

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 6th Meeting of the 2020 Interim

November 18, 2020

Call to Order and Roll Call

The 6th meeting of the Interim Joint Committee on Judiciary was held on Wednesday, November 18, 2020, at 10:30 AM, in Room 171 of the Capitol Annex. Representative Jason Petrie, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Jason Petrie, Co-Chair; Senators Alice Forgy Kerr, Gerald A. Neal, Michael J. Nemes, John Schickel, Wil Schroder, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kim Banta, John Blanton, Charles Booker, Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Joseph M. Fischer, Angie Hatton, Samara Heavrin, Nima Kulkarni, Stan Lee, Derek Lewis, Savannah Maddox, C. Ed Massey, Chad McCoy, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, Maria Sorolis, and Rob Wiederstein.

Guests: Bryan Beaman and Professor Russ Weaver.

LRC Staff: Katie Comstock and Yvonne Beghtol.

Approval of the Minutes

Representative Fischer made a motion to approve the October 22, 2020 minutes, seconded by Representative McCoy, and passed by voice vote.

Constitutional Discussion of Religious Liberty

Professor Russ Weaver, University of Louisville School of Law, gave an overview of the First Amendment's clauses pertaining to freedom of religion. The two clauses are the Establishment Clause, which prohibits the government from establishing religion, and the Free Exercise Clause, which gives people the right to freely exercise their religion. Initially these protections only applied against the federal government, but were later extended to the states.

Bryan Beaman, an attorney with Sturgill Turner, reviewed related United States Supreme Court decisions. Mr. Beaman stated that cases examining the Free Exercise Clause and the Establishment Clause are some of the court's most difficult cases. Governments must act neutrally toward religion. Governments cannot single out a religion,

religious citizens, or religious beliefs for less than equal treatment. A state or community's closing or reopening plan may apply the same limits to a religious organization as to a secular organization. However, stricter limits cannot be imposed on places of worship than on businesses, unless there is sufficient justification for the difference in treatment.

Mr. Beauman broke the Free Exercise and Establishment Clauses into four categories: 1) laws that expressly discriminate against a religious organization; 2) laws that expressly favor a religious organization; 3) laws that apply equally to secular and religious organizations; and 4) laws that treat a religious organization equally to some secular groups, but worse or better than other secular groups. Recent events have raised questions as to whether the state has placed religious entities in a disfavored category.

Mr. Beauman clarified that the United States Constitution does not require that religious organizations be treated more favorably than a secular organization. However, the United States Constitution does require that religious organizations be treated equally when there is a favorite or exempt secular category, unless the state can sufficiently justify the difference in treatment.

Professor Weaver analyzed Governor Beshear's COVID-19 orders. When there is discrimination against religion, a court is going to apply strict scrutiny and the law is going to be presumptively unconstitutional. Professor Weaver reviewed the United States Supreme Court's holdings in *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* and the *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. If mass gatherings are not allowed, then the state can prohibit church services as well as all mass gatherings. But to decide which organizations can or cannot gather is where the problem lies. Consistent social distancing rules, such as requiring those attending church services to wear masks and maintain social distancing, would be permissible if required of all gatherings. The focus is not on prohibiting religion, but on the way in which people interact in public. Professor Weaver stated that earlier in the year decisions were being made about what should be considered essential and not essential. The reality is that some religions believe very strongly in the need to come together, to commune. If they choose to gather in person, the government does have the right to regulate the way in which it occurs, such as requiring the wearing of masks. But to prohibit them from gathering is problematic. Professor Weaver stated that Treasurer Ball's report about the threats being made against churches gave him concern.

Mr. Beauman reviewed four recent lawsuits filed between April and May of 2020. The first case was filed by On Fire Christian Church, the second was filed by Maryville Baptist Church, the third by congregants of the Maryville Baptist Church, and the fourth by Tabernacle Baptist Church. The first lawsuit was filed the Saturday before Easter challenging the city of Louisville's prohibition against worship gatherings being held on Easter Sunday. Courts dealt with restrictions stating churches were not allowed to gather in-person or drive-thru, police would be used to deter and disperse religious gatherings,

and asking the community to report any churches attempting to violate these guidelines. Judge Walker granted a temporary restraining order against the city for violating both the First Amendment and the Kentucky state statute regarding religious freedom. The ruling noted that the city's actions were underinclusive due to addressing one type of gathering and not others. The church sought to have a drive-in ceremony for Easter, congregants seated in their cars that would be spaced out. Judge Walker ruled that if churchgoers sitting in their cars posed a danger of spreading the virus then the city should have closed all drive-thrus and parking lots. Judge Van Tatenhove granted a temporary restraining order for the Tabernacle Baptist Church drive-in ceremony, because the church proposed to maintain all of the CDC's requirements. The lawsuits filed by the Maryville Baptist Church and its congregants were moot since the District Court's injunction was still valid and in effect, and the church continued to abide by the restrictions. The Court of Appeals determined that some businesses were allowed to gather and others were not, placing religious organizations in the disfavored category.

During a pandemic, public health officials and government officials have a lot of leeway in the mechanics of how they address and protect public health. However, courts have said there are some constitutional lines that a government official cannot cross even in the midst of a crisis. Constitutional protections against unlawful discrimination also apply.

In response to Chairman Petrie, Professor Weaver stated that scrutiny requires looking at the objective that governmental actions are trying to accomplish, and the means by which they try to accomplish it. Low level scrutiny looks at whether or not the actions are reasonable, and assumes the governmental actions will be upheld. Strict scrutiny assumes the governmental actions are presumptively unconstitutional, considers whether the objective is compelling or overriding, and if the means are the least restrictive possible. Strict scrutiny applies when determining discrimination against religion. Some federal statutes require a higher level of scrutiny for protection of religious liberties. When applied to the states, there was a question as to whether that was an overreach. However, Mr. Beauman added that the Kentucky Religious Freedom Restoration Act sets a higher bar of scrutiny than federal statutes.

In response to Senator Wheeler, Professor Weaver stated that when you have disparate treatment, the court is going to apply strict scrutiny. Mr. Beauman stated that when a restriction is put in place, but exceptions are made, it is going to be difficult for the government to defend the restrictions as constitutionally protected. The focus is on the least restrictive means, or being narrowly tailored. When exceptions are created, it makes it difficult for those laws and regulations to be applied to constitutionally protected activity, no matter what the activity.

In response to Senator Schickel, Professor Weaver stated that the goal of freedom of expression and religious protections is not only to protect mainline or orthodox views,

but also to respect what might not be regarded as mainline. There are limits, but the U. S. Supreme Court has made clear that religious beliefs need to be respected. Mr. Beauman added that the protections under state statutes and under the federal constitution apply to all beliefs, no matter how popular the religion.

There being no further business, the meeting adjourned at 11:26 AM.