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Hon. Andy Beshear
Governor of Kentucky
Office of the Governor of Kentucky
700 Capital Ave., Ste. 100
Frankfort, KY 40601

VIA ELECTRONIC MAIL

Governor Beshear:

We write to you today to urge you to use your authority as Governor to veto HB 43. HB 43, sponsored by Representative Baker, is purportedly an attempt to protect the First Amendment rights of individuals to participate in in-person services at houses of worship in response to Covid 19 Pandemic executive orders.

Under the guise of providing protections for worship services during an emergency, the bill could create broad criminal and civil immunity for religious groups by effectively prohibiting the government from enforcing any law against religious organizations, as long they claim to be exercising their faith when engaging in the unlawful conduct.

HB 43 would amend KRS Section 39A.100, which governs the emergency powers of the Governor by adding, among other provisions, Section 6. Under Section 6(c), the government, which would include courts, may not take certain "discriminatory actions" against religious organizations based on the organizations' exercise of religion.

"Discriminatory actions" are defined broadly. They include causing "any tax, fine, civil or criminal penalty, payment, damages award, or injunction to be assessed against a religious organization." They also include denying a tax exemption for a religious organization, as well as denying religious organizations state grants, contracts, scholarships, licenses, certifications, and other benefits.

Although other parts of the bill reference actions taken "during a declared emergency", nothing in Section 6(c) limits enforcement to such an emergency, and therefore religious organizations could claim that Section 6(c) applies outside the context of disasters and public emergencies. As currently drafted, Section 6(c) could cause untold harm and wreak havoc throughout the Commonwealth. For example:



- Religious organizations could claim immunity from criminal prosecution for the sexual abuse or physical harm of children that occurs in connection with religious activities or rituals.
- A house of worship that violates the fire code by exceeding capacity limits during worship services could not be fined or forced by a court to comply with the law.

There is another significant problem with HB 43, as currently drafted. Section 6(b) provides that nothing in subsection (a) prevents the Governor from requiring compliance with neutral health, safety, or occupancy requirements. However, at a minimum, it should also make clear that nothing in subsection (c) should forbid requiring similar compliance. But even using that interpretation, the bill is overbroad, because under Section 6(c) religious organizations still could be shielded from penalties for failing to comply with requirements that are not considered health, safety, or occupancy requirements. For example:

- Because no civil penalties, damages awards, or injunctions may be issued against religious organizations, a family whose child was injured or killed at a religious school due to negligence or recklessness could be prevented from suing the school.
- Religious organizations could be shielded from the legal consequences of violating nondiscrimination laws, both based on their beliefs and for activities connected with their exercise of religion
- Employees of religious schools and hospitals could be prevented from suing if their employers engaged in harassment, discrimination, or even criminal behavior.
- The state could be required to give government contracts to groups like the KKK, which claim to be religiously based.
- The state could be required to award a social-services contract (e.g., to operate a soup kitchen) to organizations that claim a religious right to discriminate against beneficiaries who are Jewish or have a disability.
- Kentucky could not recover state funds used by religious organizations for fraudulent or improper purposes, as long as the funds were used while engaging in religious activities.
- The state could be forced to approve tax-exempt status for a religious charity that refuses to hire Black people.
- The state could not revoke a religious organization's tax-exempt status if it engaged in for-profit, commercial activities as part of its religious exercise.

Under Section 6(c), religious organizations would even be shielded from more mundane laws. For example, a church could refuse to pay speeding tickets incurred by church-owned vehicles while they were transporting congregants to and from religious activities.



Exempting religious organizations from nearly every law—from the mundane to our most critical legal protections—and shielding them from civil and criminal liability during an emergency or at any other time is the type of broad religious preference that the U.S. Constitution forbids. And it is not necessary to safeguard religious worship during a crisis.

Finally, even Section 6(a) is too broad because it allows religious organizations to ignore critical orders issued during a state of emergency, even as comparable non-religious entities are restricted—so long as any other “essential” business or organization is allowed to continue operating.

For example:

The bill bars the government from “limit[ing] the ability of a religious organization to continue operating or engag[ing] in religious services during a state of emergency to the same or greater extent that other organizations or businesses that provide essential services are permitted to operate” — without regard for whether the other essential organizations or businesses pose a comparable risk.

A church could claim the right to continue holding worship services despite an approaching hurricane and evacuation order merely because gas stations remain open as essential businesses to facilitate residents’ ability to leave town.

Though non-religious wedding venues might be closed because of a spike in infections of a deadly disease, a church could claim the right to hold a large ceremony in its chapel and a reception in its gathering hall merely because a doctor’s office may also operate.

Ultimately, no new legislation is necessary to protect religious worship during emergencies. The Kentucky Constitution and Kentucky’s Religious Freedom Restoration Act already protects religious freedom, and the U.S. Supreme Court’s recent rulings affirm that, although some limits on worship services are permissible in rare circumstances, these restrictions may not be more severe than restrictions imposed on comparable secular gatherings. This rule protects the right to worship while ensuring that courts and public officials have the flexibility needed to adequately address the most dire of disasters.

The ACLU of Kentucky urges you to VETO HB 43. Thank you.

Kate Miller
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