**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**Eastern Division**

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| ELIM ROMANIAN PENTECOSTAL CHURCH, LOGOS BAPTIST MINISTRIES, | ) | |
| Plaintiff, | ) | Case No. 1:20-cv-02782 |
| v. | ) | |
| JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois, | ) | |
| Defendant. | ) | |

**PLAINTIFFS' REPLY IN SUPPORT MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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**(To be filed separately within 2 hours.)**

**TABLE OF AUTHORITIES**

**(To be filed separately within 2 hours.)**

**PLAINTIFFS' REPLY IN SUPPORT OF TRO AND PRELIMINARY INJUNCTION**

In accordance with this Court's Order (dkt.13), Plaintiffs, ELIM ROMANIAN PENTECOSTAL CHURCH and LOGOS BAPTIST MINISTRIES, by and through the undersigned counsel, hereby their Reply in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

**INTRODUCTION**

In his Response Opposing Plaintiffs' Motion for Temporary Restraining Order (dkt. 21, "TRO Response"), the Governor seemingly contends that COVID-19 empowers him to hit the pause button on the Constitution. (TRO Response at 1). The Constitution has no pause button and no temporary suspension clause. As the Sixth Circuit has stated twice in the last week, "[w]hile the law may take periodic naps during a pandemic, we will not let it sleep through one." *Roberts v. Neace*, No. 20-5465, slip op. at 7 (6th Cir. May 9, 2020) (attached hereto as EXHIBIT A) (enjoining enforcement of COVID-19 restrictions on **in-person** worship services); *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 2020 WL 2111316, *4 (6th Cir. May 2, 2020) (enjoining enforcement of COVID-19 restrictions on drive-in worship services) (consolidated with *Roberts* for appeal). Indeed, though "[t]he COVID-19 pandemic has upended every aspect of our lives . . . **constitutional rights still exist**." *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, *8 (W.D. Ky. Apr. 11, 2020) (emphasis added). The Governor seems to have forgotten the First Amendment has no pause button—it endures today and is still "as necessary now as when the *Mayflower* met Plymouth Rock." *Id.* Our commitment to our enduring freedoms depends on Article III courts preserving them as inviolate. Certainly, during times of national crisis, such as the current uncertainty arising from COVID-19, "the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights." *American Communist*

*Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 453 (1950) (Black, J., dissenting). But, where the fog of public excitement is at its apex, "the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). Without doubt, "[t]herein lies the security of the Republic, the very foundation of constitutional government." *Id.* Plaintiffs plead unto this Court to hold sacred that which so many have fought and died to achieve—an incredible experiment of liberty that has lit the world for over 250 years. For, "**[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be discarded**." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting) (emphasis added).

**SUPPLEMENTAL FACTS**

As the Court observed in today's Order denying reassignment (dkt. 2), Plaintiffs "have raised . . . factual allegations regarding the size of the congregation and the physical size of the churches involved, along with their offer to maintain social distancing and personal hygiene procedures for their church services." Indeed, since the Verified Complaint was filed, some of those allegations have materialized into additional verified facts, which Plaintiffs present here to supplement the Verified Complaint, in the attached Supplemental Declaration of Pastor Christian Ionescu in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (the "Ionescu Declaration").

As shown in the Ionescue Declaration, today Plaintiff Elim Church held a religious service on its premises (the "Sunday service"), as it had indicated to Governor Pritzker it would in its pre-suit Communication (dkt. 1-12), in which it requested that he permit the church to hold the service subject to strict social distancing and health precautions that the church indicated it would voluntarily undertake. (Ionescue Decl. ¶¶ 3–6.) Elim Church strictly complied with each of the 10

safety points on page 3 of its letter to Governor Pritzker (Dkt. 1-12 at 3), and went even farther because it wanted to be beyond reproach, and because it cares deeply about the health and safety of its members and congregants. (Ionescue Decl. ¶¶ 4–5.) Even a cursory view of the sanctuary during the service would have shown the extensive measures taken by the church:

(Ionescue Decl. ¶ 6(h), (i).)

Elim Church held the Sunday service, however, under the cloud of interruption and enforcement action by police under the authority of Governor Pritzker's COVID-19 orders. (Ionescue Decl. ¶¶ 7–12.) The church's concerns about being fined, arrested, hauled off to jail, or subjected to other punitive measures have interfered with and diminished its collective worship experience, to a much greater extent than COVID-19, and the precautionary measures it has voluntarily employed, ever could. (Ionescue Decl. ¶ 9.) This diminishment of their exercise of the their sincerely held beliefs will continue as long as Governor Pritzker's orders disparately single out in-person religious services for more restrictive treatment. (Ionescue Decl. ¶¶ 8–12.) Nevertheless, the measures the church voluntarily took for this Sunday service, it is willing to voluntarily take again—and will take again. (Ionescue Decl. ¶ 10.)

## LEGAL ARGUMENT

### I. THE GATHERING ORDERS SUBTANTIALLY BURDEN PLAINTIFFS' FREE EXERCISE RIGHTS.

#### A. The Sixth Circuit, the Highest Federal Court to Address Similar COVID-19 Orders, Has *TWICE* Held That Similar Restrictions on Religious Gatherings Violate the Free Exercise Clause, Including Prohibitions on In-Person Gatherings Such as Those Prohibited Here.

The Governor claims that certain district court orders enjoining enforcement of COVID19-executive orders restricting the exercise of religion are mere "outliers" unworthy of this Court's consideration. (TRO Response at 23). The problem for the Governor is that the Sixth Circuit—the highest court to consider such restrictions—has conclusively determined that restrictions on drive-in **and in-person** worship services are a gross violation of the First Amendment and has enjoined the government from enforcement of such restrictions. *Roberts*, No. 20-5465, slip op. (6th Cir. May 9, 2020) (enjoining enforcement of COVID-19 restrictions on **in-**

**person** worship services); *Maryville Baptist Church, Inc.*, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (enjoining enforcement of COVID-19 restrictions on drive-in worship services).

The Governor posits that the Sixth Circuit's recent injunctions are uninstructive here because they pertain to only drive-in services, which the Governor contends are permissible. (TRO Response at 16-17). But, the Governor overlooked the *Roberts* Sixth Circuit opinion, which was handed down before the Governor's Response was filed. In *Roberts*, the Sixth Circuit **granted an injunction pending appeal prohibiting the Governor of Kentucky from treating religious gatherings—including in-person worship services—differently from other so-called "essential" businesses**.

The Sixth Circuit noted that the Kentucky COVID-19 executive orders prohibiting religious gatherings "likely fall on the prohibited side of the line" that the Free Exercise Clause draws. *Roberts*, slip op. at 5. Indeed, "[a]s a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Id.* As such, the Sixth Circuit held that the COVID-19 orders, similar to those at issue in the instant litigation, likely violate the First Amendment, and should be enjoined.

Just as Plaintiffs have requested here, the Kentucky church merely sought to be treated equally with similar non-religious gatherings that are not subject to the same outright prohibition—under threat of criminal sanction—as that imposed on churches. As the Sixth Circuit noted,

> Keep in mind that the Church and its congregants just want to be treated equally. They don't 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. They do not ask to share a chalice. **The Governor has offered no good reason 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**.

*Roberts*, slip op. at 6 (emphasis added).

> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

(*Id.* (italics in original) (bold emphasis added)).

Though Governor Pritzker asserts he is not hostile towards religious gatherings, his self-serving statements are irrelevant. "The constitutional benchmark is government *neutrality*, **not government avoidance of bigotry**." (*Roberts*¸ slip op. at 7 (emphasis added) (internal quotation marks omitted). In so holding, the Sixth Circuit found that COVID-19 executive orders, similar if not identical to those at issue here, simply fail the constitutional standard. It therefore enjoined the Commonwealth of Kentucky from enforcing discriminatory prohibitions against religious gatherings. (*Id.*).

### B. Other Federal Courts Have Likewise Granted Blanket Injunctions Against Prohibitions on Religious Gatherings.

The Governor claims that the injunction issued in *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020) (granting injunction for in-person services) is "an outlier." (TRO Response at 23). This is false. Indeed, as noted, a federal circuit court has already determined that the constitution forbids enforcement of COVID-19 orders as to **both** drive-in and in-person religious gatherings. *See supra* Section I.A. And if that alone were not sufficient to eviscerate the Governor's contention—which it is—the other federal courts to issue recent decisions on these restrictions similarly prohibited the government from enforcing restrictions on in-person worship services. On May 8, 2020, the United States District Courts for the Eastern and Western Districts of Kentucky held that prohibitions on religious gatherings (whether drive-in or in-person) simply do not pass muster under the First Amendment. *See Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, slip op. (W.D. Ky. May 8, 2020) [hereinafter

*Maryville* W.D. Ky. (attached hereto as EXHIBIT B); *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, slip op. (E.D. Ky. May 8, 2020) (attached hereto as EXHIBIT C).

