No. 20-5427
In the United States Court of Appeals for the Sixth Circuit

MARYVILLE BAPTIST CHURCH, *et al.*,

Plaintiffs-Appellants

v.

ANDY BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY,

Defendant-Appellee

On Appeal from the U.S. District Court, Western District of Kentucky
No. 3:20-cv-00278

BRIEF OF THE COMMONWEALTH OF KENTUCKY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

Kentucky law vests Attorney General Daniel Cameron with the authority to represent the Commonwealth of Kentucky in any case "in which the Commonwealth has an interest." Ky. Rev. Stat. 15.020. The Attorney General is the lawyer for the people of the Commonwealth. Under Kentucky law, he has not merely the authority, but the *duty*, to take action in cases where the people's legal or constitutional interests are threatened. *See Commonwealth of Kentucky ex rel. Beshear v. Commonwealth of Kentucky Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016).

This is one of those cases. The freedom to practice one's faith is a defining feature of American liberty. "Since the founding of this nation, religious groups have been able to 'sit in safety under [their] own vine and figtree, [with] none to make [them] afraid.'" *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (quoting Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)). This is the promise

[1] As the chief law officer of the Commonwealth, the Attorney General may file this brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

of America. It is one of the Nation's "most audacious guarantees." *On Fire Christian Ctr., Inc. v. Fischer*, --- F. Supp. 3d. --- , 2020 WL 1820249, at *3 (W.D. Ky. Apr. 11, 2020).

But in the wake of executive orders shutting down in-person worship services in Kentucky in response to Covid-19, this guarantee is on shaky ground. Kentucky Governor Andy Beshear used his pen to close houses of worship across the Commonwealth while allowing similar secular activities to continue uninterrupted. Pandemic or not, the Constitution prohibits public officials from targeting religious exercise in this manner. As the attorney for the people of the Commonwealth, Attorney General Cameron submits this brief in support of the Appellants' request for a preliminary injunction preventing further religious discrimination.

SUMMARY OF ARGUMENT

In response to the Covid-19 pandemic, Governor Beshear issued a series of executive orders that effectively prohibited in-person religious services across the Commonwealth. These orders were necessary, the Governor explained, to prevent further spread of Covid-19—a highly contagious and sometimes-fatal disease. Despite that, Governor Beshear included numerous carve-outs for secular activities posing the same or

greater risks. What looked like a generally applicable law at first blush turned out to be an exception-riddled policy that left the faithful alone to bear its burdens. This kind of discrimination against the free exercise of religion cannot be permitted.

Governor Beshear's executive orders violate the Free Exercise Clause because they discriminatorily impose significant burdens on the right to worship without the kind of narrow tailoring necessary to survive strict scrutiny. The Constitution does not allow the Governor to ban gatherings in sanctuaries while allowing gatherings in offices. He cannot outlaw in-person worship while hosting his own in-person press conferences. These "hallmarks of discrimination" undermine the core principles of the First Amendment. This Court must reverse the district court and enjoin the Governor from enforcing or re-imposing his unlawful orders.

ARGUMENT

On March 19, 2020, Governor Andy Beshear outlawed all in-person religious services throughout the Commonwealth of Kentucky. Two weeks later, he ordered the Kentucky State Police to the grounds of a small Baptist church to issue notices of violation against any person attending worship on Easter Sunday. That all came to an end, though,

when this Court, on sequential Saturdays, twice held that Governor Beshear's ban on religious gatherings likely violated the Free Exercise Clause. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam). And since then, nothing about the merits of this case has changed.

Well, almost nothing. The Governor has persisted in blaming religious services for outbreaks of Covid-19. But, at the same time, he has since celebrated—and even *participated in*—secular gatherings involving thousands of individuals. What started out as subtle discrimination is now unmistakable. Governor Beshear's selective ban on religious worship violates the Free Exercise Clause. It is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

The First Amendment prohibits the government from burdening one's "free exercise" of religion. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In doing so, it "protect[s] religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, --- U.S. --- , 137 S. Ct. 2012, 2019 (2017). That means the government generally

cannot discriminate against religious conduct. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). When it does, strict scrutiny applies. *Id.* And a law that discriminates against religion "will survive strict scrutiny only in rare cases." *Id.* at 546. As this Court already held, this is not such a case.

