

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

MARYVILLE BAPTIST CHURCH, INC.,)
et al.,)

Plaintiffs,)

v.)

Civil Action No. 3:20-cv-00278-DJH

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

Defendant.)

**GOVERNOR BESHEAR’S RESPONSE IN OPPOSITION TO PLAINTIFFS’ RENEWED
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

Three courts have now declined to enjoin the March 19, 2020 Order prohibiting all mass gatherings during the novel coronavirus (COVID-19) state of emergency as it applies to in-person faith-based gatherings. On April 18, 2020, this Court denied Plaintiffs’ request for a temporary restraining order to enjoin the mass gatherings order. (Doc. 9.) Plaintiffs appealed, and the Sixth Circuit declined to enjoin the prohibition of in-person mass gatherings. *See Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427 (6th Cir. May 2, 2020) (Doc. 15-2). In a similar case brought by congregants of Maryville Baptist Church, a Court in the Eastern District of Kentucky denied a motion to enjoin the mass gatherings order as it applies to in-person faith-based gatherings. *See Roberts v. Neace*, No. 2:20-cv-054 (E.D.Ky. May 4, 2020) (Doc. 46) (attached as Exhibit A). Plaintiffs now ask this Court to enjoin the mass gatherings order as it applies to in-person faith-based services while their appeal of this Court’s order denying the TRO is pending – a step the Sixth Circuit refused to take. Governor Andy Beshear opposes the motion.

Neither the Governor nor the Commonwealth have taken any enforcement action against Plaintiffs or any person who participated in Plaintiffs' mass gathering on April 12, 2020, or otherwise. Kentucky State Police Troopers did not intervene, did not issue any citations, and did not arrest any individuals at Maryville Baptist Church. They recorded license plate information of vehicles in the parking lot of Maryville Baptist Church and provided notice of the potential consequences of participating in a mass gathering. The Kentucky State Police provided the license plate information to local public health officials, but did not mail any document to any individual at Maryville Baptist Church on April 12. Only local officials, who Plaintiffs' claim mailed letters with quarantine agreements to attendees of the April 12 in-person service, have taken enforcement action regarding the April 12 in-person service. In fact, the Kentucky State Police have not returned to Maryville Baptist Church since April 12. Plaintiffs cannot meet their high burden for obtaining an injunction of the order prohibiting all mass gatherings as it applies to in-person services. The Court should deny the motion.

BACKGROUND

I. A Deadly And Highly-Contagious Disease Spreads Across America And Kentucky.

Kentucky, like the rest of the country, is facing the most serious public-health emergency in more than a century. COVID-19 is a severe, acute respiratory disease caused by the virus SARS-CoV-2.¹ The World Health Organization ("WHO") declared it a Public Health Emergency of International Concern on January 30, 2020.² The next day, the U.S. Department of Health and Human Services declared a public health emergency, which it renewed on April 21,

¹ *Coronavirus Disease 2019 (COVID-19), Situation Summary*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last updated Apr. 19, 2020; last visited May 5, 2020) ("CDC Situation Summary").

² *WHO Director-General's Statement On [International Health Regulations] Emergency Committee On Novel Coronavirus (2019-nCoV)*, World Health Organization, available at [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov)) (Jan. 30, 2020) (last visited May 5, 2020).

2020.³ *See* 42 U.S.C. § 247d. The WHO declared COVID-19 a pandemic on March 11, 2020.

Id. COVID-19 can be lethal, and older people and people of all ages with chronic medical conditions (such as heart disease, lung disease, and diabetes) have a higher risk of developing serious illness.⁴ *Id.* The Centers for Disease Control and Prevention (“CDC”) summarize the perils of the pandemic as follows:

Widespread transmission of COVID-19 could translate into large numbers of people needing medical care at the same time. Schools, childcare centers, and workplaces, may experience more absenteeism. Mass gatherings may be sparsely attended or postponed. Public health and healthcare systems may become overloaded, with elevated rates of hospitalizations and deaths. Other critical infrastructure, such as law enforcement, emergency medical services, and sectors of the transportation industry may also be affected. Healthcare providers and hospitals may be overwhelmed. At this time, there is no vaccine to protect against COVID-19 and no medications approved to treat it.

Id. The risk of exposure naturally increases as the outbreak expands. *Id.* As of May 5, 2020, Kentucky had 5,822 confirmed cases of COVID-19 and 275 confirmed deaths, with 625 confirmed cases and 14 deaths on May 5.^{5,6}

II. The Commonwealth Acts Quickly To Prevent The Spread Of COVID-19.

Upon the first confirmed positive case of COVID-19 in Kentucky, Governor Beshear and the Kentucky Cabinet for Health and Family Services (“CHFS”), with Secretary Friedlander as the Governor’s designee, began exercising their emergency powers under KRS Chapters 39A,

³ *Determination That A Public Health Emergency Exists*, U.S. Dep’t of Health and Human Services (Jan. 31, 2020), available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Apr. 15, 2020); *Renewal of Determination That A Public Health Emergency Exists*, U.S. Dep’t of Health and Human Services (Apr. 21, 2020) (last visited May 5, 2020).

⁴ The CDC’s National Center for Health Statistics reports that, as of 2017, Kentucky ranks fifth among the states for deaths per capita due to heart disease, first for chronic lower respiratory disease, and fifth for diabetes. *Stats of the State of Kentucky (2017)*, Centers for Disease Control and Prevention, National Center for Health Statistics, available at <https://www.cdc.gov/nchs/pressroom/states/kentucky/kentucky.htm> (last visited May 5, 2020).

⁵ KYEM Coronavirus (COVID) Data, KDPH COVID-19 Dashboard, available at <https://kyem.maps.arcgis.com/apps/MapSeries/index.html?appid=4a185cde02f54008b18edc474a768cfe> (last visited on May 5, 2020).

⁶ *Gov. Beshear: Kentucky Will Defeat COVID-19*, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=153> (last visited May 5, 2020).

194A and 214 to contain the spread of the virus. On, March 6, 2020, the Governor declared a State of Emergency. (Ky. Exec. Order No. 2020-215).⁷ As the number of confirmed COVID-19 cases increased, the Governor and CHFS, as well as other state officials, took additional steps to prevent its spread.

On March 16, 2020, CHFS restricted food and beverage sales to carryout, delivery, and drive-thru services, prohibiting onsite consumption. (CHFS Order, Mar. 16, 2020).⁸ On March 17, 2020, CHFS required all public-facing businesses that encourage public congregation or that, by the nature of the service to the public, cannot comply with CDC guidelines concerning social distancing, to cease in-person operations. (CHFS Order, Mar. 17, 2020).⁹ On March 18, 2020, the Governor issued Executive Order 2020-243 that, among other things, encourages all Kentuckians to take all feasible measures to comply with social distancing guidelines from the CDC and the Kentucky Department for Public Health. (Ky. Exec. Order No. 2020-243).¹⁰ On March 22, 2020, the Governor ordered closed all retail businesses to in-person traffic that are not life-sustaining, allowing them to provide curbside or delivery service for online or phone orders only. (Ky. Exec. Order No. 2020-246).¹¹

On March 19, 2020, CHFS issued an Order prohibiting all mass gatherings, defined to include “any event or convening that brings together groups of individuals, including, but not

⁷ Available at https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf (last visited on May 5, 2020).

⁸ Available at https://governor.ky.gov/attachments/20200316_Order_Restaurant-Closure.pdf (last visited May 5, 2020).

⁹ Available at https://governor.ky.gov/attachments/20200317_Order_Public-Facing-Businesses.pdf (last visited May 5, 2020).

