

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

MARYVILLE BAPTIST CHURCH, INC., )  
and DR. JACK ROBERTS, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ANDY BESHEAR, in his official capacity as )  
Governor of the Commonwealth of Kentucky, )  
 )  
Defendant. )

CASE NO. 3:20-cv-00278-DJH

---

**PLAINTIFFS’ RENEWED  
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL  
AND MOTION TO AMEND BRIEFING SCHEDULE**

Plaintiffs, MARYVILLE BAPTIST CHURCH, INC. (“Maryville Baptist Church” or the “Church”), and DR. JACK ROBERTS (“Dr. Roberts”), pursuant to Local Rule 7.1 and Federal Rule of Appellate Procedure 8(a)(1)(C), and on a continuing emergency basis, renew their Emergency Motion for Injunction Pending Appeal (ECF 17, “District Court IPA Motion”) pursuant to the Order of the Sixth Circuit Court of Appeals (ECF 23, “6th Circuit IPA Order”) granting, in part, Plaintiffs’ Emergency Motion for Injunction Pending Appeal to that court (“6th Circuit IPA Motion,” attached hereto as Exhibit A), and pursuant to this Court’s Order (ECF 24, “Status Order”) entered today setting a telephonic status conference “to revisit the briefing schedule previously set in this matter [ECF 22] and to discuss the necessity of creating a record to aid in the appellate process.” (Status Order 2.)

**JURISDICTION AND TIMING  
FOR THIS COURT’S RULING ON RENEWED IPA MOTION**

The Sixth Circuit has jurisdiction over Plaintiffs’ appeal of this Court’s April 18, 2020 Order (ECF 9) denying Plaintiffs’ Emergency Motion for Temporary Restraining Order and

Preliminary Injunction (ECF 3, Plaintiffs' "TRO/PI Motion"). (6th Cir. IPA Order 2–3; Status Order 2.) The Sixth Circuit also took up Plaintiffs' 6th Circuit IPA Motion filed April 30, even though Plaintiffs' District Court IPA Motion filed April 24 remained pending in this Court, because of the impending May 3 Sunday service and, "Under these circumstances, no one can fairly doubt that time is of the essence." (6th Cir. IPA Order 3.) Nonetheless, the 6th Circuit IPA Order only resolved Plaintiffs' respective IPA motions as to Plaintiffs' drive-in worship services, enjoining "[t]he Governor and all other Commonwealth officials . . . during the pendency of [the] appeal, from enforcing orders prohibiting drive-in services at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities." (6th Cir. IPA Order 10.) The Sixth Circuit left to this Court, however, "[i]n the near term," resolution of Plaintiffs' respective IPA motions as to in-person worship at the Church, and "urge[d] [this Court] to prioritize resolution of the claims in view of the looming May 20 date and for the Governor and plaintiffs to consider acceptable alternatives." (6th Cir. IPA Order 10.) Given that Plaintiffs' next affected service is this Wednesday evening, May 6, **Plaintiffs respectfully request this Court's ruling on Plaintiffs' District Court IPA Motion (ECF 17, as renewed hereby), as to in-person worship, at or before 3:00 P.M. Wednesday, May 6**, so that Plaintiffs may proceed with their Wednesday night worship service under the Court's protection, or seek further immediate relief in the Sixth Circuit.

Plaintiffs respectfully submit to the Court that they are conscientiously observing the respective jurisdictional and procedural rules of this Court and the Sixth Circuit in while diligently working to protect their rights. In the telephonic status conference convened in this Court before Magistrate Judge Edwards (ECF 19, 22), Plaintiffs' counsel transparently stated to Judge Edwards that **Plaintiffs' priority was this Court's ruling on the District Court IPA Motion before the**

**ensuing Sunday** (May 3), and that Plaintiffs otherwise needed to know what this Court would do before taking the IPA matter to the 6th Circuit. Plaintiffs' counsel **also**, however, answered the question Judge Edwards posed regarding briefing of the District Court IPA Motion, urging that Governor Beshear should be required to respond as soon as possible, and in any event by Monday (May 4), not Friday (May 8) as suggested by Judge Edwards. Plaintiffs' counsel also committed to a one-day reply (which would have facilitated a ruling before the ensuing Wednesday service if Governor Beshear responded on Monday), but revised that commitment to two days once Judge Edwards indicated the Governor's response would be due on Wednesday (at which point both Plaintiffs' Sunday and Wednesday services would have passed without relief from the Court, and replying on Friday instead of Thursday, if Plaintiffs even took both days, would have made no practical difference). The status conference having concluded with Judge Edwards' indicating a forthcoming briefing schedule finishing on the following Friday (May 8), and no order to the contrary having been entered after the status conference, Plaintiffs filed their 6th Circuit IPA Motion the same day to obtain relief in time for the ensuing Sunday service, which relief that court granted, in part, in the 6th Circuit IPA Order.<sup>1</sup>

**SIXTH CIRCUIT'S PARAMETERS  
FOR THIS COURT'S RULING ON RENEWED IPA MOTION**

In the 6th Circuit IPA Order, the court applied the familiar "four factors" in granting Plaintiffs' 6th Circuit IPA Motion. (6th Cir. IPA Order 3–10.) Importantly, the court held, "The Church is likely to succeed on its state and federal claims, **especially** with respect to the ban's

---

<sup>1</sup> In granting Plaintiffs relief, the Sixth Circuit implicitly rejected Governor Beshear's accusation of impropriety in Plaintiffs' positioning within the jurisdictional and procedural parameters of the respective courts, and this Court should likewise reject the accusation should Governor Beshear repeat it here. (*See* Governor Andy Beshear's Response in Opposition to Plaintiffs-Appellant's Emergency Motion for Injunction, 6th Cir. ECF 13-1, attached hereto as Exhibit B, at 13–14.)

application to drive-in services” (6th Cir. IPA Order 3 (emphasis added)), and that it is “unnecessary to dwell on the remaining three factors” with respect to drive-in services (6th Cir. IPA Order 9). More importantly, however, the court suggested the same outcome is due with respect to in-person services; but, for in-person services, the court indicated this Court should give “additional input . . . whether of a fact-finding dimension **or not**” as to the balancing of the other three factors with the established likelihood of success. (6th Cir. IPA Order 10 (emphasis added).)

The reasoning and conclusions on which the Sixth Circuit based its injunction as to drive-in services applies with equal force to in-person services:

The way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches. **The orders permit uninterrupted functioning of “typical office environments,” which presumably includes business meetings. How are in-person meetings with social distancing** any different from drive-in church services with social distancing?

(6th Cir. IPA Order 4–5 (emphasis added) (citation omitted).)<sup>2</sup> And:

As just shown, the Governor’s orders do not seem to survive strict scrutiny, *particularly* with respect to the ban on outdoor services.

(6th Cir. IPA Order 6–7 (emphasis added).) And:

The orders allow “life-sustaining” operations and don’t include worship services in that definition. And many of the serial exemptions for secular activities pose comparable public health risks to worship services. For example: The exception for “life-sustaining” businesses allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other health-related precautions. But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services *and even* when they meet outdoors.

---

<sup>2</sup> The Sixth Circuit expressly rejected Governor Beshear’s argument that his orders do not ban drive-in services, both because of what the orders say and because of how the orders were enforced against Plaintiffs’ drive-in service. (6th Cir. IPA Order 5.)

(6th Cir. IPA Order 7 (emphasis added) (citation omitted).) And:

[R]estrictions inexplicably applied to one group and exempted from another do little to further these goals [“to lessen the spread of the virus or . . . protect the Commonwealth’s citizens”] and do much to burden religious freedom. **Assuming all of the same precautions are taken**, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? **Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers.**

(6th Cir. IPA Order 7–8 (emphasis added).) And:

[I]t’s exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it.”

(6th Cir. IPA Order 8.) And:

**The Governor has offered no good reason so far** for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.

(6th Cir. IPA Order 8–9 (emphasis added).) And:

The Governor claims . . . that the explanation for these groups of people to be in the same area—intentional worship—distinguishes them from groups of people in a parking lot or a retail store or an airport or some other place where the orders allow many people to be. We doubt that the reason a group of people go to one place has anything to do with it. **Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another?**

(6th Cir. IPA Order 9 (emphasis added).)

The breadth of the ban on religious services, together with a haven for numerous secular exceptions, should give pause to anyone who prizes religious freedom.

(6th Cir. IPA Order 10.)

Taken together, the foregoing reasoning and conclusions of the Sixth Circuit make it clear: **no reasons** offered by Governor Beshear so far are good enough to justify his orders' allowing people—even large numbers of people—to “practice social distancing and hygiene in one place but not another.” (6th Cir. IPA Order 9.) Thus, this Court’s inquiry in aid of the appellate process should, and must, focus only on whether Governor Beshear has any other reason not previously disclosed. Moreover, this inquiry does not require further factual development. (6th Cir. IPA Order Governor Beshear presented substantial factual matter to the Sixth Circuit in his Response in Opposition to Plaintiffs-Appellant’s Emergency Motion for Injunction, 6th Cir. ECF 13-1 (“6th Cir. IPA Motion Response”), attached hereto as Exhibit B. Governor Beshear presumably put his best foot forward in his Response to the Sixth Circuit, and still failed to give a good reasons for his orders’ bans on in-person services. The Court also has the benefit of the *Amicus Curiae* Brief of the Commonwealth of Kentucky in Support of Plaintiffs’ Motion for an Injunction Pending Appeal (ECF 20-2) filed by the Kentucky Office of the Attorney General and fully supporting Plaintiffs’ position.

Furthermore, as shown in Plaintiffs’ Verified Complaint (ECF 1), the Kentucky State Police did not enter Plaintiffs’ sanctuary when they descended on Plaintiffs’ Easter Sunday service to post notices of criminal violation on all cars in the parking lot. (V.Compl. ¶ 51.) Thus, with respect to Plaintiffs’ distancing and hygiene practices, or intended practices, it is unlikely Governor Beshear can adduce any further facts relevant to **his burden** to establish his orders are narrowly tailored under the applicable strict scrutiny standard. (6th Cir. IPA Order 4–9; 6th Cir. IPA Mot. 17–20.) To be sure, the Sixth Circuit already concluded “that the Church and Dr. Roberts do not seek to insulate themselves from the Commonwealth’s general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social

distancing. They are willing to follow any hygiene requirements.” (6th Cir. IPA Order 8.) And to remove all doubt, attached hereto as Exhibit C is the Declaration of Dr. Jack Roberts providing photographic evidence of the distancing measures employed by Plaintiffs inside the Church, and increased distancing employed in the parking lot.

**CONCLUSION**

For all of the foregoing reasons, unless Governor Beshear can proffer to this Court new, persuasive evidence or argument relevant to his burden to prove narrow tailoring, there is no need to for the Court to receive any further evidence or argument, and the Court should grant Plaintiffs’ District Court IPA Motion, as renewed hereby, forthwith, and in any event before 3:00 P.M. on Wednesday, May 6, 2020, so that Plaintiffs may proceed with their Wednesday night worship service under the Court’s protection, or seek further immediate relief in the Sixth Circuit.

Respectfully submitted,

s/ Roger K. Gannam

Mathew D. Staver

Horatio G. Mihet

Roger K. Gannam

Daniel J. Schmid

LIBERTY COUNSEL

P.O. Box 540774

Orlando, FL 32854

(407) 875-1776

court@LC.org

hmihet@LC.org

rgannam@LC.org

dschmid@LC.org

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF system which will effect service upon all counsel or parties of record.

DATED this May 4, 2020.

s/ Roger K. Gannam  
Roger K. Gannam  
*Attorney for Plaintiffs*



No. 20-5427

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

MARYVILLE BAPTIST CHURCH, INC.; DR. JACK ROBERTS

Plaintiffs–Appellants

v.

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

Defendant–Appellee

---

On Appeal from the United States District Court  
for the Western District of Kentucky  
In Case No. 3:20-cv-00278 before The Honorable David J. Hale

---

**PLAINTIFFS-APPELLANTS' EMERGENCY MOTION  
FOR INJUNCTION PENDING APPEAL  
AND TO EXPEDITE APPEAL**

---

Mathew D. Staver, *Counsel of Record*  
Horatio G. Mihet  
Roger K. Gannam  
Daniel J. Schmid  
LIBERTY COUNSEL  
P.O. Box 540774  
Orlando, Florida 32854  
(407) 875-1776  
court@LC.org | hmihet@LC.org  
rgannam@LC.org | dschmid@LC.org

*Attorneys for Plaintiffs–Appellants*

**EXHIBIT A**

**CORPORATE DISCLOSURE STATEMENT**

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Plaintiffs–Appellants state that neither is a subsidiary or affiliate of a publicly owned corporation, and that no publicly owned corporation, not a party to the appeal, has a financial interest in its outcome.