In the case consolidated with *Roberts* before the Sixth Circuit, *Maryville Baptist Church, Inc. v. Beshear*, the Western District of Kentucky entered an order Friday granting an injunction pending appeal and a preliminary injunction prohibiting the enforcement of Kentucky's COVID-19 orders against in-person worship services. No. 3:20-cv-278-DJH-RSE, slip op. at 1, 6 (W.D. Ky. May 8, 2020) (attached hereto as EXHIBIT B). The district court had previously denied the plaintiffs' motion for temporary restraining order, 2020 WL 1909616 (W.D. Ky. April 18, 2020), but ruled for the plaintiffs Friday after finding the Kentucky Governor failed to meet his burden to prove narrow tailoring under the strict scrutiny standard. *Maryville Baptist*, W.D. Ky. slip op. at 4–6 ("The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals.") ("He still 'has offered no good reason . . . for refusing to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the same.'" (alteration in original)).

In *Tabernacle*, the Eastern District of Kentucky issued a temporary restraining order enjoining Kentucky from enforcing its COVID-19 orders prohibiting religious gatherings. *Tabernacle*, slip op. at 12. In that order, the court noted that—even in times of emergency—the First Amendment does not "mean something different because society is desperate for a cure or prescription." *Id.*, at 1. There, though the court noted that it was tasked with "identifying precedent in unprecedented times," *id.* at 7, and that COVID-19 was a different yard stick. *Id.* However, the court noted precisely what Plaintiffs pointed out in their TRO motion here, namely that "**even under *Jacobsen*, constitutional rights still exist**." *Id.* at 8 (quoting *On Fire Christian Ctr, Inc v.*

*Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820248, *15 (W.D. Ky. Apr. 11, 2020) (emphasis added)). In fact, "while courts should refrain from second-guessing the efficacy of a state's chosen protective measures" a government very well may "go so far beyond what was reasonably required for the safety of the public as to authorize or **compel the courts to interfere**." *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (emphasis added)). **The Governor's actions here have transgressed that line**. Indeed,

> It follows that the prohibition on in-person services should be enjoined as well. . . . There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, *benefit from constitutional protection***.

*Id.*, at 10 (emphasis added).

As Plaintiffs pointed out in their original TRO motion, the District of Kansas's *First Baptist* opinion is particularly instructive here as well. The *First Baptist* court issued a TRO enjoining Kansas officials from enforcing the state's discriminatory prohibition on religious gatherings and required the government to treat "religious" gatherings (worship services) the same as other similar gatherings that are permitted. *See* 2020 WL 1910021, at *6–7. The TRO specifically states that the government's disparate treatment of religious gatherings is a violation of the Free Exercise Clause because it shows that "**religious activities were specifically targeted for more onerous restrictions than comparable secular activities**," and that the churches had shown irreparable harm because they would "be prevented from gathering for worship at their churches" during the pendency of the executive order. *Id.* at *7–8 (emphasis added). In discussing the Kansas orders—which imposed a 10-person limit on in-person gatherings just as Governor Pritzker's orders here—the court said that specifically singling out religious gatherings for disparate treatment while permitting other non-religious activities "show[s] that these executive orders expressly target

religious gatherings on a broad scale and are, therefore, not facially neutral," *Id.*, at *7. In fact, much like here, "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). Thus, the court found that Kansas should be enjoined from enforcing its disparate terms against churches.

As these cases demonstrate—contrary to Governor Pritzker's argument—injunctions against COVID-19 prohibitions on religious gatherings are not "outliers," but are instead the better-reasoned results reached by multiple district courts and twice by the Sixth Circuit. This Court should similarly hold. For "[h]istory reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. **But the ultimate strength of our constitutional guarantees lies in the unhesitating application in times of crisis and tranquility alike**." *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring) (emphasis added).

### C. The Governor's Notion of Content-Neutrality Is False as a Matter of Fact, and Irrelevant Under the Free Exercise Clause Because Content-Based Determinations Concern Plaintiffs' Free Speech, Not Free Exercise, Claims.

The Governor contends that his GATHERING ORDERS pass the Free Exercise Clause test because they are "content-neutral." (TRO Response at 18). As an initial matter, the Governor's contention is wholly irrelevant in the Free Exercise Clause context. A content-neutrality analysis arises under Plaintiffs' free speech, not free exercise claims. "Content-based laws—those that target **speech** on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (emphasis added).

"Some facial distinctions based on a **message** are obvious, defining regulated **speech** by particular subject matter, and others are more subtle, defining regulated **speech** by its function or purpose. Both distinctions are drawn based on the **message** a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 2227 (emphasis added). Nowhere in the enormous body of federal jurisprudence on the Free Exercise Clause is a content-neutrality analysis to be found. The reason for that is simple: it deals with an entirely separate component of the First Amendment. The Governor's initial contention can and should be dismissed out of hand.

Assuming *arguendo* that the Governor's content-neutral analysis was applicable in the free exercise context—which it is not—it would be factually incorrect, as it blatantly misrepresents the GATHERING ORDERS. This Court need look no further than the text of the GATHERING ORDERS to determine that they are content-based restrictions on constitutionally protected liberties. The GATHERING ORDERS purport to prohibit "all public and private gatherings of any number of people," except a religious gathering of no more than 10 people is permissible. (V.Compl. ¶¶ 39, 41, EX. H.) But, the State found **23 categories of exempted so-called "essential" businesses**, including, *inter alia*, grocery stores, alcoholic beverage stores, cannabis stores, gas stations, hardware stores, law firms and professional businesses, labor unions, and hotels, that are not subject to a 10 person limitation. (V.Compl. ¶¶ 42, 43, EX. H.) Indeed, as this Court has found, a system of exemptions makes it likely that a law is content-based. *See ACLU of Ill. v. White*, 2009 WL 5166231, *4 (N.D. Ill. Dec. 23, 2009); *see also H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009) (holding that a system where some forms of speech are exempted while others are not is content-based and subject to strict scrutiny). The State's broad swath of exemptions for all but religious gatherings is textbook content discrimination and subject to strict scrutiny.

### D. The Governor Misapprehends the GATHERING ORDERS and Their Discriminatory Hostility to Religious Gatherings.

The Governor contends that the GATHERING ORDERS do not discriminate against religious gatherings because they apply "equally" to religious and non-religious gatherings alike. (TRO Response at 19). This is pure subterfuge and blatantly incorrect. The plain text of the GATHERING ORDERS dispels the Governor's notion. While the Governor started with the general position that "all public and private gatherings [of] 50 or more people" were prohibited, and specifically included "faith-based events" in that prohibition (V.Compl. ¶¶ 30, 31, EX. C.), in the next breath, the Governor opened a broad category of exemptions for certain "essential" stores. (V.Compl. ¶ 32.) On March 20, the State enhanced the prohibitions by prohibiting "all public and private gatherings of any number of people." (V.Compl. ¶ 34, EX. D.) Yet, in same text, the Governor created a massive hole of exemptions for the **23 categories of businesses** that need not comply with the restrictions, including grocery stores, alcoholic beverage stores, hardware stores, cannabis stores, gas stations, law firms and professional businesses, labor unions, and hotels, and also including warehouse, supercenter, and 'big box' stores combining several categories, so long as they abided by social distancing "to the greatest extent feasible" and "where possible." (*Id.*). Notably, **every one of the exempt categories are non-religious gatherings while the prohibition on in-person religious gatherings remain prohibited**. If that is equal treatment, the term has no meaning.

But, that is only half the story. Even now, with the aspirational Restore Illinois plan, which "can and will be updated" and is "subject to change" at any time and in the Governor's discretion, the Governor only contemplates religious gatherings of more than 10 people in Phase 4, when and if Governor Pritzker determines it is appropriate to permit such gatherings. (V.Compl. ¶¶ 45–49, EX. J.) And, to have religious gatherings of more than 50 people, Plaintiffs' churches must wait

until "a vaccine is developed to prevent additional spread of COVID-19" or "a treatment option is readily available," **which the Governor has indicated can take from 12 to 18 months from now**. (V.Compl. ¶¶ 48, 49 EX. J.). If that does not constitute an institutionalization of a constitutional pause button, then nothing ever would.

The GATHERING ORDERS' purpose in treating religious gatherings differently is pure pretext because there is no evidence that religious gatherings "pose unique health risks that mass gatherings at commercial and other facilities do not," *First Baptist*, 2020 WL 1910021, at *7, or "because the risks at religious gatherings uniquely cannot be adequately mitigated with safety protocols" such as those at liquor stores, cannabis stores, or other "essential" stores that may continue to operate without the 10-person limitation. *Id.* Treating Plaintiffs and other religious gatherings differently is a sham. The Constitution demands more. So, too, should this Court.

### E. The Governor's Reference to an "Undue Burden" Standard Is Wholly Inapplicable to Plaintiffs' Free Exercise Claims, as the Free Exercise Clause Prohibits a *Substantial*, Not Undue, Burden on Plaintiffs' Exercise of Religion.

Strangely, the Governor contends that the GATHERING ORDERS do not violate the Free Exercise Clause because they are not an "undue burden." (TRO Response at 24). But that is not the applicable standard. The "undue burden test [is] **unique to abortion-related regulations.**" *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 593 n.24 (E.D. La. 2002). *See also Compassion in Dying v. Washington*, 79 F.3d 790, 843 (9th Cir. 1996) (Beezer, J., dissenting) ("the undue burden test is unique to the abortion right") It is wholly inapplicable to determinations of claims under the Free Exercise Clause.

