellant had only one option—to either change his religious practices in violation of his sincerely held beliefs, or face criminal prosecution, I would find that appellant's religious exercise is burdened by the enforcement of the fire code and would next determine whether the enforcement of the fire code was generally applicable.

{¶ 67} Like in *Dad's Place*, I would find that the enforcement of the fire code is not generally applicable. Specifically, the City's use of a grandfathering scheme to classify the buildings is largely based on cost-related reasons, and that the fire code grants Fire Chief Pool and the City the discretion to determine when a change of use had occurred, and in certain circumstances, permits discretionary classification changes. This was expressly discussed in Chief Pool's testimony where he acknowledged that the "grandfather" provision of the fire code was created by balancing economic costs with safety risks.

{¶ 68} Furthermore, Chief Pool explained the significant discretion given to him and the City, and the lack of objective criteria used in determining when a “sleeping area” exists:

- Q: So, someone sitting in a chair that is sleeping does not necessarily implicate that sleeping generally is -- is occurring? A sleeping area has to be established, isn't that right?
- A: The determination has to be used that an area of the building is being used for sleeping purposes. The intent is to sleep.
- Q: Okay, so it's not if somebody goes to church and happens to doze off?
- A: That would -- that would be discretionary, and I think that would be a stretch to say that that was a sleeping area.
- Q: Okay.
- A: Someone fell asleep in a pew, yes.
- Q: Okay. And you had -- people just sitting with a chair with their head down on the table?
- A: Again, it's discretionary, and in my view that does not necessarily constitute a sleeping area.
- Q: Okay. Same for sitting on the floor leaning against the wall?
- A: Again, it becomes a discretionary item. One individual, I am going to view that as not a sleeping area. If the entire room was, I would then take a different light at that. Again, there's some discretion there.
- Q: Yeah. And this -- all -- all of these different activities are subject to your interpretation, correct?
- A: That's correct

{¶ 69} Regarding occupancy violations, Chief Pool testified that he had the discretion to permit a change of use occupancy if he determined that the new use occupancy presents a lesser hazard than the previously approved use occupancy. Chief Pool explained, however, that in this situation, the change of use from assembly, which

involves gatherings of many people, to residential, which involves sleeping individuals, would present a greater hazard because sleeping individuals are less likely to be aware of a fire.

{¶ 70} Based on the above, I would review appellant's Free Exercise claim in this case using strict scrutiny review.

Ohio's Conscience Clause

{¶ 71} Ohio Constitution's Conscience Clause, under Article 1, Section 7 states that,

All men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. ... Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

{¶ 72} This constitutional guarantee provides broader protections of religious rights than that of the federal Constitution. *Humphrey v. Lane*, 89 Ohio St. 3d 62, 68 (2000). Therefore, laws that even "tangentially affect religion" and even simply interfere with the rights of the conscience are unconstitutional unless they pass strict scrutiny. *Id.* at 67. "Under Ohio law, a court must apply strict scrutiny to all free exercise claims, even those involving 'religiously neutral, evenly applied government actions' as well as 'indirect encroachments upon religious freedom.'" *Dad's Place* at ¶ 58, quoting *Humphrey* at 67. Accordingly, "[u]nder this test, 'the state enactment must serve a

compelling state interest and must be the least restrictive means of furthering that interest.” *Id.*, quoting *Humphrey* at 67.

{¶ 73} In *Dad’s Place*, we determined that the City’s fire code enforcement triggered strict scrutiny under the Ohio Constitution. For the same reason—because the Ohio Constitution requires increased scrutiny—I would also apply strict scrutiny review to appellant’s Conscience Clause claim in this matter.

C. The City’s enforcement of the fire code fails the strict scrutiny test.

{¶ 74} Next, I would determine whether the restriction on appellant’s exercise of religion is constitutional. *See Mahmoud v. Taylor*, 145 S.Ct. 2332, 2360 (2025). This is the most rigorous standard in American Law. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). To survive strict scrutiny, the City must show that its code enforcement (1) serves a compelling governmental interest and (2) is the least restrictive means of furthering that interest. *Humphrey* at 66.