¹⁰ Available at https://www.klc.org/userfiles/EO_Social_Distancing20200324144503.pdf (last visited May 5, 2020).

¹¹ Available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf (last visited May 5, 2020).

limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.” (CHFS Order, Mar. 19, 2020).¹²

Since that time, Governor Beshear has taken additional measures to stop the pandemic, including by also closing all businesses that are not life-sustaining. (Ky. Exec. Order No. 2020-257).¹³ Kentuckians have answered the call of public officials. Data suggest social distancing is “flattening the curve.”¹⁴ Governor Beshear has also taken steps to reopen certain limited Kentucky health care services and businesses in phases, including establishing minimum requirements for all businesses in Kentucky.¹⁵ As part of reopening Kentucky, Governor Beshear has announced that beginning on May 20, 2020, faith-based organizations will be permitted to have in-person services at a reduced capacity with appropriate social distancing, hygiene measures, and minimum requirements implemented, and he is working with faith groups on that reopening.¹⁶

III. Following The Guidance Of President Trump And The CDC, The Commonwealth Prohibits All Mass Gatherings And Promotes Social Distancing.

Governor Beshear and his designees have issued orders, including the Order prohibiting mass gatherings, based on the guidance and recommendations of public health officials, including those of the CDC and The White House encouraging social distancing and

¹² Available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf (last visited May 5, 2020).

¹³ Available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited May 5, 2020).

¹⁴ *Coronavirus in Kentucky, Indiana: Tracking COVID-19 curve of cases, deaths*, WLKY, available at <https://www.wlky.com/article/coronavirus-kentucky-indiana-curve/32110616> (last visited May 5, 2020); Shay McAlister and Andrea Ash, *Are Kentucky and Indiana actually ‘flattening the curve?’* (WHAS11 News, Mar. 26, 2020) (last updated Mar. 27, 2020), available at <https://www.whas11.com/article/news/investigations/focus/what-does-it-mean-to-flatten-the-curve-and-is-it-working-in-ky-in/417-2cac611c-6e4b-44a2-ac38-3b86212656d9> (last visited May 5, 2020); Garrett Wymer, *In the middle of a ‘critical’ month, how does Kentucky’s ‘curve’ compare?*, WKYT (Apr. 16, 2020) (last updated Apr. 17, 2020), available at <https://www.wkyt.com/content/news/In-the-middle-of-a-critical-month-is-Ky-flattening-the-curve-569701941.html> (last visited May 5, 2020).

¹⁵ Available at <https://govstatus.egov.com/ky-healthy-at-work> (last visited May 5, 2020).

¹⁶ See *Gov. Beshear Outlines Road Ahead for Gradual Reopening of Businesses* (Apr. 29, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=148> (last visited May 5, 2020).

recommending that people avoid large and small gatherings in private places and public spaces.^{17,18,19} The CDC stresses that limiting face-to-face contact with others is the best way to reduce the spread of COVID-19.²⁰ To practice social or physical distancing, the CDC directs people to stay at least six feet away from each other, not gather in groups, and stay out of crowded places and avoid mass gatherings. *Id.* (See Affidavit of Dr. Steven Stack, May 6, 2020, ¶¶ 15-18 (attached as Exhibit B).)

On March 29, 2020, the CDC revised its guidance on mass gatherings based on the guidance of The White House. Under the revised guidance, the CDC stated, “During the next 30 days, individuals and organizations should cancel or postpone in-person events that consist of 10 people or more throughout the U.S.”²¹ The White House recommended avoiding social gatherings in groups of 10 or more people.²²

IV. Epidemiological Evidence Shows Mass Gatherings Result In The Spread Of COVID-19 And Deaths.

While most Kentuckians have complied with the Order and social distancing directives to help save Kentuckians’ lives, some have not. In mid-March, a faith-based mass gathering in Hopkins County resulted in an outbreak of COVID-19, with more than 50 people becoming

¹⁷ Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 5, 2020).

¹⁸ Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf (last visited May 5, 2020).

¹⁹ The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited May 5, 2020).

²⁰ Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 5, 2020).

²¹ See n. 14.

²² See n. 15.

infected and, to date, the loss of six lives. (Stack Aff., ¶¶ 41-46.)^{23,24,25} On March 27, 2020, Hopkins County had only two confirmed cases of COVID-19; two weeks later, it had 83 confirmed cases, making it the fastest-growing county in the Commonwealth.²⁶

In Pulaski and Calloway counties, two different church congregations of around 200 people went into self-quarantine after positive cases were confirmed in those counties.²⁷ Local public health officials in Pulaski County confirmed that a 59-year-old woman who tested positive for COVID-19 had attended church the prior Sunday, possibly exposing the virus to 40 others who attended the service. *Id.* In Calloway County, University Church of Christ in Murray advised its congregation of about 150 people to self-quarantine after the county confirmed a case of COVID-19. *Id.*

Mass gatherings in other states have led to clusters of positive cases and deaths. In Washington State, a church choir rehearsal in early March resulted in 45 confirmed cases of COVID-19 and two deaths.²⁸ In Virginia, a church pastor died on April 12 after he defied social distancing and continued having church services.²⁹ In Baton Rouge, Louisiana, a pastor's refusal

²³ Bailey Loosemore and Mandy McClaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, The Courier-Journal (Apr. 2, 2020), available at <https://www.courier-journal.com/story/news/local/2020/04/02/coronavirus-kentucky-hopkins-county-church-revival-led-outbreak/5111379002/> (last visited May 5, 2020).

²⁴ Bailey Loosemore, *Kentucky church responds to 'unjust criticism' about revival at center of COVID-19 outbreak*, The Courier-Journal (Apr. 4, 2020) (last updated Apr. 5, 2020), available at <https://www.courier-journal.com/story/news/local/2020/04/04/coronavirus-kentucky-hopkins-county-church-responds-criticism/2947251001/> (last visited May 5, 2020).

²⁵ Joe Sonka, et al., *Coronavirus hot spots plague Western Kentucky, Southeast Indiana and Northern Tennessee*, The Courier-Journal (Apr. 10, 2020), available at <https://www.courier-journal.com/story/news/politics/2020/04/10/coronavirus-hot-spots-plague-kentucky-indiana-and-tennessee/5103043002/> (last visited May 5, 2020).

²⁶ See n. 21.

²⁷ Savannah Eadens, *Dozens in quarantine after being exposed to COVID-19 at churches in Calloway, Pulaski county*, The Courier-Journal (Mar. 20, 2020), available at <https://www.courier-journal.com/story/news/2020/03/20/coronavirus-kentucky-members-multiple-churches-quarantine/2888205001/> (last visited May 5, 2020).

²⁸ Richard Read, *A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead*, Los Angeles Times (Mar. 29, 2020), available at <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak> (May 5, 2020).