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT .....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES .....iv

RELIEF SOUGHT ..... 1

FACTUAL GROUNDS FOR RELIEF .....2

    A. Satisfaction of Fed. R. App. P. 8(a). .....3

    B. Factual Summary.....6

LEGAL ARGUMENT .....9

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT THE COMMONWEALTH’S ORDERS SHOULD BE RESTRAINED BECAUSE THEY VIOLATE APPELLANTS’ FREE EXERCISE RIGHTS UNDER THE FIRST AMENDMENT AND KENTUCKY RFRA. ....10

    A. The Commonwealth’s Application of the Orders Burdens Appellants’ Free Exercise Rights Under the First Amendment and Kentucky RFRA.....10

    B. The Commonwealth’s application of the Orders to burden Appellants’ free exercise of religious beliefs is subject to strict scrutiny under the First Amendment and KRFRA.....12

    C. The Commonwealth’s Application of the Orders Cannot Withstand Strict Scrutiny and Should Be Restrained.....16

II. PLAINTIFFS HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT AN IPA RESTRAINING AND ENJOINING THE COMMONWEALTH. ....20

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WARRANT AN IPA.....21

CONCLUSION.....22

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS.....24

CERTIFICATE OF SERVICE .....25

EXHIBITS

Order, April 18, 2020 (ECF 9, “TRO/PI Order”)..... Exhibit 1

Notice of Appeal (ECF 16)..... Exhibit 2

Verified Complaint for Declaratory Relief, Temporary Restraining  
Order, Preliminary and Permanent Injunctive Relief, and Damages  
(ECF 1, “Verified Complaint”) ..... Exhibit 3

Plaintiffs’ Emergency Motion for Temporary Restraining Order and  
Preliminary Injunction and Supporting Memorandum of Law (ECF  
3, “TRO/PI Motion”)..... Exhibit 4

*Amicus Curiae* Brief of the Commonwealth of Kentucky in Support  
of Plaintiffs’ Motion for an Injunction Pending Appeal (ECF 20-2,  
“AG Brief”) ..... Exhibit 5

**TABLE OF AUTHORITIES**

**Cases**

*ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) .....21

*ACLU of Ohio v. Capital Square Rev. & Advisory Bd.*,  
243 F.3d 289 (6th Cir. 2001) .....20

*Ashcroft v. ACLU*, 542 U.S. 656 (2004) .....17

*Ashford v. Raby*, 951 F.3d 798 (6th Cir. 2020).....4

*Bernal v. Fainter*, 467 U.S. 216 (1984) .....16

*Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016).....18

*Burson v. Freeman*, 504 U.S. 191 (1992).....16

*Chem. Weapons Working Group (CWWG) v. Dep’t of the Army*,  
101 F.3d 1360 (10th Cir. 1996) .....3,4

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,  
508 U.S. 520 (1993).....11,13,14

*Elrod v. Burns*, 427 U.S. 347 (1976) .....20

*EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178-DJH,  
2019 WL 1233575 (W.D. Ky. Mar. 15, 2019) .....9

*FCA US LLC v. Bullock*, 737 Fed. App’x 725 (6th Cir. 2018).....5

*First Baptist Church. v. Kelly*, No. 20-1102-JWB,  
2020 WL 1910021 (D. Kan. Apr. 18, 2020).....15,19

*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,  
546 U.S. 418 (2006).....17

*Jacobson v. Massachusetts*, 197 U.S. 11 (1905) .....11

*Joelner v. Vill. of Washington Park*, 378 F.3d 613 (7th Cir. 2004).....21

*Jones v. Caruso*, 569 F.3d 258 (6th Cir. 2009).....21

*Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969).....21,22

*McCullen v. Coakley*, 134 S. Ct. 2518 (2014) ..... 17

*Ne. Ohio Coal. for Homeless & Serv. Employees Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999 (6th Cir. 2006).....4

*On Fire Christian Ctr., Inc. v. Fisher*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)..... 7,11,14,15,16,19,21,22

*Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566 (6th Cir. 2002) .....4,5,9

*Republican Party of Minn. v. White*, 536 U.S. 765 (2002).....16,17

*Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) ..... 16

*Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)..... 18

*Smith v. Kentucky*, 520 S.W.3d 340 (Ky. 2017) ..... 4

*Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) ..... 18

*Terminiello v. City of Chicago*, 337 U.S. 1 (1949)..... 11

*Terret v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).....20

*Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707 (1981)..... 11

*Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007).....9

**Statutes**

Kentucky Religious Freedom Restoration Act,  
 Ky. Rev. Stat. § 446.350 ..... 10,11,12,16

**Other Authorities**

6th Cir. R. 27 ..... 1,2

Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, <i>Federal Practice &amp; Procedure</i> (2d ed. 1995).....	20,21
Fed. R. App. P. 8.....	1,3
<i>Hebrews</i> .....	10
<i>Matthew</i> .....	10
U.S. Const. amend I.....	<i>passim</i>

## **RELIEF SOUGHT**

Plaintiffs–Appellants, MARYVILLE BAPTIST CHURCH, INC. (the “Church”), and the Church’s pastor DR. JACK ROBERTS (“Dr. Roberts”) (collectively, “Appellants”), on an emergency basis pursuant to 6th Cir. R. 27(c), move the Court:

1. Pursuant to Fed. R. App. P. 8(a)(2), for an injunction pending appeal (IPA) of the district court’s April 18, 2020 Order (“TRO/PI Order,” attached as Exhibit 1), which is the subject of Appellants’ Notice of Appeal to this Court (attached as Exhibit 2), restraining and enjoining Defendant–Appellee, ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky (the “Commonwealth” or “Kentucky”), from unconstitutionally enforcing and applying against Appellants, as the Kentucky State Police did on Easter Sunday, the various COVID-19 orders issued by Governor Beshear and other Commonwealth officials (collectively, the “Orders”) purporting to prohibit Appellants, on pain of criminal sanctions and mandatory, household-wide quarantines, from gathering for in-person or even “drive-in” worship services at the Church, regardless of whether Appellants meet or exceed the social distancing and hygiene guidelines pursuant to which the Commonwealth disparately and discriminatorily allows so-called “life-sustaining” commercial and non-religious entities (e.g., liquor stores, warehouse



clubs, supercenters, and office buildings) to accommodate large gatherings, crowds, and masses of persons without scrutiny or numerical limit; and, or in the alternative,

2. Pursuant to 6th Cir. R. 27(f), for an order expediting the briefing, oral argument, and ultimate disposition of their appeal, to remedy the irreparable harm being suffered by Appellants in having to conduct religious worship services each Sunday morning and Wednesday night under the continuing threat of unconstitutional and illegal Commonwealth enforcement actions against Appellants, following actual enforcement action against Appellants and their congregants by the Kentucky State Police.

### **FACTUAL GROUNDS FOR RELIEF**

Good cause and other reasons for the requested relief are shown herein, as supported by Appellants' Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages ("Verified Complaint," attached as Exhibit 3), Appellants' Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law to the district court ("TRO/PI Motion," attached as Exhibit 4), and the *Amicus Curiae* Brief of the Commonwealth of Kentucky in Support of Plaintiffs' Motion for an Injunction Pending Appeal filed in the district court by the Kentucky Office of the Attorney General ("AG Brief," attached as Exhibit 5).

**A. Satisfaction of Fed. R. App. P. 8(a).**

Pursuant to Fed. R. App. P. 8(a)(1)(C), Appellants first moved for an emergency IPA in the district court on April 24, the same day Appellants filed their notice of appeal. The ensuing Sunday and Wednesday passed without any action by the district court on the motion. Today (April 30), the magistrate convened a status conference, and took input from counsel on a briefing schedule for the emergency IPA motion. The magistrate indicated a forthcoming briefing schedule concluding next Friday, May 8, potentially followed by oral argument, if the district court requires it, which effectively denies Appellants emergency preliminary relief for at least another Sunday–Wednesday cycle, and likely several more. This delay by the district court satisfies the condition that “the district court . . . failed to afford the relief requested,” Fed. R. App. P. 8(a)(2)(A)(ii), justifying Appellants’ seeking an emergency IPA from this Court. Moreover, Appellants could be excused from first seeking an IPA in the district court for impracticability under Fed. R. App. P. 8(a)(2)(A)(i), if not futility, because the district court has already ruled against Appellants on the merits under the TRO/PI/IPA standard, and incurring the additional irreparable harm ought not be necessary. *See Chem. Weapons Working Group (CWWG) v. Dep’t of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996) (“When the district court’s order demonstrates commitment to a particular resolution,

application for a stay from that same district court may be futile and hence impracticable.”)

Appellants appealed to this Court from the district court’s TRO/PI Order, which denied Appellants’ TRO/PI Motion.<sup>1</sup> Though phrased as a denial of Appellants’ temporary restraining order (TRO) (TRO/PI Order 7), “the label attached to an order by the trial court is not decisive, and [this Court] looks to the nature of the order and the substance of the proceeding below.” *Ne. Ohio Coal. for Homeless & Serv. Employees Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006) (cleaned up).<sup>2</sup> Thus, Appellants appealed the denial as a denial, in substance, of their preliminary injunction (PI) because the district court made a merits determination on the likelihood of success and irreparable harm determinations common to both the TRO and PI aspects of the motion. (TRO/PI Order 2–7.) *See Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566,

---

<sup>1</sup> The grounds for Appellants’ TRO/PI Motion included violations of free exercise, speech, and assembly rights under the First Amendment, and violations of the Kentucky RFRA. This Motion incorporates the arguments below, but due to space limitations the focus herein is on violations of free exercise and Kentucky RFRA.

<sup>2</sup> This motion uses the parenthetical “(cleaned up)” to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See, e.g., Ashford v. Raby*, 951 F.3d 798, 801 (6th Cir. 2020); *Smith v. Kentucky*, 520 S.W.3d 340, 354 (Ky. 2017).

572 (6th Cir. 2002) (“Such a ruling is appealable . . . if it is tantamount to a ruling on a preliminary injunction.” (cleaned up)); *see also FCA US LLC v. Bullock*, 737 Fed. App’x 725, 727 (6th Cir. 2018) (“We have jurisdiction when the grant or denial of a TRO threatens to inflict irretrievable harms.” (cleaned up)).<sup>3</sup> Furthermore, it had already been a week after the district court’s denial when Appellants filed their appeal, and the district court still had not set a status conference or briefing schedule on the PI despite stating it would do so in the TRO/PI Order (TRO/PI Order 7), effectively denying Appellants any preliminary relief and forcing them to face the ensuing Sunday and Wednesday under the continued threat of more Commonwealth enforcement actions against them. (TRO/PI Order 7.)

---

<sup>3</sup> At today’s status conference Appellants’ counsel advised the magistrate that the district court is without jurisdiction to schedule briefing or otherwise consider the PI aspect of Appellants’ TRO/PI Motion because the district court’s effective denial of the PI is the basis for Appellants’ appeal of the TRO/PI Order to this Court. Governor Beshear’s counsel tacitly agreed, advising the magistrate that this Court has already established a merits briefing schedule for the appeal, and thereafter offering scheduling input only for briefing Appellants’ IPA motion in the district court. *See Overstreet*, 305 F.3d at 572 (“Although the district court treated the motion as one for a temporary restraining order, both parties have treated the motion, and the district court’s ruling thereon, as a motion for a preliminary injunction.”).

**B. Factual Summary.**<sup>4</sup>

The series of COVID-19 Orders issued by Governor Beshear and his designees from March 6 to March 25, 2020, purport to prohibit “[a]ll mass gatherings,” ambiguously defined to include “any event or convening that brings together groups of individuals,” but specifically including “faith-based . . . activities”—regardless of whether participants observe governmental social distancing and hygiene guidelines. (V.Compl. ¶¶ 24–25, 30, 34, Exs. D, F.) The Orders, however, exempt 19 expansive categories of commercial and non-religious activities “where large numbers of people are present” from the “mass gatherings” prohibition, expressly allowing “life-sustaining” liquor stores, warehouse clubs, retail supercenters, and professional offices to accommodate gatherings, crowds, or masses of people without numerical limit, and subject only to “social distancing and hygiene guidance” from the Commonwealth “to the fullest extent **practicable**,” such as “ensuring physical separation . . . by at least six feet **when possible**.” (V.Compl. ¶¶ 26–34, Ex. D, Ex. F at 5 (emphasis added).) Also expressly exempted from the “mass gatherings” prohibition as “life-sustaining” are “[c]arry-out, delivery, and drive-through food and beverage sales.” (*Id.*)

---

<sup>4</sup> Here Appellants highly condense the relevant allegations from their Verified Complaint, but nonetheless commend to the Court ¶¶ 19–89 of the Verified Complaint (and referenced exhibits) for a complete factual background, along with the AG Brief.