I. The selective ban on mass gatherings unlawfully discriminates against religious activity.

This case originates from two executive orders that Governor Beshear's administration issued in response to the Covid-19 pandemic. Together, these two orders banned traditional, in-person religious services throughout every corner of the Commonwealth. After this Court (and a pair of district courts) enjoined the Governor from enforcement, he amended the orders so that they no longer apply to religious gatherings. [*See* Notice, R. 36-1, PageID#584–85]. But Governor Beshear has left no doubt that he desires to re-impose his ban on in-person religious services if he determines he needs to do so. [*See* Gov. Mtn. to Dissolve Prelim. Inj., R. 46-1, PageID#666]. So even though these orders are no longer in place,

their effect on the religious freedom of Kentuckians remains a critical concern.[2]

A. The first order, issued on March 19, prohibits "[a]ll mass gatherings." [Mar. 19, 2020 Order, R. 1-5, PageID#66]. Under the order, a mass gathering "includes any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, *faith-based*, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." [*Id.* (emphasis added)]. This is a broad prohibition. It applies to gatherings of any number of people. It applies to gatherings in confined spaces as well as the outdoors. And it applies to gatherings in which people wear masks and remain six feet apart. The text of the order leaves no doubt: *all* "faith-based" gatherings are illegal.

[2] This is why the case is not moot. In recently asking for relief from the district court's injunction, the Governor argued that "it is essential that Governor Beshear and other state officials be able to respond promptly" and "without second-guessing by the federal courts." [*Id.* at PageID#666–67]. To the extent that the Governor's new order created doubt as to whether this controversy remains live, his motion in the district court removes it. Governor Beshear has every intention of re-implementing his ban on religious gatherings if he determines that such a need arises.

That's not to say the order has no exceptions. It in fact contains two. First, the order states that "a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit." [*Id.*]. Second, the order provides that a mass gathering "does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." [*Id.*]. Religious activities are not included in either group of exemptions.

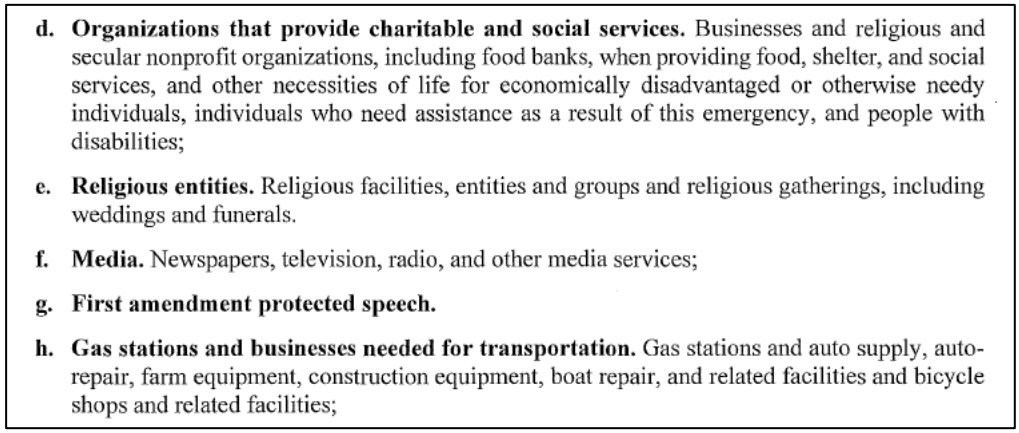
Several days after prohibiting "mass gatherings," Governor Beshear issued another executive order closing all businesses and organizations that are not "life-sustaining." [Mar. 25, 2020 Order, R. 1-7, PageID#73]. The order vaguely defined "Life-Sustaining Businesses" as "all businesses that allow Kentuckians to remain Healthy at Home." [*Id.*]. Perhaps because that definition provides little guidance for your everyday Kentuckian, Governor Beshear then listed the kinds of activities and industries allowed to remain open. The list included 19 different categories of businesses and organizations spanning more than 4 pages. [*Id.* at PageID##73–76].

What did Governor Beshear consider life-sustaining? "Media," is one example, which he defined as "[n]ewspapers, television, radio, and other media services." [*Id.* at PageID#74]. For months after he declared a state of emergency, the Governor invited reporters into the close quarters of a small conference room in the Capitol to attend his daily press conferences—presumably he considered these gatherings exempt as a "life-sustaining" necessity. Also included in the list of exemptions were law firms, accounting services, laundromats, dry cleaners, liquor stores, and hardware stores. [*Id.* at PageID##73–75]. Churches, synagogues, or other houses of worship did not make the cut.