²⁹ Rebecca Klar, *Va. bishop who defied social distancing recommendation dies of coronavirus complications*, The Hill (Apr. 14, 2020), available at <https://thehill.com/homenews/state-watch/492653-virginia-bishop-who-was-defiant-of-coronavirus-dies-of-covid-19> (last visited May 5, 2020).

to comply with mass gathering prohibitions led to the death of a church elder and the hospitalization of a parishioner who is representing the church in a legal challenge against the mass gathering order.³⁰

V. The Majority Of Kentuckians Comply With Measures To Protect The Health And Safety Of Themselves And Their Neighbors.

In Kentucky, the vast majority of groups have complied with social distancing measures and the prohibition on mass gatherings. In particular, demonstrating the general applicability of the Order prohibiting mass gatherings, on April 10, 2020, the Tourism, Arts and Heritage Cabinet continued its Order closing the Kentucky Performing Arts Center pursuant to the Order on mass gatherings, as well as Executive Orders 2020-243 and 2020-257.³¹ Additionally, the Department of Fish and Wildlife suspended all fishing tournaments in Kentucky because of the COVID-19 outbreak and canceled all of its summer camps.^{32,33}

Sporting events across the Commonwealth have also been canceled during the pandemic. The Kentucky High School Athletic Association suspended the Boys and Girls Sweet Sixteen® basketball tournaments, and indefinitely suspended all spring sports.³⁴ Amateur National Motocross events in Kentucky have been postponed indefinitely.³⁵

Religious faiths of different denominations have held virtual services or drive-in services that adhere to proper social distancing and CDC hygiene measures. On Easter Sunday, multiple

³⁰ Rachel Olding, *Parishioner of La. Church That Defied Virus Lockdown Dies From COVID-19, But Pastor Claims It's a Lie*, The Daily Beast (Apr. 17, 2020), available at <https://www.thedailybeast.com/member-of-tony-spells-life-tabernacle-church-in-baton-rouge-dies-from-coronavirus-another-member-in-icu> (last visited May 5, 2020)

³¹ Tourism, Arts and Heritage Cabinet Order (Apr. 10, 2020) (attached as Exhibit C).

³² Available at <https://fw.ky.gov/Fish/Pages/Tournament-Fishing.aspx> (last visited May 5, 2020).

³³ Available at <https://fw.ky.gov/Education/Pages/Summer-Camps.aspx> (last visited May 5, 2020).

³⁴ Jason Frakes, *KHSAA announces indefinite suspension of all spring sports because of coronavirus pandemic*, The Courier-Journal (Mar. 31, 2020), available at <https://www.courier-journal.com/story/sports/preps/kentucky/2020/03/31/coronavirus-khsaa-announces-suspension-all-spring-sports/5096810002/> (last visited May 5, 2020).

³⁵ Competition Bulletin 2020-5: Area Qualifiers Postponed Through March (Mar. 17, 2020), available at <https://www.courier-journal.com/story/sports/preps/kentucky/2020/03/31/coronavirus-khsaa-announces-suspension-all-spring-sports/5096810002/> (last visited May 5, 2020).

churches across Kentucky that had reportedly planned to hold in-person services changed to virtual or drive-in services. For example, churches in Harlan County that planned to hold in-person services opted for drive-in services instead.³⁶ Governor Beshear and public health officials have repeatedly encouraged drive-in and virtual faith-based services, so long as social distancing and hygiene measures are implemented and followed. (Stack Aff., ¶¶ 46.)^{37,38}

The Kentucky State Police received approximately six complaints from concerned citizens and community leaders about Maryville Baptist Church having in-person services on April 12, 2020. (Affidavit of Executive Director of the Operations Division of the Kentucky State Police, Lieutenant Colonel Phillip Burnett, Jr., May 6, 2020, ¶6 (attached as Exhibit D).) Prior to April 12, Plaintiff, Dr. Jack Roberts, publicly stated that Maryville Baptist Church would continue to have in-person services in violation of the March 19 Cabinet Order prohibit mass gatherings, despite pleas from local officials.^{39,40}

³⁶ Sarah Ladd, Easter churchgoers defiant after Kentucky troopers write down their license plate numbers, *The Courier-Journal* (Apr. 12, 2020), available at <https://www.courier-journal.com/story/news/2020/04/12/kentucky-churches-hold-in-person-easter-services-despite-order/5127260002/> (last visited May 5, 2020).

³⁷ See, e.g., Governor Andy Beshear, *Update on COVID-19 in Kentucky – 3.20.2020 PM*, YouTube (Mar. 20, 2020), at 46:45-47:15 (“I believe that this is a creative solution, as long as there is the distancing between those cars We want to see creativity, we want to see ways that they can connect My Commissioner of Public Health says that’s good.”)(available at https://youtu.be/vG_nreWckWw) (last visited May 5, 2020); Governor Andy Beshear, *Update on COVID-19 in Kentucky – 4.11.2020*, YouTube (Apr. 11, 2020), at 52:08-55:27 (“I have been in favor of drive-in services, a chance for people to get together and worship while being apart. . . . We’ve had great buy-in from our faith community around the state. . . . We have had churches working really hard on that and we appreciate it.”)(available at https://youtu.be/X_INS02f0CI) (last visited May 5, 2020).

³⁸ In Mississippi, the United States Department of Justice intervened in a lawsuit filed after a Mayor’s order prohibited drive-in services and attendees of drive-in services received \$500 tickets. The Mayor later stated the City of Greenville would not make people pay the \$500 tickets and that he would allow drive-in services to occur after the Mississippi Governor provided guidance. Associated Press, *Mississippi mayor gives OK for drive-in church with windows up after lawsuit, parishioners fined \$500*, Fox 8 News (Apr. 15, 2020), available at <https://fox8.com/news/coronavirus/mississippi-mayor-gives-ok-for-drive-in-church-with-windows-up-after-lawsuit-parishioners-fined-500/> (last visited May 5, 2020).

³⁹ Jessie Cohen, *Maryville Baptist Church holds Bible study against Gov. Beshear’s recommendation*, WHAS 11 (Apr. 9, 2020), available at <https://www.whas11.com/article/news/health/coronavirus/maryville-baptist-church-holds-wednesday-bible-study-against-beshear-recommendation/417-22c63bd4-1875-4055-9a8d-47eb9235c572> (last visited May 5, 2020).

⁴⁰ Churches still defying Beshear’s orders to stop in-person gatherings, *The Courier-Journal* (Apr. 9, 2020), available at <https://www.wave3.com/2020/04/09/churches-still-defying-beshears-orders-stop-in-person-gatherings/> (last visited May 5, 2020).

A. Maryville Baptist Refuses to Comply with Emergency Orders.

True to Dr. Roberts' stated intention, Maryville Baptist Church held in-person services on April 12, with reports of 50 or 100 people attending; it had held another in-person service the prior Wednesday, with more than 40 people attending. *Id.*^{41,42} Demonstrating its knowledge of the risk of the spread of the virus through in-person services, Maryville Baptist aired the service via speaker outside of the church so some in their vehicles in the parking lot could attend by drive-in, and made the service available virtually on Facebook.⁴³



Id. Based on media reports, those who attended the service inside the church were not following CDC social distancing guidelines.⁴⁴

⁴¹ Sarah Ladd, *Easter churchgoers defiant after Kentucky troopers write down their license plate numbers*, The Courier-Journal (April 12, 2020), available at <https://www.courier-journal.com/story/news/2020/04/12/kentucky-churches-hold-in-person-easter-services-despite-order/5127260002/> (last visited May 5, 2020).

⁴² Eileen Street, *Maryville Baptist Holds In-Person Service*, Spectrum News 1 (Apr. 12, 2020), available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/maryville-baptist-church-easter-sunday-in-person-service> (last visited May 5, 2020).

⁴³ See n. 40.

⁴⁴ See n. 41.



One attendee named Sally Oh said, “So people hugged us and shook our hands. It was like church.”⁴⁵ Neither did those entering and exiting the church follow social distancing guidelines or wear personal protective equipment.



⁴⁵ *Id.*



Id.

Most alarming, most attendees of the April 12 service were not Bullitt County residents.⁴⁶ At least two people who attended the in-person service were residents of New Jersey, one of the epicenters of the pandemic in America. *Id.* Those New Jersey residents were photographed shaking the pastor's hand, failing to comply with CDC social distancing guidelines.



