

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARYVILLE BAPTIST CHURCH, INC.
and DR. JACK ROBERTS,

Plaintiffs,

v.

Civil Action No. 3:20-cv-278-DJH-RSE

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

Defendant.

* * * * *

ORDER

The Court previously denied the motion of Plaintiffs Maryville Baptist Church and Jack Roberts for a temporary restraining order preventing Governor Andy Beshear from enforcing a ban on mass gatherings as it applied to church services. (Docket No. 9) Plaintiffs appealed the Court's ruling, and the Sixth Circuit has since granted in part Plaintiffs' motion for an injunction pending appeal. *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 2020 U.S. App. LEXIS 14213 (6th Cir. May 2, 2020). The Sixth Circuit, noting that the Governor had not asserted sovereign immunity, enjoined the Governor from enforcing the ban as to drive-in church services but left for this Court to decide whether the ban was permissible as applied to in-person services. *See id.* at *8-*9, *15-*16. After briefing was complete, as the Court finalized its decision on that issue, the Governor filed a motion to dismiss, asserting sovereign immunity for the first time in this litigation. (D.N. 33) As explained below, the Court finds that Plaintiffs would likely succeed on the merits of their claim under the Kentucky Religious Freedom Restoration Act (KRFRA). In the alternative, the Court finds that Plaintiffs have a substantial likelihood of success on the merits of their constitutional claims. The Court will therefore grant the remainder of Plaintiffs' motion for injunction pending appeal.

I.

Plaintiffs assert violations of the First Amendment and KRFRA arising from orders issued by the Governor and state health officials in response to the COVID-19 pandemic. (D.N. 1) The orders ban “mass gatherings,” defined as “any event or convening that brings together groups of individuals.” (D.N. 1-5, PageID # 66) This restriction includes, “but [is] not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.” (*Id.*) The ban on mass gatherings is consistent with guidance from the Centers for Disease Control and Prevention that “COVID-19 spreads mainly among people who are in close contact with each other (within about 6 feet) for a prolonged period” and may be spread by individuals who do not show symptoms of illness. (D.N. 31-2, PageID # 453 (affidavit of Kentucky Public Health Commissioner Steven Stack, M.D.)) Plaintiffs maintain that they have required, and would continue to require, social-distancing and hygiene measures for individuals attending in-person services at the church.¹ (D.N. 1, PageID # 17)

The parties repeatedly denied any need for discovery in this matter. Nor did either side seek an evidentiary hearing or oral argument on Plaintiffs’ motions. The Court directed the parties to confer regarding a set of stipulated facts. The stipulation filed (D.N. 29) is of minimal value. As a result, the factual basis for the analysis below is severely limited.

II.

The Federal Rules of Civil Procedure provide that “[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction

¹ Plaintiffs have held, and continue to hold, in-person services in violation of the Governor’s orders. (*See, e.g.*, D.N. 25-3)

on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d). As before, the Court's analysis is guided by four factors: (1) whether Plaintiffs have demonstrated a strong likelihood of success on the merits; (2) whether they will be irreparably injured absent the requested injunction; (3) whether the injunction would "substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *4-*5 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

Because the Court must avoid constitutional questions if possible, it addresses Plaintiffs' KRFRA claim first. *See, e.g., Torres v. Precision Indus.*, 938 F.3d 752, 754-57 (6th Cir. 2019); *WJW-TV, Inc. v. Cleveland*, 878 F.2d 906, 910 & n.4 (6th Cir. 1989).

A. Kentucky Religious Freedom Restoration Act

Kentucky Revised Statutes § 446.350 provides:

The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

There is no dispute here that "the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus." *Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *6. Likewise, neither the Court nor the Governor questions whether the activities burdened by the restrictions are motivated by sincerely held religious beliefs, or that the burden is substantial. *See id.* Thus, as the Sixth Circuit recognized, Plaintiffs' KRFRA claim turns on the "least restrictive means" element, *id.*, for which the Governor bears the burden of proof. *See Ky. Rev. Stat. § 446.350.* Unfortunately, the Governor does not address this element, much less provide "clear and convincing evidence" to support it. (*See generally* D.N. 31)

The Governor briefly argues, for purposes of Plaintiffs’ constitutional claims, that the orders are narrowly tailored. Citing evidence that “mass gatherings present a particular risk for the spread of disease, as compared to transitory encounters,” he asserts that “[p]roviding an exception to the mass gatherings order for in-person faith-based services would compromise the Commonwealth’s efforts to reduce the spread of COVID-19 and flatten the curve.” (*Id.*, PageID # 430 & n.52; *see* D.N. 31-2, PageID # 453) The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals. (*See generally* D.N. 31) Most notably, his response brief fails to address the Sixth Circuit’s suggestion that concerns about large gatherings could be adequately addressed by simply “limit[ing] the number of people who can attend a service at one time.” *Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *14. Because the Governor bears the burden of proof on this element, Ky. Rev. Stat. § 446.350, the Court is compelled to find that Plaintiffs have a strong likelihood of success on the merits of their KRFRA claim.