The question relevant to Plaintiffs' claims is whether the GATHERING ORDERS impose a **substantial** burden on Plaintiffs' sincerely held religious beliefs. They do. A "substantial burden" exists when the government "necessarily bears direct, primary, and fundamental

responsibility for rendering religious exercise effectively impracticable," *Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003), or when "it puts substantial pressure on an adherent to modify his behavior or violate his beliefs." *Koger v. Bryan*, 523 F.3dd 789,799 (7th Cir. 2008). The GATHERING ORDERS impose such a substantial burden on Plaintiffs' religious beliefs. (V.Compl. ¶ 217 (alleging that the GATHERING ORDERS, substantially burden Plaintiffs' sincerely held religious beliefs, compel Plaintiffs to either change those beliefs or to act in contradiction to them, and force Plaintiffs to choose between the teachings and requirements of their sincerely held religious beliefs in the commands of Scripture and Defendant's imposed value system)); (*id.* ¶ 89 (the GATHERING ORDERS put substantial pressure on Plaintiffs' to violate their sincerely held religious beliefs)).

## II. THE GATHERING ORDERS INFRINGE PLAINTIFFS' FREE SPEECH RIGHTS.

### A. An Order That Says "at No Time, in No Place, and in No Manner" May More Than 10 Individuals Gather for Worship Simply Cannot Be Considered a Reasonable Time, Place, and Manner Restriction.

The Governor contends that his GATHERING ORDERS are merely a reasonable time, place, and manner restriction on Plaintiffs' constitutionally protected expression.[1] But, the Governor's notion that a total prohibition on religious sermons, given to in-person religious gatherings and expressed during a worship service that is completely prohibited under the GATHERING ORDERS is a reasonable time, place, and manner restriction is a constitutional fallacy. **Indeed, binding precedent requires this Court reject the Governor's contention**. *See, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002) (holding that a

[1] Plaintiffs' sermons at their religious gatherings (worship services) are protected speech under the First Amendment. *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971) (noting that "sermons," such as those Plaintiffs wish to give at their religious gatherings "come under the protection of free speech"). The Governor tacitly concedes that his GATHERING ORDERS apply to protected speech and expression. (TRO Response at 31-32).

government regulation warrants lesser scrutiny "if it is a time, place, and manner regulation **and not a ban**" (emphasis added)). *See also Frisby v. Schultz*, 487 U.S. 474, 489 (1988) ("complete bans" are "not a constitutional time, place and manner regulation of speech" (White, J., concurring)); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 6-47 (1986) (holding that only those speech-restrictive regulations that are not complete bans are subject to a time, place, and manner analysis). Such is not the case here.

Here, the GATHERING ORDERS have imposed a total ban (V. Compl. ¶39), and thus necessarily cannot be a time, place, and manner restriction. If the government could ban all speech, in all places, and at any time (as it has purported to do here with only religious gatherings), how in the world of constitutional logic could that be permissible? The answer to that dispositive question in simple: **it cannot**. *See, e.g., Zebulon Enter., Inc. v. DuPage Cnty.*, 2020 WL 1888928, 3 (N.D. Ill. Apr. 16, 2020) (noting that a "total ban" is not subject to a time, place, and manner regulation); *BBL, Inc. v. City of Angola*, No. 1:13-v-76-RLM, 2014 WL 26903, *12 (N.D. Ind. Jan. 2, 2014) ("An ordinance that results in a total ban is invalid."); *Chicago Joe's Tea Room, LLC v. Vill.. of Broadview*, No. 07 C 2680, 2009 WL 3151856, *2 (N.D. Ill. Sept. 25, 2009) (noting that Supreme Court precedent that "an outright ban requires **more** than a time, place, and manner analysis" (emphasis added)); *Illinois One News, Inc. v. City of Marshall*, 2006 WL 449018, *11 (S.D. Ill. Feb. 22, 2006) ("A regulation that appears on its face to be a time place and manner restriction but that in practice is effectively a total ban will receive strict scrutiny.").

### B. Contrary to the Governor's Contention, Total Prohibitions on Speech Are a Prior Restraint.

The Governor contends that the GATHERING ORDERS do not represent a prior restraint because, according to the Governor, the GATHERING ORDERS "do not restrain any speech." (TRO Response at 34). This is demonstrably false. As numerous federal courts—including this

Court—have recognized, total prohibitions on speech represent prior restraints. *See, e.g.*, *Int'l Union of Operating Eng'rs, Local 250, AFL-CIO v. Vill. of Oakland Park*, 139 F. Supp. 2d 950, 964 (N.D. Ill. 2001) (noting that a law that "completely prohibits" speech "constitutes a prior restraint"). *See also Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 638 (4th Cir. 1999) (holding that total prohibitions "act[] as such a [prior] restraint"); *R.W.B. of Riverview, Inc. v. Stemple*, 111 F. Supp. 2d 748, 756 (S.D.W.V. 2000) ("total bans" are an unconstitutional prior restraint); *see also Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1364 (M.D. Fla. 2000) ("This Court also finds that . . . moratoria are governed by prior restraint analysis in the same manners as permitting schemes."); *D'Ambra v. City of Providence*, 21 F. Supp. 2d 106, 113–14 (D.R.I. 1998) (moratorium on protected expression that includes no indication of ending is a complete prohibition and invalid prior restraint); *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102, 1108 (W.D. Wash. 2005) (total prohibitions on protected expression fail prior restraint analysis).

More importantly for this Court's analysis, however, is that **the Seventh Circuit dictates that this Court find that complete prohibitions on expression—such as those at issue in the GATHERING ORDERS—are a classic prior restraint**. *See, e.g.*, *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 262, 269 (7th Cir. 1978) (noting that where the government's restriction amounts to "the equivalent of a total prohibition of the exercise of constitutionally guaranteed rights," "[s]uch a limitation operates as a prior restraint." (emphasis added)). *See also Morales v. Schmidt*, 489 F.2d 1335, 134-47 (7th Cir. 1973) (Stevens, J., dissenting) ("It involves a total prohibition [and] thus represents an example of a prior restraint.").

The GATHERING ORDERS prohibit all speech in a religious gathering of more than 10 people. Such orders thus constitute a complete prohibition on such speech by pastors at such gatherings. The GATHERING ORDERS are thus presumptively unconstitutional under the First

Amendment, and this Court should enjoin and restrain the Governor from enforcing his unconstitutional prohibitions on such speech. The First Amendment demands nothing less.

## III. THE GATHERINGS ORDERS UTTERLY FAIL THE REQUIRED AND MOST DEMANDING STRICT SCRUTINY TEST.

### A. The Governor Misapprehends the Strict Scrutiny Standard and Faults Plaintiffs for Not Satisfying His Own Burden.

The Governor contends that his GATHERING ORDERS pass strict scrutiny because "**Plaintiffs**" "have no idea whether the measures they tout that were adopted in Texas, Florida, Indiana, Arizona, and Ohio will be sufficient." (TRO Response at 26 (emphasis added)). This fails for two reasons. First, **it is not Plaintiffs responsibility to demonstrate that the Governor's GATHERING ORDERS are the least restrictive means. That burden is the Governor's**, and his alone. As the Supreme Court has held: "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 such, on a PI motion, **the government—**not the movant—bears the burden of proof on narrow tailoring, because **the government** bears that burden at trial. *See Ashcroft,* 542 U.S. at 665 (on PI motion, "**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute." (emphasis added)).

The State indisputably bears the burden of proving narrow tailoring at trial. *See, e.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *id.* at 2540 ("To meet the requirement of narrow tailoring, **the government must demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." (emphasis added)). Thus, the

State also bears—and falls woefully short of meeting—the burden of proving narrow tailoring here. *See Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 665.

### B. Theoretical, Non-Record References in Counsel's Briefs Do Not and Cannot Satisfy the Governor's Burden to *Demonstrate* That Other Less-Restrictive Alternatives Were Tried and Failed, or Considered and Ruled out for Good Reason.

The second reason the Governor's response fails as a matter of law is because his counsel's unsupported statements in the record do not count. As a matter of law, "**arguments in a Government brief, unsupported by documentary evidence, are *not* evidence**." *United States v. Stevens*, 500 F.3d 625, 628 (7th Cir. 2007) (emphasis added). *See also United States v. Adriatio-Fernandez*, 498 F. App'x 596, 599 (7th Cir. 2012) ("A lawyer's unsupported statements are not evidence."). As a matter of black letter law, statement of counsel are plainly insufficient to constitute evidence in this matter. Indeed, "**[m]ere assertions alone by counsel . . . do not constitute any evidence**." *United States v. Robbins*, 197 F.3d 829, 843 (7th Cir. 1999) (emphasis added). *See also Moore v. Pipefitters Ass'n Local Union 596, U.A.*, 306 F.R.D. 187, 193 (N.D. Ill. 2014) ("Unsupported statements in briefs are not evidence."); *MB Fin. Bank, N.A. v. Walker*, 741 F. Supp. 912, 916 (N.D. Ill. 2010) ("**Unsupported statements in briefs are not evidence and do not count**." (emphasis added)).

To attempt to satisfy its burden (a burden the Governor erroneously attempts to foist on Plaintiffs), the Governor merely asserts that he should not be required to "knowingly accept the inevitable illness and death of residents in the midst of a pandemic." (TRO Response at 27). But, **there are no affidavits, no record evidence, and nothing that supports any conclusion that less restrictive alternatives would bring about the Governor's feigned scenario**. In fact, the Governor's response amounts to little more than *ipse dixit*, which simply does not count. As this Court said in *Moore v. Pipefitters Ass'n*, 306 F.R.D. 187, 193 (N.D. Ill. 2014), where, as here,

"[t]here is nothing in the motion . . . beyond [counsel's] *ipsi dixit*. **That is not enough**. Unsupported statements in briefs are not evidence." (emphasis added).

