

1 (Begin proceedings in open court at 2:11 p.m.)

2 THE COURT: Good afternoon. We're on the record in On
3 Fire Christian Church v. Greg Fischer, et al, 3:20-CV-264. Even
4 though we're doing this over the phone, this is a courtroom, so
5 the rules of our federal courtroom are in place. That means no
6 recordings. At the end of this hearing, the Court will post on
7 the docket an unofficial rough transcript. That's just an
8 attempt to be as open and transparent as possible in spite of
9 the fact that the physical courtroom is closed to visitors.

10 If members of the public go to the Court's website,
11 www.kywd.uscourts.gov, there will be an immediate general order
12 blurb with a list of draft transcripts. They can click the link
13 which takes them directly to the list of uploaded draft
14 transcripts.

15 In a moment, I'll ask counsel to make their appearances. We
16 do have a court reporter here, so please always try to be clear
17 about who's speaking so that we can have an accurate transcript.
18 I'll begin with the plaintiff. If you could please state your
19 appearances for the record.

20 MR. MARTENS: Yes, Your Honor. This is Matthew
21 Martens of WilmerHale appearing for the plaintiff. I believe I
22 have a pro hac vice motion pending with the Court.

23 THE COURT: Very good. And you'll be speaking for the
24 plaintiff today. Are there any other attorneys on the
25 plaintiff's side who need to enter their appearances?

1 MR. SMITH: Your Honor, this is Brooken Smith on
2 behalf of the plaintiff. I'm here with Mike Swansburg.

3 THE COURT: Okay. Thank you.

4 MR. SASSER: Your Honor, this is Hiram Sasser for
5 plaintiff.

6 THE COURT: Okay. Very good. I'll turn to the
7 defendant. Could you please enter your appearances for the
8 record?

9 MR. O'CONNELL: Judge, we have a little technical
10 difficulty there. This is Mike O'Connell, Jefferson County
11 attorney. I'm here with John Carroll and Jeff Mosley. Mr.
12 Carroll will be arguing on behalf of Louisville Metro today.

13 THE COURT: Very good. Before we turn to the
14 arguments, one quick preliminary question for the defendant. So
15 Mr. Carroll. Any objections to the pro hac motions that have
16 been filed on the docket?

17 MR. CARROLL: No, Your Honor.

18 THE COURT: Okay. Okay. Plaintiff has the burden, at
19 this stage, so I'm going to start with the plaintiffs. Mr.
20 Martens, are you going to present any evidence today?

21 MR. MARTENS: Your Honor, I think that depends. What
22 I'd like to do is move into evidence the transcript of the
23 mayor's remarks, which I believe is reflected in the filing that
24 was made by the city last night, and there is a recording, which
25 the Court cited.

1 We'd be happy to have a court reporter transcribe that, if
2 that'd be useful, but it doesn't look like there's disagreement
3 by the parties about the mayor's remarks. So if there's no
4 objection from the plaintiffs, we'd like to move that in.

5 We would also like to move into evidence the organizational
6 chart that we filed with my declaration as well as the CDC
7 guidelines, and then also the affidavits of Pastor Salvo. If
8 there's no objection, those are the -- that is the evidence we'd
9 like to move in.

10 THE COURT: Okay. Thanks. Mr. Carroll, any objection
11 to any of that?

12 MR. CARROLL: No objection, Your Honor.

13 THE COURT: Okay. And just to clarify, Mr. Martens.
14 The statement from the mayor that I think you're referring to is
15 on page 6 and page 7 of the defendant's motion to dissolve the
16 temporary restraining order and their response on the
17 preliminary injunction; is that correct?

18 MR. MARTENS: Yes, I believe that's correct. I'm just
19 looking here at the pages, but that sounds right. Yes, it's
20 pages 6 and 7.

21 THE COURT: Okay. So in that case, would you like to
22 make any argument on the preliminary injunction in addition to
23 what, of course, has been filed in your briefing?

24 MR. MARTENS: Yes, Your Honor. I would. Thank you.
25 And I'd also like to, first of all, thank the Court for

1 accommodating my schedule issue. I apologize if that caused any
2 inconvenience, and I greatly appreciate the Court accommodating
3 that meeting that I could not move.

4 THE COURT: No problem.

5 MR. MARTENS: Thank you. Turning to the issues
6 raised, in particular, in the City's filing last night, I'd like
7 to start first with the claim, which seems to have been repeated
8 several times, that the City was denied an opportunity to
9 respond before the TRO was issued. I believe that argument is
10 baseless.

11 As an initial matter, I wrote to the mayor on the morning of
12 Thursday, April 9th, explaining our concerns and inviting their
13 response. And while I recognize that the mayor is busy with a
14 number of matters these days, I'm sure, ultimately, this was
15 also an important matter to my client, and we transmitted the
16 letter by e-mail to make sure it would be received promptly, and
17 there was no response.

18 After filing our papers, then, on Friday, on the afternoon
19 of Friday, we reached out to and ultimately made contact with
20 counsel for both the mayor and opposing counsel. We weren't
21 required to do that, but we did so in good faith, and, again,
22 the mayor's counsel chose not to make a filing in response.

23 I asserted several times that they reached out to the Court.
24 I don't know how they did that, but they didn't do it through
25 the appropriate manner, which is to file a writing on the

1 electronic filing system, either ask for a hearing or to make a
2 written submission.

3 So I just want the record to be clear that while the claim
4 has been made several times that the mayor and the City were
5 denied an opportunity to respond before the TRO, I don't believe
6 that's correct.

7 Turning to the merits of the constitutional claims here, I'm
8 still somewhat unclear, after reading the defendant's brief, as
9 to exactly what their position is with regard to enforcement.

10 They alleged a number of things or assert a number of things
11 in their filing last night, including that the March 19th order
12 by the governor prohibits face -- faith-based gatherings, mass
13 gatherings. They assert that the mayor has the authority to
14 enforce that order. They assert that the mayor can do so
15 through criminal citations. They acknowledge that they, through
16 the police department, have been issuing notices of violations
17 for that order, and those notices, which were attached to their
18 papers, make statements threatening potential enforcement
19 action.

20 The mayor publically stated that people who attend drive-in
21 church services would be in violation of the March 19th order by
22 the governor, which, as a matter of law, is punishable as a
23 misdemeanor. And the mayor has -- and they have also asserted
24 in their brief that the mayor has the authority to enforce the
25 March 19th order more stringently.

1 At the same time, despite asserting that they have all these
2 powers to make criminal enforcement, they claim that there's
3 nothing to enjoin, but, notably, what they never say is that
4 despite that legal backdrop, that my client has the right to
5 function and offer drive-in church services. They never
6 actually say that. Instead, they continue to make assertions
7 about their authority to impose criminal penalties and offer the
8 cold comfort that they simply haven't done so yet.

9 We think that that is -- that is an actionable case
10 appropriately enjoined, and the governor -- and the mayor's
11 statements over and over that church is not allowed and citing
12 that -- and saying that the -- such drive-in church services
13 would be in violation of the governor's order, which is --
14 carries a criminal punishment, posed a real threat to my client
15 that he was concerned about and remains concerned about, and
16 that -- and the may -- and the defendant's brief does nothing to
17 calm those concerns. In fact, if anything, continues to assert
18 the authority to impose criminal punishment.

19 So in that instance, we believe that this issue is rightly
20 before the Court, is even more so now in light of the assertions
21 that the mayor makes about his authority to impose criminal
22 punishment, and we believe that the TRO was properly before of
23 this Court, and an injunction request is also like -- properly
24 before this Court.

25 In response to the constitutional claims that we have made,

1 including freedom of religion, free exercise clause, right to
2 assemble, in state constitutional claims, under Kentucky's
3 literal RFRA statute, the only response that I understand that
4 the city to be making in response is that the police power of
5 the state to protect the public health, safety, and welfare
6 trumps constitutional rights.

7 It was, frankly, a somewhat extraordinary statement that
8 they make. In particular, on pages I believe it's 11 and 12 of
9 their brief where they recite the state's police power, which I
10 don't believe anyone disputes that states have police power long
11 recognized, but if you'd like on page 10 -- or excuse me. Page
12 11 of their brief, they include the sentence that says that it's
13 always been understood that all, quote, end quote, rights which
14 involve conduct are subject to limitations by the essential
15 police measures which protect public health, safety, and
16 welfare.

17 With all due respect to the City, Your Honor, that is
18 exactly backwards. The public -- the police power of the state
19 to protect public health, safety, and welfare is subject to
20 constitutional rights. Constitutional rights are not subject to
21 the police power of the state, and I think that that, frankly,
22 frightening statement by the City reflects that they do not
23 understand the legal structure here.

24 They don't argue any narrow tailoring or particular
25 necessity with regard to this unique gathering, where -- where

1 this church's gathering consists of the CDC guidelines. They're
2 essentially asserting a blanket right by invoking public health,
3 safety, and welfare to override constitutional rights.

4 I think that -- and that is a troubling argument. No one
5 here is contesting that COVID-19 is a serious disease. Nobody
6 here is contesting the government officials have powers under
7 the police power to address the threat of a disease, but a claim
8 like that that the mayor is making, which is that rights yield,
9 without apparent limitation to governmental authority is
10 shocking, and, with all due respect, is not the law.

11 Ultimately, the mayor's and the City's brief does nothing to
12 address our argument that their reading and threatened
13 enforcement of the March 19th order is discriminatory, and that
14 is ultimately our primary concern with regard to our religious
15 freedom argument.

16 That they have -- it is not a law that the order, the
17 governor's order, and the threatened enforcement of it is not
18 neutral, it is not evenly applied, but it was particularly
19 singling out the church here and church gatherings of
20 enforcement, which is what gave rise to our concern. The
21 mayor's statement that there will be no church, and that church
22 won't be allowed.

23 I'd also like to just briefly address the photos that
24 they've attached to their brief. First of all, there's no
25 authentication of those photos, in terms of when they were taken

1 or by whom they were taken or where they were taken. That said,
2 I think the most relevant evidence here is what occurred
3 yesterday, and what -- or excuse me. Sunday, two days ago, and
4 what those -- what they have not offered, to my knowledge, is
5 any evidence of what happened this past Sunday.

6 But we have offered into evidence the declaration of the
7 pastor showing that he was carefully instructing his
8 congregation to follow the CDC guidelines here. He is very
9 concerned about the health and safety of his congregation and is
10 committed to following the CDC guidelines.