The lone reference to religious organizations in the March 25 order allowed for religious charities to continue operating to "provid[e] food, shelter, and social services, and other necessities of life for economically disadvantaged or special populations, individuals who need assistance as a result of this emergency, and people with disabilities." [*Id.* at PageID#74]. So while the order did not permit religious organizations to conduct religious services, it did allow them to provide the kinds of services that Governor Beshear pre-approved.

Not every state followed the same path as Kentucky. Ohio, a state that implemented early and aggressive social-distancing protocols and shelter-in-place orders, recognized the problem with categorizing some activities as essential but excluding religion from that list.[3] As demonstrated in the following excerpt from its March 22 order defining "essential businesses," Ohio specifically allowed religious gatherings to continue:

Figure 1: Ohio's March 22 order defining essential businesses



d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;

e. **Religious entities.** Religious facilities, entities and groups and religious gatherings, including weddings and funerals.

f. **Media.** Newspapers, television, radio, and other media services;

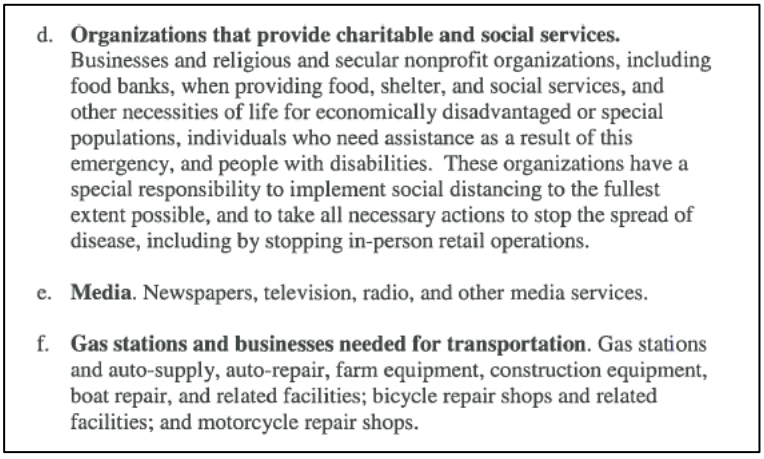
g. **First amendment protected speech.**

h. **Gas stations and businesses needed for transportation.** Gas stations and auto supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities and bicycle shops and related facilities;

[3] Ohio's original March 22 shelter-in-place order is available at https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf (last visited July 7, 2020). Ohio later revised its initial order, but it retained the exemption for religious entities. *See* Ohio April 2, 2020 Order, available at https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf (last visited July 7, 2020). Both orders in Ohio have now expired.

Governor Beshear issued his order only three days later. It tracked Ohio's order with almost identical language, yet for some reason, excluded the accommodation for religious liberty:

Figure 2: Kentucky's March 25 order defining "life-sustaining" businesses



d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or special populations, individuals who need assistance as a result of this emergency, and people with disabilities. These organizations have a special responsibility to implement social distancing to the fullest extent possible, and to take all necessary actions to stop the spread of disease, including by stopping in-person retail operations.

e. **Media**. Newspapers, television, radio, and other media services.

f. **Gas stations and businesses needed for transportation**. Gas stations and auto-supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities; bicycle repair shops and related facilities; and motorcycle repair shops.

Thus, the template for respecting religious liberty existed before Governor Beshear took action. But he chose a different path—one that discriminated against religion.

Not to be missed, none of the exceptions for life-sustaining organizations imposed a limit on the number of individuals who may congregate together. Nor does the list impose time constraints, even though the Governor has argued that the duration of a gathering bears on the risk of transmission. So under the March 25 Order, for example, any number of attorneys may gather together every day in a conference room for any

length of time, but *no* individuals may attend weekly mass in a large, spacious sanctuary.