## IV. "WORSHIP AS I TELL YOU AND PERMIT YOU TO WORSHIP" IS NOT THE ROLE OF THE GOVERNMENT AND IS, ITSELF, IRREPARABLE HARM.

The Governor contends that Plaintiffs cannot suffer irreparable harm here because "alternative forms of worship" are available under the GATHERING ORDERS. This is offensive on its face, and wholly irrelevant under the Constitution. "**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Here, the Governor has purported to inform Plaintiffs ***how***, ***when***, and in ***what manner*** they may worship the Lord. If this is not a government prescription of orthodoxy, then nothing qualifies. Indeed, the Governor has taken "upon [himself] authority to prescribe what shall be orthodox" in Plaintiffs' religious services, *Catholic League for Religious and Civil Rights v. City and Cnty. of San Franscisco*, 624 F.3d 1043, 1059 (9th Cir. 2010), and that is plainly unconstitutional under the First Amendment. *See Hefferman v. City of Patterson*, 136 S. Ct. 1412, 1417 (2016) ("The basis constitutional requirement reflects the First Amendment's hostility to government action that prescribes what shall be orthodox."). The Governor's orders have crossed the line, and it is incumbent on this Court to remedy their excess. The GATHERING ORDERS impose irreparable harm by imposing the State's prescrbed method of worship on Plaintiffs and their religious beliefs. The TRO should issue.

## CONCLUSION

For all of the foregoing reasons and for those outlined in Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Plaintiffs respectfully request that the Court issue

the TRO and PI as set forth in the Prayer for Relief in Plaintiffs' Verified Complaint (V.Compl. at 40–43.)

Respectfully submitted,

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***Attorneys for Plaintiffs***

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of May, 2020, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Daniel J. Schmid
Daniel J. Schmid

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

Deborah S. Hunt
Clerk

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Filed: May 09, 2020

Mr. Wesley Warden Duke
Mr. Jeffrey C. Mando
Mr. Steven Travis Mayo
Mr. Christopher David Wiest

Re: Case No. 20-5465, *Theodore Roberts, et al v. Robert Neace, et al*
Originating Case No.: 2:20-cv-00054

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Laura A. Jones
for Robin Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Thomas Bernard Bruns
Mr. Robert R. Carr
Mr. Barry Lee Dunn
Mr. Marc Griffin Farris
Ms. Jennifer H. Langen
Mr. David Thomas Lovely
Mr. Taylor Allen Payne
Mr. Robert Albert Winter Jr.

Enclosure

No. 20-5465

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
May 09, 2020
DEBORAH S. HUNT, Clerk

| | | |
|---|---|---|
| THEODORE JOSEPH ROBERTS, RANDALL DANIEL, SALLY O'BOYLE, on behalf of themselves and all others similarly situated, | ) | |
| Plaintiffs-Appellants, | ) | O R D E R |
| v. | ) | |
| ROBERT NEACE, in his official capacity as Boone County Attorney, ANDREW G. BESHEAR, in his official capacity as Governor, ERIC FRIEDLANDER, in his official capacity as Acting Secretary of the Cabinet for Health and Family Services, | ) | |
| Defendants-Appellees. | ) | |

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

PER CURIAM. Three congregants of Maryville Baptist Church wish to attend in-person worship services this Sunday, May 10. By order of the Kentucky Governor, however, they may not attend "faith-based" "mass gatherings" through May 20. Claiming that this limitation on corporate worship violates the free-exercise protections of the First and Fourteenth Amendments of the United States Constitution, the congregants seek emergency relief barring the Governor and other officials from enforcing the ban against them. The Attorney General of the Commonwealth supports their motion as amicus curiae. The Governor and other officials oppose the motion.

Governor Beshear has issued two pertinent orders arising from the COVID-19 pandemic. The first order, issued on March 19, prohibits "[a]ll mass gatherings," "including, but not limited to, community, civic, public, leisure, faith-based, or sporting events." R. 1-4 at 1. It excepts "normal operations at airports, bus and train stations, . . . shopping malls and centers," and "typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." *Id.*

The second order, issued on March 25, requires organizations that are not "life-sustaining" to close. R. 1-7 at 2. The order lists 19 broad categories of life-sustaining organizations and over a hundred sub-categories spanning four pages. Among the many exempt entities are laundromats, accounting services, law firms, hardware stores, airlines, mining operations, funeral homes, landscaping businesses, and grocery stores. Religious organizations do not count as "life-sustaining," except when they provide "food, shelter, and social services." *Id.* at 3.

On April 12, Maryville Baptist Church held an Easter service. Some congregants went into the church. Others parked their cars in the church's parking lot and listened to the service over a loudspeaker. Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance, whether in the church or outdoors, amounted to a criminal act. The officers recorded congregants' license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction.

Theodore Joseph Roberts, Randall Daniel, and Sally O'Boyle all attended this Easter service, and they all complied with the State's social-distancing and hygiene requirements during it. At some point during the service, the state police placed attendance-is-criminal notices on their cars. In response, the three congregants sued Governor Beshear, another state official, and a

county official, claiming that the orders and their enforcement actions violate their free-exercise and interstate-travel rights under the U.S. Constitution.

The district court denied relief on the free-exercise claim and preliminarily enjoined Kentucky from enforcing its ban on interstate travel. The congregants appealed. They asked the district court to grant an injunction pending appeal on the free-exercise claim, but the court refused. The congregants now seek an injunction pending appeal based on their free-exercise claim.

Two other cases, challenging the same ban, have been making their way through the federal district courts of Kentucky. In contrast to the district court in this case, they both preliminarily granted relief to the claimants based on the free-exercise claim. On May 8, a district court from the Western District of Kentucky issued an order preliminarily enjoining the Governor from enforcing the orders' ban on in-person worship with respect to the same church at issue in our case. *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE (W.D. Ky. May 8, 2020). That same day, a district court from the Eastern District of Kentucky reached the same conclusion in an action involving a different church. *Tabernacle Baptist Church, Inc. of Nicholasville, Kentucky v. Beshear*, N. 3:20-cv-00033-GFVT (E.D. Ky. May 8, 2020). In doing so, it observed that "the constitutionality of these governmental actions will be resolved at the appellate level, at which point the Sixth Circuit will have the benefit of the careful analysis of the various district courts, even if we disagree." *Id.* at 5.

This is not our first look at the issues. Last week, we granted relief in the case from the Western District of Kentucky with respect to drive-in services and urged the district court and parties to prioritize resolution of the more difficult in-person aspects of the case. *Maryville Baptist Church, Inc. v. Beshear*, -- F.3d --, 2020 WL 2111316 (6th Cir. May 2, 2020). We are grateful for

their input. In assessing today's motion for emergency relief, we incorporate some of the reasoning (and language) from our earlier decision.

We have jurisdiction over this appeal. "Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions" are immediately appealable. 28 U.S.C. § 1292(a)(1). Under the circumstances, this order operates as the denial of an injunction. And no one can fairly doubt that this appeal will "further the statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). At least four more worship services are scheduled on the Sundays and Wednesdays between today and May 20, when the Governor has agreed to permit places of worship to reopen. Lost time means lost rights.

We ask four questions in evaluating whether to grant a stay pending appeal: Is the applicant likely to succeed on the merits? Will the applicant be irreparably injured absent a stay? Will a stay injure the other parties? Does the public interest favor a stay? *Nken v. Holder*, 556 U.S. 418, 434 (2009).

*Likelihood of success.* The Governor's restriction on in-person worship services likely "prohibits the free exercise" of "religion" in violation of the First and Fourteenth Amendments. U.S. Const. amends. I, XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). On one side of the line, a generally applicable law that incidentally burdens religious practices usually will be upheld. *See Emp't Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872, 878–79 (1990). On the other side of the line, a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be "justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 553 (1993).

These orders likely fall on the prohibited side of the line. Faith-based discrimination can come in many forms. A law might be motivated by animus toward people of faith in general or one faith in particular. *Id.* A law might single out religious activity alone for regulation. *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995). Or a law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities. *See Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365–67 (3d Cir. 1999).

Were the Governor's orders motivated by animus toward people of faith? We don't think so. The initial enforcement of the orders at Maryville Baptist Church no doubt seemed discriminatory to the congregants. But we don't think it's fair at this point and on this record to say that the orders or their manner of enforcement turned on faith-based animus.

Do the orders single out faith-based practices for special treatment? We don't think so. It's true that they prohibit "faith-based" mass gatherings by name. R. 1-4 at 1. But this does not suffice by itself to show that the Governor singled out faith groups for disparate treatment. The order lists many other group activities, and we accept the Governor's submission that he needed to mention worship services by name because there are many of them, they meet regularly, and their ubiquity poses material risks of contagion.

Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so. As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. *Ward*, 667 F.3d at 738. "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and

generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

The Governor insists at the outset that there are "no exceptions." ROA (20-5427) 13-1 at 25. But that is word play. The orders allow "life-sustaining" operations and don't include worship services in the 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, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate so long as they follow social-distancing and other health-related precautions. R. 1-7 at 2–6. 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 the other services.