11 To the extent that the Court considers the photos competent
12 evidence, and I don't believe they're properly in the record,
13 they show nothing of the sort that the defendant's claiming.
14 Namely, violations of social distancing. The fact that there's
15 photos of people in proximity to one another is not a violation
16 of social distancing guidelines.

17 There's no discussion in there, and there's no evidence
18 before the Court as to whether those individuals are family
19 members who would properly be in close proximity to one another
20 whether at a church service or at home.

21 They show people standing in a truck bed, because particular
22 people attending had a truck, but, again, there's no evidence
23 that those folks are not family members. There's no indication
24 that they're doing anything improper. They're watching a church
25 service.

1 Admittedly, some of -- some of the participants raised their
2 hand and worshipped during those services, but, again, there's
3 no evidence tho those folks were making contact or touching one
4 another. While one of the photos reflects a collection plate
5 being passed, that's a necessary part of worship for many
6 congregations, and, as you see, the participant in it was not
7 making physical contact with people, was wearing a mask and was
8 wearing gloves. So we don't believe that those photos show any
9 evidence of violation, to the extent that they're even properly
10 in the record.

11 And, again, I think the evidence of the pastor instructing
12 his congregation to follow the CDC guidelines was -- is
13 compelling, in terms of his commitment to follow this -- this
14 Court's TRO and abide by the guidelines. And while -- while
15 they met on Sunday in a mass gathering, they did so, we believe,
16 in a manner that was safe and does not present a compelling
17 government interest to override the ability of the church to
18 worship.

19 So with that, we ask that the Court would deny the
20 defendant's motion to dissolve the TRO and enter a preliminary
21 injunction.

22 THE COURT: Thanks, Mr. Martens.

23 MR. MARTENS: Thank you.

24 THE COURT: A number of questions. I'll begin with
25 the photos that you mentioned. And I take the point that

1 they're not necessarily -- they're not authenticated.

2 The photo of the collection basket being walked around from
3 car to car, you know, in that photo, the person collecting the
4 money is clearly within six feet of the person giving the money.

5 I understood you to say that collecting money is a part of
6 the worship service. Even if that's the case, it's not clear to
7 me that there is not another way to collect money that wouldn't
8 involve passing the basket where people are within six feet of
9 each other. You know, Venmo, PayPal, an online option, mailing
10 in checks.

11 So I think your point about most of these other pictures,
12 and I also take your point about the collection bas -- I mean
13 about how maybe this past Sunday, even more precautions were
14 taken than in earlier weeks, I think, probably, it's the case
15 that all of us are taking more precautions today than we took
16 several weeks ago. But could you respond to, I guess, my
17 concern about, you know, was there a safer way to collect
18 donations?

19 MR. MARTENS: Absolutely, Your Honor. I'd be happy to
20 respond to that. So I think the Court makes an important point,
21 which is that I think we're all facing extraordinary times and
22 attempting, in good faith, to understand how to best protect
23 ourselves and our communities in these evolving circumstances.

24 And so I don't know about you, but for me, three weeks ago
25 feels like a lifetime ago, and a lot's changed in that time, and

1 to the -- what I understand is that these photos were -- that
2 this photo -- that they -- let me say this: What I understand
3 is that the collection of money through a basket was something
4 that the church did a number of weeks ago.

5 Obviously, times have evolved since then, and my
6 understanding is that the church has made a -- has taken
7 additional precautions. Including I don't believe that they
8 collected money by a basket yesterday -- or excuse me. On
9 Sunday. They have shortened their services, and they have
10 precluded people from using the restroom facilities at the
11 building, because they don't want people out and walking around.

12 So I think the Court's point is well taken that as the
13 situation has evolved, the church has learned, just as the rest
14 of us have learned, on -- of what precautions are necessary, and
15 what activities are advisable. And so I don't think that the
16 church would object, because they didn't this past Sunday,
17 collect money in this manner, I'm sure that they are willing to
18 consider other alternatives that would satisfy the City's and/or
19 the Court's concerns.

20 THE COURT: Let's talk a little bit more about the CDC
21 guidelines. The pastor submitted an affidavit I think just
22 today of a statement he made at the beginning of Sunday's
23 service. The statement begins by saying, "On Fire Christian
24 Church is fully committed to complying with the CDC's guidelines
25 in all that we do."

1 You also submitted CDC guidelines that refer to different
2 regimes of precaution. There is a certain regime that would
3 apply when there's no community transmission, an elevated regime
4 when there's minimal to moderate community transmission, and
5 then a third more severe regime that would apply when there is
6 substantial community transmission.

7 Do you have an opinion on which or does your client have an
8 opinion on which of those three regimes applies to Jefferson
9 County, Kentucky, right now?

10 MR. MARTENS: So I don't think I have an opinion on
11 that. I can tell the Court what the City is do -- excuse me.
12 What the church is doing in and effort to observe CDC
13 guidelines, because as we understand it, all of the CDC
14 guidelines are recognized a practicability aspect to them, which
15 is that they're not hard-and-fast rules. That they're
16 guidelines to -- but recognizing they have to be flexible.

17 And just as the Court pointed out in the TRO opinion, there
18 are -- there's closer contact, for example, when people go to
19 drive-through windows or check out in grocery stores. It's not
20 a rigid rule.

21 Even though we're supposed to maintain social distancing in
22 stores, there are moments when people will come within six feet,
23 but the goal, I believe, and the church is trying to abide by,
24 is that people maintain -- stay six feet apart, stay in their
25 cars, keep their windows largely rolled up, not be wandering

1 around in the parking lot, not be going over to use the
2 restrooms, and that the only person who should be outside is
3 somebody, maybe, who's necessary for security, and that the
4 pastor on the stage by himself. So --

5 THE COURT: Let me interrupt -- let me interrupt, and
6 just if we are in a regime of minimal to moderate community
7 transmission, which is, you know, I think it's hard to say we're
8 not at least in that regime, and I, you know --

9 MR. MARTENS: Uh-huh.

10 THE COURT: -- expect the City would say we're in
11 substantial community transmission regime, but even under the
12 minimal to moderate community transmission regime, under the CDC
13 guidelines, the guidelines say that religious organizations
14 should cancel or postpone in-person gatherings or move to
15 smaller groupings. It also says they should follow directions
16 of state and local authorities.

17 In either of the guidelines that -- what you filed today, do
18 you think that On Fire is complying with the guideline that says
19 cancel or postpone or move to smaller groupings?

20 MR. MARTENS: So if the -- I think it depends on how
21 one reads that. In other words, I think that there is a fair
22 argument that it is smaller groupings, in the sense that you
23 don't have all members of the church in one large room where one
24 person coughs, and, you know, someone three pews away could be
25 infected. I do think that what the church is trying to achieve

1 here is smaller groupings. That family members are staying
2 within their cars, in their confined space. So to the extent
3 that there's an enclosure, people are enclosed in their cars
4 separated from others.

5 So I do believe that that's an attempt to achieve smaller
6 groupings, meaning not having a large grouping of people in one
7 confined space.

8 THE COURT: Okay. Then I do think that's helpful.
9 Thank you for answering the question in trying to figure out
10 whether the church is complying with the CDC guidelines. The
11 guidelines -- well, the guidelines that you filed today, are
12 they still in effect? I mean, this is such a fluid situation,
13 and, you know, I mean, I think that's part of your point, but
14 are the -- I guess that's my question. Are the guidelines you
15 filed, are they still in effect?

16 MR. MARTENS: So I don't -- unfortunately, I don't
17 know the answer to that. What I -- the reason I filed them was
18 because they were the ones cited, I believe, by the City and the
19 mayor in their papers, and so I wanted the Court to have them
20 readily accessible.

21 Whether there -- as far as I know, I didn't see -- I mean,
22 when I looked -- when we looked on the website, we didn't see
23 anything superseding those, but I also recognized that there is,
24 in all the guidelines that CDC has put out over time has
25 recommended to keep up to date, but I haven't seen anything

1 superseding those, though I recognize they're phrased as
2 interim.

3 THE COURT: Well, and I'll ask the City. It's not a
4 trick question to you or to them.

5 MR. MARTENS: Yeah. Understood.

6 THE COURT: It's a fluid situation. At least one more
7 question on the guidelines and the precautions. Is your client
8 doing anything to discourage people from driving out of -- from
9 out of state in order to come to their worship service?

10 MR. MARTENS: So I don't know the answer to that. I
11 don't know whether they have members, for example, from southern
12 Indiana. I could certainly inquire about that, perhaps while
13 the Court is speaking with other counsel, but I don't know
14 whether -- whether that's the case. I know they tried to
15 discourage people from coming in not in automobiles, like on
16 bicycles or things like that, but I don't know whether they
17 have -- whether there's an issue with out-of-state attendance.

18 THE COURT: I guess another question is why not --
19 would it be feasible for them to put their windows all the way
20 up? I don't -- I guess I'm not clear on how they're listening
21 to the service, if it's via radio or Bluetooth or if there is
22 some big, loud speaker that you would need the window down for.
23 It, obviously, would be different if we were in July, and it was
24 100 degrees outside or something, but is there a reason not to
25 put the windows all the way up?

1 MR. MARTENS: So I don't believe that it's over radio.
2 I believe that it is loud speaker, though I can confirm that,
3 and I think that is the reason that they're doing that, just to
4 be able to hear.

5 THE COURT: Okay. Let me turn to the law a little bit
6 as opposed to the facts of the case. Assume that Louisville
7 Police see members of On Fire not social distancing at a
8 drive-in service. Do you think, at that point, it would be
9 within the mayor's power to ban the service?

10 MR. MARTENS: So I don't think -- so I think that
11 that's a nuance question. I think that the approach that the
12 mayor can't take is targeting of religion. So what we've seen
13 with regard to other events, as evidenced by what they put in
14 the record on the notice is that their approach wasn't to ban
15 things where people -- shut down stores where people aren't
16 violating but to encourage. And so I think what I would say is
17 that I believe there is an obligation of neutral treatment.

18 I read just in the paper that -- the Louisville paper this
19 weekend in, I believe, a section called Butchertown, there was a
20 parade of people in town, and I haven't heard any response to
21 that.

22 So I think that the question there is nuance only in the
23 sense that I don't believe that the mayor can take a
24 discriminatory approach against religion that does not apply --

25 THE COURT: Let's assume -- Mr. Martens, let's assume

1 neutrality. Let's assume that there was no specific targeting
2 of church services. Maybe if a neighbor observed that there is
3 not social distancing going on and called 311. You know,
4 assume -- assume the most -- assume the most neutral of
5 policies, but at the end of the day, there is a police officer
6 who observes, you know, inactions of social distancing at one of
7 these services. At that point, you know, do you believe that
8 the mayor has the power to ban the service going forward?