On Good Friday (April 10), and in reliance on the Orders, Governor Beshear specifically threatened criminal sanctions and quarantines against Easter Sunday worshippers who showed up at a church in Kentucky. (V.Compl. ¶¶ 2, 38–42.) On Saturday, April 11, District Judge Justin R. Walker of the Western District of Kentucky issued a TRO enjoining the Mayor of Louisville from “enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on drive-in church services” at a Louisville church. *See On Fire Christian Ctr., Inc. v. Fisher*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at \*1 (W.D. Ky. Apr. 11, 2020) [hereinafter *On Fire*].<sup>5</sup> The court issued the TRO because the Mayor threatened churchgoers with criminal enforcement of the Orders: the Mayor said he would “use the police to deter and disburse” religious gatherings, had requested that the police “record license plates of all vehicles in attendance,” and threatened that public health officials would contact and instruct individuals to self-quarantine under the threat of criminal sanction. *Id.* at \*4–5. The court held such threats and actions were unconstitutional because the government “**may not ban its citizens from worshipping.**” *Id.* at \*8 (emphasis added).

Nevertheless, **what the Mayor of Louisville only threatened, and the district court enjoined as unconstitutional under the First Amendment,**

---

<sup>5</sup> The TRO/PI Order also denied Appellants’ request for assignment of their case to Judge Walker as a related case. (TRO/PI Order 2.)

**Governor Beshear actually did to Appellants** in the same judicial district. On Easter Sunday (April 12), as Appellants were conducting worship services at the Church, the Kentucky State Police were dispatched to issue notices to Appellants' congregants that their attendance at church was a criminal act, and to record the license plates of all vehicles in the Church's parking lot. (V.Compl. ¶¶ 2, 4, 43–51.) The Commonwealth followed up its police action with letters to all vehicle owners that they must self-quarantine and engage in certain government-supervised behaviors for 14 days or be subject to further sanction. (V.Compl. ¶¶ 52–55.) Also on Easter Sunday, however, the Walmart and Kroger shopping centers less than one mile from the Church accommodated hundreds of cars in their parking lots and persons inside their stores, but the Commonwealth did not target them for any enforcement action. (V.Compl. ¶¶ 64–68, Ex. I.)

During their Easter Sunday service, Appellants promoted, and their congregants strictly observed, the Orders' social distancing and hygiene guidance, and will continue doing so for the duration of the COVID-19 period. (V.Compl. ¶¶ 57–59.) Appellants also conducted a “drive-in” service by broadcasting their service over a loudspeaker in the Church's parking lot. (V.Compl. ¶¶ 60–62.) No

person inside the Church or in its parking lot on Easter Sunday was known or observed to be infected by or symptomatic of COVID-19. (V.Compl. ¶ 63.)<sup>6</sup>

### **LEGAL ARGUMENT**

Determining whether to grant an IPA motion requires the same determinations as a motion for TRO or PI: that Appellants have a strong likelihood of success on the merits, that they will suffer irreparable injury absent the order, that the balance of the equities favors the order, and that the public interest is served by the Court's issuing the order. *See Overstreet*, 305 F.3d at 572; *Workman v. Bredesen*, 486 F.3d 896, 905 (6th Cir. 2007); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575, \*1 (W.D. Ky. Mar. 15, 2019). Appellants satisfy each of these elements.

---

<sup>6</sup> Today (April 30), Governor Beshear filed in the district court a Notice of Supplemental Fact Development (ECF 21), advising the court that "beginning on May 20, 2020 faith-based organizations will be permitted to have in-person services at a reduced capacity, with social distancing, and cleaning and hygiene measures implemented and followed." The Notice did not, however, walk back any enforcement threats or actions already made or taken against Appellants, and three Sundays (and two Wednesdays) will elapse before the Governor's undefined and unquantified "reduced capacity" permissions will take effect. The Notice also does not guarantee equal treatment for religious gatherings going forward, nor does it denounce or abandon the unconstitutional unequal treatment of religious gathering that has been, and continues to be, in effect. Thus, the Notice has no practical effect on Appellants' need for an IPA.



**I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT THE COMMONWEALTH’S ORDERS SHOULD BE RESTRAINED BECAUSE THEY VIOLATE APPELLANTS’ FREE EXERCISE RIGHTS UNDER THE FIRST AMENDMENT AND KENTUCKY RFRA.**

**A. The Commonwealth’s Application of the Orders Burdens Appellants’ Free Exercise Rights Under the First Amendment and Kentucky RFRA.**

Appellants demonstrated below that they have sincerely held religious beliefs, rooted in Scripture’s commands (e.g., *Hebrews* 10:25), that Christians are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. (V.Compl. ¶¶ 123, 199, 226, 238.) And, as the district court recognized in *On Fire*, “many Christians take comfort and draw strength from Christ’s promise that ‘where two or three are gathered together in My name, there am I in the midst of them.’” 2020 WL 1820249, at \*8 (quoting *Matthew* 18:20). Indeed, the court explained, “the Greek work translated church . . . literally means **assembly**.” *Id.* (cleaned up) (emphasis added). Governor Beshear’s threatened and executed prohibitions under the Orders unquestionably and substantially burden Appellants’ religious practice of assembling together for worship, according to their sincerely held beliefs, in violation of the First Amendment and the Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350 [hereinafter KRFRA].

Though Governor Beshear might not view church attendance as fundamental to Appellants’ religious exercise—or “life-sustaining” on par with liquor store or

supercenter shopping, or professional office work—his opinion is irrelevant because “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or **regulates or prohibits conduct because it is undertaken for religious reasons.**” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) [hereinafter *Lukumi*] (emphasis added). Prohibiting Kentuckians from attending church services where other non-religious gatherings are permitted under similar circumstances “**violat[es] the Free Exercise Clause beyond all question.**” *On Fire*, 2020 WL 1820249, at \*6 (emphasis added). Even in a time of crisis or disease, see *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the First Amendment does not evaporate. Indeed, “even under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose.” *On Fire*, 2020 WL 1820249, at \*8; see also *Terminiello v. City of Chicago*, 337 U.S. 1, 27, 31, 38 (1949).

Like the Free Exercise Clause, KRFRA also prohibits the Commonwealth from substantially burdening a person’s exercise of religion. And KRFRA defines “burden” to include “indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.”

There can be no question that the Orders, on their face and as applied, impose direct penalties on Appellants for the act of attending church in conformance with their sincerely held religious beliefs. As shown in the Factual Grounds for Relief (*supra* pp. 7–8), not only did Governor Beshear threaten to penalize Easter Sunday worshippers who attended church, even for drive-in services, but the Kentucky State Police directly enforced the Orders against Appellants. Moreover, the Orders purport to exclude Appellants from their own facilities for worship services, while allowing the facilities to be used for charitable or other services approved by Governor Beshear. (AG Br. 4–5.) Such restrictions and penalties clearly and substantially burden Appellants’ religious practice, triggering First Amendment and KRFRA protections.

**B. The Commonwealth’s application of the Orders to burden Appellants’ free exercise of religious beliefs is subject to strict scrutiny under the First Amendment and KRFRA.**

The Commonwealth’s application of the Orders to burden Appellants’ religious practices must be subjected to strict scrutiny under KRFRA, which specifies that the Commonwealth may not substantially burden religious exercise unless it “proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.” Under the First Amendment, however, the Orders just as clearly must be subjected to strict scrutiny because they

are not neutral or generally applicable, and therefore “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 531–32.

“Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Lukumi*, 508 U.S. at 531. A law is not neutral “if the object of the law is to infringe upon or restrict practices because of their religious motivation.” *Lukumi*, 508 U.S. at 533. Courts first look to the text, but “facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality.” *Id.* at 533–34 (cleaned up). The First Amendment prohibits hostility that is “masked, as well as overt.” *Id.* The Orders are not facially neutral, but even if so, they covertly depart from neutrality by treating “faith-based” gatherings differently from non-religious gatherings.

Similarly, to determine general applicability courts focus on disparate treatment of similar conduct. *Lukumi*, 508 U.S. at 542. A law is not generally applicable where “inequality results” from the government’s “decid[ing] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with religious motivation.” *Id.* at 543. Thus, a law “fall[s] well below the minimum standard necessary to protect First Amendment rights” when the government **“fail[s] to prohibit nonreligious conduct that endangers these**

**interests in a similar or greater degree”** than the prohibited religious conduct. *Id.* (emphasis added).

The Orders fail neutrality on facial examination, and fail both neutrality and general applicability on actual enforcement. First, the orders facially prohibit “mass gatherings” broadly, including “faith-based” gatherings, but then expressly exempt a multitude of commercial and nonreligious activities involving crowds (e.g., shopping at liquor, warehouse, and supercenter stores). (V.Compl. ¶¶ 26–34, Exs. D–F.) Exempted gatherings are permitted if distancing and hygiene guidelines are followed (“when possible” and to the extent “practicable”), but “faith-based” gatherings are prohibited even if distancing and hygiene guidelines are followed religiously. (*Id.*) And, **while a religious group can meet for secular purposes, it cannot have a “religious service.”** (AG Br. 4–5.)

Second, the Orders were not applied neutrally or generally. Rather, Governor Beshear singled out religious worship gatherings in his Good Friday threats, and the Kentucky State Police were only dispatched to the Church on Easter Sunday, even as crowds and masses of cars and people populated nearby shopping centers. (*See supra* p. 8.) Where the government “has targeted religious worship” for disparate treatment—such as parking in the Church’s parking lot—while “not prohibit[ing] parking in parking lots more broadly—including, again, the parking lots of liquor stores,” there is no neutrality. *On Fire*, 2020 WL 1820249, at \*6.

On the same day the district court entered its TRO/PI Order, the District of Kansas issued a TRO enjoining as unconstitutional executive orders prohibiting religious gatherings of more than ten persons, even though the orders “begin with a broad prohibition against mass gatherings,” because “they proceed to carve out broad exemptions for a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious services.” *First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at \*5 (D. Kan. Apr. 18, 2020) [hereinafter *First Baptist*]. The court found religious gatherings were “targeted for stricter treatment due to the nature of the activity involved, rather than because such gatherings pose unique health risks that mass gatherings at commercial and other facilities do not, or because the risks at religious gatherings uniquely cannot be adequately mitigated with safety protocols,” and, “the disparity has been imposed without any apparent explanation for the differing treatment of religious gatherings.” *Id.* at \*7. Thus, the court concluded, “churches and religious activities appear to have been singled out among essential functions for stricter treatment. **It appears to be the only essential function whose core purpose—association for the purpose of worship—had been basically eliminated.**” *Id.* (emphasis added).

As demonstrated in *On Fire* and *First Baptist*—both COVID-19 era decisions on all fours with this case—if large gatherings at liquor, warehouse, and supercenter stores are not prohibited, even though bringing people together more than

Appellants’ conscientiously distanced and sanitized worship services, then it is obvious the Commonwealth has neither neutrally nor generally applied the Orders, but instead has targeted “faith-based” gatherings for discriminatory treatment.

**C. The Commonwealth’s Application of the Orders Cannot Withstand Strict Scrutiny and Should Be Restrained.**

Because the Commonwealth’s discriminatory application of the Orders triggers strict scrutiny under the First Amendment and KRFRA (*see supra* pts. I.A–B), the Commonwealth is subject to “the most demanding test known to constitutional law,” *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (cleaned up), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) (“[W]e readily acknowledge that a law rarely survives such scrutiny . . . .”). **“Strict-scrutiny review is strict in theory but usually fatal in fact.”** *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (cleaned up) (emphasis added). This is not that rare case.

To be sure, efforts to contain the spread of a deadly disease are “compelling interests of the highest order.” *On Fire*, 2020 WL 1820249, at \*7. But where the Commonwealth permits regular large gatherings of persons for commercial and non-religious purposes, while expressly prohibiting Appellants’ “faith-based” gatherings, the Commonwealth’s assertions of a compelling interest are substantially diminished. Indeed, the Orders “cannot be regarded as protecting an interest of the highest order . . . **when [they leave] appreciable damage to that supposedly vital**

**interest unprohibited.”** *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added).

Whatever interest the Commonwealth purports to claim, however, it cannot show the Orders and their enforcement are narrowly tailored to be the least restrictive means of protecting that interest. And it is the Commonwealth’s burden to make the showing because “the burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). “As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Appellants] must be deemed likely to prevail unless the Government has shown** that [Appellants’] proposed less restrictive alternatives are less effective than [the Orders].” *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

The Commonwealth cannot carry its burden because it cannot demonstrate that it seriously undertook to consider other, less-restrictive alternatives and ruled them out for good reason. To meet this burden, the Commonwealth must show that it “**seriously** undertook to address the problem with less intrusive tools readily available to it,” meaning that it “**considered different methods that other jurisdictions have found effective.**” *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). And the Commonwealth cannot meet its burden by showing “simply that the chosen route is easier.” *Id.* at 2540. Thus, the



Commonwealth “would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason.**” *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added). Furthermore, “[i]t is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.” *Sable Commc ’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). “There must be a fit between the . . . ends and the means chosen to accomplish those ends.” *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011) (cleaned up).

