

April 9, 2020

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Via e-mail: greg.fischer@louisvilleky.gov

Mayor Greg Fischer
City of Louisville
527 W. Jefferson Street
4th Floor
Louisville, Kentucky 40202

Re: Drive-in Easter Church Service

Dear Mayor Fischer:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. My law firm has a long history of working together with First Liberty to protect the religious liberty of Americans of all faiths.

Together we represent On Fire Christian Church of Louisville, Kentucky ("OFCC" or the "Church"), and we write out of concern with regard to your recent announcement that drive-in church services are prohibited in Louisville for Easter this year.¹ Reportedly, you have also encouraged people to contact the city's 311 phone number if they are aware of a house of worship that plans to hold a drive-in service in contravention of your prohibition.² These directives go beyond the Centers for Disease Control ("CDC") guidelines and target religious exercise contrary to both federal and Kentucky state law. We are writing to request that you retract your directives.

As I am sure you are aware, Easter is among the most important of holidays on the Christian calendar. In the Christian faith, Easter is a celebration of the physical resurrection of Jesus Christ from the dead on the Sunday morning following his crucifixion. For more than 2,000 years, Christians have gathered physically each Sunday throughout the year in observance of that event, and the physical gathering of the church is central to that celebration. Indeed, the Greek word translated "church" in our English versions of the Christian scriptures is the word "ekklesia," which literally means "assembly." The bodily assembly of the church on Easter Sunday each year to celebrate in a special way Christ's bodily resurrection is of particular importance and significance for Christians.

¹ See *Fischer: Drive-in, parking lot Easter services not allowed in Louisville*, WLKY (April 8, 2020), <https://www.wlky.com/article/fischer-drive-in-parking-lot-easter-services-not-allowed-in-louisville/32079690>; Matthew Glowicki, Louisville Courier Journal (April 7, 2020), *Fischer explains why he doesn't want to see drive-in religious services during Easter, Passover*, <https://www.courier-journal.com/story/news/2020/04/07/louisville-coronavirus-no-easter-passover-car-services-fischer-says/2965005001/>.

² Glowicki, *supra* note 2.

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We understand that the assembly of Christian believers this year poses unique challenges because of the COVID-19 pandemic that has spread in our country. OFCC is committed to physically gathering for Easter in a manner consistent with guidelines issued by the CDC for community and faith-based organizations³ to ensure the safety and well-being of members and congregants. The Church has been hosting drive-in church services in its parking lot for several weeks consistent with CDC guidelines and again plans to host a drive-in church service this Sunday for Easter. In order to ensure the physical safety of congregants, cars will park six feet apart, all congregants will remain in their cars with windows no more than half open for the entirety of the service. Multiple security personnel will be present to ensure proper spacing between cars and orderly compliance with all guidelines. Other than security, the only persons not restricted to a car will be the pastor and a videographer, both of whom will remain a safe distance from the parked cars. This will provide strong protection for the health of the church community and others and err on the side of caution to prevent potential contact and ensure the transmission of illness is not facilitated by the service.

Your prohibition of religious gatherings of this type on Easter, regardless of the precautions taken, is forbidden under both federal and Kentucky state law. Kentucky's Religious Freedom Act ("KRFA") prohibits government officials from substantially burdening religious exercise without demonstrating that the restriction imposed advances a compelling interest by the least restrictive means. Ky. Rev. Stat. Ann. § 446.350. The First Amendment's Free Exercise Clause imposes a similar standard when government action targets religious exercise. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The government bears the burden of meeting this exceptionally demanding standard. *See id.* at 546; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014);⁴ Ky. Rev. Stat. Ann. § 446.350. The requirements are so high that government action "that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive [this standard] only in rare cases." *Lukumi*, 508 U.S. at 546.

It is clear that your prohibition of drive-in church services imposes a substantial burden -- indeed, a wholesale prohibition -- on this particular religious exercise by the Church. *Cf. Hobby Lobby*, 573 U.S. at 726. Stated another way, your directive prohibits the physical gathering of believers that is central to the Easter celebration, effectively limiting religious services by houses of worship to video or teleconferencing only but does not force the same restriction on other

³ See Centers for Disease Control, *Interim Guidance for Administrators and Leaders of Community- and Faith-Based Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html>.

⁴ KRFA is substantially similar to the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1. Thus, cases interpreting RFRA are instructive in interpreting KRFA.

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entities or activities. As a result, it uniquely handicaps churches from implementing the social distancing guidelines⁵ provided by the CDC and approved by Governor Beshear.

This burden on religious worship is not the least restrictive means of achieving your public safety goal. The CDC’s social distancing guidelines are appropriate to limit the spread of COVID-19. Imposing more restrictive requirements that target only churches and their drive-in services like those that churches around the country have implemented to serve their members and communities⁶ does not meet the requirements of the least restrictive means test. Isolating congregants in a car is less restrictive than isolating them in a house. Consequently, the prohibition of drive-in services is not the least restrictive means of preventing the spread of COVID-19, *see* Ky. Rev. Stat. Ann. § 446.350; *Lukumi*, 508 U.S. at 538–39, 546, and so violates state and federal law because of the burden it lays on religious exercise.

The prohibition is similarly unlawful because it treats houses of worship less favorably than similarly situated entities. For example, the prohibition does not apply to restaurants that provide drive through or take out service. Nor does it apply to establishments such as Wal-mart, where far more people park with more contact and less oversight. A government cannot meet its burden to demonstrate a compelling interest in restricting religious exercise if it implements such exemptions. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006); *Lukumi*, 508 U.S. at 547.

Defining similarly situated services as “essential” is not availing. Religious exercise is an essential and constitutionally protected activity.⁷ No government may suspend the Constitution because that government insufficiently values its citizens’ religious needs. Furthermore, the federal Cybersecurity & Infrastructure Security Agency of the U.S. Department of Homeland Security includes clergy within its list of essential infrastructure personnel.⁸

The Church recognizes that you are dealing with a tremendously difficult situation, and it applauds you for your work to protect the city and its residents. The Church will continue to work with you and the City to keep everyone safe and well. Even so, the prohibition against drive-in church services for Easter goes beyond the CDC’s requirements and violates both the First

⁵ It also effectively prohibits any Easter services for houses of worship that lack the expertise or technological infrastructure necessary to provide religious services by video or teleconference.

⁶ *See, e.g.*, Salena Zito, “While some churches go virtual, others go old school: Drive-ins,” Washington Examiner (March 23, 2020), <https://www.washingtonexaminer.com/opinion/while-some-churches-go-virtual-others-go-old-school-drive-ins>.

⁷ *See* U.S. Const. amend. i; *cf. McCreary Cty. v. ACLU*, 545 U.S. 844, 875 (2005) (noting the constitutional necessity that the military provide chaplains for servicemembers).

⁸ *See* U.S. Dep’t of Homeland Security Cybersecurity & Infrastructure Security Agency, “Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response,” *available at* https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf (includes “Clergy for essential support” as essential workers).

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Amendment's Free Exercise Clause and the Kentucky Religious Freedom Act. As Easter Sunday is only a couple of days away, please let me know by 4:00 p.m. ET today, Thursday, April 9, if OFCC is permitted to hold its drive-in service on Easter so that the Church may consider its next steps.

Best regards,

A handwritten signature in blue ink, appearing to read "Matt. Martens", with a stylized flourish at the end.

Matthew T. Martens

MTM:mtm

cc: Pastor Chuck Salvo
Hiram Sasser, Esq.