9 MR. MARTENS: I think that in that instance, the mayor
10 would have the authority through the police department to
11 address the particular -- the particular person who was not
12 following the obligation to social distance, but I don't believe
13 that a single instance of social distancing by one participant
14 would be enough to negate my client's rights.

15 I would have concerns about that situation about one --
16 another person's violation being attributed as enough to
17 infringe my client's right to religious liberty. So I think
18 that the mayor could -- through the police department, could
19 take action with regard to a particular violator, but I don't
20 think that it is a -- that is a narrowly-tailored -- I don't
21 believe that shutting down the entire church service would
22 satisfy the definition of narrow tailoring.

23 THE COURT: Okay. Neither do I. Let's talk about
24 Jacobson v. Massachusetts. Under Jacobson, the rules of the
25 road, when it comes to constitutional law, are not entirely

1 inflexible in the time of a national emergency, in the time of a
2 pandemic. Of course, as you read in my TRO opinion, that
3 doesn't mean that the constitutional rights cease to exist.

4 Can you tell me what you think the rule is that comes out of
5 Jacobson, and maybe, specifically, what you think the interplay
6 is between Jacobson and the free exercise clause?

7 MR. MARTENS: Yeah. So I think that the Court rightly
8 noted that the constitution is not a suicide pact, and my client
9 is not asking for it to be. I think that the synthesis of the
10 cases is that, at the end of the day, that there is, you know, a
11 strict scrutiny analysis.

12 We're not asking -- this is not a case, for example, where
13 we're asking to all have 100 people sitting in a, you know, tiny
14 room. What we're arguing is sort of two of positions. One is
15 the neutrality point, which I've already made, and the other is
16 that there needs to be a compelling interest which we are not
17 contesting here, and narrow tailoring. And I think our concern
18 here is that the Government is taking the approach of a meat
19 cleaver when a scalpel would do. And --

20 THE COURT: Mr. Martens, ask that you just outline
21 strict scrutiny, compelling interest, narrow tailoring. When
22 the Government is being not neutral between religious parties
23 and nonreligious parties, that is a test that applies even
24 asking -- that's a test that always applies.

25 And so my question for you is: Do you think that an

1 epidemic like COVID-19 changes your client's free exercise
2 rights at all? Is my analysis -- is the Court's analysis any
3 different in the context of the pandemic than it would be a
4 normal time?

5 MR. MARTENS: So I think the answer to that is, in one
6 sense, yes, and, in one sense, no. Certainly, the presence of a
7 pandemic creates a serious issue that the Government is right to
8 address and needs to address. What I don't think that means is
9 that it means set aside our constitutional rights, and that they
10 evaporate, and I fear that that's the argument that the city is
11 making here.

12 THE COURT: My question is you say they don't
13 evaporate, and, as you can tell from my TRO opinion, I agree.
14 My question for you is: Yes, they don't evaporate. How much of
15 them are left?

16 MR. MARTENS: I believe that -- well, I think that
17 the -- that the -- that the -- that there's a tailoring
18 required, I guess that's the point I'm making, is that as the
19 interest of the government increases, and the inability to draw
20 lines increases in a fact-specific scenario, you know, the
21 Government would have more leeway.

22 I don't think we're not arguing for an inflexible rule here.
23 We recognize that some situations are more difficult than
24 others. Some situations are more dire than others, but that
25 there has to be an effort at tailoring, and that's what we don't

1 see here is any effort of tailoring.

2 And so I think that the seriousness of the risk posed
3 certainly matters. In the absence of other alternatives, it
4 certainly matters, and circumstances, as the Court observed, can
5 change. This is a fluid situation. But what we -- but what we
6 don't have here is the Government making the argument generally
7 that people can't come in contact with one another for any
8 circumstances.

9 The Government's recognized that that is a necessary reality
10 for things like, as the Court pointed out, liquor stores or
11 veterinarians or laundromats or dry cleaners or shopping malls,
12 a whole host of things that the Government has recognized.

13 And so we might be in a different situation if the
14 Government said it's simply impossible, given the state of the
15 world, that people leave their house for any reason, but that's
16 not where we're at, thankfully. And so I think the concern is
17 is that the Government is then not tailoring its rules to
18 accommodate churches, but it is simply taking an easier route
19 and saying just close them down. So I think that's the problem.
20 So it's certainly facts and circumstances specific. We're not
21 arguing otherwise.

22 THE COURT: Okay. If the Government stands up at this
23 hearing in a few minutes and says, you know, we, the Government,
24 believe there really was no ban against drive-in services, and
25 we, the Government, acknowledge that the Court disagrees. We,

1 the Government, acknowledge the Court concluded that the mayor's
2 statements had created an official policy banning drive-in
3 church services, but going forward, we, the Government, assert
4 clearly, unequivocally, there is absolutely no ban on drive-in
5 church services.

6 I'm not saying they'll say that, I doubt that they'll say
7 that, but if they say that, in that instance, do you still need
8 a preliminary injunction?

9 MR. MARTENS: So if they -- if they say not only that
10 there is no ban, that they promise that there is no -- that they
11 will communicate to the police officers that there is no ban,
12 and that they can guarantee that no direction will be given
13 going forward to enforce a ban, that might be a different
14 situation.

15 But in that situation, I'm unclear why they filed the brief
16 they did, and I think my client, absent some very strong
17 confirmations that they will -- that there is no ban, and that
18 they would communicate as much to the police department and
19 enforce that among their police officers, which I think, if
20 anything, we've seen a ratcheting up on in Kentucky over the last
21 few days, but I can't say that there's no -- that there's no
22 representation that they could make that might not obviate the
23 situation.

24 But I feel like that my concern is that they sort of
25 inflamed it with their brief, which asserts their authority to

1 do this. To impose the ban. So I guess the answer is it
2 depends. It depends what they said, and how firmly they said
3 it, and I'd be curious why they would oppose a preliminary
4 injunction if they were really committed to that.

5 THE COURT: Okay. I'm going to turn to the Government
6 now. I'll give you the chance at the end to reply to anything
7 they say, and then I'll give them the chance to reply to
8 anything else that you say. I never mind hearing more from any
9 attorney at a hearing who feels like he or she has something to
10 say. So thank you, Mr. Martens.

11 MR. MARTENS: Thank you, Your Honor.

12 MR. CARROLL: Your Honor.

13 THE COURT: Yes.

14 MR. CARROLL: Your Honor, this is John Carroll on
15 behalf of Metro. The first thing I wanted to do is to say we,
16 being Jeff Mosley, had telephone contact on Friday of last week
17 with Brooken Smith, of one of plaintiff's counsel, indicating
18 that we would respond.

19 With respect to the photographs, I'm not sure if I really
20 understand the plaintiff's position. We, obviously, had a
21 couple days to respond in this matter. Those photographs are
22 taken from the Courier-Journal's website. I believe at least a
23 number of those photographs actually give a description with
24 respect to when they may have been taken. They are on prior
25 days. These drive-by or drive-in services, I believe, have only

1 been present since the middle of March.

2 I'm not sure if the plaintiffs are taking the position that
3 they somehow are contesting that these photos are accurate. If
4 that's the case, then certainly, Your Honor, if we're not
5 allowed to have these photographs considered, then we'll be
6 happy to get an affidavit together. And, in fact, one of the
7 photos actually, I believe, shows the pastor of this church
8 actually touching his elbow to a person in the car.

9 There are certainly photographs that show a number of
10 individuals out in the open away from cars. There are
11 photographs showing people in open truck beds. So, certainly,
12 that particular evidence, Your Honor, if they are actually
13 contesting these photos that they're -- then we would like an
14 opportunity to submit an affidavit to show that they, in fact,
15 are authentic. Certainly, they're on a public website, in terms
16 of from the Courier-Journal, and if we need to do so, we'll be
17 happy to submit an affidavit.

18 In addition, Your Honor, we do believe that the mayor in
19 this case, pursuant to his emergency powers as contained, among
20 other authorities, KRS 39A.100(2) certainly has the right and is
21 entitled to exercise and take reasonable measures to protect the
22 safety, health, and welfare and to save lives.

23 Certainly, all of this goes back to the governor's order, I
24 believe it's a March 19th of 2020, and it's our position that
25 the mayor should be allowed to take actions that are necessary

1 in respect to that.

2 Now, in this particular instance, actually, as we submitted
3 in the affidavit from Chief of Police Conrad, he actually
4 indicates that there have been no criminal actions taken against
5 anyone, except for one criminal trespass matter which had to do
6 with an area which was closed to the public, and this person
7 continued to try to get into that area.

8 So from a respect of had there been threatening actions, I
9 don't believe the mayor has done anything other than, in his
10 talk that he was giving on this particular day, he was showing
11 his compassion, his reasonableness. He was trying to certainly
12 tell people that the safest way is to stay away and to have
13 proper social distancing, and that was his intent.

14 No actions have been taken with respect to this particular
15 church, the plaintiff in this matter, despite the fact that on
16 more than one occasion, I believe, Your Honor, certainly, there
17 have been instances of the violation of social distancing in the
18 guidelines and the governor's order, and I think that's what
19 these photographs show.

20 And, again, in the affidavit that was submitted initially to
21 the Court by Pastor Salvo, if you read that, you would think,
22 and I think the Court think that, that, in fact, this church was
23 completely complying with the guidelines when, in fact, the
24 practices show they have not.

25 So, Your Honor, those are some comments that, certainly, if

1 they are actually -- if the plaintiffs are actually contesting
2 authenticity of these photos, I believe that we should be given
3 a couple days in order to get an affidavit from a person from
4 the Courier-Journal to provide that information.

5 The Court earlier asked what was our position with respect
6 to the Jacobson case, and I believe the Jacobson case, the main
7 point is that the Supreme Court of the United States, and that's
8 good law still, basically said in that case under the pressure
9 of great danger, constitutional rights may be reasonably
10 restricted as the safety of the general public may demand.

11 The Supreme Court of the United States also said in another
12 older case, Prince vs. Massachusetts, 321 US 158 in 1944, the
13 Court stated the right to practice religious freely -- religion
14 freely does not include liberty to expose the community to
15 communicable disease.

