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

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

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF**
**RENEWED EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

Plaintiffs, MARYVILLE BAPTIST CHURCH, INC. ("Maryville Baptist Church" or the "Church"), and DR. JACK ROBERTS ("Dr. Roberts"), pursuant to the Court's Memorandum of Conference and Order dated May 5, 2020 (ECF 28), file this brief in support of Plaintiffs' Renewed Emergency Motion for Injunction Pending Appeal (ECF 25, "Renewed IPA Motion") and in reply to Governor Beshear's Response in Opposition (ECF 31, "Renewed IPA Response").

## I. THE COURT SHOULD GRANT PLAINTIFFS' RENEWED IPA MOTION BECAUSE GOVERNOR BESHEAR HAS NOT BROUGHT THIS COURT ANY NEW REASONS OR ANSWERS TO JUSTIFY ENFORCEMENT OF THE COMMONWEALTH'S ORDERS PROHIBITING PLAINTIFFS' IN-PERSON WORSHIP SERVICES.

### A. The Sixth Circuit's Determinations of Likelihood of Success, Irreparable Harm, Balancing of Harms, and Public Interest Are Binding on This Court as Law of the Case.

This Court is bound by what the Sixth Circuit has already decided with respect to an IPA enjoining the Governor's enforcement of the Commonwealth's Orders prohibiting in-person worship services:

> It is clear that when a case has been remanded by an appellate court, **the trial court is bound** to proceed in accordance with the mandate and **law of the case as established by the appellate court. The law of the case doctrine precludes a court from reconsideration of identical issues. Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case**.

*Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (cleaned up) (emphasis added). Governor Beshear's IPA Response acknowledges the existence of the 6th Circuit IPA Order (ECF 23) but pretends the Sixth Circuit did not say what it said. This Court, however, is bound by what was already decided in the 6th Circuit IPA Order.

As shown in Plaintiffs Renewed IPA motion, the Sixth Circuit has already concluded, "**The Church is likely to succeed on its state and federal claims**" (6th Cir. IPA Order 3 (emphasis added)), because, "**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 (emphasis added); Renewed IPA Mot. 5.) Indeed, the Sixth Circuit wrote, "**The Commonwealth has no good answers**." (6th Cir. IPA Order 8; Renewed IPA Mot. 5.)

Having concluded the Commonwealth's COVID-19 Orders likely do not survive strict scrutiny review on the merits as to drive-in **and** in-person worship services, the Sixth Circuit concluded it unnecessary "to dwell on the remaining three factors" as to drive-in services. (6th Cir. IPA Order 9.) As to in-person services, however, the court proceeded to evaluate the other three factors:

> As for harm to the claimants, **the prohibition on attending any worship service this Sunday and the Sundays through May 20**

> **assuredly inflicts irreparable harm**.[1] As for harm to others, an injunction appropriately permits religious services with the same risk-minimizing precautions as similar secular activities, and permits the Governor to enforce social distancing rules in both settings. As for the public interest, treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees.

(6th Cir. IPA Order 9 (citation omitted).) But the Sixth Circuit stopped short of issuing the IPA as to in-person services, observing, "The balance is more difficult when it comes to in-person services" (6th Cir. IPA Order 10), "[i]n view of the fast-moving pace of this litigation and in view of the lack of additional input from the district court, whether of a fact-finding dimension or not." (*Id.*) But the Sixth Circuit "urge[d] the district 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), with the admonition, "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." (*Id.*)

Having confirmed its jurisdiction over Plaintiffs' appeal of this Court's April 18, 2020 Order (ECF9, "TRO/OI Order") (6th Cir. IPA Order 2), and having determined Plaintiffs' likelihood of success on the merits, irreparable harm, and satisfaction of the balancing of harms and public interest factors as to in-person worship services (6th Cir. IPA Order 9), the Sixth Circuit relinquished jurisdiction to this Court only for "additional input" with respect to the balancing of

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[1] The May 20 date is significant because Governor Beshear has represented to 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." (ECF 21, Governor Beshear's Not. Supp. Fact Devel., at 1.) Although Governor Beshear has not offered any other details or defined "reduced capacity," and Plaintiffs do not concede that Governor Beshear's May 20 plan will resolve any of Plaintiffs' claims herein, the Sixth Circuit's reference to May 20 necessarily means that the court had the Governor's current prohibition of in-person services in mind in the court's irreparable harm and subsequent IPA factor determinations.

the IPA factors for in-person services. (6th Cir. Oder 10.) And given the Sixth Circuit's unequivocal conclusions that the Governor provided the 6th Circuit no good reasons or answers justifying the Commonwealth's prohibitions on worship services that comply with the same distancing and hygiene guidelines as "life sustaining" businesses, this Court can only consider new reasons offered by the Governor. But, as shown below, Governor Beshear's Renewed IPA Response simply repackages what the Governor already gave the Sixth Circuit and the Sixth Circuit found wanting. Thus, Governor Beshear still has offered no good reason or answer, and this Court should grant Plaintiffs' Renewed IPA Motion.