B. Constitutional Claims

In the alternative—assuming, without deciding, that the Governor has properly asserted sovereign immunity and that the KRFRA claim is therefore barred—the Court finds that Plaintiffs are likely to succeed on the merits of their constitutional claims. Unlike this Court, the Sixth Circuit read the mass-gatherings ban as discriminatory and thus subject to strict scrutiny. *See Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *10-*11. (*Cf.* D.N. 9, PageID # 223-25) And as explained above, the Governor has offered little to show that the orders were narrowly tailored. *See supra* part II.A; *see also Maryville Baptist*, 2020 U.S. Dist. LEXIS 14213, at *7 (“All in all, the Governor did not narrowly tailor the order’s impact on religious exercise.”).

The remaining factors all follow from Plaintiffs' likelihood of success. *See Maryville Baptist*, 2020 U.S. Dist. LEXIS 14213, at *14. While "the balance is more difficult when it comes to in-person services," the Governor has not shown that allowing in-person services at limited capacity, with strict social-distancing and hygiene measures observed, would substantially harm third parties or the public interest. *See id.* at *10-*11 (noting that "[t]he exception for 'life-sustaining' businesses allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other health-related precautions").² He still "has offered no good reason . . . for refusing to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the

² The Sixth Circuit was concerned that this Court "seemed to think . . . that the explanation for these groups of people to be in the same area—intentional worship—distinguishes them from groups of people in a parking lot or a retail store or an airport or some other place where the orders allow many people to be." *Id.* at *13. To address the panel's concern, the Court clarifies that this was not, and is not, the Court's belief. Rather, the Court contrasted events where individuals gather and remain at a specific time for a common purpose or experience—such as church services, movies, concerts, and sporting events, all of which are currently prohibited—with activities undertaken individually, such as a trip to the grocery or liquor store, which is typically brief and begins and ends according to the individual's independent purpose. (*See* D.N. 9, PageID # 224-25; *see also* D.N. 31, PageID # 427 (noting that the ban on mass gatherings is intended to "close[] any event the purpose of which is to congregate person-to-person for an extended period to engage in a particular activity")) "Why can someone safely walk down a grocery store aisle but not a pew?," the Sixth Circuit asks, "[a]nd why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Id.* at *11. In the infectious-disease context, the Court views the differences between such encounters as significant: the fellow grocery shopper will not sit down nearby and stay for an hour or more, talking and singing; the deliverywoman is unlikely to embrace or speak closely with a package recipient. The studies cited by the Governor, as well as the affidavit of Commissioner Stack, confirm that these distinctions are relevant in preventing the spread of COVID-19. (D.N. 31, PageID # 430 n.52 ("There is preliminary evidence suggesting that mass gatherings present a particular risk for the spread of disease, as compared to transitory encounters, which is why CDC has advised against gatherings where individuals are in close contact for prolonged periods of time." (citations omitted)); D.N. 31-2, PageID # 453) The same distinctions cannot be drawn for workplaces such as law offices or laundromats, as discussed above.

same.” *Id.* at *13. The Court therefore finds that preliminary injunctive relief is warranted on Plaintiffs’ constitutional claims as well.

III.

For the reasons set forth above, it is hereby

ORDERED as follows:

(1) Plaintiffs’ renewed motion for injunction pending appeal (D.N. 25) is **GRANTED** as to in-person services. Given that the same issues are raised in Plaintiffs’ initial motion for preliminary injunction, that motion (D.N. 3) is likewise **GRANTED**. The Governor and other Commonwealth officials are **ENJOINED** from enforcing the ban on mass gatherings as to in-person services at Maryville Baptist Church so long as the church, its ministers, and its congregants adhere to public health requirements set by state officials.³

(2) Plaintiffs’ initial motion for injunction pending appeal (D.N. 17) and motion for reassignment (D.N. 11) are **DENIED** as moot.

(3) The Governor’s motion to exceed the page limit (D.N. 30) and the motion of the Commonwealth of Kentucky for leave to file an amicus brief (D.N. 20) are **GRANTED**.

(4) If necessary, the Court will set by subsequent order a briefing schedule on the Governor’s motion to dismiss and a hearing on Plaintiffs’ request for permanent injunction.

May 8, 2020

A handwritten signature in black ink, appearing to read "D.J. Hale", is written over a circular seal of the United States District Court for the Eastern District of Kentucky. The seal contains the text "UNITED STATES DISTRICT COURT" and "EASTERN DISTRICT OF KENTUCKY".

**David J. Hale, Judge
United States District Court**

³ At approximately 6:00 p.m. on Friday, May 8, 2020, the Governor filed “Supplemental Fact Development” that included new guidelines for in-person worship services. (D.N. 34)