Keep in mind that the Church and its congregants just want to be treated equally. They don't 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. They do not ask to share a chalice. The Governor has offered no good reason 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.

Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.

No doubt, some groups in some settings will fail to comply with social-distancing rules. If so, the Governor is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not. What he can't do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings. We have plenty of company in ruling that at some point a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one. *See, e.g.*, *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165–70 (3d Cir. 2002); *Fraternal Order of Police*, 170 F.3d at 365; *see also Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 196–98 (2d Cir. 2014).

We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth's citizens. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). And we agree that no one, whether a person of faith or not, has a right "to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, 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. While the law may take periodic naps during a pandemic, we will not let it sleep through one.

Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is "government *neutrality*," not "governmental avoidance of bigotry." *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). A law is not neutral and generally applicable unless there is "neutrality between religion and non-religion." *Hartmann*,

68 F.3d at 978. And a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones. *See id.* at 979; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1233–35, 1234 n.16 (11th Cir. 2004); *see also Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus.").

All of this requires the orders to satisfy the strictures of strict scrutiny. They cannot. No one contests that the orders burden sincere faith practices. Faith plainly motivates the worship services. And no one disputes the Church's sincerity. Orders prohibiting religious gatherings, enforced by police officers telling congregants they violated a criminal law and by officers taking down license plate numbers, will chill worship gatherings.

At the same time, no one contests that the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus. The Governor has plenty of reasons to try to limit this contagion, and we have no doubt he is trying to do just that.

The question is whether the orders amount to "the least restrictive means" of serving these laudable goals. That's a difficult hill to climb, and it was never meant to be anything less. *See Lukumi*, 508 U.S. at 546. There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of "typical office environments," R. 1-4 at 1, which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church

services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.

Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25; *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at *7–8 (W.D. Ky. Apr. 11, 2020).

As individuals, we have some sympathy for Governor DeWine's approach—to allow places of worship in Ohio to hold services but then to admonish all of them (we assume) that it's "not Christian" to hold in-person services during a pandemic. Doral Chenoweth III, *Video: Dewine says it's "not Christian" to hold church during coronavirus*, Columbus Dispatch, April 1, 2020. But the Free Exercise Clause does not protect sympathetic religious practices alone. And that's exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it. *Smith*, 494 U.S. at 886–87.

The Governor suggests that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport. But the reason a group of people go to one place has nothing 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 for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship

services. If the problem is numbers, and risks that grow with greater numbers, there is a straightforward remedy: limit the number of people who can attend a service at one time. All in all, the Governor did not customize his orders to the least restrictive way of dealing with the problem at hand.

*Other factors.* Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). Just so here. The prohibition on attending any worship service through May 20 assuredly inflicts irreparable harm by prohibiting them from worshiping how they wish. *See Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). 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. *See Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012).

In the week since our last ruling, the Governor has not answered our concerns that the secular activities permitted by the order pose the same public-health risks as the kinds of in-person worship barred by the order. As before, the Commonwealth remains free to enforce its orders against all who refuse to comply with social-distancing and other generally applicable public health imperatives. All this preliminary injunction does is allow people—often the same people—to seek spiritual relief subject to the same precautions as when they seek employment, groceries, laundry, firearms, and liquor. All of us can agree that it's not easy to decide what is Caesar's and what is God's in the context of a pandemic that has different phases and afflicts different parts of

the country in different ways. But at this point and in this place, the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment.

The plaintiffs' motion for an injunction pending appeal is **GRANTED**. The Governor and the other defendants are enjoined, during the pendency of this appeal, from enforcing orders prohibiting in-person 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.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARYVILLE BAPTIST CHURCH, INC.
and DR. JACK ROBERTS, Plaintiffs,

v. Civil Action No. 3:20-cv-278-DJH-RSE

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

* * * * *

**ORDER**

The Court previously denied the motion of Plaintiffs Maryville Baptist Church and Jack Roberts for a temporary restraining order preventing Governor Andy Beshear from enforcing a ban on mass gatherings as it applied to church services. (Docket No. 9) Plaintiffs appealed the Court's ruling, and the Sixth Circuit has since granted in part Plaintiffs' motion for an injunction pending appeal. *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 2020 U.S. App. LEXIS 14213 (6th Cir. May 2, 2020). The Sixth Circuit, noting that the Governor had not asserted sovereign immunity, enjoined the Governor from enforcing the ban as to drive-in church services but left for this Court to decide whether the ban was permissible as applied to in-person services. *See id.* at *8-*9, *15-*16. After briefing was complete, as the Court finalized its decision on that issue, the Governor filed a motion to dismiss, asserting sovereign immunity for the first time in this litigation. (D.N. 33) As explained below, the Court finds that Plaintiffs would likely succeed on the merits of their claim under the Kentucky Religious Freedom Restoration Act (KRFRA). In the alternative, the Court finds that Plaintiffs have a substantial likelihood of success on the merits of their constitutional claims. The Court will therefore grant the remainder of Plaintiffs' motion for injunction pending appeal.

**I.**

Plaintiffs assert violations of the First Amendment and KRFRA arising from orders issued by the Governor and state health officials in response to the COVID-19 pandemic. (D.N. 1) The orders ban "mass gatherings," defined as "any event or convening that brings together groups of individuals." (D.N. 1-5, PageID # 66) This restriction includes, "but [is] not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." (*Id.*) The ban on mass gatherings is consistent with guidance from the Centers for Disease Control and Prevention that "COVID-19 spreads mainly among people who are in close contact with each other (within about 6 feet) for a prolonged period" and may be spread by individuals who do not show symptoms of illness. (D.N. 31-2, PageID # 453 (affidavit of Kentucky Public Health Commissioner Steven Stack, M.D.)) Plaintiffs maintain that they have required, and would continue to require, social-distancing and hygiene measures for individuals attending in-person services at the church.[1] (D.N. 1, PageID # 17)

The parties repeatedly denied any need for discovery in this matter. Nor did either side seek an evidentiary hearing or oral argument on Plaintiffs' motions. The Court directed the parties to confer regarding a set of stipulated facts. The stipulation filed (D.N. 29) is of minimal value. As a result, the factual basis for the analysis below is severely limited.

**II.**

The Federal Rules of Civil Procedure provide that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction

[1] Plaintiffs have held, and continue to hold, in-person services in violation of the Governor's orders. (*See, e.g.*, D.N. 25-3)

on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d). As before, the Court's analysis is guided by four factors: (1) whether Plaintiffs have demonstrated a strong likelihood of success on the merits; (2) whether they will be irreparably injured absent the requested injunction; (3) whether the injunction would "substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *4-*5 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

Because the Court must avoid constitutional questions if possible, it addresses Plaintiffs' KRFRA claim first. *See, e.g.*, *Torres v. Precision Indus.*, 938 F.3d 752, 754-57 (6th Cir. 2019); *WJW-TV, Inc. v. Cleveland*, 878 F.2d 906, 910 & n.4 (6th Cir. 1989).

**A. Kentucky Religious Freedom Restoration Act**

Kentucky Revised Statutes § 446.350 provides:

> The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government 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. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

There is no dispute here that "the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus." *Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *6. Likewise, neither the Court nor the Governor questions whether the activities burdened by the restrictions are motivated by sincerely held religious beliefs, or that the burden is substantial. *See id.* Thus, as the Sixth Circuit recognized, Plaintiffs' KRFRA claim turns on the "least restrictive means" element, *id.*, for which the Governor bears the burden of proof. *See* Ky. Rev. Stat. § 446.350. Unfortunately, the Governor does not address this element, much less provide "clear and convincing evidence" to support it. (*See generally* D.N. 31)

The Governor briefly argues, for purposes of Plaintiffs' constitutional claims, that the orders are narrowly tailored. Citing evidence that "mass gatherings present a particular risk for the spread of disease, as compared to transitory encounters," he asserts that "[p]roviding an exception to the mass gatherings order for in-person faith-based services would compromise the Commonwealth's efforts to reduce the spread of COVID-19 and flatten the curve." (*Id.*, PageID # 430 & n.52; *see* D.N. 31-2, PageID # 453) The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals. (*See generally* D.N. 31) Most notably, his response brief fails to address the Sixth Circuit's suggestion that concerns about large gatherings could be adequately addressed by simply "limit[ing] the number of people who can attend a service at one time." *Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *14. Because the Governor bears the burden of proof on this element, Ky. Rev. Stat. § 446.350, the Court is compelled to find that Plaintiffs have a strong likelihood of success on the merits of their KRFRA claim.

**B. Constitutional Claims**

In the alternative—assuming, without deciding, that the Governor has properly asserted sovereign immunity and that the KRFRA claim is therefore barred—the Court finds that Plaintiffs are likely to succeed on the merits of their constitutional claims. Unlike this Court, the Sixth Circuit read the mass-gatherings ban as discriminatory and thus subject to strict scrutiny. *See Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *10-*11. (*Cf.* D.N. 9, PageID # 223-25) And as explained above, the Governor has offered little to show that the orders were narrowly tailored. *See supra* part II.A; *see also Maryville Baptist*, 2020 U.S. Dist. LEXIS 14213, at *7 ("All in all, the Governor did not narrowly tailor the order's impact on religious exercise.").