### B. The Governor's Renewed IPA Response Substantively Contains Nothing New.

Although the Sixth Circuit gave Governor Beshear an opportunity to present new reasons to this Court to justify the Commonwealth's COVID-19 Orders, the Governor utterly failed to do so. Thus, this Court need go no further, and should grant Plaintiffs' Renewed IPA Motion in aid of the appellate proceeding in the Sixth Circuit. A comparison of the Governor's Renewed IPA Response filed in this Court, with the Governor's 6th Circuit IPA Motion Response filed in the Sixth Circuit (and filed by Plaintiffs herein at ECF 25-2), shows that the Governor has offered no legitimate response to the Sixth Circuit's conclusions that the Governor had no good reasons or answers to justify the Commonwealth's Orders prohibiting worship services.

The exhibits to the Governor's Renewed IPA Response reveal what the Governor wants to present as new, but the new material does not carry the Governor's burden. For example, the Affidavit of Dr. Steven J. Stack, M.D. (ECF 31-2) is identical to the Affidavit of Dr. Steven J. Stack, M.D. filed in the Sixth Circuit (ECF 25-2 PageID ## 366–371), save one new paragraph (¶ 46) presenting an irrelevant count of total COVID-19 cases in Hopkins County, purportedly connected to a church event on March 15–16 (¶¶ 41–45 (early in the COVID-19 era)), but without

providing whether the church observed distancing and hygiene precautions such as those Plaintiffs are willing to observe.

As another example, the Declaration of Leiutenant [sic] Colonel Phillip Burnett, Jr. (ECF 31-4) of the Kentucky State Police appears new, but is in reality a repackaging of the same information in the Affidavit of Commissioner Rodney Brewer (ECF 25-2 PageID ## 373–74) of the Kentucky State Police. The Burnett Declaration, however, though not providing anything new, does refute a falsehood in the Governor's Renewed IPA Response to this Court, where the Governor stated, "[n]either the Governor nor the Commonwealth have taken any enforcement action against Plaintiffs or any person who participated in Plaintiffs' mass gathering on April 12, 2020." (Renewed IPA Resp. 2.) The Burnett Declaration directly contradicts this statement, for it states that uniformed Kentucky State Police officers went to Maryville Baptist Church on Easter Sunday, recorded the license plates of vehicles in the parking lot, posted notices of criminal violation of the Commonwealth's orders on the vehicles, and provided the license plate information to local health officials. (Burnett Decl. ¶¶ 6–10.) The enforcement actions of the Kentucky State Police against Plaintiffs, and the falsity of the Governor's Renewed IPA Response, is further confirmed in the parties' Stipulation of Facts Not in Dispute (ECF 29), which confirms the enforcement actions in the Burnett Declaration, and further provides the notices of criminal violation were placed on both occupied and unoccupied vehicles, resulting in letters and self-quarantine agreements being sent to Plaintiff Dr. Roberts and others on Kentucky Cabinet for Health and Family Services Department for Public Health letterhead. (Stip. ¶¶ 4–5.) Moreover, the Stipulation provides that **the executive orders pursuant to which the Kentucky State Police acted remain in full force and effect, and Governor Beshear has not since Easter Sunday**

**announced any voluntary change in his COVID-19 policies or enforcement regarding churches that would take effect prior to May 20, 2020**. (Stip. ¶¶ 8–9.)