Compelling State Interest

{¶ 75} Life and fire safety are compelling governmental interests in the abstract. *See Holt v. Hobbs*, 574 U.S. 352, 362 (2015); *Humphrey* at 69. However, the government cannot rely on “broadly formulated interests” under a strict scrutiny review. *Fulton*, 593 U.S. at 541, quoting *Gonzales v. O Centro Espirita Beneficente Uniiio do Vegetal*, 546 U.S. 418, 431 (2006). Instead, strict scrutiny demands the government show a compelling interest in enforcing its law against the “particular religious claimants” at issue. *Id.*, quoting *O Centro* at 431.

{¶ 76} The City believes that its prosecution of appellant boils down to the enforcement of uniform fire safety codes on a building designated as mercantile and assembly, but is being used as a congregate residential facility. The City contends that appellant’s “use places visitors to Dad’s Place in danger as well as the residents of the second-floor apartments, neighboring businesses, and first responders. The safety of these people clearly demonstrates a compelling state interest.” I disagree—the fact that many exceptions to the fire code exist and are applied to similarly situated facilities for non-safety reasons, destroys the State’s argument that its enforcement of the fire code is for safety purposes.

{¶ 77} The City attempts to rebut the comparisons between Dad’s Place and the residential buildings exempted from the fire code by looking to differences such as communal space in the church versus separate apartments or hotel rooms, no fire walls in the church versus fire walls in the apartments and hotels, as well as where people sleep in each facility, and how that sleep impacts the use of egresses. Notably, however, the City continuously goes back to what it deems as the “most important” distinction between Dad’s Place and the exempted residential facilities—that they received their occupancy based on the fire code in place at the time of issuance, or in other words, that these other buildings were grandfathered into the current fire code. I believe that this is fatal to the City’s argument.

{¶ 78} As noted by appellant, Chief Pool could not say that the similarly situated facilities without automatic sprinkler systems were *safe*, only that they were “*code compliant*.” Chief Pool additionally noted that cost and risk had to be balanced in the

34.

code, therefore, these older residential facilities were exempt from the sprinkler requirement based on that balance. The reality of this rationale is that these buildings are not compliant with the City's fire code because they are inherently safer, but because of a cost-based exemption that they are grandfathered into.

{¶ 79} Under strict scrutiny, “a law cannot be regarded as protecting an interest ‘of the highest order’ ... when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (alteration in original). Unlike other cases cited by the City where fire safety and protecting life were found to be a compelling governmental interest that supported the actions of the governments, *see e.g., Affordable Recovery Housing v. City of Blue Island*, 860 F.3d 580, 581-82 (7th Cir.2017), here, the City cannot claim that the restriction for Dad's Place would make the community in and around Dad's Place safer when so many other facilities pose a similar threat to the community but are exempted from the same restriction. In essence, the City tolerates the existence of a hazard for a comparable secular activity while denying that same hazard for a religious activity. Accordingly, the City cannot identify a compelling government interest that would justify treating Dad's Place differently than the similarly situated buildings in the same jurisdiction. Nor can the City cannot identify a compelling interest that would justify criminally charging and convicting appellant for failing to quash that hazard in his church.

{¶ 80} Based on the foregoing, I would find that the first requirement of the strict scrutiny analysis is not met.

Narrowly Tailored

{¶ 81} To satisfy strict scrutiny review, the City must also show that “measures less restrictive of the [Church’s] First Amendment activity could not address” the City’s safety interests. *Tandon v. Newsome*, 593 U.S. 61, 63 (2021). If “the government can achieve its interests in a manner that does not burden religion, it *must* do so.” (Emphasis added.) *Fulton*, 593 U.S. at 541.

{¶ 82} The City contends that the “adoption of the Ohio Fire Code is strong evidence that it is exercising the least restrictive means of ensuring fire safety.”

However, as noted by appellant in his post-trial brief, there are several alternatives less restrictive than criminal prosecution:

1. Treat the temporary shelter as a Group R use exempt from the requirement for sprinklers and allow the Church a reasonable amount of time to obtain a certificate of occupancy from the Ohio Department of Commerce;
2. Grant or help the Church request a formal variance under Ohio Fire Code § 104.8 from the requirement to install an automatic sprinkler system;
3. Exercise its discretion to determine that a change in use has not occurred at the Church, thereby eliminating the requirement to install an automatic sprinkler system;
4. Impose the same fire safety requirements on the Church that the Ohio fire code imposes on other comparable secular uses such as Sarah’s Friends, the three motels in the City, the various apartments around town, or three family dwellings;
5. Permit the Church and Pastor Avell to engage in a fire watch on a temporary basis, as authorized by the Ohio Building Code and the Ohio Department of Commerce when a property applies for a Certificate of Partial Occupancy based upon a change of use;

6. Recognize the Church's obvious defense of necessity to save the lives of vulnerable citizens, *cf City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 2202, 2220 (2024); or
7. Provide a grant to the Church to cover the cost of installing the sprinkler system.