⁴⁶ Shellie Sylvestri, *Most attendees of Easter service in Maryville not Bullitt Co. residents*, Wave 3 News (Apr. 14, 2020), available at <https://www.wave3.com/2020/04/14/most-attendees-easter-service-maryville-not-bullitt-co-residents/> (last visited May 5, 2020).



As of May 5, 2020, New Jersey had nearly 131,000 confirmed cases of COVID-19 and more than 8,200 deaths.⁴⁷

⁴⁷ New Jersey COVID-19 Dashboard, available at <https://covid19.nj.gov/#live-updates> (last visited May 5, 2020).

On April 12, 2020, uniformed Kentucky State Police responded to the complaints it received about Maryville Baptist Church having in-person services. (Burnett, Jr. Aff., ¶¶ 7-10.) Uniformed KSP recorded the license plate information of vehicles in the parking lot of the church, and placed notices on the vehicles relaying the potential consequences of participating in a mass gathering. (*Id.*, ¶¶ 7-8.) They did not intervene, did not issue any citations and did not arrest any individual at Maryville Baptist Church, and they have not since April 12, 2020. (*Id.*, ¶ 9.) The Kentucky State Police provided the license plate information to local public health officials. (*Id.*, ¶ 10.) The Kentucky State Police has not mailed any document to any individual present at Maryville Baptist Church on April 12, 2020. (*Id.*, ¶ 12.) Since April 12, 2020, the Kentucky State Police has not returned to Maryville Baptist Church. (*Id.*, at 11.) Further, Plaintiffs do not allege and have not shown that any individual has been forced to quarantine as result of attending an in-person service there.

Dr. Roberts recognized the danger to the health and safety of those attending in-person services at Maryville Baptist Church, saying prior to April 12, “I’ve told my son, ‘Don’t come to church.’ I’ve told other folks, ‘Don’t come to church ... watch the live stream.’”⁴⁸ Yet he still refused to comply with the mass gathering Order and continued to hold in-person services, threatening the health and safety of those in attendance and spreading the virus far beyond his community. When asked by media if he recommended that people who attended the in-person service self-quarantine for 14 days, Dr. Roberts said, “I don’t know if I did or not. I really don’t. I could have; I should have, but whether I did or not I don’t remember.”⁴⁹ One attendee named Sally Oh said she would not self-quarantine, adding, “We need people to get the virus and recover because that builds herd immunity.” *Id.*

⁴⁸ See n. 38.

⁴⁹ See n. 41.

B. The Commonwealth Investigates Businesses for Failure to Comply with Emergency Orders and Responds to Complaints of Non-Compliance.

Businesses and groups that have endangered Kentuckians' lives by refusing to comply have faced consequences. Between April 1 and 21, the Department of Workplace Standards within the Kentucky Labor Cabinet received referrals of 220 complaints from the KYSafer non-compliance citizen reporting hotline for investigation and possible enforcement action through closure orders, citations, and fines. (Affidavit of Commissioner Kimberlee C. Perry, May 6, 2020, ¶ 5 (attached as Ex. E).) The Department has performed in-person investigations of 179 of those complaints; of the remaining 41 complaints, the Department is awaiting investigation or has counseled the business on proper compliance. (*Id.*, ¶ 7.) The Department's investigations verified that 119 businesses or organizations were complying or that the complaints were not verified. (*Id.*, ¶ 8.) As of April 21, the Department had issued 60 closure orders to businesses or organizations, including, but not limited to, businesses or organizations that are not life-sustaining, but continued to operate in violation of the Commonwealth's orders and others that *are* life-sustaining but had not implemented social distancing and hygiene measures as recommended by the CDC.⁵⁰

From March 19 through April 21, 2020, the Kentucky State Police received approximately 70 complaints from concerned citizens about non-compliance with the March 19 Order prohibiting all mass gatherings. (Burnett, Jr. Aff., ¶ 3.) Uniformed Kentucky State Police visited all locations of the complaints, including but not limited to, a hair salon, an arcade, gas stations, flea markets, in neighborhoods and personal residences, and issued no citations and took

⁵⁰ See Eileen Street, *Attendees at Maryville Baptist Service Face No Charges*, Spectrum News 1 (Apr. 13, 2020), available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/kentucky-no-charges-maryville-baptist-church-bullitt-county-> (last visited May 5, 2020); (Perry Aff., ¶ 9.)

no other enforcement action. (*Id.*, ¶ 4.) They did not intervene, they did not issue any citations and they did not arrest any individual in response to the complaints. (*Id.*, ¶ 5.) During the State of Emergency, the Kentucky State Police has increased routine patrols, patrolling about 2,175 retail locations a total of 9,240 times. (*Id.*, ¶ 14.)

VI. Plaintiffs Do Not Allege The Governor Has Prevented Them From Holding In-Person Services.

Since Easter Sunday, a day Plaintiff Roberts publicized his intent to disregard the mass gatherings order, the Kentucky State Police has not returned to Maryville Baptist Church. (*Id.*, ¶ 11.) Plaintiffs have not alleged or provided any evidence to the contrary.

Plaintiffs also do not allege they have received letters from the local health department regarding in-person services since Easter Sunday. Plaintiffs do not allege anyone was ordered to quarantine as a result of attending in-person services. In fact, Plaintiffs have yet to allege they were *actually* prevented from holding in-person services on any date.

Finally, Plaintiffs do not allege they have ceased in-person services since the Easter Sunday service. To the extent Plaintiffs continue to hold in-person services uninterrupted by the Kentucky State Police or local health departments, what is the irreparable injury?

ARGUMENT

Plaintiffs seek the extraordinary remedy of an emergency injunction pending their interlocutory appeal (IPA). An IPA is governed by Fed. R. Civ. P. 62(d), which states, “While an appeal is pending from an interlocutory order or final judgment that . . . refuses . . . an injunction, the court may . . . grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” When addressing a motion for an IPA, a District Court must engage in a balancing exercise, weighing the following four factors: (1) whether the movant will likely

prevail on the merits of the appeal, (2) whether the movant will suffer irreparable injury if restoration of the injunction is denied, (3) whether other parties will be harmed by restoration, and (4) whether the public interest will be served by granting the restoration.

This Court correctly determined this balancing test weighs in favor of the Governor when it denied Plaintiffs' motion for a temporary restraining order. (Doc. 9.) Nothing has changed. The Sixth Circuit and the Eastern District of Kentucky both also declined to enjoin the mass gatherings order as it applies to in-person faith-based services. *See Roberts v. Neace*, No. 2:20-cv-054 (E.D. Ky. May 4, 2020) (Doc. 46) (Ex. A). The Court in the Eastern District of Kentucky also denied an emergency motion to stay and for an injunction pending appeal in *Roberts* for the reasons stated in the Court's Opinion and Order denying the motion for a preliminary injunction. *See Roberts*, No. 2:20-cv-054 (E.D. Ky. May 5, 2020) (Doc. 53) (attached as Exhibit F); *Roberts*, No. 2:20-cv-054, Plaintiffs' Emergency Motion for Injunction Pending Appeal (Doc. 49).

Plaintiffs are not entitled to the requested relief because they cannot demonstrate a strong likelihood of success on the merits, irreparable injury, or a balance of the equities in their favor.