The March 19 and March 25 orders imposed a sweeping and discriminatory prohibition against religious activity in Kentucky—one that stretched to every corner of the Commonwealth without regard to the relative risks in each county. Even though the orders broadly allowed individuals in counties with high rates of infection to work in law offices and newsrooms, or to visit hardware stores, liquor stores, laundromats, and grocery stores, they did not permit people to attend religious services at a church, synagogue, mosque, or other house of worship. Not even in Robertson County, where it took almost four months of the pandemic before the county reported its first case.[4]

B. The Governor's orders unconstitutionally targeted religious activity. *See Maryville Baptist Church*, 957 F.3d at 614 (citing *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012)). "Faith-based discrimination can come in many forms." *Roberts*, 958 F.3d at 413. Some laws are motivated

[4] *See* Tom Latek, *Robertson becomes the last county in state to have case of COVID-19*, Times-Tribune (June 30, 2020), available at https://www.thetimestribune.com/news/local_news/robertson-becomes-last-county-in-state-to-have-case-of-covid-19/article_0830cea1-6572-5267-81b1-0de029d96551.html (last visited July 6, 2020).

by animus toward religion, while others "single out religious activity alone for regulation." *Id.* But one particularly invidious kind of discrimination is the generally applicable law that is "riddled with exemptions." *See Ward*, 667 F.3d at 738. "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Roberts*, 958 F.3d at 413–14 (quoting *Ward*, 667 F.3d at 740). That is precisely what happened here.

Take the initial ban on mass gatherings. It broadly banned "any event or convening that brings together groups of individuals." [R. 1-5, PageID#66]. That ban included both religious (*e.g.*, "faith-based") and secular (*e.g.,* "concerts" and "festivals") activities. But the order went on to exempt several kinds of gatherings for special treatment—all of which are secular, and many of which pose the same or greater risk of causing the spread Covid-19. [*Id.*]. People could, for example, gather at airports and libraries, but not at a Christian church or a Hindu temple. They could continue routine operations in "typical office environments," but

must abandon the routine at their local synagogue. The exemptions were plenty. Yet they did not include religious worship.

The second order only magnified this problem. It provided nearly *four pages* of detailed exemptions for activities that the Governor considered "life-sustaining." As this Court recognized, every single one was secular in nature: "The exception for 'life-sustaining' businesses allows law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate . . . . But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of the other services." *Roberts*, 958 F.3d at 414.

Governor Beshear inexplicably contends that his orders contained no exemptions at all. [*See* Gov. Resp., R. 31, PageID#426 ("In fact, the Order does not provide any exemptions at all.")]. He argues that his first order simply "provides examples of what a 'mass gathering' is and what it is not." [*Id.* at PageID#426–27]. But as this Court recognized, "that is word play." *Roberts*, 958 F.3d at 414. According to his order, a mass gathering is any "convening that brings together groups of individuals." [R. 1-

5, PageID#66]. Yet the order does not include airports, where people convene for travel. It does not include offices, where people convene for work. And it does not include libraries, where people convene for activities like group readings. These are *exemptions* to the mass-gathering ban, regardless of what the Governor calls them.

The Governor's argument is even less plausible when applied to the second order. That order shuts down every business in the state that the Governor did not consider "life-sustaining." [R. 1-7, PageID#73]. No amount of word play can turn the four pages of permissible activity into anything but a detailed set of exemptions from the generally applicable rule—all of which applied only to secular conduct.

Governor Beshear has also argued that his orders did not discriminate against religious activity because the exempted secular activities are not similar to religious worship. This Court sensibly rejected this argument already. *See Roberts*, 958 F.3d at 414 ("And many of the serial exemptions for secular activities pose comparable public health risks to worship services."). A trip to the laundromat to wash and dry one's clothes usually involves sitting in the same room as others for at least as long as a typical Sunday-morning sermon. So long as individuals abide

by the same social-distancing and hygiene requirements, what exactly makes sitting in a pew more dangerous than sitting in a chair while one's laundry dries? Or as the Court put it before: "How are in-person meetings with social distancing any different from in-person church services with social distancing?" *Id.* at 415.

The exemption for "typical office environments" in the March 19 order gives away the game. [*See* R. 1-5, PageID#66]. An office ordinarily includes multiple employees working together for seven to eight hours a day, five days a week—often in the same room or conference space. True, some of those individuals might be in cubicles or even separate offices. But the ban on "mass gatherings" does not *require* that kind of spacing, and it does not prohibit individuals from working together in the same room—as many do. It certainly did not prevent the Governor himself from hosting daily press conferences with reporters in attendance, often for an hour or more each day. How are religious services, which often last no more than a few hours each week, a more dangerous gathering? To this day, the Governor has yet to say.[5]

[5] None of this analysis changes after the single-justice concurrence recently issued in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.) (Roberts, C.J.). *South Bay* raises similar—though

All this should trouble the Court even more in light of Governor Beshear's latest attempt at lifting the injunction against his ban on religious gatherings while he allows all kinds of non-essential activity to resume. Today, dog groomers and hair salons are free to open their doors, as his March 25 order no longer governs. Yet he has asked the district court for authority to re-impose his ban on in-person religious services—just in case. [*See* R. 46-1, PageID#661–67].