16 And I believe that the Prince case as well as what the Court
17 cited, the Court cited a recent Fifth Circuit case here in 2020,
18 which, again, goes back, and it actually cites both Jacobson,
19 and it cites the Prince case as well as some other cases. I
20 believe all those cases indicate that, in fact, the state and
21 the mayor have the right, in a situation such as this, in which
22 there is a pandemic, to take reasonable measures and to enforce
23 those measures if need be.

24 So are we saying that that's what we were going to do?
25 Certainly, I believe that we have the right under the

1 constitution, under the Supreme Court caselaw, under the
2 statutes of Kentucky, including KRS 39A.100, to take such
3 measures if they -- if they're warranted.

4 And, again, in this instance, and something that I certainly
5 disagree with plaintiff's counsel, the mayor in this situation,
6 in his duties, and he has a duty to enforce the statutes of
7 Kentucky, he was being very compassionate. Certainly, the
8 mayor, in fact, has a wife who, unfortunately, in the recent
9 weeks, in fact, contacted this disease, and that's why he was
10 giving these talks.

11 But to say that he is out threatening folks left and right I
12 don't think is correct. I think if you look at the entire body
13 of what he said on that date as well as his other discussions
14 that he's had, his main concern is of a compassionate,
15 reasonable leader, and that is that he wants to save lives, and
16 that he believes, just like the United States Government has
17 indicated, that the best way to do that is to keep proper social
18 distancing.

19 And in this instance, this particular instance, nothing was
20 ever taken in regard to an action against the church, but, in
21 fact, there is indication that the church, on multiple
22 occasions, whether they desired it or not, they had a number of
23 people who were not complying with COVID-19, they were not
24 properly -- properly social distancing, and those are matters
25 which I think should be properly considered.

1 Our position in this matter is that the mayor does have
2 certain powers as given to him under the statutes of Kentucky,
3 and that he has a duty to, in fact, enforce the law if need be,
4 and, again, that there are police powers, and we've cited those
5 in our briefs, that would give them the right to do that, but in
6 this instance, none of that was done. None of it was
7 actually -- no action was actually taken, and, in fact, in no
8 instance since this matter has started have -- has the Metro
9 Government actually arrested people for violations.

10 So in that, Your Honor, it's our position that the radio
11 broadcast or the Internet broadcast was not an order. It's just
12 an oral rhetoric. And that the order that should be looked at
13 here is certainly the March 19, 2020, proclamation by the
14 governor as well as I think there's been some other
15 proclamations that have subsequently been put out by the
16 governor of Kentucky.

17 THE COURT: Okay. Mr. Carroll, let's start with some
18 of the procedural matters. It's been represented that either
19 the mayor's office or his attorneys twice tried to reach the
20 Court on Friday.

21 MR. CARROLL: No, not the Court, Your Honor. Not the
22 Court. Tried to reach plaintiff's counsel.

23 THE COURT: Oh, okay.

24 MR. CARROLL: Yes, sir, and that's -- I indicated that
25 Jeff Mosley, who is the general counsel for Metro, actually

1 spoke to Brooken Smith on I believe it's Friday afternoon.
2 Brooken Smith is one of the plaintiff's counsel. So no, Your
3 Honor. If that's what you understood, I'm sorry that I was not
4 clear.

5 THE COURT: It may not have been you who said it. It
6 was the mayor who said he attempted twice to contact the Court.
7 So I guess you're saying that's incorrect?

8 MR. CARROLL: I'm saying what we tried to do is we
9 tried to contact and did contact plaintiff's counsel. Mr.
10 Mosley is actually here. He could tell the Court exactly what
11 transpired, but the point was you were going to respond.

12 THE COURT: Mr. Carroll, just, you know, in part,
13 because I want to, of course, make sure that if something
14 happened on the Court side, then that's something that I want to
15 be able to address going forward. When Mayor Greg Fischer said
16 he twice tried to contact the Court, is he correct?

17 MR. MOSLEY: Your Honor, this is Jeff -- Jeff Mosley.
18 I'm not aware of that. The sequence of events was I was
19 contacted late Friday by Mr. Smith. We had a conversation. He
20 sent me the pleadings. I forwarded them to the county
21 attorney's office. We talked very briefly about the case, and,
22 you know, the thought was that Jefferson County and Louisville
23 Metro would have an opportunity to respond certainly before an
24 order was entered.

25 So we did not contact the Court, but that is the -- then I

1 believe that the county attorney had contact with plaintiff's
2 counsel on Saturday, I believe, and so that's the facts of that
3 procedural situation.

4 THE COURT: Well, I appreciate the clarification very
5 much, Mr. Mosley, and this question can be to you or to Mr.
6 Carroll. Your briefing says that you intended to respond to the
7 motion for a temporary restraining order. You didn't file
8 anything on the docket to notify the Court that you intended to
9 respond; is that correct?

10 MR. CARROLL: That's correct, Your Honor. I came in
11 Saturday morning, after being contacted on Saturday morning,
12 and, certainly, I was very busy preparing a response, intended
13 to initially respond on Saturday and file a written pleading,
14 but before I could actually complete that pleading, we received
15 your order. So you're correct, Your Honor.

16 THE COURT: All right. Let's turn a little bit toward
17 the question of what is the city's policy, and, actually, I
18 guess there's really two important questions. The first
19 question is what was the city's policy before the TRO. And then
20 to the extent that the policy has changed, what is the city's
21 policy? And it may well be that it's your position that there
22 has been no change in the city's policy.

23 So I guess my first question here is, going back to before
24 the TRO, did -- do you believe -- did Louisville believe that
25 drive-in church services were illegal under the governor's March

1 19th order?

2 MR. CARROLL: Let me first say that certainly no steps
3 had been taken in any respect against drive-in services.
4 Certainly, it is my understanding that Metro's position with
5 respect to actual in-church services were that they were not
6 proper, but no action had been taken against anyone with respect
7 to drive-in services.

8 Certainly, you know, Mr. Mosley may be able to speak more
9 definitively about that than I would.

10 MR. MOSLEY: Your Honor, Jeff Mosley again to try to
11 answer your question. I believe that the policy for the City
12 with these evolves day by day, because each event is different.

13 The, certainly, in-person congregate services we believe are
14 against Governor Beshear's -- it's actually the cabinet for
15 family health and service's order of March 19th, which the
16 Governor reiterated in his March 25th order. So in congregate
17 in-person services we do believe are against the order and, I
18 guess, your title is illegal.

19 The services as to the drive through, of course, we have the
20 issue where we believe that they are against the spirit of the
21 order, and, certainly, when the social distancing pieces to this
22 were violated, that's what gave us pause as to were they illegal
23 or not.

24 But it's tough to give you a blanket policy statement as
25 each of these situations and each of these events are different,

1 but, certainly, in congregate, you know, people gather to
2 church, what's the traditional church that we would see, we do
3 believe those are against -- or against the CHFS order that bans
4 mass gatherings.

5 THE COURT: And I appreciate that, Mr. Carroll, Mr.
6 Mosley, but I guess I'm still unclear about the answer to my
7 question. You said that drive-in church services would be
8 inconsistent with the spirit of the governor's order, but you
9 didn't really say whether you think they are illegal. Do you
10 think they are illegal?

11 MR. MOSLEY: If you go by what the governor said --
12 the governor's order, it doesn't -- would seem to ban those
13 services. However, he did seem to indicate orally that those
14 services -- you know, in other words, they may be against the
15 order, but if you're going to do them, do them this way. So
16 that's my understanding of the oral commentary on this issue.

17 So that's the guidance that we have been going on, and our
18 ability to try to interpret and to act or not act on these
19 situations. So I understand it's a tough question, but those
20 are the facts we have.

21 THE COURT: Okay. And I guess I really do not mean to
22 be difficult, but I do think that this case, you know, depends,
23 in part, on getting an answer to this question. You know, I
24 heard you to say that the text of the governor's order makes
25 drive-in church services illegal. I have heard you to say that

1 the governor's oral statements cast some doubt on that.

2 Of course, in your briefing, you make a point of saying that
3 because the mayor's statements were not written, that they
4 shouldn't be treated as lawful orders. I'm not sure I think
5 that's entirely right, but I'm still not clear.

6 If I were a citizen, and I called your office, and I said,
7 "I want to have a drive-in church service where everybody stays
8 six feet away, and they stay in their cars. Is that illegal?"
9 What would you tell that citizen?

10 MR. MOSLEY: Your Honor, I don't know what I would
11 tell the citizen. I would tell the citizen to review the
12 governor's order, and to -- and to, you know, interpret it as we
13 have.

14 THE COURT: Okay.

15 MR. CARROLL: I also do think, Your Honor -- and this
16 is John Carroll. I do think under KRS 39A.100 that given the
17 fact that Louisville is a county in which is much more densely
18 populated than most, that, certainly, that the mayor have
19 additional powers on top of what the governor has said, but,
20 again, I don't think that's -- I think, in that respect, we're
21 really getting into something that is not before the Court. I
22 don't think that's -- I think we're getting into a real
23 rightness question in that respect. And, again, I think --

24 THE COURT: Let me ask you, Mr. Carroll or Mr. Mosley.
25 Do you think there's anything a little bit frightening about the

1 Government telling a citizen that your conduct might be illegal
2 or it might not?

3 MR. CARROLL: I think when you look at the mayor's
4 comments, and I think you have to look at them as a whole, that
5 that was not his intention to frighten people, Your Honor. I
6 think --

7 THE COURT: I'm not -- let me interrupt. I'm not
8 talking about the mayor's statement right now. With respect,
9 I'm talking about your statement. Your statement seems to be,
10 and Mr. Mosley's, to the citizen who wants to participate in a
11 drive-in church service, maybe that's illegal, and maybe it's
12 not illegal.

13 MR. MOSLEY: Well, Your Honor, we would say it would
14 be, you know, against the order if it -- against the governor's
15 order if it doesn't follow the social -- the CDC guidelines. So
16 that's --

17 THE COURT: It does follow the CDC guidelines?

18 MR. MOSLEY: If you follow the CDC guidelines, we
19 haven't enforced it, so I would -- that would be reason to
20 believe that it is not illegal, and we are not going to enforce
21 it.

22 THE COURT: Okay. So a drive-in church service where
23 each car is six feet away from each other, the windows are
24 rolled halfway up is not illegal, correct?

25 MR. MOSLEY: Well, Your Honor, I don't have the CDC

1 guidelines, but whatever the CDC guidelines state for those type
2 of gatherings, if they're followed, it's not illegal.