Still another example is the Declaration of Kimberlee C. Perry (ECF 31-5), Commissioner of the Department of Workplace Standards within the Kentucky Labor Cabinet, which is a repackaging of the same declaration filed in the Sixth Circuit (ECF 25-2 PageID ##375–77). The new Perry Declaration updates the numbers of Department investigations of businesses for not complying with the Commonwealth's COVID-19 Orders (Perry Decl. ¶¶ 5–10) but does not provide any new categories of information. To be sure, the Perry Declaration bolsters the Sixth Circuit's conclusion that there is no reason why churches should not be allowed to operate pursuant to the same CDC distancing guidelines as are available to "life-sustaining" businesses, with Commonwealth enforcement performed on a case-by-case basis. (6th Cir. IPA Order 8–9 ("If any group fails, as assuredly some groups have failed in the past, the Governor is free to enforce the social-distancing rules against them for that reason.").) To this end, the Perry Declaration provides that her Department "has approved a total of 18 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." (Perry Decl. ¶ 10.)

The only "new" exhibits included with the Governor's Renewed IPA Response are trial court orders that do not in any way displace the binding 6th Circuit IPA Order, and are therefore inapposite to this case.[2] (ECF 1, 6, 7.) To be sure, the Governor depends heavily on the Western

[2] There is an additional new exhibit, an order of the Secretary of the Tourism, Arts and Heritage Cabinet, ordering the closure of certain state parks. (ECF 31-3.) This exhibit not only provides nothing material for this Court's consideration, but also appears not to be the exhibit the Governor intended to attach. (Renewed IPA Resp. 8 (referencing "Order closing the Kentucky Performing Arts Center").)

District of Kentucky Memorandum and Order in *Roberts v. Neace*, No. 2:20cv054 (WOB-CJS) (W.D.K.Y. May 4, 2020), denying a preliminary injunction against enforcement of the Commonwealth's Orders prohibiting in-person services at Maryville Baptist Church. (ECF 31-1; Renewed IPA Resp. 20–22, 25.) (The lead plaintiff in *Roberts* is not the same person as Plaintiffs Dr. Roberts in this case.) But this Court is bound by the 6th Circuit IPA Order, not the inconsistent *Roberts* order arising from different parties and different claims.

Given that the Governor has presented this Court with nothing new, the Governor has utterly failed to overcome his lack of good reasons and answers in the Sixth Circuit. Accordingly, the Court should grant Plaintiffs' Renewed IPA Motion.

## II. THE GOVERNOR'S REASONS REJECTED BY THE SIXTH CIRCUIT AND REPACKAGED FOR THIS COURT DO NOT JUSTIFY HIS BURDENING PLAINTIFFS' RIGHTS OR DENIAL OF THE IPA.

Because the Governor has not presented this Court with any substantive new facts or argument to overcome his lack of good reasons or answers in the Sixth Circuit, this Court should grant Plaintiffs' Renewed IPA Motion. Some of the Governor's failed arguments to the Sixth Circuit are worth noting here:

- **Plaintiffs Have Suffered Irreparable Harm.** Disregarding the Sixth Circuit's unequivocal determination that Plaintiffs are suffering irreparable harm (6th Cir. IPA Order 9), the Governor protests that Plaintiffs cannot show irreparable harm because the Kentucky State Police did not arrest anyone on Easter Sunday and have not returned to the Church. (Renewed IPA Resp. 26–27.) This argument has no merit because, as shown above and stipulated by the parties, the Kentucky State Police certainly did take enforcement action against Plaintiffs' and their congregants' free exercise rights on Easter Sunday, and the Governor's enforcement policies have not changed. No more is required. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("With regard to the factor of irreparable injury, for example, it is well-settled that 'loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

- **Governor Beshear Cannot Meet His Narrow Tailoring Burden.** It is Governor Beshear's burden to prove narrow tailoring. (6th Cir. IPA Motion, ECF 25-1, at 17.) Given all the examples of less restrictive COVID-19 state regulations demonstrated by Plaintiffs (6th Cir. IPA Motion, ECF 25-1, at 18–19), it is the Governor's burden to prove Kentucky's more restrictive prohibitions are necessary to address some problem peculiar to Kentucky, which the Governor has failed to do. Furthermore, the Governor's attempt to use hearsay "media reports" and misleading, long-range and one-off photographs (Renewed IPA Resp. 10–13) to refute Plaintiffs' verified allegations as to distancing and hygiene must fail.

## CONCLUSION

For all of the foregoing reasons, and the reasons in Plaintiffs' Renewed IPA Motion, there is no need to for the Court to receive any further evidence or argument, and the Court should grant Plaintiffs' Renewed IPA Motion forthwith, so that Plaintiffs may proceed with their Sunday, May 10 worship service under the Court's protection, or seek further immediate relief in the Sixth Circuit.

Respectfully submitted,

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**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 7, 2020.

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