I. Plaintiffs Cannot Succeed On The Merits.

Plaintiffs did not succeed before the Sixth Circuit on the same issue it raises here regarding application of the mass gatherings order to in-person services. Moreover, similarly-situated Plaintiffs did not succeed on similar claims before a District Court in the Eastern District of Kentucky. The Sixth Circuit has also recognized that Plaintiffs' claims will be moot on May 20, 2020, when the mass gatherings order will be altered to permit limited in-person faith-based gatherings—a date occurring prior to the Sixth Circuit's set schedule to address the appeal of the denial of the temporary restraining order. Thus, granting an injunction pending the appeal in this instance would effectively provide Plaintiffs with the ultimate relief sought in the suit. In such a

situation, it is inappropriate to grant the injunction. *Jiminez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958). *See also* Wright and Miller, Federal Practice and Procedure, § 2904 at 321.

A. The Governor has Authority to Prohibit Mass Gatherings During a Pandemic.

The statutory authority for the Governor’s Order challenged in this lawsuit is found in KRS Chapter 39A. KRS 39A.100(1)(j) authorizes the Governor “to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population” during a declared state of emergency. More specifically, KRS 39A.100(1)(f) authorizes the Governor “[t]o exclude all nonessential, unauthorized, disruptive, or otherwise uncooperative personnel from the scene of an emergency, and to command those groups assembled at the scene to disperse.” “A person who refuses to leave an area in which a written order of evacuation has been issued in accordance with a written declaration of emergency or a disaster may be forcibly removed to a place of safety or shelter, or may, if this is resisted, be arrested by a peace officer.” *Id.* KRS 39A.100(1)(b) allows the Governor to require state agencies to respond to the emergency or disaster in the manner directed.

Here, acting in accordance with the authority under KRS Chapters 39A, 194A and 214, CHFS, on behalf of and as a designee of the Governor, issued the Order to halt all mass gatherings. The intent of the Order is to implement CDC guidelines to limit groups of people gathering in close proximity for a prolonged period of time. The Governor, the Cabinet, and local officials have enforced the order uniformly and without discrimination.

B. The Governor’s Mass Gathering Order Does Not Violate the Free Exercise Clause Because It is a Valid and Neutral Law of General Applicability.

Plaintiffs assert the Governor’s prohibition of mass gatherings to curb the spread of COVID-19 violates their right to practice their religion. This claim must fail because the order

prohibits all mass gatherings in accordance with CDC guidelines, while also specifically allowing and encouraging acceptable alternative means to communally worship: drive-in services and virtual services.

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

This is because the clause “embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” *Cantwell* 310 U.S. at 303-04 (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 144 U.S. 33 (1890)). The holding of “religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” *Minersville School Dist. Bd. of Ed. v. Gobitis*, 30 U.S. 586, 594-95 (1940). Under the prevailing standard, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of*

the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

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

Here, the mass gatherings order – both on its face and in its application – is neutral and of general applicability. As this court correctly recognized in denying the motion for a temporary restraining order, by its plain terms the Order prohibits “all mass gatherings,” not just religious gatherings. (Doc. 9.) In addition, the District Court for the Eastern District of Kentucky held on May 4, 2020:

... it is abundantly clear that the “object or purpose of” Kentucky’s mass gathering ban is not “the suppression of religion or religious conduct.” *Lukumi*, 508 U.S. at 533. To the contrary, the plain text of the challenged order categorically bans all “mass gatherings” as a means of preventing the spread of a life-threatening virus. The illustrative examples set forth are sweeping: “community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.

Roberts, No. 2:20-cv-054 (E.D. Ky. May 4, 2020) (Doc. 46, Page ID#: 831) (Ex. A).⁵¹

⁵¹ In *Binford v. Sununu*, a New Hampshire court examined an illustrative list nearly identical to that in the mass gatherings order in denying a motion for a preliminary injunction concerning Governor Christopher Sununu’s emergency order that, among other things, prohibited, “Scheduled gatherings of 50 or more people for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.” Docket No. 217-2020-CV-00152, Order at 3-4 (N.H. Superior Ct., Mar. 25, 2020) (attached as Exhibit G). The court there wrote that the plaintiffs’ argument about the emergency order, including that the word “spiritual” targeted religious activities, ignored the illustrative list in the paragraph of the order detailing the types of events the order applied to. *Id.* at 17. The court held that the list made the order “clearly content neutral in that it prohibits any gathering in excess of 50

In fact and practice, the entire purpose and success of the order hinges upon it to applying to all. Plaintiffs present no evidence the Order targeted their mass gathering because of its religious nature. Rather, the order targets any intent to gather in groups. In its application, the order has forced the closure of events with no religious affiliation, including movie theaters, concerts, and sporting events. This Court recently acknowledged this fact. (Doc. 9, Page ID#: 5.) State and local officials have ordered the closure of businesses for non-compliance with social distancing and hygiene measures, as well as businesses that are not life-sustaining that continued to operate in violation of orders. The District Court for the Eastern District of Kentucky also recognized the effect of the order, writing:

Does the mass gathering ban have the effect of preventing plaintiffs who comply with it from attending in-person church services? Yes. Does the ban do so because the gatherings are faith-based? No.

Roberts, No. 2:20-cv-054 (E.D. Ky. May 4, 2020) (Doc. 46, Page ID#: 832) (Ex. A)

Thus, even though the Order may “burden” faith-based mass gatherings, it equally burdens all mass gatherings, regardless of the religious nature. Its purpose is to prevent the spread of a disease that is particularly infectious, with no cure or treatment. The order does not discriminate or differentiate among groups, because COVID-19 does not differentiate or discriminate.

The order also does not exempt secular mass gatherings and is not applied in a manner that would exempt secular mass gatherings. In fact, the Order does not provide any exemptions at all. *Cf. Ward v. Polite*, 667 F.3d 727, 738-39 (6th Cir. 2012). Rather, the Order provides

people, regardless of the content of the event.” *Id.* The court recognized that, as the March 19 Order at issue here, the emergency order followed the guidance of the Centers for Disease Control (CDC) and Prevention and the White House, and “was specifically designed to comport with relevant CDC guidelines to slow the spread of COVID-19.” *Id.* at 18. The court further opined that the impact on the ability to congregate at a church was merely incidental to the neutral regulation and otherwise reasonable given its limited duration and the public health threat facing the citizens of the State. *Id.* at 20.

examples of what a “mass gathering” is and what it is not; the distinction is that it closes any event the purpose of which is to congregate person-to-person for an extended period to engage in a particular activity. This Court recognized the distinction in its Order denying a temporary restraining order, writing that presence at a grocery or liquor store “is a single and transitory experience: individuals enter the store at various times to purchase items; they move around the store individually—subject to strict social-distancing guidelines set out by state and federal health authorities [...]—and they leave when they have achieved their purpose. Plaintiffs’ desired church service, in contrast, is by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose.” (Doc. 9, Page ID#: 4.)

The mass gatherings order does not apply to locations providing services necessary to maintain public health and safety, despite the fact that people are in transit in the location at the same time. Plaintiffs argue these are exceptions, but Plaintiffs fail to submit any evidence that these decisions were made with “religion in mind.” *See Roberts*, 2:20-cv-054, (E.D.Ky. May 4, 2020) (Doc. 46, Page ID#: 831) As the Eastern District of Kentucky Court noted:

Plaintiffs do not argue that the State has permitted any other of the cited examples of mass gatherings to take place; rather, plaintiffs argue that certain businesses that the government has allowed to remain open present similar health risks. That, of course, is a judgment call, but what is missing is any evidence that Kentucky has conducted the essential/non-essential analysis with religion in mind. *Lukumi*, 508 U.S. at 543. Moreover, there is an undeniable difference between certain activities that are, literally, *life* sustaining and other[s] that are not. Food, medical care and supplies, certain travel necessary to maintain one’s employment and thus income, are, in that sense, essential. Concerts, sports events, and parades clearly are not. And while plaintiffs argue that faith-try based gatherings are as important as physical sustenance, as a literal matter, they are not *life*-sustaining in the physical sense.