3 THE COURT: Okay. And so now I guess I do want to
4 turn to the mayor's statements. If the drive-in church service,
5 where the cars are six feet away from each other, is not
6 illegal, why did he say we are not allowing churches to gather
7 in any kind of drive-through capacity?

8 MR. MOSLEY: Your Honor, the mayor is not a lawyer,
9 and the mayor was speaking to try to strongly discourage these
10 services.

11 THE COURT: So I understand he's not a lawyer, but I
12 guess one thing I worry about is that, you know, most of the
13 public is not lawyers either. And so when they hear a mayor,
14 who's the boss of the police chief, and they know that, you
15 know, there are about two million people in the country who are
16 in prison, and most of them were arrested by police officers who
17 work for the mayor, when they hear a mayor say we're not
18 allowing churches to gather in any kind of drive-through
19 capacity, you can understand why a nonlawyer citizen would think
20 that that's the mayor announcing an official policy with law
21 enforcement consequences, right?

22 MR. MOSLEY: Well, Your Honor, given the prior conduct
23 of this church and violations of social distancing, that
24 probably generated -- you know, was the basis for some of his
25 comments. He wanted to discourage this type of conduct to slow

1 the spread of the disease.

2 THE COURT: Do you think it's appropriate for the
3 mayor to say something is not allowed when it is allowed in
4 order to achieve a good result that he's hoping for?

5 MR. MOSLEY: Your Honor, it's not my -- it's not for
6 me to say what is appropriate for the mayor to say.

7 THE COURT: Let's say that a drive-in church service
8 does violate some kind of social distancing rule under the
9 governor's March 19th order. Would that be a misdemeanor crime?

10 MR. CARROLL: If they violated it, would it be a
11 misdemeanor crime? I guess. I think -- I mean, certainly,
12 they -- you know, 100 years ago, they had case on this.

13 Your Honor, this is John Carroll. There was a case 100
14 years ago in Kentucky in which a church leader was asked not to
15 have services during the pandemic that occurred in 1919. And,
16 ultimately, because he refused on numerous occasions to comply
17 with what he was being ordered to do, ultimately, he was
18 prosecuted.

19 So in a -- in a particular situation, certainly, I believe
20 that, you know, if there -- if there are violations, and there
21 continue to be violations, that the mayor has powers in which he
22 could enforce the law, and I think that's what Kentucky statutes
23 say is that -- is that the power exists.

24 THE COURT: And going back to my question, it would be
25 a misdemeanor, correct?

1 MR. CARROLL: Yes, Your Honor. I believe that
2 that's -- there's actually a statute that's on that, which is --
3 hold on just one second, and I'll get you that provision. Okay.
4 There are, I think, a couple of statutes that talk about it.
5 KRS 39A.990, and 39B.990 as well as KRS 212.715. Which KRS
6 212.715 actually states, "No person shall fail or refuse to
7 observe or obey a written order of any board of health,
8 department of health, or health officer issued pursuant to
9 provisions of law or regulations adopted thereunder."

10 THE COURT: And in your public health notice and
11 orders that you attached as an exhibit I think yesterday, a lot
12 of these public health notice and orders include a sentence here
13 that says, "Continued violation could subject business to
14 closure and, if necessary, court proceedings may be initiated
15 for the enforcement thereof." Would those -- could those court
16 proceedings include criminal court proceedings?

17 MR. CARROLL: Well, for example, there is a statute
18 KRS 212.992, which is more -- I don't know that it necessarily
19 is imprisonment, but it certainly speaks about fines and
20 continuing violations, so it's almost more of a -- more of a
21 contempt-type situation, but --

22 THE COURT: And I'm not asking about the distinction
23 between felonies and misdemeanors.

24 MR. CARROLL: Okay.

25 THE COURT: I'm really asking more about the

1 distinction between civil and criminal. When one of these
2 public health notice and orders goes out, and it says continued
3 violation could subject said business to court proceedings that
4 may be initiated for the enforcement thereof, would those court
5 proceeding -- could those court proceedings be criminal?

6 MR. CARROLL: Your Honor, I think, certainly, it is
7 heavily fact dependent, but, in fact, you could, I believe, get
8 into a situation where it would be a degree of wanton
9 endangerment. It could be even something --

10 THE COURT: Criminal wanton endangerment?

11 MR. CARROLL: Yes, or you could even have a situation
12 almost like in a battery and assault where people are touching.
13 In other words, you know, I guess upon, you know, if you had the
14 right situation, you know, somebody who knowing they have
15 Coronavirus or somebody in their family, and they're actually
16 touching people, then -- or it could be some type of possibly
17 disorderly conduct.

18 The statute in Kentucky on disorderly conduct is an
19 extremely broad statute as far as what it prohibits. That's --
20 you know, again, that's a class B -- unless it's changed, it's a
21 class B misdemeanor. But, again, I think it's heavily fact
22 dependent. I'm not sure that I would feel proper, you know, in
23 putting it to an exact circumstance, because it's heavily fact
24 dependent.

25 THE COURT: Let me turn to one of the things that you

1 mentioned in your responses yesterday. You said, "The Court
2 erred in describing Mayor Fischer's comments. The Court
3 described them as a threat. For the Court's knowledge, the
4 purpose of passing out the fliers was educational."

5 And you go on later to say, "The purpose of recording
6 license plates was to assist the health department with
7 potentially tracking individuals and their families who may test
8 positive to the virus and then encourage and/or mandate them to
9 self-quarantine for 14 days so as to protect the public at
10 large."

11 You know, I do think that there's a difference. To your
12 point earlier, I do think I agree with you-all that there is a
13 difference between the mayor is a clearly compassionate person.
14 A person who, I'm sure, deeply wants to save lives. Going on TV
15 or going on the Internet and pleading with people, requesting of
16 people that they not do something. That's different than the
17 mayor ordering them not to do something or the mayor announcing
18 that certain conduct is illegal.

19 Here you're talking about sending the police to check the
20 license plates of people who go to a drive-in church service.
21 Then recording of those license plates and possibly requiring
22 them, mandating them to self-quarantine for 14 days. You know,
23 you may think that that is an appropriate thing to do. Your
24 opposing party may think it's not an appropriate thing to do,
25 but I would think we could all agree that it's a threat.

1 If the mayor says something is illegal, and in order to
2 enforce it, we're going to record license plates, and we might
3 mandate that you self-quarantine for 14 days, because you went
4 to a church drive-in service, that seems an awful lot like a
5 threat, right?

6 MR. CARROLL: Judge, I believe that there's actually a
7 subsequent order by the governor that allows that, which is -- I
8 believe it's the April 10th, 2020, order with respect to taking
9 down of license plates, and it mentions some other things. It's
10 not -- it's certainly not a part of the complaint. The
11 complaint doesn't mention that particular order, but I believe
12 there is an order --

13 THE COURT: I'm just -- I'm just talking about what
14 you wrote in your response brief. Would you agree that when a
15 mayor announces that something is illegal and says, "The police
16 are going to write down your information if you do it, and they
17 might mandate that you self-quarantine for 14 days," is that --
18 that is a legal threat, right?

19 MR. CARROLL: Your Honor, I don't believe that it's
20 correct that licenses were recorded at drive-in first of all.
21 That --

22 THE COURT: I'm not asking about what -- I'm not
23 asking about what enforcement actions were taken. I'm asking
24 about what enforcement actions the mayor said could be taken.

25 MR. CARROLL: I don't believe he said that, Your

1 Honor.

2 THE COURT: So --

3 MR. CARROLL: In terms of if you -- if we're speaking
4 about the radio broadcast, if that's what you're, in particular,
5 saying, I don't believe he -- I don't believe the comments with
6 respect to taking down of recorded license plates was part of
7 his broadcast. Now --

8 THE COURT: Okay. Let me ask -- let's try to --
9 because there's so much law that I think, you know, plenty of
10 people can disagree about, let's at least try to figure out
11 where there is a consensus here about the facts.

12 I have a quote here from the mayor that's from his April 9th
13 daily COVID-19 briefing, and it was cited in my temporary
14 restraining order. It says, "If there are gatherings on
15 Sundays, Louisville Metro Police Department will be there on
16 Sunday handing out information detailing the health risks
17 involved." Okay. So far, I would agree with you, that's not a
18 threat. "And I have asked LMPD to record license plates of all
19 vehicles in attendance."

20 Now, then that raises the question, well, why is the mayor
21 ordering his police officers to record license plates? You
22 answered that question in your response brief. You say, "The
23 purpose of recording license plates was to assist the health
24 department with potentially tracking individuals and their
25 families who may test positive for the virus, and then to

1 encourage and/or, and here's where I think the
2 legally-enforceable threat comes in, mandate them to
3 self-quarantine for 14 days."

4 And so I guess my first question is: Do you agree that the
5 mayor said, "We're going to send the police to record license
6 plates"? Let's start there.

7 MR. CARROLL: I'm not sure -- if you're asking me did
8 the mayor say something, Judge, I don't mean to be
9 disrespectful, but, honestly, I can't tell you that I listen to
10 the mayor. So I'm not sure I can answer that fully myself,
11 so --

12 THE COURT: Well, let me ask you this way: If the
13 mayor -- if I'm right, if the mayor said, quote, "I have asked
14 LMPD to record license plates of all vehicles in attendance,"
15 then you would agree with me that the mayor said he was telling
16 the police to record license plates, correct?

17 MR. CARROLL: Again, the statement that we have in
18 the -- in our brief, the first thing is I'm not sure, if you
19 really read the thing in full context, that it doesn't have to
20 do with in congregate. Because that's my understanding of what
21 was actually being done with respect to taking down of license
22 plates is that that's for actual church services themselves.

23 So I'm not sure that it can be, you know, a single -- a
24 single passage can be said, well, really, he was speaking about
25 drive-through rather than in congregate. Because, in fact, what

1 the mayor's -- I believe his intent as well as what, in fact,
2 practices that are being followed are for when there's
3 in-congregate services, which is, in fact, happening here in
4 metro Louisville. There's a couple churches that actually have,
5 over the weekend, met in person.

6 Yes, license plates were, from my understanding, were taken
7 down, and that's all based on, again, the governor did an April
8 10, 2020, order, which speaks specifically to that power for
9 police to be able to do that.

10 THE COURT: And your -- let me not ask you about what
11 the mayor said but just ask you about what you wrote in your
12 brief. You said, "The purpose of recording license plates was,
13 among other things, to mandate them to self-quarantine for 14
14 days." That's -- do you remember that part of your brief?