The Commonwealth utterly fails this test. The Commonwealth tried nothing else. For religious gatherings, it considered nothing but a complete prohibition, while expansively exempting numerous businesses and non-religious entities, such as liquor, warehouse, and supercenter stores. (V.Compl. ¶¶ 24–34, EXS. D–F.) The Commonwealth has not and cannot state why or how crowds and masses of persons at a warehouse or supercenter store, where distancing and hygiene are only required if “practicable” and “when possible,” are any less “dangerous” to public health than a responsibly distanced and sanitized worship service, yet the Commonwealth exempted the non-religious gatherings and prohibited Appellants’ church services.

Examples abound of less restrictive approaches that the Commonwealth neither tried nor considered. One option tried successfully in other jurisdictions is to exempt religious worship from gathering prohibitions altogether. Florida, Indiana,

and Ohio have declared religious worship among essential activities which may continue. (V.Compl. ¶¶ 70–71, Exs. L, M; AG Br. 6–7.) Another less restrictive alternative is allowing churches to continue in-person services provided they observe distancing and hygiene practices. Arizona, Arkansas, Alabama, and Connecticut have all taken this approach. (V.Compl. ¶¶ 72–75, Exs. N–Q.) Appellants have demonstrated they already observe the distancing and hygiene guidance that the Commonwealth deems sufficient (to the extent “practicable” and “when possible”) for non-religious gatherings. (V.Compl. ¶¶ 19-36, 56–63.) There is no justification for depriving Appellants of the same consideration or benefit.

Indeed, as the district court exquisitely stated in *On Fire*, the Commonwealth is unlikely to be able to demonstrate that it deployed the least restrictive means because the Orders, and their application,

are **“underinclusive” and “overbroad.”** They’re underinclusive because they don’t prohibit a host of equally dangerous (or equally harmless) activities that the Commonwealth has permitted . . . . Those . . . activities include driving through a liquor store’s pick-up window, parking in a liquor store’s parking lot, or walking into a liquor store where other customers are shopping. The Court does not mean to impugn the perfectly legal business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is “essential,” **so is [church].**

*On Fire*, 2020 WL 1820249, at \*7 (emphasis added) (footnote omitted); *see also First Baptist*, 2020 WL 1910021, at \*7 (D. Kan. Apr. 18, 2020).

The Commonwealth’s failure to tailor its gathering restrictions to closely fit the safety ends it espouses, and failure to try other, less restrictive alternatives that have worked and are working in other jurisdictions across the country, demonstrates that the Commonwealth cannot satisfy its burden to prove narrow tailoring. Thus, the Commonwealth’s enforcement of the Orders fails strict scrutiny, and the IPA is warranted.

**II. PLAINTIFFS HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT AN IPA RESTRAINING AND ENJOINING THE COMMONWEALTH.**

Not only is Governor Beshear’s choosing **for** Appellants to forego established constitutional rights to “attend virtual services” (AG Br.8 n.3) offensive and baseless as a matter of settled law, it also betrays the Governor’s failure to understand that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”<sup>7</sup> *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §2948.1 (2d ed. 1995) (“When an alleged constitutional right is involved, most courts hold that **no further showing of**

---

<sup>7</sup> Prescribing the manner of Kentuckians’ worship is also an Establishment Clause violation. *See ACLU of Ohio v. Capital Square Rev. & Advisory Bd.*, 243 F.3d 289, 294 (6th Cir. 2001) (Establishment Clause forbids government’s “compel[ling] the citizens to worship under a stipulated form of discipline” (quoting *Terret v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815))).

**irreparable injury is necessary.**” (emphasis added)). Thus, demonstrating irreparable injury in this matter “**is not difficult. Protecting religious freedom was a vital part of our nation’s founding, and it remains crucial today.**” *On Fire*, 2020 WL 1820249, at \*9 (emphasis added).

### **III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WARRANT AN IPA.**

An IPA enjoining enforcement of the Orders on Appellants’ responsibly conducted church services will impose no harm on the Commonwealth. “[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute . . . .” *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). But for Appellants, “even minimal infringements upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.” *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). Indeed, absent an IPA, Appellants “face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs.” *On Fire*, 2020 WL 1820249, at \*9.

An IPA is in the public interest, too. “Injunctions protecting First Amendment freedoms are **always in the public interest.**” *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added). “First Amendment rights are not private rights of the appellants so much as they are rights of the general public. Those guarantees

[are] for the benefit of all of us.” *Machesky v. Bizzell*, 414 F.2d 283, 288–90 (5th Cir. 1969) (cleaned up). “[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience.” *On Fire*, 2020 WL 1820249, at \*9 (emphasis added). Thus, the balance of the equities tips decidedly in Appellants’ favor, and an IPA is in the public interest.

### CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that the Court (1) issue injunction pending appeal, restraining and enjoining Governor Beshear, all Commonwealth officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the Orders (specifically the March 19 and 25 orders, V.Compl. Exs. D, F) or any other order to the extent any such order prohibits drive-in church services at the Church, or in-person church services at the Church if the Church meets the social distancing and hygiene guidelines pursuant to which the Commonwealth allows so-called “life-sustaining” commercial and non-religious entities (e.g., liquor stores, warehouse clubs, supercenters, and office buildings) to accommodate large gatherings, crowds, or masses of persons without numerical limit; and, or in the alternative, (2) order

expedited briefing on a significantly shorter schedule than currently set, oral argument, and ultimate disposition of this appeal.

Respectfully submitted:

/s/ Roger K. Gannam  
Mathew D. Staver, *Counsel of Record*  
Horatio G. Mihet  
Roger K. Gannam  
Daniel J. Schmid  
LIBERTY COUNSEL  
P.O. Box 540774  
Orlando, Florida 32854  
(407) 875-1776  
court@LC.org | hmihet@LC.org  
rgannam@LC.org | dschmid@LC.org

*Attorneys for Plaintiffs–Appellants*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 5,119 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

DATED this April 30, 2020.

/s/ Roger K. Gannam  
Roger K. Gannam  
*Attorney for Plaintiffs–Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

DATED this April 30, 2020.

/s/ Roger K. Gannam  
Roger K. Gannam  
*Attorney for Plaintiffs–Appellants*



No. 20-5427

---

**UNITED STATES COURT OF APPEALS  
for the SIXTH CIRCUIT**

---

MARYVILLE BAPTIST CHURCH, INC.; DR. JACK ROBERTS

*Plaintiffs-Appellants*

v.

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

*Defendant-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
NO. 3:20-CV-00278  
Before the Honorable David J. Hale

---

**GOVERNOR ANDY BESHEAR'S RESPONSE IN OPPOSITION TO  
PLAINTIFFS-APPELLANTS' EMERGENCY MOTION  
FOR INJUNCTION**

---

Defendant-Appellee Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, hereby responds in opposition to Plaintiffs'-Appellants' Emergency Motion. Plaintiffs fail to carry their burden to warrant emergency or preliminary relief, and misrepresent the facts. Accordingly, this Court should deny Plaintiffs' motion.

**EXHIBIT B**

## **FACTUAL BACKGROUND**

### **I. Kentucky Acts Quickly To Prevent The Spread Of COVID-19.**

In Kentucky, Governor Beshear and the Cabinet for Health and Family Services (“CHFS”) began exercising their emergency powers under KRS Chapters 39A, 194A and 214 to contain the spread of the virus. On, March 6, the Governor declared a State of Emergency. (Ky. Exec. Order No. 2020-215).<sup>1</sup> As the number of confirmed COVID-19 cases increased, the Governor and CHFS took additional steps to prevent its spread.

On March 19, 2020, CHFS issued an Order prohibiting *all* mass gatherings, defined to include “any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.” (CHFS Order, Mar. 19, 2020).<sup>2</sup> Governor Beshear has taken additional measures to stop the pandemic, including by also closing all businesses that are not life-sustaining. (Ky. Exec. Order No. 2020-257).<sup>3</sup> Kentuckians have

---

<sup>1</sup> Available at [https://governor.ky.gov/attachments/20200306\\_Executive-Order\\_2020-215.pdf](https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf) (last visited on May 1, 2020).

<sup>2</sup> Available at [https://governor.ky.gov/attachments/20200319\\_Order\\_Mass-Gatherings.pdf](https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf) (last visited May 1, 2020).

<sup>3</sup> Available at [https://governor.ky.gov/attachments/20200325\\_Executive-Order\\_2020-257\\_Healthy-at-Home.pdf](https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf) (last visited May 1, 2020).

answered the call of public officials. Data suggest social distancing is “flattening the curve.”<sup>4</sup>

## **II. Following The Guidance Of President Trump And The CDC, The Commonwealth Prohibits All Mass Gatherings.**

Like other emergency orders, the Order prohibiting mass gatherings was issued based on the guidance and recommendations of public health officials and the CDC and The White House, encouraging social distancing and recommending that people avoid large and small gatherings in private places and public spaces.<sup>5,6,7</sup> The CDC stresses that limiting face-to-face contact with others is the best way to

---

<sup>4</sup> Shay McAlister and Andrea Ash, *Are Kentucky and Indiana actually ‘flattening the curve?’* (WHAS11 News, Mar. 26, 2020) (last updated Mar. 27, 2020) (last visited Apr. 16, 2020); Garrett Wymer, *In the middle of a ‘critical’ month, how does Kentucky’s ‘curve’ compare?*, WKYT (Apr. 16, 2020), available at <https://www.wkyt.com/content/news/In-the-middle-of-a-critical-month-is-Ky-flattening-the-curve-569701941.html> (last visited May 1, 2020).

<sup>5</sup> Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 1, 2020).

<sup>6</sup> Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents\\_FINAL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf) (last visited May 1, 2020).

<sup>7</sup> The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited May 16, 2020).

reduce the spread of COVID-19.<sup>8</sup> The CDC directs people to stay at least six feet away from each other, not gather in groups, and stay out of crowded places and avoid mass gatherings. *Id.* (See Affidavit of Dr. Steven Stack, Apr. 22, 2019, ¶¶ 15-18 (attached as Exhibit A).) On March 29, 2020, the CDC revised its guidance on mass gatherings based on the guidance of The White House. The CDC stated, “During the next 30 days, individuals and organizations should cancel or postpone in-person events that consist of 10 people or more throughout the U.S.”<sup>9</sup> The White House recommended avoiding social gatherings in groups of 10 or more people.<sup>10</sup>

Epidemiological evidence shows mass gatherings can result in the spread of COVID-19 and deaths. In mid-March, a mass gathering in Hopkins County resulted in an outbreak of COVID-19, with more than 50 people becoming infected

---

<sup>8</sup> Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 1, 2020).

<sup>9</sup> Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents\\_FINAL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf) (last visited May 1, 2020).

<sup>10</sup> The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited May 1, 2020).

and, to date, the loss of six lives. (Stack Aff., ¶¶ 40-45.)<sup>11,12,13</sup> On March 27, 2020, Hopkins County had only two confirmed cases of COVID-19; two weeks later, it had 83 confirmed cases, making it the fastest-growing county in the Commonwealth.<sup>14</sup> In Pulaski and Calloway counties, two different church congregations of around 200 people went into self-quarantine after positive cases were confirmed in those counties.<sup>15</sup>

---

<sup>11</sup> Bailey Loosemore and Mandy McClaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, The Courier-Journal (Apr. 2, 2020), available at <https://www.courier-journal.com/story/news/local/2020/04/02/coronavirus-kentucky-hopkins-county-church-revival-led-outbreak/5111379002/> (last visited May 1, 2020).

<sup>12</sup> Bailey Loosemore, *Kentucky church responds to 'unjust criticism' about revival at center of COVID-19 outbreak*, The Courier-Journal (Apr. 4, 2020), available at <https://www.courier-journal.com/story/news/local/2020/04/04/coronavirus-kentucky-hopkins-county-church-responds-criticism/2947251001/> (last visited May 1, 2020).

<sup>13</sup> Joe Sonka, et al., *Coronavirus hot spots plague Western Kentucky, Southeast Indiana and Northern Tennessee*, The Courier-Journal (Apr. 10, 2020), available at <https://www.courier-journal.com/story/news/politics/2020/04/10/coronavirus-hot-spots-plague-kentucky-indiana-and-tennessee/5103043002/> (last visited May 1, 2020).