{¶ 83} Furthermore, the existence of less-restrictive alternatives is particularly true given that the City filed a civil injunction against appellant with nearly identical claims. Seeing that less restrictive alternatives than criminal prosecution exist, I would find that the second requirement of the strict scrutiny analysis is not met.

D. The City's Failure to Satisfy the Requirements of Plain Error Review Establish Plain Error

{¶ 84} In a standard case, after finding that the enforcement of the Bryan Fire code violates both requirements of the strict scrutiny analysis, and therefore, that appellant should not have been criminally charged for knowingly violating the code, the analysis would end there. However, because appellant waived his constitutional argument when he failed to adequately raise it before the trial court, this court would need to go a step further and determine whether the trial court committed plain error.

{¶ 85} As previously noted, For an error to be "plain" or "obvious," the error must be plain "under current law" "at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 467, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); accord *Barnes*, 94 Ohio St.3d at 27, 759 N.E.2d 1240; *State v. G.C.*, 10th Dist. Franklin No. 15AP-536, 2016-Ohio-717, 2016 WL 764409, ¶ 14. Thus, an "error cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal." *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (Stucky, J., concurring), citing *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455-56 (5th Cir. 2005); *United States v. Diaz*, 285 F.3d 92, 96 (1st Cir. 2002); *see also State v. Harden*, 4th Dist. Pickaway No. 21CA2, 2022-Ohio-1436, 2022 WL 1301951, ¶ 36 ("If the standard is unsettled, then an error in applying, or failing to apply, a particular standard could not, by definition, be an obvious error."); *United*

States v. Gonzalez, 792 F.3d 534, 538 (5th Cir. 2015) (“A lack of binding authority is often dispositive in the plain-error context.”). *State v. Johnson*, 2024-Ohio-1163, ¶ 29, 239 N.E.3d 475, 486, *appeal not allowed*, 2025-Ohio-231, 177 Ohio St. 3d 1418, 250 N.E.3d 122, and *cert. denied*, 146 S. Ct. 205, 223 L. Ed. 2d 70 (2025).

Johnson, 2024-Ohio-1163, at ¶ 29 (8th Dist.).

{¶ 86} While the primary issue regarding how to review the constitutionality of Bryan fire code was unsettled at the time of trial, our decision in *Dad’s Place* was published while this appeal was pending. In *Dad’s Place*, we determined that the Bryan fire code was to be reviewed using strict scrutiny review. Therefore, by following in the footsteps of *Dad’s Place*, and after conducting an independent review of the record in this case, I would again find that the constitutionality of the Bryan fire code was to be reviewed using the strict scrutiny test. Accordingly, I believe that the application of strict scrutiny was settled “at the time of appellate consideration.” See *Johnson* at ¶ 29, quoting *Johnson v. United States*, 520 U.S. at 467.

{¶ 87} Next, when applying the strict scrutiny test to the Bryan fire code, I would have found that the enforcement of the fire code failed to satisfy the requirements of strict scrutiny review, and therefore, appellant should not have been criminal charged or convicted for knowingly violating the code. As such, I would have concluded that but-for the errors made in this case, appellant would not have been convicted and the outcome of the trial would have been different. See *Jones*, 2026-Ohio-634, at ¶ 37(6th Dist.). Accordingly, I would have found that appellant established plain error.

III. Conclusion

{¶ 88} In sum, while I concur with two of the majority's conclusions—(1) that appellant waived his constitutional argument, and (2) that appellant's assignment of error is well-taken—I disagree with a fundamental portion of the analysis—that the City waived appellant's waiver. Therefore, despite appellant's waiver, I would have found that the enforcement of the fire code against appellant and Dad's Place does not satisfy strict scrutiny under either the Ohio Constitution or the U.S. Constitution, and therefore, appellant should never have been convicted for knowingly violating the code.

{¶ 89} Accordingly, I believe that the January 24, 2025 judgment of the Williams County Court of Common Pleas should be reversed and appellant's convictions should be vacated.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.supremecourt.ohio.gov/ROD/docs/.