Id. at Page ID#: 832)

In-person faith-based services, like concerts, sports events, and parades, are not specifically restricted because of the purpose for the gathering, but because they are unique, not just in the communal nature of the gathering, but also in the services they provide. Unlike life-sustaining businesses that remain open, those services can be provided in a manner that does not necessarily require the gathering of people in a crowd. To address the compelling government interest recognized by the Courts, the Governor has to take steps to limit person-to-person interaction to protect the public health, while not undercutting the very services that contribute to the public health. Thus, although the Governor has required social distancing and hygiene practices and imposed additional restrictions on food, medical, and transportation services, as well as places of employment, outright preventing the gathering of groups of people in those locations could preclude the effectiveness of those services necessary to maintain public health during the time of a pandemic. This is not true for communal, civic, public, leisure and faith-based gatherings that “are not *life*-sustaining in the physical sense.” *Id.*

The Governor’s encouragement of drive-in and virtual faith-based services further demonstrates the Order’s neutrality and general applicability. Through the creativity of our state’s faith leaders, much of the state’s religious community can still participate in their worship services. And these options allow the practice and observation of one’s faith without the risk of mass-spreading COVID-19.

Because the Order is neutral and of general applicability, it is subject to “rational basis review[.]” *Miller v. Davis*, 123 F. Supp. 3d 924, 938 (E.D. Ky. 2015) (citing *Seeger v. Ky. High Sch. Athletic Ass’n*, 453 Fed. Appx. 630, 634 (6th Cir. 2011) (interpreting *Smith*, 494 U.S. 872 and *Lukumi*, 508 U.S. 520)). Under rational basis review, an emergency order will be upheld if it is “rationally related to furthering a legitimate state interest.” *Seeger*, 453 Fed. Appx. 635. An

emergency order “subject to rational basis review is accorded a strong presumption of validity.” *Id.* It should be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). Plaintiffs carry the burden to negate “every conceivable basis which might support it[.]” *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The facts weighing against Plaintiffs’ arguments are insurmountable. The White House and the CDC have recommended the closure of any establishment or event allowing for a mass gathering. National, state, and local public health officials describe the particular risks of spreading COVID-19 “among people who are in close contact with each other for a prolonged period.” (Stack Affidavit, ¶ 15.) As the District Court for the Eastern District of Kentucky noted:

As the Sixth Circuit observed just recently in the context of this pandemic, it “is imperative in such circumstances that judges give legislatures and executives—the more responsive branched of government—the flexibility they need to respond quickly and forthrightly to threats to the general welfare, even if it that flexibility sometimes comes at the cost of individual liberties.” *Adams & Boyle, P.C. v. Slatery*, – F.3d. –, No. 20-5408, 2020 WL 1982210, at *1 (6th Cir. Apr. 24, 2020).

Because the prohibition on mass gatherings is rationally related to the legitimate state interest in stopping the spread of disease, Plaintiffs cannot demonstrate a strong likelihood of success.

C. In the Alternative, the Mass Gatherings Order Survives Strict Scrutiny.

Even assuming, *arguendo*, strict scrutiny applies to the mass gatherings order, it easily meets that standard. Certainly, the Commonwealth has a compelling governmental interest in restricting mass gatherings to prevent the spread of a highly contagious, life-threatening virus. *See Lukumi*, 508 U.S. at 531-32. Plaintiffs do not deny the Commonwealth’s compelling interest in preventing the spread of COVID-19.

Further, as this Court and the District Court for the Eastern District of Kentucky have found, the mass gatherings order is narrowly tailored to advance that compelling interest. *See id.* Agreeing with this Court’s finding that the mass gatherings order satisfies the “compelling interest” test and Plaintiffs did not demonstrate a likelihood of success, the District Court for the Eastern District of Kentucky concluded:

The current public health crisis presents life-or-death dangers. Plaintiffs are not alone in having their lives and activities disrupted by it and the measures that our federal and state governments have taken to address it. Indeed, it is hard to imagine that there is any American that has not been impacted. But unless a law can be shown to have religion within its cross-hairs, either factually or in application, the fact that religious practices are impinged by it does not contravene the First Amendment.

Roberts, No. 2:20-cv-054 (E.D. Ky. May 4, 2020) (Doc. 46, Page ID#: 834) (Ex. A)

The order prohibits all mass gatherings, where the risk of transmission of the disease is highest. Despite Plaintiffs’ contentions to the contrary, there are no exceptions to the mass gatherings order. As discussed above, in those life-sustaining businesses that have been permitted to remain open during the state of emergency, multiple people may be present at once, but they are in transit – they are thus materially different in character and kind from mass gatherings, and the risk of virus spread is materially different as well.⁵² Providing 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. Again, the

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. (Stack Affidavit, ¶ 15.) *See also* Jianyun Lu et al., COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020, *Emerging Infectious Diseases*, Vol. 26, No. 7 (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited May 5, 2020) (finding that individuals seated at a mass gathering near an infected person contracted COVID-19, while those having repeated transitory encounters with that person did not); Carl Heneghan et al., SARS-CoV-2 viral load and the severity of COVID-19, *Centre for Evidence-Based Medicine, Nuffield Department of Primary Care Health Sciences, University of Oxford* (Mar. 26, 2020), available at <https://www.cebm.net/covid-19/sars-cov-2-viral-load-and-the-severity-of-covid-19/> (last visited May 5, 2020) (summarizing evidence that length and extent of exposure may affect severity of disease, contributing to increased mortality among healthcare workers).

spread of COVID-19 has been documented where people have participated in faith-based mass gatherings. *See supra*, pp. 6-8.

Accordingly, under strict scrutiny the mass gatherings order is constitutional.

II. Plaintiffs Fail To Allege An Irreparable Injury.

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

Having solely relied on that presumption, Plaintiffs fail to set forth factual allegations to demonstrate an irreparable injury. For instance, they do not allege KSP cited or arrested any person at Maryville Baptist Church on April 12, 2020. They only allege KSP was present in the parking lot of the church, recorded information of vehicles in the parking lot, and placed notices of potential consequences of participating in a mass gathering on vehicles in the parking lot. Plaintiffs do not allege they have been or are currently under a forced quarantine for attending in-person services. Only local officials have taken any action related to the April 12 service – in the form of mailing a letter to individuals believed to have attended in-person services requesting that they agree to self-quarantine for 14 days and asking them to contact the local health department if they have any questions.

Nor do Plaintiffs allege the mass gatherings order prevents them from being able to practice and observe their faith. As the record shows, Plaintiffs can attend virtual or drive-in church services provided by Maryville Baptist Church. Plaintiffs do not allege a specific and

forthcoming irreparable injury. The Kentucky State Police have not returned to Maryville Baptist Church since April 12. As such, and in light of the serious public health threat posed by Plaintiffs' desire to worship communally person-to-person, they fail to allege an irreparable injury to warrant preliminary injunctive relief.

III. Issuance Of Plaintiffs' Requested Injunction Would Cause Substantial Harm.

Plaintiffs' requested relief would cause substantial harm to the public health and safety. With respect to faith-based mass gatherings, the CDC and the White House have recommended avoiding social gatherings of ten or more people. Epidemiological evidence demonstrates that mass gatherings in defiance of these recommendations, and in defiance of the Governor and the Secretary's Order, have resulted in the spread of COVID-19. Of particular relevance to Plaintiffs' motion, faith-based mass gatherings have resulted in the spread of COVID-19.