<sup>14</sup> Joe Sonka, et al., *Coronavirus hot spots plague Western Kentucky, Southeast Indiana and Northern Tennessee*, The Courier-Journal (Apr. 10, 2020), available at <https://www.courier-journal.com/story/news/politics/2020/04/10/coronavirus-hot-spots-plague-kentucky-indiana-and-tennessee/5103043002/> (last visited May 1, 2020).

<sup>15</sup> Savannah Eadens, *Dozens in quarantine after being exposed to COVID-19 at churches in Calloway, Pulaski county*, The Courier-Journal (Mar. 20, 2020), available at <https://www.courier-journal.com/story/news/2020/03/20/coronavirus-kentucky-members-multiple-churches-quarantine/2888205001/> (last visited Apr. 17, 2020).

### III. The Majority Of Kentuckians Comply With Measures.

In Kentucky, the vast majority of groups have complied with social distancing measures and the prohibition on mass gatherings. Demonstrating the general applicability of the March 19 Order, on April 10, 2020, the Tourism, Arts and Heritage Cabinet continued its Order closing the Kentucky Performing Arts Center pursuant to the Order and Executive Orders 2020-243 and 2020-257.<sup>16</sup> The Department of Fish and Wildlife suspended all fishing tournaments in Kentucky and canceled all of its summer camps.<sup>17,18</sup> Sporting events have also been canceled during the pandemic. The Kentucky High School Athletic Association suspended the state basketball tournaments and indefinitely suspended all spring sports.<sup>19</sup> Amateur National Motocross events ky have been postponed indefinitely.<sup>20</sup>

---

<sup>16</sup> Tourism, Arts and Heritage Cabinet Order (Apr. 10, 2020) (attached as Ex. B).

<sup>17</sup> Available at <https://fw.ky.gov/Fish/Pages/Tournament-Fishing.aspx> (last visited May 1, 2020).

<sup>18</sup> Available at <https://fw.ky.gov/Education/Pages/Summer-Camps.aspx> (last visited May 1, 2020).

<sup>19</sup> Jason Frakes, *KHSAA announces indefinite suspension of all spring sports because of coronavirus pandemic*, The Courier-Journal (Mar. 31, 2020), available at <https://www.courier-journal.com/story/sports/preps/kentucky/2020/03/31/coronavirus-khsaa-announces-suspension-all-spring-sports/5096810002/> (last visited May 1, 2020).

<sup>20</sup> Competition Bulletin 2020-5: Area Qualifiers Postponed Through March (Mar. 17, 2020), available at <https://www.courier-journal.com/story/sports/preps/kentucky/2020/03/31/coronavirus-khsaa-announces-suspension-all-spring-sports/5096810002/> (last visited May 1, 2020).

Religious faiths of different denominations have held virtual services or drive-in services that adhere to proper social distancing and CDC hygiene measures. On Easter Sunday, multiple churches in Kentucky that had reportedly planned to hold in-person services changed to virtual or drive-in services. Churches in Harlan County that planned to hold in-person services opted for drive-in services instead.<sup>21</sup> Contrary to Plaintiffs' representations in their emergency motion, Governor Beshear and public health officials have repeatedly encouraged drive-in and virtual faith-based services, so long as social distancing and hygiene measures are implemented and followed. (Stack Aff., ¶¶ 46.)<sup>22</sup>

On April 12, the Kentucky State Police received and responded to 42 complaints from concerned citizens and community leaders about non-compliance with executive emergency orders on mass gatherings and social distancing associated with faith-based organizations. (Affidavit of Commissioner Rodney Brewer, Apr. 22, 2020, ¶¶ 6-9 (attached as Exhibit C).) In the end, only one of the

---

<sup>21</sup> Sarah Ladd, Easter churchgoers defiant after Kentucky troopers write down their license plate numbers, *The Courier-Journal* (Apr. 12, 2020), available at <https://www.courier-journal.com/story/news/2020/04/12/kentucky-churches-hold-in-person-easter-services-despite-order/5127260002/> (last visited May 1, 2020).

<sup>22</sup> See, e.g., Governor Andy Beshear, *Update on COVID-19 in Kentucky – 3.20.2020 PM*, YouTube (Mar. 20, 2020), at 46:45-47:15, available at [https://youtu.be/vG\\_nreWckWw](https://youtu.be/vG_nreWckWw) (last visited May 1, 2020); Governor Andy Beshear, *Update on COVID-19 in Kentucky – 4.11.2020*, YouTube (Apr. 11, 2020), at 52:08-55:27, available at [https://youtu.be/X\\_1NS02f0CI](https://youtu.be/X_1NS02f0CI) (last visited May 1, 2020).



subjects of those complaints refused to comply with the executive orders. (*Id.*, ¶ 10-11.) That organization – Maryville Baptist Church in Bullitt County – held in-person church services on April 12, with about 50 people attending; it had held another in-person service the prior Wednesday, with more than 40 people attending. *Id.* Based on media reports, those who attended the service inside were not following CDC social distancing guidelines.<sup>23</sup>



Neither did those entering and exiting follow them or wear personal protective equipment.

---

<sup>23</sup> See Eileen Street, *Maryville Baptist Church Holds In-Person Service*, Spectrum News 1 (Apr. 12, 2020), available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/maryville-baptist-church-easter-sunday-in-person-service> (last visited Apr. 17, 2020).





*Id.*

Most attendees of the April 12 service were not Bullitt County residents.<sup>24</sup>

At least two people who attended the in-person service were residents of New Jersey, one of the epicenters of the pandemic in America, *id.*, who were photographed shaking the pastor's hand.



---

<sup>24</sup> Shellie Sylvestri, *Most attendees of Easter service in Maryville not Bullitt Co. residents*, Wave 3 News (Apr. 14, 2020), available at <https://www.wave3.com/2020/04/14/most-attendees-easter-service-maryville-not-bullitt-co-residents/> (last visited Apr. 17, 2020).



As of the date of this filing, New Jersey has more than 121,000 confirmed cases of COVID-19, and more than 7,000 deaths.<sup>25</sup>

The pastor recognized the danger to those attending in-person services, saying prior to April 12 that, “I’ve told my son, ‘Don’t come to church.’ I’ve told other folks, ‘Don’t come to church ... watch the live stream.’”<sup>26</sup> Yet the pastor still refused to comply with the mass gatherings Order and hold in-person services.

---

<sup>25</sup> New Jersey COVID-19 Dashboard, available at <https://covid19.nj.gov/#live-updates> (last visited May 1, 2020).

<sup>26</sup> Jessie Cohen, *Maryville Baptist Church holds Bible study against Gov. Beshear’s recommendation*, WHAS 11 (Apr. 9, 2020), available at <https://www.whas11.com/article/news/health/coronavirus/maryville-baptist-church-holds-wednesday-bible-study-against-beshear-recommendation/417-22c63bd4-1875-4055-9a8d-47eb9235c572> (last visited May 1, 2020).

Businesses and groups that have endangered Kentuckians' lives by refusing to comply have faced consequences. Between April 1 and 21, the Department of Workplace Standards within the Labor Cabinet received referrals of 170 complaints from the KYSafer non-compliance citizen reporting hotline. (Affidavit of Commissioner Kimberlee C. Perry, Apr. 21, 2020, ¶ 5 (attached as Ex. D).) The Department performed in-person investigations of 130 of those complaints; of the remaining 40 complaints, the Department is awaiting investigation or has counseled the business on proper compliance. (*Id.*, ¶ 7.) The investigations verified that 89 businesses or organizations were complying or that the complaints were not verified. (*Id.*, ¶ 8.) As of April 21, the Department had issued 41 closure orders to businesses or organizations, including, but not limited to, ones that are not life-sustaining but continued to operate and others that had not implemented social distancing and hygiene measures as recommended by the CDC.<sup>27</sup>

From March 19 through April 21, 2020, the Kentucky State Police received approximately 70 complaints from concerned citizens about non-compliance with the March 19 Order. (Brewer Aff., ¶ 3.) The complaints referenced mass gatherings at various locations, including hair salons, gas stations, and flea

---

<sup>27</sup> See Eileen Street, *Attendees at Maryville Baptist Service Face No Charges*, Spectrum News 1 (Apr. 13, 2020), available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/kentucky-no-charges-maryville-baptist-church-bullitt-county-> (last visited Apr. 17, 2020); (*Id.*, ¶ 9.)

markets, and in neighborhoods and personal residences, and the majority of the groups dispersed prior to Troopers' arrival. (*Id.*, ¶¶ 4-5.) The Kentucky State Police has increased routine patrols, patrolling about 839 retail locations a total of 6,173 times. (*Id.*, ¶¶ 12-13.)

#### **IV. Plaintiffs File Suit.**

On April 17, 2020, Plaintiffs filed suit. The District Court denied the motion for temporary restraining order the next day. Plaintiffs appealed the District Court's Order to this Court six days later and the same day filed in the District Court an emergency motion for injunction pending appeal. The District Court conducted a telephonic conference regarding that motion on April 30, 2020.

Plaintiffs blatantly misrepresent the facts of the action pending in the District Court on their motion for an emergency injunction pending appeal. First, during the telephonic conference with the Magistrate on April 30, Plaintiffs' counsel actually asked for a delay in the deadline to file their reply, from May 7 until May 8, when the Magistrate suggested the reply be due on May 7 because of Plaintiffs' counsel's stated urgency for briefing on the motion. In addition, upon the Magistrate asking counsel for the parties if they desired oral argument, Plaintiffs' counsel waived oral argument and the Magistrate stated she would inform the presiding Judge that the parties waived oral argument. At no point during the telephonic conference or between the Magistrate's text Order scheduling it, did



Plaintiffs or their counsel urge a decision on their motion prior to Sunday, May 3 or Wednesday, May 6. In fact, Plaintiffs' counsel did not assert during the telephonic conference that their motion be decided without a response from Governor Beshear, and they did not object to Governor Beshear being provided an opportunity to be heard through a response. Contrary to Plaintiffs' argument (*see* Doc. 4-1, Pages: 10-12), neither the District Court nor the Magistrate demonstrated a commitment to a particular resolution by scheduling expedited briefing on Plaintiffs' motion below. Instead, Plaintiffs agreed upon the briefing schedule and, in turn, agreed that a decision on the motion would not come until after the ensuing Sunday and Wednesday.

As for Appellants' contention that the District Court delay in entering an order after denying the temporary restraining order requires an emergency injunction here, the District Court denied the motion on April 18 (Doc. 4-1), and Plaintiffs waited until April 24 to file their notice of appeal (Doc. 4-3). At no time between – which included a Sunday and a Wednesday – did Appellant file any pleading in the District Court requesting that it enter an order setting an expedited briefing schedule on the motion for a preliminary injunction, or an order scheduling a telephonic conference, or requesting emergency relief.

In their motion, Plaintiffs claim the Governor “tacitly agreed” that the District Court lacks jurisdiction to hear the motion Plaintiffs filed and asked the

District to Decide. (Doc. 4-1, Page 5 n. 3.) Plaintiffs again misrepresent the facts in an attempt to obtain emergency relief from this Court that is not warranted. During the telephonic conference with the Magistrate, Plaintiffs' counsel argued the District Court lacked jurisdiction because of their notice of appeal, but asserted the District Court should decide the motion before they could file the same motion here. Counsel for Governor Beshear did not state any position on Plaintiffs' jurisdiction argument; however, counsel did inform the Magistrate of the briefing schedule of this Court. Informing the Magistrate of the briefing schedule of this Court was not agreement with Plaintiffs' argument on jurisdiction, tacitly or otherwise.

### **ARGUMENT**

Plaintiffs seek the extraordinary remedy of an emergency injunction pending their interlocutory appeal (IPA). This Court lacks jurisdiction to grant such relief. Not only is the remedy extraordinary by its own right, Plaintiffs seek the remedy before this Court while simultaneously seeking the same relief before the District Court. *See* Plaintiffs' Emergency Motion for Injunction Pending Appeal, *Maryville Baptist Church, et al. v. Beshear*, Case 3:20-cv-00278-DJH, Doc. 17, PageID #: 254 (W.D.Ky Apr. 24, 2020). As required by Fed. R. App. P. 8(a)(1)(C), before seeking the IPA from this Court, Plaintiffs first sought the IPA from the District

Court. Yet, before allowing the District Court a chance to rule on the motion, Plaintiffs filed this motion. The federal rules do not permit such relief.