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not identical—issues as those presented here. The Supreme Court denied an application by the plaintiffs for an injunction pending the grant of certiorari. As is typical in such circumstances, the Supreme Court did not issue a majority opinion. Chief Justice Roberts, however, penned a concurrence, which no other justice joined, explaining his preliminary conclusion that California's stay-at-home order did not "indisputably" discriminate against religious activity. *Id.* at 1613–14.

Governor Beshear has argued below that this single-justice concurrence is binding precedent such that this Court's prior decisions are "no longer good law." [R. 46-1, PageID#664]. This argument is baseless. A decision to deny an injunction pending the grant of certiorari has no precedential value. *See Teague v. Lane*, 489 U.S. 288, 296 (1989) (denying certiorari is not precedential); *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (mem.) (explaining the extraordinarily high burden required for obtaining an injunction prior to certiorari at the Supreme Court). This is particularly true for a concurring opinion that did not garner five votes. Because the single-justice concurrence in *South Bay* is not precedential, this Court must continue to apply its own published decisions. *See Gaddis ex rel. Gaddis v. Redford Tp.*, 364 F.3d 763, 770 (6th Cir. 2004); *see also* 6 Cir. R. 32.1(b).

C. On top of his "exemption-riddled" orders, Governor Beshear has also selectively enforced his ban on mass gatherings. This case first arose after the Governor ordered the Kentucky State Police to Maryville Baptist Church to issue notices of violation against anyone attending worship service on Easter Sunday. [Verf. Compl., R. 1, PageID#11–12]. In his press release on Good Friday, Governor Beshear stated that those "attending [Easter worship] will be notified that it is [a] misdemeanor violation of the emergency orders issued by the Governor." [*Id.* at PageID#12]. He also announced that the Kentucky State Police would be collecting license plate numbers and forwarding them to the local health department to enforce a mandatory quarantine. The Governor did this even though he was only aware of *seven* churches statewide that intended to hold in-person services on Easter Sunday.[6]

[6] *See* Chris Kenning, *Coronavirus roundup: It's church vs. state in an Easter Sunday showdown as deaths rise*, The Courier Journal (Apr. 12, 2020), available at https://www.courier-journal.com/story/news/local/2020/04/12/coronavirus-update-defiant-easter-services-more-covid-19-deaths/2978274001/ (last visited July 7, 2020) ("Statewide, the vast majority of churches did avoid in-person services, according to the Kentucky State Police . . . . Beshear said he believed seven churches planned to hold in-person services.").

Contrast the Governor's reaction to Maryville with his response to the recent protests throughout the Commonwealth over issues of racial justice. These protests certainly ran afoul of the Governor's ban on mass gatherings, yet he made no similar announcement about the Kentucky State Police recording license plate numbers or implementing mandatory quarantines. In fact, Governor Beshear encouraged the gatherings and even *participated* in one taking place at the Capitol involving hundreds of individuals:[7]

[7] A copy of the Governor's post on social media is available at https://twitter.com/GovAndyBeshear/status/1269064159234338816 (last visited July 6, 2020). This is a public record on the official Twitter account of the Governor of Kentucky.

Like his "exception-riddled" orders, Governor Beshear's selective enforcement of the ban on mass gatherings belies his claim of neutrality. The orders are discriminatory as written and as enforced.

D. Make no mistake, this business of comparing secular activities with religious ones to determine whether Kentuckians can freely worship according to their faith is a sordid affair. It is deeply troubling that Governor Beshear has categorically excluded religious worship from his list of "life-sustaining" activities, deeming them non-essential during the Covid-19 pandemic. In doing so, the Governor has elevated activities that sustain life "in the physical sense," [R. 31, PageID#428], above those that sustain life in the spiritual sense, *Maryville Baptist Church*, 957 F.3d at 614. One can debate whether that is good policy or not. But "[t]he protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests." *Espinoza v. Montana Dep't of Revenue*, --- U.S. --- , 2020 WL 3518364, at *10 (2020). It is beyond question, however, that these kinds of value-driven judgments should not come from government officials who are bound by the Constitution. If religious liberty means anything, it must mean that one's spiritual well-

being *is* essential in every sense of the word, and that no government can say otherwise.