Again, for example, a revival in Hopkins County in mid-March has been linked to more than 50 confirmed cases of the novel coronavirus and, to date, six deaths. *See supra*, pp. 6-7. And in the state of Washington, a church choir rehearsal in early March resulted in 45 confirmed cases and two deaths. *See supra*, pp. 7-8.

Importantly, those attending a mass gathering, such as in-person faith-based services, not only risk exposure to COVID-19 themselves, but they also risk exposing anyone they later come into contact with.(Stack Aff., ¶¶ 41-47.) These risks are exacerbated by the fact that COVID-19 appears to have a long incubation period, and an infected person may spread the virus even if asymptomatic.

Allowing faith-based mass gatherings as Plaintiffs request could result in more illness, more deaths, and a higher spike in cases at any given time, resulting in our health care centers becoming overwhelmed. The Commonwealth's orders represent efforts to prevent this spike in

cases because if our health care systems become overwhelmed, all of the problems of COVID-19 compound.

Additionally, the efforts and sacrifices Kentuckians have made to engage in social distancing and limit their exposure to one another would be sacrificed. The progress made to flatten the curve could be reversed out if Kentuckians become exposed at a mass gathering or in another state and return home infected.

Rather than present sufficient arguments in response, Plaintiffs contend there are secular exceptions to the mass gatherings order. That is not the case, as this Court and the District Court for the Eastern District of Kentucky have found. Activities currently permitted by orders – shopping for life-sustaining good such as groceries, going through a restaurant drive-thru – are materially different in kind and in terms of risk of exposure. As a result of the substantial harm currently posed by mass gatherings, Plaintiffs cannot meet their burden.

IV. Issuance Of Plaintiffs’ Requested Injunction Would Not Serve The Public Interest.

While, “[g]enerally speaking, ‘the public interest is served by preventing the violation of constitutional rights[,]’ . . . enjoining officials from pursuing their chosen policies is not without costs.” *League of Women Voters v. Hargett*, 400 F.Supp.3d 706, 733-34 (M.D.Tenn. Sept. 12, 2019) (quoting *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004)). Courts, then, are directed to weigh the plaintiffs’ interests against that of the public. *Id.*

As knowledge of COVID-19 and its spread is constantly evolving, and as cases of the virus continue to increase in the Commonwealth, state and local officials must be able to take rapid, decisive action. Here, the Governor, other constitutional officers, state officials, public health officials, state and federal courts, school districts, local officials, and citizens have all

taken action to prevent the spread of COVID-19 – the type of collective action public health officials state is needed to protect public health and safety. The public interest in state officials’ ability to take these measures is significant, as the purpose is to prevent the spread of COVID-19 and save the lives of Kentuckians. Certainly, that overrides the public’s interest in attending in-person faith-based mass gatherings, especially since there are multiple other ways citizens may worship during this time, including virtual and drive-in services, and religious services are not singled out or burdened differently from other mass gatherings in the March 19, 2020 Order.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Governor Beshear respectfully asks the Court to deny Plaintiffs-Appellants’ Renewed Emergency Motion for Injunction Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ S. Travis Mayo
S. Travis Mayo

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:20cv054 (WOB-CJS)

THEODORE JOSEPH ROBERTS,
ET AL.

PLAINTIFFS

VS.

MEMORANDUM OPINION AND ORDER

HON. ROBERT NEACE,
ET AL.

DEFENDANTS

Plaintiffs Theodore Joseph Roberts, Randall Daniel, and Sally Boyle bring this action challenging the constitutionality of certain measures instituted by the Commonwealth of Kentucky in response to the COVID-19 public health crisis.

Specifically, plaintiffs Daniel and Boyle allege that the ban on "mass gatherings" as applied to in-person church attendance violates their right to freedom of religion under the First Amendment. (Doc. 6, ¶¶ 56-66). Plaintiff Roberts alleges that restrictions on out-of-state travel violate his fundamental liberty interest and thus his right to substantive due process. (*Id.* ¶¶ 67-73). Plaintiffs further allege that the Travel Ban violates their right to procedural due process. (*Id.* ¶¶ 74-79).

This matter is before the Court on plaintiffs' emergency motion for temporary restraining order and motion for preliminary

injunction (Doc. 7). The Court previously heard oral argument on these motions and took the matter under submission. (Doc. 33).

By agreement of the parties, the Court now issues the following Memorandum Opinion and Order ruling on plaintiffs' motion for preliminary injunction.¹

Factual and Procedural Background

A. Challenged Restrictions

On March 6, 2020, Kentucky Governor Andrew Beshear began issuing a series of Executive Orders placing restrictions on Kentucky citizens as part of an effort to slow the spread of the COVID-19 virus in the Commonwealth. (Am. Compl. ¶¶ 13-23).

As relevant here, on March 19, 2020, Governor Beshear issued an Executive Order prohibiting all "mass gatherings." (Am. Compl. Exh. D). The Order states: "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; concerts; festivals; conventions; fundraisers; and similar activities." The Order states that mass gatherings do not include "normal operations at

¹The Court acknowledges that Governor Beshear has filed a notice stating that beginning on May 20, 2020, "faith-based organizations will be permitted to have in-person services at a reduced capacity, with social distancing, and cleaning and hygiene measures implemented and followed." (Doc. 40). Given that this date is nearly three weeks away, the Court concludes that an expeditious ruling herein is still warranted.

airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit," as well as "typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." (*Id.*).

Subsequent Executive Orders closed non-life-sustaining retail businesses; banned most elective medical procedures; shut down additional businesses for in-person work; and placed further restrictions on retail establishments that were allowed to remain open. (Am. Compl. ¶¶ 18-23).

On March 30, 2020, the Governor issued an Executive Order banning Kentucky residents from travelling out of state, except when required for employment; to obtain groceries, medicine, or other necessary supplies; to seek or obtain care by a licensed healthcare provider; to provide care for dependents, the elderly, or other vulnerable person; or when required by court order. (Am. Compl. Exh. H). The Order also required any Kentuckian in another state for reasons other than those set forth in the exceptions to self-quarantine for fourteen days upon returning to Kentucky. (*Id.*).

Finally, on April 2, 2020, Governor Beshear issued an additional Executive Order expanding the travel ban to require residents of states other than Kentucky who travel into the

Commonwealth for reasons outside the above exceptions also to self-quarantine for fourteen days. (Am. Compl. Exh. I).

B. Bases for Plaintiffs' Claims

Notwithstanding the ban on mass gatherings, on Easter Sunday, April 12, 2020, plaintiffs attended in-person church services at Maryville Baptist Church in Hillview, Bullitt County, Kentucky. (Am. Compl. ¶ 27). Plaintiffs allege that they did so in accord with their sincerely held religious beliefs that in-person church attendance was required, and that they observed appropriate social distancing and safety measures during the service. (*Id.* ¶¶ 28-29).

Upon exiting the church, plaintiffs found on their vehicle windshields a Notice informing them that their presence at that location was in violation of the "mass gathering" ban. (Am. Compl. ¶ 32). Plaintiffs allege that the notices were placed there by the Kentucky State Police at the behest of Governor Beshear, who had stated that he was going to target religious services for such notices. (*Id.* ¶ 33-34).

The Notice states that the recipient is required to self-quarantine for fourteen days and that the local health department will send them a self-quarantine agreement. In bold, the notice continues: "Failure to sign or comply with the agreement may result in further enforcement measures," and "Please be advised that KRS 39A.990 makes it a Class A misdemeanor to violate an emergency

order.” (*Id.* ¶ 32). Plaintiffs subsequently received such documentation from the Kentucky Cabinet for Health and Family Services, Department for Public Health. (Doc. 37 at 5-6).