15 MR. MOSLEY: Your Honor, this is Jeff Mosley. That
16 part of the brief I believe that you're referring to, the
17 license plate issue is to -- is to help the health -- health
18 department. If one of the people from an in-congregate service
19 attracts the disease, then to be able to track them down easier
20 and put them into quarantine, the license plate allows us to
21 potentially save other people's lives and the lives of their
22 family.

23 So it's tracking device is what the license plate thing is,
24 and it was used in in-congregate services this weekend, of
25 which, from my understanding, there were two that occurred over

1 the weekend. So that is the purpose of that. If you don't have
2 the disease, then we, the city, are not putting you in
3 quarantine. It's on people that have the disease are required
4 to be in quarantine.

5 THE COURT: Okay. Your briefing refers to the
6 issuance of 16 notice orders for the cessation of violations,
7 and no criminal citations, even though it's permissible
8 enforcement under KRS 39A.180. One of those work orders was
9 with regard to On Fire. It's -- I think I have number page 184,
10 maybe, of that docket entry.

11 And I know there were at least 184 pages. It was a lot of
12 docket. It was a lot of pages. I don't expect you to remember
13 all of them but if you want to take a second to try to find that
14 one.

15 MR. CARROLL: Judge, that's a complaint. That's not
16 an order. Actually, there -- those are --

17 THE COURT: Can I just -- it says work order.
18 What's -- and what is a work order relative -- what's the
19 difference between a work order and another order?

20 MR. CARROLL: I think it's -- what it is is there
21 are -- of the ones that we attached, there is actually 16 of
22 them.

23 THE COURT: Uh-huh. Right.

24 MR. CARROLL: Fifteen of them do not have to do with
25 On Fire.

1 THE COURT: Right.

2 MR. CARROLL: I think -- which the one that is the
3 most up to date of any of them is, and I think it's the
4 sixteenth one in order has to do with On Fire, which is in the
5 last couple of days, and essentially what it is, Your Honor, it
6 is a notice or it's a complaint stating these things.

7 Nothing has been taken in respect to that, but nothing,
8 actually, in respect to, I think, any of these 16 have actually
9 ended up in what -- as you're saying, a criminal matter, none of
10 them have mattered, have come with that, but they're actually
11 notices that go to the department of public health and wellness
12 here in metro Louisville.

13 THE COURT: Okay. And so I really am just trying to
14 figure out what the document is.

15 MR. CARROLL: It was --

16 THE COURT: Looks like it was a work order created on
17 April 13th at 10:37 a.m., which was Monday. Does that mean that
18 the complaint was received on Monday at 10:37 a.m.?

19 MR. CARROLL: I'm trying to get the exact page number,
20 but -- yeah. You're talking about page 183. I believe it says,
21 Your Honor, if you look on the first page, which is page 183 on
22 your all's docket filings, it actually indicates that on April
23 the 7th of 2020, Louisville Metro Government received,
24 essentially, a notice that there were -- to ensure physical
25 separation of employees and customers by at least six feet

1 having to do with that particular address at 18 -- that one is
2 on page 183. That one is actually -- no. That's Outer Loop.
3 So I'm trying to -- I'm trying to see if -- you're talking about
4 the one that starts at page 184?

5 THE COURT: That's right.

6 MR. CARROLL: Okay. All right. Let me see if I
7 can -- Jeff, you want to take a look at this for me? It says it
8 actually -- is the date on it is, in fact, initiated, it says,
9 April 13th, 2020, and it says initiated by Michael Bennett, and
10 it is -- and that one is for the address of On Fire at 5627 New
11 Cut Road.

12 And, again, it's no action's been taken, and, actually,
13 there's an indication on there work order comments. And I
14 received this one later than any of the rest of them that I got.
15 It says April 13th, 2020, 10:37 a.m., work order created at
16 4-13-20, 10:37 a.m.

17 So from my understanding, all it is is it's just something
18 to -- basically, at that point in time, they're considering it.
19 That's all -- I mean, it's just in the very early stages of
20 anyone ever making any kind of comment about it.

21 THE COURT: You said they're considering it. What
22 were they considering?

23 MR. CARROLL: Well, it is a -- it says on it, it
24 says -- under the work order description, it says COVID On
25 Fire -- On Fire Christian Church, On Fire Christian Church on

1 New Cut Road is still planning on holding services tonight for
2 good Friday and Sunday for Easter despite local government
3 orders.

4 So it's certainly, from my reading of this particular order,
5 and, again, what I was trying to be is be complete. That's why
6 I put all 16 of them. And, again, it's not saying any specific
7 violation. That's not what it's say -- that's not what this
8 particular one is.

9 MR. MOSLEY: Your Honor, this is Jeff Mosley, and my
10 understanding of that is that it was complaint driven. The
11 complaint came in, and they were starting to work it up.

12 THE COURT: Okay. And --

13 MR. MOSLEY: And, obviously --

14 THE COURT: -- I'm concerned that maybe they started
15 some kind of enforcement action after the TRO, but --

16 MR. CARROLL: No.

17 MR. MOSLEY: No, sir.

18 MR. CARROLL: No, sir.

19 THE COURT: It does say that -- yeah. It looks like
20 maybe this came in on Friday. It's just that the work order
21 wasn't created until the next Monday. Does that sound right to
22 you-all?

23 MR. CARROLL: I believe that's correct. In other
24 words, and, obviously, what Mr. Mosley is indicating is it was
25 in a very early stage to even have somebody look into it at all.

1 And, again, this particular one does not -- all it mentions is
2 that there may be a service on that weekend. It doesn't
3 really -- it doesn't spell out anything about a violation.

4 THE COURT: Let's move on. You know, the plaintiffs
5 have said that if you make clear that a drive-in church service
6 where cars are six feet apart from each other is not illegal,
7 and if that is communicated to the police, then this case may be
8 moot. You're free to not -- not say that, but I do think it
9 would be clarifying to know whether that that is what you're
10 saying.

11 MR. CARROLL: Well, I think, first of all, what little
12 you gave in regard to those particular facts, I think there
13 would have to be a whole lot more looked at, because all you
14 have expressed is one factor, that is cars being six feet apart.

15 Obviously, when you have people, like in these photographs,
16 hanging through the top of the car, hanging on one another,
17 windows much -- actually doors open with people getting out of
18 them, there is a number of other facts, so it's heavily fact
19 dependent, and I'm not sure -- you know, you only mentioned one
20 little, small piece of it, but --

21 MR. MOSLEY: Judge -- Judge, this is Jeff Mosley. But
22 to your point. If -- drive-through services, as long as they
23 abide by the social distancing, we have said is not illegal. We
24 said that earlier, and we stand by that point. The key is the
25 social distancing.

1 THE COURT: Okay. Give me one moment, please. Do
2 you-all know anything about -- or do you -- I take it you don't
3 plan to present -- introduce any evidence with regard to what
4 happened at On Fire's service this past Sunday. Am I correct?

5 MR. CARROLL: Judge, I'm not aware of any particulars
6 with regard to the service, at this -- at this point in time, as
7 to what happened on last Sunday. We're talking about,
8 obviously, a day and a half ago. You know, and there is -- that
9 I'm aware, for example, there are no photographs up yet, anyway,
10 from the Courier-Journal on their site as to the particulars on
11 that day, whether On Fire was doing a much better job of social
12 distancing or whether they, in fact, were doing the same thing
13 with respect to many violations. So I'm not aware of that,
14 Judge. I'm just not.

15 THE COURT: Okay. Let's, I guess, turn briefly, I
16 know this hearing has run for quite a while, but if this case is
17 not moot, then the motion for preliminary injunction will depend
18 on the First Amendment merits and also the Religious Freedom
19 Restoration Act merits, and so I do want to ask you some
20 questions about those.

21 One of those questions is were there specific legal
22 conclusions in the temporary restraining order that you take
23 issue with? And if so, what were they? I'm not asking about
24 the disputed question of whether -- when the mayor said we're
25 not allowing drive-through church services, that I'm not talking

1 about whether or not, when he said that, he was announcing
2 policy or whether he was just making a request.

3 Assume that I am convinced that the mayor, before the TRO,
4 had announced a government policy of not allowing drive-through
5 church services that he indicated would be enforceable. Beyond
6 that, which I know you disagree with, were there areas of the
7 First Amendment analysis or the Religious Freedom Restoration
8 Act analysis that you disagree with?

9 MR. CARROLL: Your Honor, in respect to your temporary
10 restraining order, I mean, I can certainly -- you know, there's
11 some paragraphs of it that I certainly am -- which I can agree
12 to in terms of paragraph 3 enjoins Louisville from enforcing,
13 attempting to enforce, threatening to enforce, or otherwise
14 requiring compliance with any prohibition on drive-in services
15 at On Fire. There are some other ones. I'm not --

16 THE COURT: Well, let me be more specific. Let's walk
17 through a couple of the legal conclusions.

18 MR. CARROLL: Okay.

19 THE COURT: There is a question of whether or not
20 gathering in a drive-through church service, the desire of the
21 plaintiffs to do that is a sincerely-held religious belief. Do
22 you agree it's a sincerely-held religious belief?

23 MR. CARROLL: I don't know that I could speculate as
24 to -- certainly, I can take it that they have said that. I'm
25 not sure I can read their minds to be able to say whether it's a

1 sincerely-held religious belief. Certainly, I would hope so,
2 but I don't know that I can answer for them.

3 THE COURT: What do you think is the Court's test
4 for determining whether or not the plaintiffs have asserted a
5 sincerely-held religious belief?

6 MR. CARROLL: I'm not sure we're challenging that
7 right, Your Honor.

8 THE COURT: Okay.

9 MR. CARROLL: I don't believe we are. I think I
10 understand what you're saying, and I don't think we're
11 challenging -- we're not challenging the sincerity of their --
12 what they're saying from a theoretical standpoint.

13 THE COURT: Okay. And that really was my question,
14 and the reason I'm trying to -- I'm trying to narrow the
15 disputed legal questions so that --

16 MR. CARROLL: From a standpoint of do I -- do I -- I
17 do believe that based on the prior -- on these photographs,
18 which, again, I think are important, that the affidavit that was
19 provided by Pastor Salvo in which he, I believe, gave the
20 representation that they were completely complying, I don't know
21 that I can -- especially with given the fact that he appears to
22 be, in several of those photos, violating social distancing
23 himself, I don't think I can agree with that aspect, but from a
24 theoretical standpoint, do I -- I don't think we have a problem
25 with what they're saying, that they are sincere in their

1 beliefs.