The remaining factors all follow from Plaintiffs' likelihood of success. *See Maryville Baptist*, 2020 U.S. Dist. LEXIS 14213, at *14. While "the balance is more difficult when it comes to in-person services," the Governor has not shown that allowing in-person services at limited capacity, with strict social-distancing and hygiene measures observed, would substantially harm third parties or the public interest. *See id.* at *10-*11 (noting that "[t]he 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").[2] He still "has offered no good reason . . . for refusing to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the

[2] The Sixth Circuit was concerned that this Court "seemed to think . . . 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." *Id.* at *13. To address the panel's concern, the Court clarifies that this was not, and is not, the Court's belief. Rather, the Court contrasted events where individuals gather and remain at a specific time for a common purpose or experience—such as church services, movies, concerts, and sporting events, all of which are currently prohibited—with activities undertaken individually, such as a trip to the grocery or liquor store, which is typically brief and begins and ends according to the individual's independent purpose. (*See* D.N. 9, PageID # 224-25; *see also* D.N. 31, PageID # 427 (noting that the ban on mass gatherings is intended to "close[] any event the purpose of which is to congregate person-to-person for an extended period to engage in a particular activity")) "Why can someone safely walk down a grocery store aisle but not a pew?," the Sixth Circuit asks, "[a]nd why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Id.* at *11. In the infectious-disease context, the Court views the differences between such encounters as significant: the fellow grocery shopper will not sit down nearby and stay for an hour or more, talking and singing; the deliverywoman is unlikely to embrace or speak closely with a package recipient. The studies cited by the Governor, as well as the affidavit of Commissioner Stack, confirm that these distinctions are relevant in preventing the spread of COVID-19. (D.N. 31, PageID # 430 n.52 ("There is preliminary evidence suggesting that mass gatherings present a particular risk for the spread of disease, as compared to transitory encounters, which is why CDC has advised against gatherings where individuals are in close contact for prolonged periods of time." (citations omitted)); D.N. 31-2, PageID # 453) The same distinctions cannot be drawn for workplaces such as law offices or laundromats, as discussed above.

same." *Id.* at *13. The Court therefore finds that preliminary injunctive relief is warranted on Plaintiffs' constitutional claims as well.

**III.**

For the reasons set forth above, it is hereby

**ORDERED** as follows:

(1) Plaintiffs' renewed motion for injunction pending appeal (D.N. 25) is **GRANTED** as to in-person services. Given that the same issues are raised in Plaintiffs' initial motion for preliminary injunction, that motion (D.N. 3) is likewise **GRANTED**. The Governor and other Commonwealth officials are **ENJOINED** from enforcing the ban on mass gatherings as to in-person services at Maryville Baptist Church so long as the church, its ministers, and its congregants adhere to public health requirements set by state officials.[3]

(2) Plaintiffs' initial motion for injunction pending appeal (D.N. 17) and motion for reassignment (D.N. 11) are **DENIED** as moot.

(3) The Governor's motion to exceed the page limit (D.N. 30) and the motion of the Commonwealth of Kentucky for leave to file an amicus brief (D.N. 20) are **GRANTED**.

(4) If necessary, the Court will set by subsequent order a briefing schedule on the Governor's motion to dismiss and a hearing on Plaintiffs' request for permanent injunction.

May 8, 2020

**David J. Hale, Judge**
**United States District Court**

[3] At approximately 6:00 p.m. on Friday, May 8, 2020, the Governor filed "Supplemental Fact Development" that included new guidelines for in-person worship services. (D.N. 34)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

| | | |
|---|---|---|
| TABERNACLE BAPTIST CHURCH, INC. OF NICHOLASVILLE, KENTUCKY,<br><br>Plaintiff,<br><br>V.<br><br>ANDREW BESHEAR, in his official capacity as Governor of Kentucky, *et al.*,<br><br>Defendants. | ) | Civil No. 3:20-cv-00033-GFVT<br><br>**OPINION & ORDER** |

*** *** *** ***

We are a relatively young nation. But our Constitution is the oldest in the world.[1] We describe it as enduring— a value that must be protected not only when it is easy but when it is hard.

And this is a hard and difficult time. A new virus sweeps the world, ravages our economy and threatens our health. Public officials, including the defendants in this case, make minute by minute decisions with the best of intentions and the goal of saving the health and lives of our citizens.

But what of that enduring Constitution in times like these? Does it mean something different because society is desperate for a cure or prescription?

[1] "Written in 1787, ratified in 1788, and in operation since 1789, the United States Constitution is the world's longest surviving written charter of government." UNITED STATES SENATE, CONSTITUTION DAY, https://www.senate.gov/artandhistory/history/common/generic/ConstitutionDay.htm.

Simply put, that is the question presented here. Tabernacle Baptist Church wants to gather for corporate worship. They want to freely exercise their deeply held religious belief about what it means to be a faithful Christian. For them, it is "essential" that they do so. And they want to invoke the Constitution's protection on this point.

But the governor, by executive order, has put a stop to that. He can do that, but he must have a compelling reason for using his authority to limit a citizen's right to freely exercise something we value greatly— the right of every American to follow their conscience on matters related to religion. As explained below, despite an honest motive, it does not appear at this preliminary stage that reason exists. Consequently, as explained below, the motions for a temporary restraining order are GRANTED.

**I**

To curb the spread of the coronavirus in the Commonwealth of Kentucky, Governor Andrew Beshear has issued a series of executive orders limiting social interaction between Kentuckians. Non-essential businesses are temporarily closed, restaurants are relegated to take-out only, and citizens have been asked to practice social distancing. The plaintiffs take exception to two of these protective measures. On March 19, 2020, as part of broader efforts to "flatten the curve,"[2] acting Secretary of the Cabinet for Health and Family Services Eric Friedlander issued an order prohibiting "mass gatherings." [R. 3-7.]. Per Secretary Friedlander's Order, mass gatherings 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;

[2] The term "flatten the curve" refers to slowing the spread of the coronavirus through the population. The goal is to "reduce[] the number of cases that are active at any given time, which in turn gives doctors, hospitals, police, schools, and vaccine-manufacturers time to respond, without becoming overwhelmed." Siobhan Roberts, *Flattening the Coronavirus Curve*, The New York Times, https://www.nytimes.com/article/flatten-curve-coronavirus.html. The result is that, when plotted on a line graph, the rate of infection appears as a flattened curve rather than a steep peak.

concerts; festivals; conventions; fundraisers; and similar activities." *Id.* (emphasis added). Some activities which necessarily involve large groups of individuals were excluded. "[A]irports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit" were not included within the definition of "mass gathering," nor were "typical office environments, factories, or retail or grocery stores[.]" *Id.*

Later, on March 25, 2020, Governor Beshear issued an executive order mandating all businesses which are not "life-sustaining" close. [R. 3-5.]. Religious organizations were excluded from the category of "life-sustaining," except to the extent they provide "food, shelter and social services." *Id.* Entities allowed to remain open included hardware stores, laundromats and dry cleaners, law offices, and liquor stores, provided they adhere to social distancing and hygiene guidelines. *See id.*

Plaintiff Tabernacle Baptist Church describes itself as "an independent, fundamental, Baptist church, independent of the world but dependent on the Word of God." *Id.* at ¶ 13. Since issuance of the above orders, Tabernacle has ceased holding in-person religious services. [R. 3-1 at 5.] Instead, Tabernacle has resorted to broadcasting services online via Facebook or holding drive-in services wherein congregants may listen to the service over their FM radio. *Id.* For Plaintiff, these substitutes offer cold comfort. "Tabernacle has a sincerely-held religious belief that online services and drive-in services do not meet the Lord's requirement that the church meet together in person for corporate worship." *Id.* For this reason, Tabernacle argues the foregoing Orders violate its First Amendment rights to free exercise of religion and freedom of assembly.[3] [R. 1.] Tabernacle argues it is likely to succeed on the merits of its claims because the orders are not narrowly tailored to serve the public health interest.

[3] The executive order has yet to be enforced against Plaintiff Tabernacle. However, the Court

Defendants dispute this characterization. Although not required in the context of ruling on a TRO, the Court held a telephone hearing this afternoon, shortly after the Defendants filed an appeal in a similar case. Counsel for Tabernacle, the Attorney General, Secretary Friedlander, and Governor Beshear participated in the call. Defendants argued the prohibition on mass gatherings is constitutional, because it is applicable to all mass gatherings generally. Further, the Defendants pointed out factual distinctions between the social interaction that takes place in a transactional setting, such as a grocery store, and the communal nature of religious services. The arguments made were substantive, not jurisdictional.

Notably, Tabernacle's is not the first challenge that has sought to enjoin the actions of Kentucky officials that curtailed residents' ability to participate in corporate worship. To date, three other district courts in Kentucky have considered whether to grant a temporary restraining order to enjoin government proscriptions on religious gatherings. In one case, the plaintiff church requested a TRO against the City of Louisville's prohibition on drive-in church services on Easter. *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 U.S. Dist.