Plaintiffs contend the IPA meets the requirements of Fed. R. App. P. 8(a)(2)(A), but their filing of emergency request for IPA before the District Court precludes the application of that Rule. Moreover, Plaintiffs cannot meet the standard set forth in Fed. R. App. P 8(a)(2)(A). Clearly, “moving first in the district court” was not “impracticable,” because the record indicates that Plaintiffs did move for this relief in the District Court. Nor has the District Court “denied the motion or failed to afford the relief requested[.]” Just yesterday, the parties participated in a scheduling conference and agreed to a briefing schedule on the emergency request for IPA in the District Court. Then, Plaintiffs sought – and received – *additional time* to brief their motion, beyond the schedule proposed by the District Court.

This Court should deny Plaintiffs’ motion while they seek the same relief from the lower court. Nevertheless, beyond the procedural pitfalls of their motion, Plaintiffs are not entitled to the requested relief because they cannot demonstrate a strong likelihood of success on the merits, irreparable injury or a balance of the equities in their favor.



## **I. Plaintiffs Cannot Succeed On The Merits.**

As this Court recently noted, “We generally lack jurisdiction to hear an appeal of a district court’s decision to grant or deny a TRO.” *PRE-TERM Cleveland, et al. v. Attorney General of Ohio, et al.*, Case No. 20-3365, 2020 WL 1673310, \*1 (6th Cir. Apr. 6, 2020). This Court stated it would only entertain “interlocutory appeals of TROs that threaten to inflict irretrievable harms or consequences before the TRO expires or, rather than preserving the status quo, act as a mandatory injunction requiring affirmative action.” *Id.* (citation omitted). The Court determined it lacked jurisdiction over an appeal of a temporary restraint of an Ohio order prohibiting constitutionally-protected elective procedures. *Id.*

Here, Plaintiffs do not attempt to demonstrate they can clear this jurisdictional hurdle. Their failure to argue an “irretrievable harm or consequence” or a requirement of “affirmative action” precludes this Court from exercising jurisdiction over the interlocutory appeal. *See id.*, at \*2. Instead, Plaintiffs argue the merits of the claims below as if that alone gets them access to this Court before the District Court has taken any action other than denying the motion for a temporary restraining order. Again, Plaintiffs attempt to jump the gun to bypass the

lower court. Regardless, Plaintiffs' arguments would still not meet the standard to warrant an injunction pending the interlocutory appeal.<sup>28</sup>

The Governor has authority to issue the emergency order challenged here. KRS 39A.100(1)(j) authorizes the Governor "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population" during a declared state of emergency. KRS 39A.100(1)(f) authorizes the Governor "[t]o exclude all nonessential, unauthorized, disruptive, or otherwise uncooperative personnel from the scene of an emergency, and to command those groups assembled at the scene to disperse." KRS 39A.100(1)(b) allows the Governor to require state agencies to respond to the emergency or disaster in the manner directed.

Here, in accordance with the authority under KRS Chapters 39A, 194A and 214, CHFS, as a designee of the Governor, issued the Order prohibiting all mass gatherings. The intent of the Order is to implement CDC guidelines to limit groups of people gathering in close proximity for a prolonged period. The Governor, the

---

<sup>28</sup> Further, there is no need for an expedited briefing schedule in this appeal. As of May 20, 2020, in-person faith-based services will again be permitted in the Commonwealth. *See* Governor Beshear Outlines Road Ahead for Gradual Reopening of Businesses (Apr. 30, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=148> (last visited Apr. 30, 2020).

Cabinet, and local officials have enforced the order uniformly, without discrimination.

Appellants fail in their claim that the Governor’s prohibition of mass gatherings to curb the spread of COVID-19 violates their right to practice their religion, because the order prohibits all mass gatherings in accordance with CDC guidelines, while also allowing alternative means to communally worship that the Governor and officials have encouraged.

The First Amendment provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” U.S. CONST., amend. I. The free exercise clause embodies a liberty applied to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). However, the clause “does not include liberty to expose the community . . . to communicable disease.” *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citation omitted). Nor does the clause “relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982)).

The clause “embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct

remains subject to regulation for the protection of society.” *Cantwell* 310 U.S. at 303-04 (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 144 U.S. 33 (1890)). The holding of “religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” *Minersville School Dist. Bd. of Ed. v. Gobitis*, 30 U.S. 586, 594-95 (1940). Under the prevailing standard, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

State action is not neutral if the purpose “is to infringe upon or restrict practices because of their religious motivation,” or “the purpose . . . is the suppression of religion or religious conduct.” *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 591 (6th Cir. 2018) (quoting *Lukumi*, 508 U.S. at 533). “A law is not of general applicability if it ‘in a selective manner impose[s] burdens only on conduct motivated by religious belief[.]’” *Michigan Catholic Conf. and Catholic Family Serv. ’s v. Burwell*, 755 F.3d 372 (6th Cir. 2014) (quoting *Lukumi*, 508 U.S. at 543).

The Governor’s Order – both on its face and in its application – is neutral and of general applicability. As the lower court correctly recognized, by its plain

terms the Order prohibits “all mass gatherings,” not just religious gatherings. *Maryville Baptist Church, Inc.*, Civil Action No. 3:20-cv-278-DJH, Order (W.D. Ky. Apr. 18, 2020) (Doc 4-1.) In fact and practice, its entire purpose and success hinges upon it to applying to all. Appellants present no evidence the Order targeted their mass gathering because of its religious nature. Rather, the Order targets any intent to gather in large groups. In its application, the Order has forced the closure of events with no religious affiliation, including movie theaters, concerts, and sporting events. The District Court recently acknowledged this fact. *Id.* at 5. State and local officials have ordered the closure of businesses for non-compliance with social distancing and hygiene measures, as well as businesses that are not life-sustaining but continued to operate in violation of orders. Thus, even though the Order may “burden” faith-based mass gatherings, it equally burdens all mass gatherings, regardless of the religious nature. Its purpose is to prevent the spread of a disease that is particularly infectious, with no cure or treatment. The Order does not discriminate or differentiate among groups, because COVID-19 does not differentiate or discriminate.

The Order does not exempt secular mass gatherings; nor is it applied in a manner that would exempt secular mass gatherings. In fact, the Order does not provide any exceptions at all. *Cf. Ward v. Polite*, 667 F.3d 727, 738-39 (6th Cir. 2012). Rather, the Order provides examples of what a “mass gathering” is and

what it is not; the distinction is that it closes any event the purpose of which is to congregate person-to-person for an extended period to engage in a particular activity. The District Court recognized this distinction, writing that presence at a grocery or liquor store “is a single and transitory experience: individuals enter the store at various times to purchase items; they move around the store individually—subject to strict social-distancing guidelines set out by state and federal health authorities [...]—and they leave when they have achieved their purpose. Plaintiffs’ desired church service, in contrast, is by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose.” *Maryville Baptist Church, Inc., et al.*, Order at 4. The Order prohibiting mass gatherings leaves open locations providing services necessary to maintain public health and safety, despite the fact that people are in transit in the location at the same time. However, even in some of those instances, the Governor has required social distancing and hygiene practices and imposed additional restrictions, such as limiting life-sustaining retail businesses to allow one adult per household in at a time.

The Governor’s encouragement of drive-in and online broadcast of faith-based services further demonstrates the Order’s neutrality and general applicability. These options allow the practice and observation of one’s faith without the risk of mass-spreading COVID-19.

Because the Order is neutral and of general applicability, it is subject to “rational basis review[.]” *Miller v. Davis*, 123 F. Supp. 3d 924, 938 (E.D. Ky. 2015) (citing *Seger v. Ky. High Sch. Athletic Ass’n*, 453 Fed. Appx. 630, 634 (6th Cir. 2011) (interpreting *Smith*, 494 U.S. 872 and *Lukumi*, 508 U.S. 520)). Under rational basis review, an emergency order will be upheld if it is “rationally related to furthering a legitimate state interest.” *Seger*, 453 Fed. Appx. 635. An emergency order “subject to rational basis review is accorded a strong presumption of validity.” *Id.* It should be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). Plaintiffs carry the burden to negate “every conceivable basis which might support it[.]” *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The facts weighing against Appellants’ arguments are insurmountable. The White House and the CDC have recommended the closure of any establishment or event allowing for a mass gathering. National, state, and local public health officials describe the particular risks of spreading COVID-19 “among people who are in close contact with each other for a prolonged period.” (Stack Affidavit, ¶ 15.) Because the prohibition on mass gatherings is rationally related to the legitimate state interest in stopping the spread of disease, Appellants’ free exercise claim fails.

## **II. Appellants Fail To Allege An Irreparable Injury.**

Generally, courts presume irreparable injury when a plaintiff alleges a violation of a constitutional right. *Overstreet v. Lexington–Fayette Urban Cty. Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002). However, when Supreme Court precedent rebuts the allegation, the presumption gives way to the alleged facts. *Id.* Appellants cannot demonstrate a strong likelihood of success on the merits and are not entitled to the presumption of irreparable injury.

Having solely relied on that presumption, Appellantss fail to set forth factual allegations to demonstrate an irreparable injury. They do not allege they are currently under a forced quarantine, or that they will miss a specific event due to the Order. They can attend virtual or drive-in church services provide by their own church. They do not allege a specific and forthcoming irreparable injury. As such, they fail to allege an irreparable injury to warrant preliminary injunctive relief.

## **III. Issuance Of The Requested Injunction Would Cause Substantial Harm.**

Appellants’ requested relief would cause substantial harm to the public health and safety. As to faith-based mass gatherings, the CDC and the White House have recommended avoiding social gatherings of 10n or more people. *See infra*. Epidemiological evidence demonstrates that mass gatherings have resulted in the spread of COVID-19. Importantly, those attending a mass gathering, such as in-person faith-based services, not only risk exposure to COVID-19 themselves,



they also risk exposing anyone they later come into contact with. These risks are exacerbated by the fact that COVID-19 appears to have a long incubation period, and an infected person may spread the virus even if asymptomatic. Allowing in-person faith-based mass gatherings as Plaintiffs request could result in more illness, more deaths, and a higher spike in cases at any given time, resulting in our health care centers becoming overwhelmed.

Additionally, the efforts and sacrifices Kentuckians have made to engage in social distancing and limit their exposure to one another would be sacrificed, and the progress to flatten the curve could be reversed. Appellants do not have an adequate argument in response. Instead, they argue that there are secular exceptions, which is not the case. There are no exceptions to the mass gatherings order, and activities currently permitted by other orders – shopping for life-sustaining good such as groceries, going through a restaurant drive-thru – are materially different in terms of risk of exposure.. Appellants cannot meet their burden.

#### **IV. Issuance Of The Requested Injunction Would Not Serve The Public Interest.**

While, “[g]enerally speaking, ‘the public interest is served by preventing the violation of constitutional rights[,]’ . . . enjoining officials from pursuing their chosen policies is not without costs.” *League of Women Voters v. Hargett*, 400 F.Supp.3d 706, 733-34 (M.D.Tenn. Sept. 12, 2019) (quoting *Chabad of S. Ohio &*

*Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004)).

Courts, then, are directed to weigh the plaintiffs’ interests against that of the public. *Id.*

As knowledge of COVID-19 and its spread is constantly evolving, and as cases of the virus continue to increase in the Commonwealth, state and local officials must be able to take rapid, decisive action. Here, the Governor, other constitutional officers, state officials, public health officials, state and federal courts, school districts, local officials, and citizens have all taken action to prevent the spread of COVID-19 – the type of collective action public health officials state is needed to protect public health and safety. The public interest in state officials’ ability to take these measures is significant and overrides the public’s interest in attending in-person faith-based mass gatherings – especially since other ways to worship – and religious services are not singled out or burdened differently from other mass gatherings in the March 19, 2020 Order.<sup>29</sup>

## CONCLUSION

Defendant-Appellee Governor Beshear respectfully asks the Court to deny Plaintiffs-Appellants’ Emergency Motion for Injunction Pending Appeal and to Expedite Appeal.

---

<sup>29</sup> For the same reasons stated herein, the Court should reject the arguments the Attorney General raises in his amicus brief (Doc 6).