2 THE COURT: Okay. And with regard to the question of
3 whether a policy prohibiting that would be overinclusive, do you
4 think that a policy prohibiting drive-in church services that
5 will abide by CDC guidelines would be unconstitutionally
6 overinclusive?

7 MR. CARROLL: Judge, I think in order to do that,
8 first of all, you'd have to know a whole lot more about the
9 facts than just doing a broad statement like that, and that's
10 where I have a problem with it. I think it depends upon the --

11 THE COURT: Whose burden was it --

12 MR. CARROLL: -- in every situation.

13 THE COURT: I'm sorry. Let me -- I've got to -- let
14 me ask my question. Once a free exercise claim has been raised,
15 and once strict scrutiny has been triggered, either because of a
16 government policy that is not neutral and not generally
17 applicable under *Lukumi Babalu* or under the Kentucky's Religious
18 Freedom Restoration Act, which side has the burden of showing
19 that the government regulation is not overinclusive?

20 MR. CARROLL: I believe in that context, it's the
21 Government.

22 THE COURT: Okay. And so are you -- is the Government
23 arguing that your -- that a ban on in-person drive-through
24 church services that respect CDC social distancing guidelines,
25 are you arguing that that would be not overinclusive?

1 MR. CARROLL: I don't -- first of all, Judge, I think
2 in this particular context of this case, that would be answering
3 something that's not right, first of all. I don't think it's
4 part of the controversy. So from that standpoint, I don't -- I
5 would certainly ask the Court not to go that far.

6 THE COURT: Okay. I'm just trying to figure out
7 whether the policy that the mayor announced, as I think a
8 reasonable person would understand it, was overinclusive or not.
9 The temporary restraining order concluded that it was. You made
10 the point of saying that you wish you had a chance to respond.
11 Had you responded, the burden would have been on to you
12 demonstrate that the policy at issue was not overinclusive, and
13 this is your opportunity to make that argument.

14 MR. CARROLL: Okay. My argument, first of all, Judge,
15 is, again, that particular radio broadcast is not an order.
16 It's not --

17 THE COURT: I understand that, but I'm saying --
18 assume I disagree with you on that. Now, let's talk about the
19 merits. Do you concede that that policy would be
20 unconstitutional overinclusive or would you like to make the
21 argument that it's not overinclusive?

22 MR. CARROLL: I think, number one, it would be fact
23 dependent. So I don't -- I don't necessarily -- you know, if
24 you're going to -- if you're -- and, again, if you're going to
25 look at his comments, you'd have to look at them all, and I

1 don't -- I don't necessarily think that's what he was saying.

2 THE COURT: Your brief doesn't mention the Kentucky
3 Religious Freedom Restoration Act. Would you like to make an
4 argument about the Kentucky freedom restoration act?

5 MR. CARROLL: I believe that no matter what claim
6 you're looking at in the context of the complaint, that, again,
7 they all go under the same framework, and that, again, all of
8 their claims essentially have to be looked at under Jacobson,
9 and that a community such as Metro has a right under health,
10 safety, and welfare, to enforce its police powers.

11 So I don't think it would make any difference whether we're
12 talking about rights under the US constitution or whether we're
13 talking about some kind of Kentucky statute, I don't think any
14 of them can be looked at differently from a standpoint of
15 they're all under the same framework.

16 THE COURT: Under Jacobson, it seems that during a
17 pandemic, Jacobson, at least, could be read to suggest that
18 during a pandemic, the rules of the road with regard to
19 constitutional rights are not exactly as they would be in normal
20 times. I take that to be one of the points of your response,
21 and I take that to be what Jacobson says, and I take that to be
22 one of the things that my temporary restraining order discussed.

23 Your opponents in this case have suggested that your
24 interpretation of Jacobson is too broad, and they've suggested
25 that there's really no limiting principle to your theory of

1 whatever constitutional rights can be tossed out the window
2 during a pandemic. And so I'd like to give you the opportunity
3 to reply to that, and if you have an articulable limiting
4 principle, I'd like to hear it.

5 MR. CARROLL: Judge, I don't agree with what
6 plaintiff's counsel has indicated. I think our -- you know, if
7 you take it as a whole, our response articulates our position,
8 and it cites several Supreme Court cases, including Jacobson,
9 and it also goes into, you know, a discussion of clear and
10 present danger in some of the other cases like Cantwell, and
11 then I have also cited, obviously, another Supreme Court case
12 here today.

13 From a standpoint of, you know, is there a way to restrict
14 it, well, obviously, you know, Jacobson, for one, talks about
15 restricting the Government's powers, and by no means are we
16 saying that the Government's powers are unlimited. That's not
17 what we expressed in our brief. That's not what we're going to
18 express today.

19 THE COURT: So what is the limit? That's my question.

20 MR. CARROLL: Well, I don't know that you can sit
21 there and, you know, say that there's a black letter law exactly
22 that says it, but, you know, I mean, certainly Jacobson talks
23 about rights that may be reasonably restricted as the safety of
24 the general public may demand.

25 There is a discussion in Prince about limitation, and that

1 religious freedom rights have to, in some instances, give way to
2 police powers. So I don't know that there is -- you know, there
3 is actually -- certainly, there's discussion in Jacobson and
4 some of its progeny cases that there's even a dissent in the
5 case you cite out of the Fifth Circuit in 2020, which, you know,
6 they want to interpret Jacobson a little differently than the
7 majority did.

8 There have been a couple other cases here recently in April
9 of 2020, one from Oklahoma, and one from Alabama. Again, and
10 they all had to do with abortion, and all three of those cases,
11 I believe, do, but I'm not sure they look at it from a
12 standpoint of can we put a black letter hold on it. You have to
13 look at what's reasonable, and you have to look at each case
14 upon its own facts of it.

15 MR. MOSLEY: And, Your Honor, this is Jeff Mosley
16 again. I think it kind of goes back to, you know, the
17 discussion we had about the drive-through services and social
18 distancing. You know, the limits, as long as social distancing
19 is observed, you know, that is a line that we're willing to
20 abide by. If social distancing is not observed, then that's a
21 line where we believe we can take action.

22 THE COURT: Okay. Is there any -- or when it comes
23 time to decide the preliminary injunction, one of the four
24 aspects of that that I'll have to consider is the question of
25 irreparable harm. The Supreme Court has said that the loss of

1 First Amendment freedoms, even for limited periods of time,
2 unquestionably constitutes irreparable injury.

3 I guess when it comes to the irreparable harm prong of the
4 four-part inquiry, where do you-all stand on that?

5 MR. CARROLL: In this case, Judge, there hasn't been
6 any irreparable harm. That's the first thing I would say. I
7 mean, there just absolutely has not been. There was no action
8 taken against this church at any time. So I don't know how they
9 ever were -- how they ever suffered irreparable harm.

10 THE COURT: I guess that's not really the inquiry. I
11 think it's a prospective forward-looking inquiry. If the mayor
12 had a policy prohibiting drive-through church services, and I
13 understand you're now saying he doesn't. You've argued that he
14 never did, although I've disagreed. I've noted that the mayor
15 has said, quote, "We're saying no drive throughs." The mayor
16 said, quote, "We are not allowing," dot, dot, dot, "any kind of
17 drive through."

18 The mayor has said, quote, "If you are a church or you are a
19 churchgoing member, and you do that," referring to a drive
20 through, "you are in violation of the mandate from the
21 governor." The mayor has said, quote, "No in-person or
22 drive-through worship services." The mayor has said, quote, "We
23 are saying no. No church worshipping. No drive throughs."

24 And I interpret that to be the mayor announcing the policy
25 of the city that the mayor interprets the governor's March 19th

1 order to prohibit drive throughs. And since the mayor -- since
2 the police commissioner works for the mayor, I interpret that to
3 be a policy by the city that there was an official policy with
4 law enforcement consequences back behind it. I understand you
5 disagree. I'm asking a different question.

6 Assuming that it was a policy. The question is: Does
7 that -- would the absence of an injunction against that policy
8 cause the plaintiff irreparable harm?

9 The Supreme Court has said the loss of First Amendment
10 freedoms unquestionably constitutes irreparable injury. And so
11 my question to you is: Do you think that the absence of an
12 injunction, assuming that the mayor's policy bans drive-ins,
13 would cause irreparable harm?

14 MR. CARROLL: I'm not sure exactly what your question
15 is, Your Honor. I'm sorry. Because, again, our disagreement
16 is, number one, and I don't -- I don't mean to be disrespectful
17 in any way, but I don't believe that everything that the mayor
18 said in a broadcast was in any way intended to be or is an
19 order.

20 And if -- I mean, because it -- and, again, he is in many
21 con -- in his overall statements in that, if you look at them in
22 the whole, are, again, certainly to discourage having a drive
23 through, but I don't -- again, his actions, and the complete
24 manner in which he's represented himself in this matter is that
25 no action has been taken, actually, with respect to anything

1 with respect to this plaintiff or any other drive-in service.

2 THE COURT: If the TRO had not existed on Easter
3 Sunday, would Louisville have -- is there any chance Louisville
4 would have taken down the license plates of the celebrants at On
5 Fire's drive in?

6 MR. MOSLEY: Your Honor, this is Jeff Mosley. The
7 answer is no. We are -- the license plates were taken down in
8 the congregate, you know, the nondrive-through gatherings.

9 THE COURT: So the people at On Fire would not have
10 faced any legal consequences?

11 MR. MOSLEY: They didn't on Easter Sunday, no.

12 THE COURT: I know, but absent the TRO, they would not
13 have faced any legal consequences?

14 MR. MOSLEY: Judge, I can't predict the future. As I
15 said earlier about social distancing, you know, that's what
16 we're concerned about. So as of Easter and before then, there
17 was nothing -- no action was taken. I can't -- I can't -- if
18 there's social distancing being violated in the future, I can't
19 tell you that action won't be taken, but that's the standard.

20 THE COURT: Okay. Anything else before I turn back to
21 the plaintiff?

22 MR. CARROLL: No, Your Honor.

23 THE COURT: Mr. Martens, anything to add?

24 MR. MARTENS: Yes, briefly, Your Honor. I think that
25 two things. One, I think the last statement by defense counsel

1 exactly claims the issue that there is, in fact, a lot of
2 controversy here. That they cannot make any representations
3 that there won't be enforcement action, and that's exactly my
4 client's concern. And then we had a discussion here of the
5 various criminal laws that might be violated, a discussion of a
6 case from Kentucky 100 years ago where there was a misdemeanor
7 statute.