Comparisons between secular and religious conduct in this context are inherently—and constitutionally—problematic. That's because the question asks whether a particular activity is "essential" (and so may exist) or "non-essential" (and so may be banned). Governor Beshear drew a line in the sand with his executive orders: Only businesses that promote earthly well-being are an essential part of daily life. So religious organizations can operate if they provide some secular benefit. Or they can operate if doing so is no riskier than some other secular activity deemed essential. But in Governor Beshear's paradigm, religious worship itself, for its own sake, is on the wrong side of the line. *That* is not essential, the Governor says. And so it is never enough to justify inclusion in his list of government-approved exemptions.[8]

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[8] This kind of value-based line drawing explains the Seventh Circuit's error in recently dismissing a Free Exercise claim in a similar case. *See Elim Romanian Pentecostal Church v. Pritzker*, --- F.3d --- , 2020 WL 3249062 (7th Cir. 2020). As here, the plaintiffs argued in *Elim* that many of the exempt secular activities pose an equal or greater risk of harm than religious services. And the Seventh Circuit *actually agreed*, admitting that "warehouse workers and people who assist the poor or elderly may be at much the same risk as people who gather for large, in-person religious worship." *Id.* at *6. Nevertheless, the court found that the Illinois

Surely the First Amendment prohibits the government from making these kinds of judgments. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Liquor stores and laundromats might be essential. But more essential than weekly communion or reciting the Mourner's Kaddish?[9] To even attempt to answer that question is troubling, which is why this Court rightly rejected such an inquiry. *See Maryville Baptist Church*, 957 F.3d at 615.

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stay-at-home order did not discriminate against religion because religious services are more like "movies and concerts"—which are not *necessary* like "soup kitchens" and "[m]eatpacking plants." *Id.* at *5–6. The court, in other words, seemed to base the comparison on its own view of the *value* of a religious service (more like the entertainment of a movie theater than the necessity of a grocery store), rather than the risks created by the activity. These sorts of judgment calls about the value of religion are precisely what the Free Exercise Clause forbids.

[9] *See* Josh Blackman, *Judge Easterbrook admits what was implicit in Chief Justice Roberts' South Bay Decision*, The Volokh Conspiracy (June 17, 2020), available at https://reason.com/2020/06/17/judge-easterbrook-admits-what-was-implicit-in-chief-justice-roberts-south-bay-decision/ (last visited July 7, 2020) ("Governors are making 'value judgments' about the importance of religious worship. They have deemed it unimportant. They have decided that 'Churches can feed the spirit' over Zoom. We *need* Amazon Prime, but receiving communion and reciting the mourner's [Kaddish] aren't essential.").

II. The ban on religious activity is not narrowly tailored.

The Governor's ban on religious gatherings discriminates against the free exercise of religion. Can it nevertheless survive strict scrutiny? This Court has already said no, and nothing about this case now compels a different answer.

To be clear, "no one contests that the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus." *Roberts*, 958 F.3d at 415. "The question is whether the orders amount to 'the least restrictive means' of serving these laudable goals." *Id.* The Governor's orders fail to meet such a standard.

The Governor contends that his mass-gathering ban is the least-restrictive means of combating Covid-19 because mass gatherings are "where the risk of transmission of the disease is highest." [Gov. Resp., R. 31, PageID#430]. But certainly there are less restrictive means of reaching the same goal. He could, for example, impose limits on the number of people who can congregate in any area based on the square footage. And he could require that every individual "adhere to social-distancing and other health requirements," whether in a house of worship or outside of

it. After all, if social distancing is enough for a law office, it should certainly be enough for worship.

In its prior opinion, this Court zeroed in on the precise problem here: "If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith." *Roberts*, 958 F.3d at 415. The least-restrictive solution for a group of religious worshippers who refuse to follow social-distancing requirements is *to enforce those guidelines*—not to ban religious worship entirely. After all, if "the same person can be trusted to comply with social-distancing and other health guidelines in secular settings," why can the government not do the same "in religious settings?" *Roberts*, 958 F.3d at 414. If the Governor has an answer, he "has not provided one." *Id.*

CONCLUSION

This Court got this case right the first two times it examined the issues. The Court should reverse the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 7, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s Brett R. Nolan
Brett R. Nolan
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because the brief contains 4,731 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

/s Brett R. Nolan
Brett R. Nolan
Attorney for Amicus Curiae

Dated: July 7, 2020