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notes that there is no issue at this preliminary stage concerning Tabernacle's ability to establish standing in this apparent pre-enforcement challenge. *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016); *see also Michigan Gas Co. v. F.E.R.C.*, 115 F.3d 1266, 1269 (6th Cir. 1997) ("Standing 'is a qualifying hurdle that plaintiffs must satisfy even if raised sua sponte by the court.'"). To bring such a challenge, a plaintiff must sufficiently allege (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) that is "proscribed by a [law]," and (3) "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). It is beyond dispute that the first two elements are easily met. As to the third element, the Court notes first that violation of the recently promulgated executive orders is a Class A misdemeanor under Kentucky law. *See* KRS § 39A.990; *see also* KRS § 532.020(2); KRS § 534.040 (setting forth the penalties for a Class A misdemeanor). And second, there is an established record of enforcement against churches that have violated the executive order in the same way Tabernacle proposes. *See Maryville Baptist*, 2020 U.S. App. LEXIS 14213, at *1 (6th Cir. May 2, 2020); *Roberts*, 2020 U.S. Dist. LEXIS 77987, at *2 (E.D. Ky. May 4, 2020). Thus, it appears that Tabernacle also meets this third and final element. In sum, on the limited record before the Court, it appears that Tabernacle meets each element of the pre-enforcement standing analysis and, notably, the Governor has advanced no argument to the contrary. Indeed, the Governor, to this point in the litigation, evinces an intent to continue enforcing the orders at issue.

LEXIS 65924 (W.D. Ky. Apr. 11, 2020). The other two cases centered on the constitutionality of Governor Beshear's executive orders. *See Roberts v. Neace*, No. 2:20-CV-054-WOB, 2020 U.S. Dist. LEXIS 77987 (E.D. Ky. May 4, 2020); *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-CV-278-DJH, 2020 U.S. Dist. LEXIS 70072 (W.D. Ky. Apr. 18, 2020). Appeals are pending before the Sixth Circuit in each of these latter cases. In *Roberts*, plaintiffs have moved for an injunction pending appeal that would permit them to attend in-person church services this Sunday. [*Roberts, et al. v. Neace, et a.*, 2:20-54-WOB-CJS, R. 56.] The Plaintiffs in *Maryville Baptist* are awaiting a district court ruling on their motion to enjoin the Governor's prohibition on mass gatherings as it applies to in-person religious services while their appeal remains pending. *Id.*

While instructive, this Court is not bound by the decisions of the district courts in those cases. *See Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011); *Ohio A. Philip Randolph Inst. v. Larose*, 761 F. App'x 506, 514 n. 4 (6th Cir. 2019) ("[T]ypically district court judges are not bound by previous decisions of other judges within the same district."). Ultimately, the constitutionality of these governmental actions will be resolved at the appellate level, at which point the Sixth Circuit will have the benefit of the careful analysis of the various district courts, even if we disagree.

**II**

Rule 65 allows the Court to issue a TRO without notice to the other party only if "(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). As noted, the Governor and

Secretary Friedlander filed an appearance, and participated in a hearing held earlier today. Additionally, although the Governor has not yet prepared a response to the instant motion, the Court considered briefing filed by the defendants in other, similar challenges to the prohibition on mass gatherings as it pertains to religious services, and provided at the Court's request. In determining whether to issue a TRO, the Court examines: 1) whether the movant has shown a strong likelihood of success on the merits; 2) whether the movant will suffer irreparable harm if the injunction is not issued; 3) whether the issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by issuing the injunction. *Overstreet v. Lexington–Fayette Urban County Government*, 305 F.3d 566, 573 (citations omitted).

"[A] temporary restraining order is an extraordinary remedy designed for the limited purpose of preserving the status quo pending further proceedings on the merits[.]" *Stein v. Thomas*, 672 Fed. App'x 565, 572 (6th Cir. 2016). This is because "our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir. 1978) (quoting *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 439 (1974)). Thus, Tabernacle must show that the foregoing preliminary injunction factors are met, and that immediate, irreparable harm will result if the TRO is not issued.

**A**

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or exercising the free exercise thereof," with few exceptions. U.S. Const. amend. 1. "When constitutional rights are threatened or impaired, irreparable injury is presumed." *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 649 (6th Cir. 2015)

(internal citations omitted). The Supreme Court has held "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This is precisely what Tabernacle alleges: violation of its First Amendment rights, specifically its right to exercise its religion and the right to freely assemble. [R. 1; R. 3-1.] Sixth Circuit precedent establishes that, "when a party seeks a preliminary injunction on the basis of a . . . violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009).

Of course, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." *Crowley v. Christensen*, 137 U.S. 86, 89 (1890). The question becomes, then, whether the mass gathering prohibition issued by Governor Beshear amounts to "reasonable conditions" on Kentuckians' constitutional right to free exercise of their sincerely-held religious beliefs. Context is important. The orders at issue do not simply restrict religious expression; they restrict religious expression in an attempt to protect the public health during a global pandemic. As a result, the Court is tasked with identifying precedent in unprecedented times.

Defendant Governor Beshear and other courts have looked to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 2020 U.S. App. LEXIS 13357 (6th Cir. Apr. 24, 2020); *On Fire Christian Ctr. v. Fischer*, 2020 U.S. Dist. LEXIS 65924, *16–17 (W.D. Ky. Apr. 11, 2020). There, the Supreme Court considered whether, when faced with an outbreak of smallpox, the city of Cambridge could constitutionally require its adult residents to receive vaccinations against the disease. *See*

*Jacobsen*, 197 U.S. at 25–26. Those who refused to vaccinate were subjected to a fine. *Id.* at 26. Although the defendant argued the law was an invasion of his liberty and violative of due process, the Supreme Court upheld the vaccination requirement based on public health concerns. *Id.* at 39.

Though over a century old, *Jacobson* is arguably the case that most directly speaks to "the expanded scope of a state's police power during times of public health crises[.]" *Adams & Boyle, P.C.*, 2020 U.S. Dist. LEXIS 13357 at *17. The Fifth Circuit has distilled *Jacobson*'s analysis into a clearer, multi-factor test:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive." At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

*In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020) (internal citations omitted); *see also Adams & Boyle, P.C. v. Slatery*, 2020 U.S. App. LEXIS 13357 (6th Cir. Apr. 24, 2020) (applying the foregoing factors to the Governor of Tennessee's directive to "postpone surgical and invasive procedures that are elective and non-urgent" including abortions). The *Jacobson* test gives states considerable leeway in enacting measures during public health emergencies. However, "even under *Jacobson*, constitutional rights still exist." *On Fire Christian Ctr.*, 2020 U.S. Dist. LEXIS 65924 at * 15. And while courts should refrain from second-guessing the efficacy of a state's chosen protective measures, "an acknowledged power of a local community to protect itself against an epidemic . . . might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere[.]" *Jacobson*, 197 U.S at 28.

Here, not only has Tabernacle alleged an irreparable injury, but Tabernacle is likely to succeed on the merits of its federal constitutional claim. Defendant does not dispute that the challenged orders place a burden on the free exercise of religion in Kentucky. A law that incidentally burdens religion, but "that is neutral and of general applicability need not be justified by a compelling government interest[.]" *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). If a law is not neutral or generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* 531–32. Even viewed through the state-friendly lens of *Jacobson*, the prohibition on religious services presently operating in the Commonwealth is "beyond what was reasonably required for the safety of the public." *Jacobson*, 197 U.S. at 28.

The Sixth Circuit recently addressed a similar challenge to Kentucky's prohibition on religious services. *See Maryville Baptist Church, Inc. v. Beshear*, 2020 U.S. App. LEXIS 14213 (6th Cir. May 2, 2020). Maryville Baptist Church held a drive-in service on Easter Sunday. But, pursuant to the prohibition on mass gatherings and executive order closing non-essential businesses—the same orders challenged in this case—"Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act." *Id.* at *3. On appeal, the Sixth Circuit considered whether to stay the district court's order denying Maryville Baptist Church's motion to enjoin enforcement of these restrictions. *Id.* In its analysis, the Court observed that Maryville Baptist was likely to succeed on the merits of its claim because "[t]he 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." *Id.* at *7.

Ultimately, the Sixth Circuit opted to enjoin enforcement of the orders only as they pertained to drive-in services. *Id.* at * 15. *Maryville Baptist* does not decide this case, but it is indicative of what might come. It follows that the prohibition on in-person services should be enjoined as well. The restrictions which the Sixth Circuit criticized as "inexplicably applied to one group and exempted from another" are the same restrictions Tabernacle challenges today. *Id.* at *11. And, as the Sixth Circuit recognized, "many of the serial exemptions for secular activities pose comparable public health risks to worship services." *Id.* at *10. The prohibition on mass gatherings is not narrowly tailored as required by *Lukumi.* There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection.

Finally, the Court is cognizant that absent a temporary restraining order today, congregants Tabernacle Baptist will be forced to forego in-person service this Sunday. Tabernacle states it "is committed to physically gathering its congregants in person in its sanctuary in a manner consistent with social distancing precautions in order to ensure the safety and well-being of its congregants." [R. 3-1 at 4.] And, should they be permitted to gather, Tabernacle has said it will follow the Center for Disease Control's guidelines on mass gatherings. *Id.* On this condition, the Court will GRANT Plaintiff's Motion for Temporary Restraining Order.

**B**

Plaintiffs have established a likelihood of success on the merits with respect to their free exercise claim, and the Court grants their motion for a TRO on that basis. The likelihood of

success on the merits is largely determinative in constitutional challenges like this one, however, the remaining factors also mitigate in favor of Plaintiffs. As already explained, Tabernacle's injury is irreparable. *See Elrod*, 427 U.S. at 373. To stay the prohibition on mass gatherings with respect to religious services which observe the social distancing guidelines promulgated by the Center for Disease Control, as Tabernacle has promised to do, does not harm the Defendants. Finally, the public interest favors the enjoinment of a constitutional violation. *See Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982).