8 I think there is more of -- more than an ample risk here,
9 clear basis for my client to be concerned that there could be
10 continuing enforcement action. Now, I hear them say at times
11 that, well, as long as there's social distancing, but the
12 concern I have is whether that there is a dual standard being
13 applied here.

14 Are they applying the same standard to my client that they
15 are applying to the public at large? Because what's been
16 singled out here is not social distancing violations in the
17 local grocery store parking lot or in the local drive-through
18 liquor line or any other number of locations around town. They
19 specifically singled out for this enhanced and vigorous
20 enforcement or observation churches, and that's my concern.

21 But that is, itself, not something that could satisfy strict
22 scrutiny. That that discriminatory treatment, the targeting, as
23 we've called it, is not justified, does not satisfy a strict
24 scrutiny standard. There is no reason why someone is more
25 infectious in a church parking lot than in a Walmart parking

1 lot. And that's -- so my concern is this heightened enforcement
2 or this heightened vigor in their pursuit of church service
3 parking -- church service gatherings.

4 I would also say that to go back to the Jacobson case that
5 the Court noted. Respectfully, my concern with the City is that
6 their interpretation of Jacobson is not just too broad but
7 frightening. That what that case recognizes is that, again, as
8 I said, that there is a recognition the Government has some
9 degree of flexibility as the risk increases, but it's not
10 without limit, and the City is entirely unable to draw any
11 limits simply invoking their police power.

12 But if you look at Jacobson itself, on page 20 -- I believe
13 it's page 28, where the Court talks about the railroad company
14 versus Husen case, H-U-S-E-N, the Court there talked about a
15 situation where a state was preventing persons and animals
16 suffering under contagious and infectious diseases from coming
17 within its borders.

18 And what the Court said was those laws went be -- quote,
19 went beyond the necessity of the case, and under the guise of
20 exerting a police power violated rights secured by the
21 constitution, end quote. And in that case, the Court said that
22 it had a duty to hold such laws invalid.

23 And that language I think sounds very much like the strict
24 scrutiny test, the compelling interest, and narrowly tailored.
25 And what we haven't -- and we've come forward now and made out

1 our prima facie case that they've offered an overbroad ban on
2 drive-in church services without -- and the burden is on them
3 that, in a particular instance, to show that a particular action
4 is narrowly tailored.

5 If it's one thing to say that they find a particular person
6 who is repeatedly and willfully violating the social distancing
7 gather regulations or guidelines, and they take action against
8 that individual person, and they do so even candidly applying
9 the same rule in the grocery store parking lot, that might be a
10 very -- that might be a defensible approach, but that's not what
11 the they're proposing here.

12 They're asking for -- they're saying we can't promise that
13 we won't come in and take action undefining -- not even defining
14 what that action is. Whether it's action against the particular
15 person or against the church as a whole or against all the
16 congregation or the pastor. They're simply saying we might take
17 action in the future if there are some social distancing
18 guidelines in the church parking lot, and, apparently, with some
19 vigor or we have concern that that's being imposed with greater
20 vigor with regard to churches than with regard to society at
21 large.

22 The burden is on them, if a particular situation arises, to
23 make out their case that they can take action, but we believe we
24 put forward a prima facie case of singling out churches for
25 drive-in churches here who are attempting to abide by the

1 guideline.

2 And in that vein, I would say that I'm not trying to be
3 unduly difficult about the authentication of the photos, but the
4 date of the photos matters, and the time period over which those
5 photos were taken matters. That if something happened on May
6 20 -- March 22nd, that's very different than it happened on
7 Easter Sunday.

8 We all recognize that this situation is evolving, that
9 people are becoming more conscious of the situation, more
10 conscious of the risks, more careful. The church is taking more
11 steps, and the City's approach doesn't recognize that.

12 They want to throw those photos in there with no
13 identification of the date they were taken, but, notably,
14 they've offered no evidence about anything done improper or any
15 social distancing violations occurring either on Palm Sunday or
16 Easter Sunday, the two most recent Sundays.

17 So it's not that I'm trying to be just an evidentiary
18 stickler about this, but I think the timing matters of the
19 photos, and if they have someone not who can authenticate that
20 it was pulled off the Internet, but someone who can
21 authenticate, namely the photographer, when it was taken, where
22 it was taken, over what time it was taken, then there may be a
23 basis for them to put that into the record, but the timing of
24 those photos does matter.

25 I'd lastly say that none of this should be heard to -- by us

1 to impugn the mayor's -- I heard the passion with which counsel
2 spoke about the mayor's concern for the people of Louisville,
3 and we don't doubt that. My client shares that passion and
4 concern for the safety of the city and his congregants
5 generally.

6 And if the mayor wants to implore people using his
7 leadership and his persuasion skills to abide by those rules,
8 that's one thing. But when you invoke the color of law, when
9 you invoke the governor's orders, when you manage a police
10 department, when you say that it's not allowed, when you set up
11 a hotline for people to call in, that's no longer moral
12 persuasion. That's legal force.

13 And when you do that, there's constitutional limitations,
14 and we believe here that the City has gone beyond the
15 constitutional limits, and we ask, as a result, for a
16 preliminary injunction to make clear going forward that the
17 City -- that the church has the right to meet in a drive-in
18 capacity maintaining social distancing.

19 THE COURT: Okay. Thank you, Mr. Martens. Mr.
20 Carroll, anything else to add?

21 MR. CARROLL: Your Honor, I have just one matter. We
22 provided as an exhibit sixteen different instances in which
23 Metro has looked at them. Fifteen them don't have anything to
24 do with church whatsoever. Some of them had to do with UPS.
25 Some of them had to do with other companies, addresses.

1 So our position with regard to discrimination is that's just
2 incorrect, Your Honor, and I think we've presented information
3 with respect to that to show that it is -- it's an incorrect
4 position to take. That's all I have, Your Honor.

5 THE COURT: Mr. Carroll, if the mayor went on Facebook
6 and spoke for 20 minutes about how -- about churches and
7 drive-ins, and how the slightest violation of social distancing
8 guideline, you know, let's say he went on and said, "If you go
9 to a drive-in at a church, and you're five and a half feet away
10 from somebody instead of six, that's illegal. We're going to
11 take down your license plate."

12 And let's say he talked only about churches, and he never
13 talked about Walmart or Lowe's or Home Depot or Kroger. We can
14 all agree that he is correct that a five-and-a-half-foot
15 violation of a social distance -- or five-and-a-half-foot
16 distance is not consistent with the six-foot distancing for
17 social distance.

18 Would you agree that the Government in that situation was
19 not acting in a way that is neutral between the religious and
20 the nonreligious?

21 MR. CARROLL: We're talking about gathering, church
22 services, going to a grocery store for necessities of food. I'm
23 not sure that I want to go so far as to pontificate, Your Honor,
24 in terms of the exact context of that.

25 THE COURT: Okay. With regard to the plaintiff's

1 reply brief, I'd like to -- I'd like the reply brief by Tuesday,
2 April 21st, because I would like to move a little more quickly.
3 I think I am also ordering supplemental briefing on this
4 question: Is the case now moot? This is a different question
5 than what was the Government's policy before the TRO.

6 That question is being litigated in the briefing already.
7 The plaintiffs have filed a brief, the defendants have filed a
8 response, and the plaintiffs can file a reply that's now due
9 Tuesday, April 21st.

10 I'd like supplemental briefing on a separate question.
11 Given what the defendants had represented in their briefing and
12 at this hearing, is the case now moot? Some caselaw that you
13 might look at, both sides, is a Sixth Circuit case called Barry
14 v. Lyon, 834 F.3d 706, it's from 2016. It talks about an
15 exception to mootness when conduct is capable of repetition, yet
16 evading review. The standard inquiry.

17 And I'd also encourage the parties to consider Knox v. SEIU.
18 It's a Supreme Court case from 2012, 567 US 298. That case says
19 the voluntary cessation -- cessation of challenged conduct does
20 not ordinarily render a case moot, because a dismissal for
21 mootness would permit a resumption of the challenged conduct as
22 soon as the case is dismissed.

23 And in particular in Knox, the Court said the case was not
24 moot, because the defendant continued to, quote, defend the
25 legality, unquote, of its conduct. And so it was not clear why

1 the union would necessarily refrain from doing it in the future.

2 I think both sides should file those briefs on Tuesday,
3 April 21st, at the same time, and then both sides may file
4 responses to each other's mootness brief on Thursday, April
5 23rd, and there will be no replies on the mootness briefing.

6 That means that the preliminary injunction will likely not
7 be decided by Saturday, April 25th, two weeks after the TRO was
8 entered, and so the TRO will have to be extended. Mr. Carroll,
9 does Louisville have any objection to that?

10 MR. CARROLL: Your Honor, the answer to your last
11 question is no.

12 THE COURT: Okay. Very good. So I'll ask each side
13 just to be sure here. Mr. Martens, anything farther for me to
14 take up today?

15 MR. MARTENS: No, Your Honor.

16 THE COURT: And, Mr. Carroll, anything?

17 MR. CARROLL: The only thing I guess I would ask a
18 little bit of clarification. Are you requiring me to get an
19 affidavit from the COURIER-JOURNAL? If so, I would be happy to
20 do so, but, again, I don't think genuinely that I don't see how
21 they can -- they can contest the fact that those photographs are
22 between when they first started doing these in mid March to now,
23 which is a period of approximately a month at most, and that
24 makes them relevant.

25 MR. MARTENS: Your Honor, I'd be happy to confer

1 with -- I'd be happy to confer with counsel about reaching some
2 resolution here. I'm sure we can work this out.

3 THE COURT: Well, it's not for me to tell you whether
4 to confer or not to confer. I'm also not going to order Mr.
5 Carroll to file anything. You know, Mr. Carroll, the date of
6 the photos seems somewhat -- at least somewhat relevant, and it
7 sounds like Mr. Martens thinks you two can work something out
8 that would -- that would give the Court some clarity on when the
9 photos were taken. Make sense?

10 MR. CARROLL: Yes, Your Honor.

11 THE COURT: Okay. Very good. All right. I'll take
12 this under submission, and we're adjourned.

13 MR. MARTENS: Thank you, Your Honor.

14 (Proceedings concluded at 4:14 p.m.)
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