Respectfully submitted,

/s/ S. Travis Mayo  
La Tasha Buckner  
General Counsel  
S. Travis Mayo  
Chief Deputy General Counsel  
Taylor Payne  
Deputy General Counsel  
Laura Tipton  
Deputy General Counsel  
Marc Farris  
Deputy General Counsel  
Office of the Governor  
700 Capitol Avenue, Suite 106  
Frankfort, KY 40601  
(502) 564-2611  
LaTasha.Buckner@ky.gov  
travis.mayo@ky.gov  
taylor.payne@ky.gov  
laurac.tipton@ky.gov  
marc.farris@ky.gov

*Counsel for Governor Andy Beshear*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2020, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ S. Travis Mayo  
S. Travis Mayo

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
COVINGTON DIVISION  
No. 2:20-cv-00054-WOB**

THEODORE JOSEPH ROBERTS, et.al.	)	
	)	
v.	)	
	)	
GOVERNOR ANDREW BESHEAR,	)	
in his official capacity, et. al.	)	
	)	DEFENDANTS

\*\*\*\*\*  
**AFFIDAVIT OF DR. STEVEN J. STACK, M.D.**  
\*\*\*\*\*

Comes the Affiant, COMMISSIONER STEVEN J. STACK, M.D., and being first duly sworn, states as follows:

1. I am not a party in this action, but serve the Governor as his Commissioner of the Department for Public Health (“DPH”) within the Cabinet for Health and Family Services. I am over the age of eighteen and competent to testify in this matter. I currently reside in Lexington, Kentucky. I am knowledgeable of the facts set forth herein, possess the requisite professional qualifications, skills, training and experience to render the expert medical opinions expressed herein. If called to testify, I would truthfully do so, as follows.
2. I graduated magna cum laude from the College of the Holy Cross in Worcester, MA, in classical studies. I completed medical school and emergency medicine residency at The Ohio State University before moving to Memphis to begin clinical practice. I also completed my MBA at UT Knoxville Haslam College of Business in December 2017.
3. I have served as medical director of multiple emergency departments, including St. Joseph East (Lexington), St. Joseph Mt. Sterling (rural eastern Kentucky) and Baptist Memorial Hospital (Memphis, TN). I possess more than 18 years of experience in emergency medicine, administrative and clinical practice experience in Kentucky, Ohio and Tennessee.
4. In 2006, my colleagues elected me to the American Medical Association (AMA) board of trustees, where I subsequently served as board chair and in 2015-2016 as the president.
5. Since the time of my appointment as Commissioner of the Kentucky Department for Public Health I have consulted with expert epidemiologists and read as much of the professional literature about the novel coronavirus, or COVID-19, from reputable sources, including the Centers for Disease Control and Prevention (CDC) which continues to closely monitor and respond to the COVID-19 outbreak so that I may advise Governor Beshear with the most up to date scientific and epidemiological medical advice how to best protect the public health of Kentucky citizens during the current international healthcare crisis.
6. The DPH is responding to a pandemic of respiratory disease spreading from person-to-person caused by a novel coronavirus. This situation poses a serious public health risk

because 100% of people, essentially, are susceptible to infection. It is highly infectious with a long incubation period. The CDC is working closely with state, local, tribal, and territorial partners, as well as public health partners such as the Kentucky DPH, to respond to this situation. COVID-19 can cause mild to severe illness; most severe illness occurs in adults 65 years and older. COVID-19 has created a public health emergency not seen in the United States since the so-called “Spanish flu” epidemic in 1918.

**General Nature of COVID-19:**

7. A virus is an infective agent that typically consists of a nucleic acid molecule in a protein coat, is too small to be seen by light microscopy, and is able to multiply only within the living cells of a host. Viruses are found in almost every ecosystem on Earth and are the most numerous type of biological entity. The study of viruses, known as virology, is a subspecialty of microbiology. Viral epidemiology is the branch of medical science that deals with the transmission and control of virus infections in humans.
8. In general, viruses are much smaller than bacteria, which contributes to the elusiveness. A new virus that spreads from animals to humans is especially dangerous because of the lack of immunity in humans. Most viral infections of humans and other animals have incubation periods. Incubation periods for viral diseases typically range from a few days to weeks.
9. Somewhat overlapping, but mainly following the incubation period, there is a period of communicability—a time when an infected individual or animal is contagious and can infect another person or animal. This, too, is important in the control of outbreaks, because the virus spreads when an individual does not even know he or she is sick.
10. When outbreaks cause an unusually high proportion of cases in a population, community, or region, they are called epidemics. If outbreaks spread worldwide, they may be called pandemics. COVID-19 has spread worldwide and the World Health Organization has declared it a pandemic.
11. A coronavirus called SARS-CoV-2 causes COVID-19. Coronaviruses are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats. Uncommonly, animal coronaviruses can infect people and then spread between people. This occurred with MERS-CoV and SARS-CoV, and now with the virus that causes COVID-19. When humans become infected with these new viruses, they do not have immunity.
12. Primarily, the virus spreads through mouth and nose droplets. An infected person coughs, sneezes, or talks, and droplets from their mouth or nose are launched into the air and land in the mouths or noses of people nearby. The droplets can also be inhaled into the lungs. It can also spread when a person touches something contaminated with infectious droplets and touches their mouth, nose, or eye.
13. The factors that make a virus dangerous are many, but of primary concern are mobility and morbidity. COVID-19 has already spread across the globe so we know it is mobile and the morbidity rates vary, almost daily, but it is reasonable to say that the virus is very deadly. Since COVID-19 presented and began spreading in late 2019, virologists and epidemiologists are studying tirelessly, but much is still unknown about the spread and severity of the coronavirus. Combine these two concerns with the uncertainty and this presents a rapidly moving virus that our public health officials must remain vigilant in combating aggressively seven days a week.



**Centers for Disease Control and Prevention Guidance:**

14. On March 6, 2020, the Governor and the Cabinet for Health and Family Services encouraged adopting many guidelines from the Centers for Disease Control to combat the spread of the novel coronavirus COVID-19.
15. The CDC has communicated that COVID-19 spreads mainly among people who are in close contact with each other (within about 6 feet) for a prolonged period. The science behind this spread is that when an infected person coughs, sneezes, or talks, droplets from their mouth or nose are launched into the air and land in the mouths or noses of people nearby. The droplets can also be inhaled into the lungs. These droplets carry the infection from an individual infected with COVID-19 to an otherwise uninfected individual, and so on and so forth. There is a strong indication that people who are infected but do not have symptoms also play a role in the spread of COVID-19.
16. The CDC also has reason to believe that not only can COVID-19 pass through droplets in the air, but it also may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes.
17. Social distancing helps to combat the methods of transmission by limiting contact with infected people and contaminated surfaces.
18. The CDC generally defines social distancing as staying at least 6 feet from other people, not gathering in groups, staying out of crowded places, and avoiding mass gatherings
19. The CDC maintains that keeping space between you and others is one of the best tools we have to avoid being exposed to COVID-19 and slow its spread locally and across the country and world.
20. On March 29, 2020, the CDC revised its guidance on mass gatherings based on the guidance of The White House. Specifically, the CDC stated that during the next 30 days, individuals and organizations should cancel or postpone in-person events of 10 or more people throughout the United States.
21. The CDC has further provided guidance on what constitutes a gathering to include, but not be limited to, a friend's house, parks, restaurants, shops, or any other place.
22. The CDC did not advise that its guidance on social distancing and mass gatherings applied to people of a specific age, but specifically included children, teens, and adults of any age.
23. The CDC is working closely with state, local, tribal, and territorial partners, as well as public health partners, to respond to this situation. COVID-19 can cause mild to severe illness; most severe illness occurs in adults 65 years and older. Different parts of the country are seeing different levels of COVID-19 activity. The United States nationally is in the acceleration phase of the pandemic. The duration and severity of each pandemic can vary depending on the characteristics of the virus and the public health response.
24. The latest case counts, deaths, and a map of states with reported cases are available on the CDC webpage. As of April 15, 2020, the CDC reported within the United States 605,390 total cases, 24,582 total deaths, with all 50 states and the following territories reporting cases: District of Columbia, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands.
25. The CDC reports that based on what we know now, those at high-risk for severe illness from COVID-19 are: people 65 years and older; people who live in a nursing home or long-

term care facility; people of all ages with underlying medical conditions, particularly if not well controlled, including: people with chronic lung disease or moderate to severe asthma, people who have serious heart conditions, and people who are immunocompromised. Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications. Other high risk factors are people with severe obesity (body mass index [BMI] of 40 or higher), people with diabetes, people with chronic kidney disease undergoing dialysis, and people with liver disease.

26. Compared to other states, Kentucky has a higher percentage of persons with these risk factors. For example, Kentucky has the highest percentage of deaths in the United States from cancer and chronic respiratory disease, the fifth highest for kidney disease, the ninth highest for heart disease and diabetes, and tenth highest for flu and pneumonia according to statistics for the year 2017, compiled by the CDC.

**Commonwealth of Kentucky Public Health Action:**

27. On March 6, 2020, the Governor of the Commonwealth of Kentucky declared a state of emergency by issuing Executive Order 2020-215. This response came to combat the spread of the novel coronavirus COVID-19.
28. The Executive Order specifically noted that the Kentucky Department for Public Health has specially trained personnel and resources to assist the state and local authorities in the protection of life, public health and safety, through coordinating a response to the emergency.
29. Immediately, the following day, the Commonwealth, led by the Governor, began implementing further instructions, guidance, and measures in accordance with the executive order.
30. Subsequently, the Cabinet for Health and Family Services issued orders and provided further guidance to close all public facing businesses, in order to combat the spread of COVID-19.
31. Most people in the Commonwealth complied immediately with the orders issued by the Cabinet for Health and Family Services, but some did not and that required a consistent effort on behalf of the Commonwealth to alter or further sharpen guidance provided to the citizens of the Commonwealth. The changes are ongoing.
32. On March 19, 2020, the Cabinet for Health and Family Services, acting on behalf of the Governor, issued an Order to halt all mass gatherings, defined as including any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities, in order to combat the spread of COVID-19.
33. Because Kentucky took these and other steps to encourage social distancing earlier during the pandemic than other states, it has done a better job to flatten the curve.

**Flattening the Curve:**

34. The baseline level of a disease refers to the amount of a particular disease that is usually present in a community. This level is not necessarily the desired level, which may in fact be zero, but rather is the observed level. Epidemic refers to a substantial increase, often sudden, in the number of cases of a disease.
35. As the governor reminds Kentucky citizens in his daily updates, a sharp peak in an epidemic puts a strain on the healthcare system. The tall, skinny curve is dangerous – it means that a lot of people will get sick at once, in a short period of time, because the government and the public have not taken enough steps to prevent the virus from spreading from person to person. Most people will not get sick enough to need a hospital, but those who do could overwhelm the number of beds and care teams that our hospitals have available. Many emergency rooms and hospitals already operate close to capacity on a good day, without coronavirus. Adding a sharp spike in very ill COVID-19 patients to that traffic could mean some people do not get the care they need. This will result in a higher death rate due to insufficient healthcare resources to treat patients who would otherwise benefit from treatment. If individuals and communities take steps to slow the spread of the virus, that means the number of cases of COVID-19 will stretch out across a longer period of time. The objective is to flatten the curve sufficiently so that the number of cases at any given time does not cross the dotted line of the capacity of our health care system to help everyone who is very sick.
36. Having fewer cases coming to the hospitals and clinics at once greatly helps to lower the number of total deaths from the virus and from other causes. It also buys time for university and government scientists, and industry, to create new therapies, medications and potentially a vaccine, and for healthcare workers to acquire personal protective equipment.
37. The more cases of COVID-19 there are at any given time, the more likely healthcare providers are to catch it, whether in the community or at work. Once they are sick, they need to stay away from patients for weeks, which means fewer people to care for the patients who need care.
38. Large events and mass gatherings contribute to the spread of COVID-19 in the United States. In-person faith-based services are not exempt from this health risk, just as sporting events like fishing tournaments are not exempt. In fact, many congregations have older and high-risk persons who attend services. Allowing in-person faith-based services risks the public health not only for those who choose to attend a large gathering, but also everyone in the community who becomes exposed to those who attend.

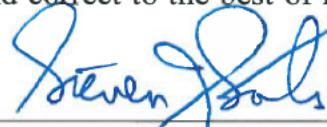
**Incidents within the Commonwealth:**

39. Diseases like COVID-19 do not discriminate. The more people in one location, the more people the disease will infect.
40. This requires constant monitoring and adjustment of guidelines and orders. When one group does not comply with directives, it endangers all the citizens of the locality, county, and ultimately the Commonwealth of Kentucky.
41. On March 15, 2020, a church welcomed a visiting preacher from out-of-state to hold a two-day revival service in Hopkins County, Kentucky.
42. The Kentucky Department for Public Health investigated the incident.
43. Several of the attendees who were interviewed stated that the preacher leading the revival encouraged them not to self-quarantine and to still attend church services.