While the Court has granted Plaintiff's and the Attorney General's Motions for a TRO based on the free exercise clause of the First Amendment, that is not the only issue before it. Tabernacle also brings claims grounded in the First Amendment guarantee of freedom to assemble, the Kentucky Constitution, and Kentucky's Religious Freedom Restoration Act. [R. 1] These issues are reserved for another day, and will benefit from briefing from the Defendants.

**C**

As a final matter, the Court considers the scope of the TRO. The Attorney General urges the Court to apply its injunction statewide rather than limiting its application to Tabernacle Baptist Church. In *Califano v. Yamasake*, the Supreme Court pointed out that one of the "principles of equity jurisprudence" is that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Rodgers v. Bryant*, 942 F.3d 451 (quoting *Califano v. Yamasake*, 442 U.S. 682 (1979)); *see also Trump v. Int'l Refugee Assist. Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) ("Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents."); *De Beers Consol. Mines Ltd. v. United Stat*es, 325 U.S. 212, 220, 65 S. Ct. 1130, 89 L. Ed. 1566 (1945) ("A preliminary

injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."). In the present case, the Executive Order at issue does not just affect Tabernacle Baptist Church. The Executive Order applies to all churches. Therefore, as the Eighth Circuit has recently upheld, injunctive relief may extend statewide because the violation established impacts the entire state of Kentucky.

**III**

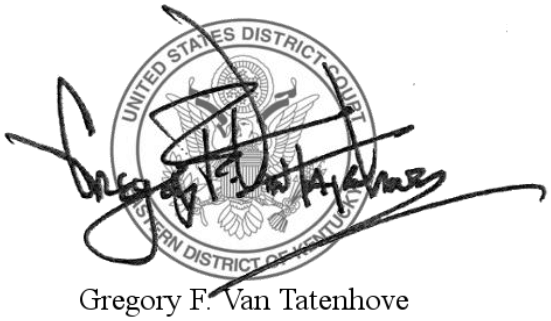
The Constitution will endure. It would be easy to put it on the shelf in times like this, to be pulled down and dusted off when more convenient. But that is not our tradition. Its enduring quality requires that it be respected even when it is hard.

In light of the foregoing, the Court will grant Plaintiff's Motion for a TRO. But the Court's review at this stage is preliminary. In depth consideration of the constitutional issues at play will require additional briefing from the parties, and particularly a response from Defendants. Expedited consideration is appropriate. Accordingly, and the Court being otherwise sufficiently advised, it is **ORDERED** as follows:

1. The Motions for Temporary Restraining Order **[R. 3; R. 13]** are **GRANTED;**
2. Defendants are **ENJOINED** from enforcing the prohibition on mass gatherings with respect to any in-person religious service which adheres to applicable social distancing and hygiene guidelines;
3. Intervening Plaintiff Attorney General Daniel Cameron's Motion for Emergency Hearing **[R. 13]** is **DENIED AS MOOT**;
4. A telephonic scheduling conference shall be held **Monday, May 11, 2020** at **11:00 a.m.**, with Judge Van Tatenhove sitting in **Frankfort**, Kentucky; and

5. To join the teleconference, the parties are **DIRECTED** to call AT&T Teleconferencing at 1-877-336-1280 and enter Access Code 2086161 (followed by #), and, when requested, enter the Security Code 09170 (followed by #).

This the 8th day of May, 2020.




Gregory F. Van Tatenhove
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**Eastern Division**

| | | |
|---|---|---|
| ELIM ROMANIAN PENTECOSTAL CHURCH, LOGOS BAPTIST MINISTRIES, | ) | |
| Plaintiff, | ) | Case No. 1:20-cv-02782 |
| v. | ) | |
| JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois, | ) | |
| Defendant. | ) | |

**SUPPLEMENTAL DECLARATION OF PASTOR CRISTIAN IONESCU IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, CRISTIAN IONESCU, being first duly sworn and cautioned, hereby testify as follows:

1) I am over the age of 18 years, I have personal knowledge of the matters set forth in this declaration, and if called to testify upon these matters I would and could do so competently.

2) I am Senior Pastor of Elim Romanian Pentecostal Church, one of the Plaintiffs in this action. I submit this Supplemental Declaration to supplement the verified facts in Plaintiffs' Verified Complaint, and to bring to the Court's attention some factual developments since that Complaint was filed.

3) Today, Sunday May 10, 2020, Elim Church held a religious service on its premises (hereinafter "Sunday service"), as we indicated to Governor Pritzker that we would in our pre-suit communication, in which we requested that he permit us to hold the service subject to strict social distancing and health precautions that we indicated we would voluntarily undertake. (Dkt. 1-12).

4) Elim Church strictly complied with each of the 10 safety points on page 3 of our letter to Governor Pritzker. (Dkt. 1-12 at 3).

5) Because we wanted to be beyond reproach, and because we care deeply about the health and safety of our members and congregants, we even went many steps farther than we indicated in our letter.

6) For instance:

a) On Saturday, May 9, we cordoned off with yellow tape approximately 85% of the 750 seats in our auditorium, leaving only approximately 120 seats (15%) available for attendees of our Sunday service, so that we can be sure that attendees are spaced at least 6 feet apart. The first 1 minute and 40 seconds of the video available at this link accurately depicts the auditorium with the blocked seats: https://youtu.be/Ccwq9BTdUPc.

b) On Saturday, May 9, 2020, the day before the service, we hired a professional industrial cleaning company to thoroughly clean and disinfect our premises, including treatment for microbial and virologic agents. The first 1 minute and 40 seconds of the video available at this link accurately depicts the cleaning company at work in our auditorium: https://youtu.be/Ccwq9BTdUPc.

c) In advance of the service, we requested any person with any symptoms of communicable illness, any person exposed to anyone diagnosed with COVID-19, and any person advanced in age or with secondary immunological conditions to refrain from attending our service.

d) At the entrance to our Sunday service, we had our personnel take the temperature of each person wishing to be admitted into our service, with contactless thermometers. We are aware of commercial companies, such as Frontier Airlines, taking their customers' temperatures and refusing service to customers with temperatures above 100.4 degrees. (*See* https://www.washingtonpost.com/travel/2020/05/07/frontier-just-became-first-us-airline-require-passenger-temperature-screening/). Because we wanted to be extra-safe and beyond reproach, we instructed our personnel to refuse admittance to anyone with a temperature of above 99.5 degrees.

e) At the Sunday service, we had to and did turn away several people after our designated capacity of 15% (120 seats) was filled.

f) At the entrance to our Sunday service, we provided complimentary hand sanitizer, gloves and masks for anyone wishing to use them.

g) At the Sunday service we created and strictly enforced a six-foot bubble zone around each person attending the service. Because we knew that media and other people would be watching our service and would be unaware of which people belong to the same household, and because we wanted to be above reproach, we even asked family members from the same household, who are not otherwise socially distanced off our premises, to generally maintain the six foot separation on our premises, so that no one will be confused or doubt our commitment to the health and safety of our congregants. Although there may have been a parent and child **from the**

**same household** that did come closer to each other than six feet, no persons who are not living together came closer to each other than six feet.

h) The following picture accurately reflects our choir members, appropriately distanced, during our Sunday service:

i) The following picture accurately reflects our congregation, appropriately distanced, during our Sunday Service

j) During our service, we requested our attendees to sing and pray in much lower and softer voices than they might otherwise.

7) Even though we voluntarily took these extensive precautions, we were extremely concerned that our service would be interrupted by law enforcement, and that I and other members would be arrested and hauled off to jail, because our service was held in violation of Governor Pritzker's 10-person limit that is discriminatorily applied against churches such as hours but not against other non-religious entities deemed essential, and because Governor Pritzker and law enforcement agencies promised enforcement through arrests, fines and other punitive and criminal measures.

8) Because the Governor's 10-person limit on churches – without regard to size or capacity, and without regard to any social distancing or safety measures – remains in effect, we continue to be very concerned that law enforcement agents will interrupt and interfere with our future services, and will arrest me and other members of the church.

9) The concerns we have about being fined, arrested, hauled off to jail or subjected to other punitive measures have interfered with and diminished our collective worship experience, to a much greater extent than COVID-19, and the precautionary measures we have voluntarily employed, ever could. Because of the threat of criminal arrest and punishment, we are unable to gather in peace and to worship God freely and without intimidation, according to our conscience.

10) The measures we voluntarily took for this Sunday service, we are willing to voluntarily take again – and will take again. No one is more concerned about the safety and health of our church members and attendees than we are.

11) We do not seek to make a political statement. We do not seek special treatment, such as to be able to meet for worship free of any precautionary measures. We only seek to be

treated equally with other "essential" places, so that – with proper safety precautions and social distancing that meet or exceed what the others are doing – we can corporately and collectively worship God according to our religious mandates and our conscience.

12) As long as Governor Pritzker's 10-person limit remains in effect against our 750-seat church, and as long as the threat of criminal punishment hangs over us, we will not be able to do that freely, in peace and without intimidation. And thus, we will not be able to enjoy the freedom that many of our members fled an oppressive regime to be able to enjoy in this country.

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

EXECUTED this May 10, 2020.

/s/ Cristian Ionescu
Pastor, Elim Romanian Pentecostal Church