- 44. At present, 54 confirmed COVID-19 cases have known epidemiological links to this revival, with three probable additional cases.
- 45. Of the 54 cases connected to the revival in Hopkins County, Kentucky, six of those have resulted in death.
- 46. The damage of these COVID-19 cases did not end with the attendees of the revival and stay isolated to Hopkins County, but instead related cases have spread to Muhlenburg, Clark, and Warren Counties, Kentucky.
- 47. With the specific incident in Hopkins County recent in time, leading up to the Easter holiday celebrated by many faiths within the Commonwealth and nationwide, the Governor encouraged churches to explore other ways to worship, including online services and even drive-in church services, that could comply with the Governor's Executive Order 2020-215 and the March 19, 2020 Order issued by the Cabinet for Health and Family Services.
- 48. On April 12<sup>th</sup>, in non-compliance of the Commonwealth's orders, as well as the directives of President Donald Trump and the CDC, a church in Bullitt County held in-person services. Based on the Amended Complaint filed in this action, individuals from outside of Bullitt County attended this service, and various media reports indicate individuals from New Jersey, one of the epicenters of the virus in the United States, attended this service.
- 49. To prevent a spread much like the one originating at the church service in Hopkins County, the Commonwealth provided those in attendance at the Bullitt County church service with notice to voluntarily self-quarantine for 14 days.
- 50. The Kentucky Department for Public Health is aware of 15 cases in which individuals have been ordered to quarantine involuntarily, and those orders have come from the courts. To the Department's knowledge, no person who attended the Bullitt County church service on April 12<sup>th</sup> has been ordered to quarantine involuntarily.

I certify that the facts set forth herein are true and correct to the best of my knowledge. Further, the Affiant sayeth naught.



Dr. Steven J. Stack, M.D.

COMMONWEALTH OF KENTUCKY )

) :SS

COUNTY OF FRANKLIN )

The foregoing instrument was acknowledged before me this 22<sup>ND</sup> day of April, 2020, by Dr. Steven J. Stack.

My Commission expires: 5/26/2020

 #556485  
NOTARY PUBLIC

MELISSA D. PITTMAN  
NOTARY PUBLIC  
STATE AT LARGE  
KENTUCKY



**ANDY BESHEAR**  
GOVERNOR

**TOURISM, ARTS AND HERITAGE CABINET**

**MICHAEL E.  
BERRY**

**JACQUELINE  
COLEMAN**

MAYO-UNDERWOOD BUILDING, 5<sup>TH</sup> FLOOR  
500 MERO STREET  
FRANKFORT, KENTUCKY 40601  
502-564-4270 - OFFICE  
502-564-1079 - FAX

April 10, 2020

Pursuant to the March 6, 2020 Executive Order of Governor Andy Beshear declaring a State of Emergency in the Commonwealth of Kentucky, and subsequent Executive Orders including, but not limited to:

- a) the March 18, 2020 Executive Order 2020-243 empowering state agencies to take all reasonable and necessary steps to ensure appropriate social distancing and to avoid overcrowding to prevent exposure to and the spread of COVID-19;
- b) the March 19, 2020 Order prohibiting mass gatherings; and
- c) the March 25, 2020 Executive Order 2020-257, closing all businesses that are not life-sustaining so that Kentuckians stay healthy at home;

I hereby direct and order the Kentucky Performing Arts to continue to keep its facilities closed through Tuesday, June 30, 2020.

A handwritten signature in blue ink, appearing to read "Michael E. Berry".

---

Michael E. Berry, Secretary  
Tourism, Arts and Heritage Cabinet

AFFIDAVIT OF COMMISSIONER RODNEY BREWER

Comes the affiant, Rodney Brewer, having been duly sworn and states as follows:

1. My name is Rodney Brewer. I am the Commissioner of the Kentucky State Police (KSP). I was appointed to this position on January 3, 2020. I make this affidavit on personal knowledge.
2. On March 19, 2020, an Order was issued by the Cabinet for Health and Family Services (CHFS) prohibiting mass gatherings.
3. From March 19, 2020 through April 21, 2020, KSP received approximately 70 complaints regarding groups of people not complying with the March 19, 2020 CHFS Order.
4. These groups were gathered at various locations, including but not limited to a hair salon, an arcade, gas stations, flea markets, in neighborhoods and personal residences.
5. The majority of these groups dispersed prior to KSP's arrival. The remaining complaints were deemed unfounded or it was determined that the groups were compliant with the order.
6. On April 12, 2019, KSP posts throughout Kentucky received complaints of groups of people violating the social distancing requirements set forth by the March 19, 2020 Order.
7. Approximately 42 complaints were received related to faith based mass gatherings and failure to observe social distancing at those gatherings.
8. Troopers were dispatched to respond to these complaints.
9. Troopers received approximately six complaints regarding Maryville Baptist Church and responded to those complaints.


10. Following a thorough investigation, all of the complaints except the complaints regarding Maryville Baptist Church were determined to be either compliant with the order or unfounded.
11. No citations were issued and no arrests were made at the Maryville Baptist Church on April 12, 2019.
12. KSP has increased routine patrols overall due to the statewide COVID-19 pandemic.
13. Between March 19, 2020 and April 21, 2020, KSP patrolled approximately 839 retail locations a total of 6,173 times.

Further affiant sayeth naught.

  
\_\_\_\_\_  
Rodney Brewer

Commonwealth of Kentucky )  
County of Franklin )

Subscribed and sworn before me by Rodney Brewer, the 22<sup>nd</sup> day of April,  
2020.

  
\_\_\_\_\_  
Notary Public  
State At Large

My commission expires: Nov 8, 2023

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
AT COVINGTON**

THEODORE JOSEPH ROBERTS, *et al.*, )

Plaintiffs, )

v. )

Civil Action No. 3:20-cv-00054-WOB-CJS

HON. ROBERT NEACE, in his official )  
capacity only as Boone County Attorney, )  
*et al.*, )

Defendants. )

**DECLARATION OF KIMBERLEE C. PERRY**

Kimberlee C. Perry states as follows:

1. My name is Kimberlee C. Perry. I am over the age of 18 and make this declaration based on my personal knowledge.
2. I am the Commissioner of the Department of Workplace Standards within the Kentucky Labor Cabinet.
3. On March 31, 2020, I was delegated authority to enforce the various public health and safety orders issued under the State of Emergency, including, but not limited to, to Executive Orders 2020-243, 2020-246, and 2020-257, and orders implementing the Governor's various Executive Orders and the orders of the secretary of the Cabinet for Health and Family Services and the Commissioner of the Department for Public Health. [Exhibit 1, 3/31/2020 Labor Cabinet Order, ¶ 1.]
4. Through that Order I was granted authority to compel compliance with the Orders referenced in Paragraph 1 of this Order, including, but not limited to, the power to issue closure



orders, citations, and fines, as well as all powers granted under KRS Chapter 39A, KRS Chapter 211, and KRS Chapter 212. [Exhibit 1 ¶ 2.]

5. Since April 1, 2020, the Department of Workplace Standards has received referrals of 170 complaints from the KY-SAFER noncompliance reporting hotline for investigation and possible enforcement action through closure orders, citations, and fines.

6. Of those 170 complaints, 102 involve businesses or organizations deemed life-sustaining under Executive Order 2020-257, and 68 involve business or organization deemed not to be life-sustaining under Executive Order 2020-257.

7. The Department of Workplace Standards, through its own investigators and investigators assigned by the Public Protection Cabinet to assist, has performed in-person investigations of 130 of the 170 complaints. The remaining 40 are awaiting in-person inspection or have been investigated or counseled on proper compliance with Executive Order 2020-257 by telephone.

8. The Department of Workplace Standards, through its own investigators and investigators assigned by the Public Protection Cabinet to assist, has verified through its in-person investigations that 89 businesses or organizations were in compliance with Executive Order 2020-257 or that the complaints were otherwise unverified.

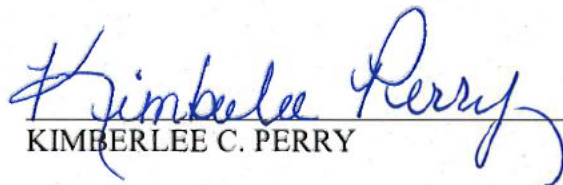
9. The Department of Workplace Standards, through its own investigators and investigators assigned by the Public Protection Cabinet to assist, has issued a total of 41 closure orders based on its in-person investigations. A closure order is issued if the business or organization is not life-sustaining, or if the business or organization is life-sustaining, but is not properly implementing CDC protocols regarding social distancing as required in Executive Order 2020-257.

10. The Department of Workplace Standards has approved a total of 14 life-sustaining businesses or organizations to reopen after those entities provided evidence that they will properly implement CDC protocols regarding social distancing in the future.

Further affiant sayeth naught.

Dated: April 21, 2020

I declare that the statements herein are true under penalty of perjury pursuant to 28 U.S.C. § 1746.

  
KIMBERLEE C. PERRY



## KENTUCKY LABOR CABINET

**Andy Beshear**  
Governor

**Jacqueline Coleman**  
Lieutenant Governor

Mayo Underwood Building  
500 Mero Street, 3<sup>rd</sup> Floor  
Frankfort, KY 40601  
Telephone: (502) 564 3070  
Fax: (502) 564-5387

**Larry L. Roberts**  
Secretary

### ORDER

**March 31, 2020**

Whereas, the Governor declared a State of Emergency by Executive Order 2020-215 on March 6, 2020, related to the novel coronavirus, COVID-19, and pursuant to that State of Emergency entered various Orders to ensure the public health and safety, including but not limited to Executive Orders 2020-243, 2020-246, and 2020-257; and

Whereas, the Secretary of the Cabinet for Health and Family Services and the Commissioner of the Department for Public Health have entered multiple orders implementing the Governor's various Executive Orders issued under the State of Emergency; and

Whereas, the Labor Cabinet, through the Department of Workplace Standards, has a unique statutory role in assisting in promoting public health and safety through the Occupational Safety and Health Program;

NOW THEREFORE under the authority granted under Executive Order 2020-257 to the Secretary of the Labor Cabinet as a member of the Governor's Executive Cabinet as set forth in KRS 11.065 to effectuate the various public health and safety orders issued under the State of Emergency, I order as follows:

1. The Commissioner of the Department of Workplace Standards is granted authority to enforce the various public health and safety orders issued under the State of Emergency, including, but not limited to, to Executive



Orders 2020-243, 2020-246, and 2020-257; and orders implementing the Governor's various Executive Orders and the orders of the secretary of the Cabinet for Health and Family Services and the Commissioner of the Department for Public Health;

2. The Commissioner shall have the same authority as the Commissioner of the Department for Public Health to compel compliance with the Orders referenced in Paragraph 1 of this Order, including, but not limited to, the power to issue closure orders, citations, and fines, as well as all powers granted under KRS Chapter 39A, KRS Chapter 211, and KRS Chapter 212.
3. The Commissioner may delegate authority to personnel in the Department of Workplace Standards to take all necessary measures to implement and enforce this Order, and such personnel shall have the same authority as the Commissioner as outlined in Paragraph 2 of this Order; and
4. This Order shall take immediate effect upon execution.

This Order shall be in effect for the duration of the State of Emergency under Executive Order 2020-215 or until this Order is rescinded by further order or operation of law.

  
LARRY L. ROBERTS, Secretary  
Kentucky Labor Cabinet

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

MARYVILLE BAPTIST CHURCH, INC., ) and DR. JACK ROBERTS, ) ) Plaintiffs, ) ) v. ) ) ANDY BESHEAR, in his official capacity as ) Governor of the Commonwealth of Kentucky, ) ) Defendant. )	)	CASE NO. 3:20-cv-00278-DJH
---	---	----------------------------

---

**DECLARATION OF DR. JACK ROBERTS**

1. I am over the age of 18 years, I have personal knowledge of the matters set forth in this declaration, and I would testify competently as to such matters if called to do so.
2. I am a resident of Bullitt County, Kentucky.
3. I am the pastor of Maryville Baptist Church.
4. I was present at Maryville Baptist Church, 130 Smith Lane, Louisville, KY on Easter Sunday, April 12, 2020, from 9:45 A.M. to 11:45 A.M. E.D.T.
5. I was present at Maryville Baptist Church, 130 Smith Lane, Louisville, KY on Sunday, May 3, 2020, from 9:45 A.M. to 11:45 A.M. E.D.T.; and again from 5:30 P.M. to 7:30 PM E.D.T.
6. I personally witnessed the Easter Sunday Service and the Sunday, May 3, 2020 services held at Maryville Baptist Church, both inside the church building, and the “drive-in” services outside in the parking lot.

7. The following photograph accurately depicts the service inside the church on Easter Sunday, April 12, 2020:



8. The following photograph accurately depicts the service inside the church on Sunday, May 3, 2020:



9. The following photograph accurately depicts the parking lot outside the church, showing every other parking space blocked off for drive-in service, on Sunday, May 3, 2020:



I DECLARE under penalty of perjury that the foregoing is true and correct.

EXECUTED this May 4, 2020.

/s/ Jack Roberts  
Dr. Jack Roberts