With regard to the Travel Ban, plaintiff Roberts alleges that the ban prevents him from travelling to Ohio and Indiana for a variety of personal reasons that do not fall within the exceptions found in Governor Beshear’s orders. (Am. Compl. ¶ 40).

Analysis

“A preliminary injunction is an ‘extraordinary remedy never awarded as of right.’” *Adams & Boyle, P.C. v. Slatery*, - F.3d -, No. 20-5408, 2020 WL 1982210, at *7 (6th Cir. April 24, 2020) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, (2008)). “Rather, the party seeking the injunction must prove: (1) that they are likely to succeed on the merits of their claim, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest.” *Id.* A court considering whether to grant a preliminary injunction must therefore “balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Id.* (citation omitted).

A. Mass Gathering Ban

The Court first considers plaintiffs' claim that Kentucky's ban on mass gatherings impermissibly infringes their First Amendment right to the free exercise of religion.

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

"A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* A law is not neutral if it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 533. Stated differently, neutrality is lacking where "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Id.*

Further, as to general applicability, the Supreme Court noted in *Lukumi* that "all laws are selective to some extent," and that reality does not render a law constitutionally suspect. *Id.* at 542. Rather, the First Amendment inquiry, again, focuses on

whether the government is selectively imposing “burdens only on conduct motivated by religious belief.” *Id.* at 543.

A law that fails to satisfy the neutrality and general applicability requirements “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Id.* 531-32.

With these principles in mind, it is abundantly clear that the “object or purpose of” Kentucky’s mass gathering ban is not “the suppression of religion or religious conduct.” *Lukumi*, 508 U.S. at 533. To the contrary, the plain text of the challenged order categorically bans all “mass gatherings” as a means of preventing the spread of a life-threatening virus. The illustrative examples set forth are sweeping: “community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.” (Doc. 6-4 at 1).

Plaintiffs do not argue that the State has permitted any other of the cited examples of mass gatherings to take place; rather, plaintiffs argue that certain businesses that the government has allowed to remain open present similar health risks. That, of course, is a judgment call, but what is missing is any evidence that Kentucky has conducted the essential/non-essential analysis with religion in mind. *Lukumi*, 508 U.S. at 543.

Moreover, there is an undeniable difference between certain activities that are, literally, *life* sustaining and other that are not. Food, medical care and supplies, certain travel necessary to maintain one's employment and thus income, are, in that sense, essential. Concerts, sports events, and parades clearly are not. And while plaintiffs argue that faith-based gatherings are as important as physical sustenance, as a literal matter, they are not *life*-sustaining in the physical sense.

As the Sixth Circuit observed just recently in the context of this pandemic, it "is imperative in such circumstances that judges give legislatures and executives—the more responsive branches of government—the flexibility they need to respond quickly and forthrightly to threats to the general welfare, even if that flexibility sometimes comes at the cost of individual liberties." *Adams & Boyle, P.C. v. Slatery*, — F.3d —, No. 20-5408, 2020 WL 1982210, at *1 (6th Cir. April 24, 2020).

Does the mass gathering ban have the effect of preventing plaintiffs who comply with it from attending in-person church services? Yes. Does the ban do so because the gatherings are faith-based? No.

For this reason, another Kentucky federal court hearing a case brought by the church attended by plaintiffs recently denied the church's motion for a temporary restraining order, finding that the church had not demonstrated a likelihood of success on

the merits of its First Amendment claim. See *Maryville Baptist Church, Inc. v. Beshear*, – F. Supp.3d –, No. 3:20cv278, 2020 WL 1909616 (W.D. Ky. April 18, 2020). The relief sought by the church was the same: in-person services with no state-imposed restrictions.²

The Court notes that just two days ago the Court of Appeals for the Sixth Circuit overruled, in part, Judge Hale’s denial of the temporary restraining order. (Doc. 41-1). However, the Sixth Circuit expressly limited its holding to drive-in church services:

The Governor and all other Commonwealth officials are hereby enjoined, during the pendency of this appeal, from enforcing orders **prohibiting drive-in services** at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for “life-sustaining” entities.

Id. at 10 (emphasis added). And the Court stated: “[W]e are inclined not to extend the injunction to in-person services at this point.” *Id.* Had the Court felt that such a broader injunction

²Another court granted plaintiffs a temporary restraining order where the City of Louisville had banned **drive-in** church services, which the plaintiffs wished to attend on Easter. See *On Fire Christian Center, Inc. v. Fischer*, – F. Supp. 3d –, No. 3:20cv264, 2020 WL 1820249, at *8 (W.D. Ky. April 11, 2020). Although plaintiffs here make a passing reference in their Complaint to drive-in services, that is not the relief they seek, nor have they suggested it as a compromise. The Court also notes that Governor Beshear, at the Court’s invitation, filed an *amicus curiae* brief in that case stating his position that his “mass gathering” ban does not prohibit drive-in religious services where proper safety protocol are observed. See Case No. 3:20cv264, Doc. 27. The issue in *On-Fire* was thus different than the one before this Court.

was warranted, it was within its power to so order. This Court thus does not find that opinion to control the outcome here.

In his opinion, Judge Hale also considered the church's claim under the Kentucky Religious Freedom Restoration Act, which invokes the more demanding "compelling interest" test. Judge Hale concluded that, even under that standard, the church did not demonstrate a likelihood of success. *Id.* at *3.

This Court agrees. The current public health crisis presents life-or-death dangers. Plaintiffs are not alone in having their lives and activities disrupted by it and the measures that our federal and state governments have taken to address it. Indeed, it is hard to imagine that there is any American that has not been impacted. But unless a law can be shown to have religion within its cross-hairs, either facially or in application, the fact that religious practices are impinged by it does not contravene the First Amendment.

For these reasons, the Court concludes that plaintiffs have not shown a likelihood of success on their merits of their First Amendment claim, and their motion for preliminary injunction on that basis will be denied.³

³For the same reasons, the Court also concludes that plaintiffs have failed to satisfy the remaining preliminary injunction factors.

B. Travel Ban⁴

After careful review, the Court concludes that the Travel Ban does not pass constitutional muster. The restrictions infringe on the basic right of citizens to engage in interstate travel, and they carry with them criminal penalties.

The “‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” *Saenz v. Rose*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). Indeed, the right is “virtually unconditional.” *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)). See also *United States v. Guest*, 383 U.S. 745, 757 (1966) (“The constitutional right to travel from one State to another ... occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”).

To be valid, such orders must meet basic Constitutional requirements. As the Supreme Court has stated:

(E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

⁴ Prospective injunctive relief against State defendants is proper under the doctrine of *Ex Parte v. Young*, 209 U.S. 123 (1908).

Aptheker v. Sec. of State, 378 U.S. 500, 508 (1964) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307-08 (1964)).

"Ordinarily, where a fundamental liberty interest protected by the substantive due process component of the Fourteenth Amendment is involved, the government cannot infringe on that right 'unless the infringement is narrowly tailored to serve a compelling state interest.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 502 (6th Cir. 2002) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). See also *Adreano v. City of Westlake*, 136 F. Appx. 865, 870-71 (6th Cir. 2005) (discussing arbitrary and capricious aspect of substantive due process claim); *Pearson v. City of Grand Blanc*, 961 F2d 1211, 1217 (6th Cir. 1992) (similar).

The travel restrictions now before the Court violate these principles. They have the following effects, among others:

1. A person who lives or works in Covington would violate the order by taking a walk on the Suspension Bridge to the Ohio side and turning around and walking back, since the state border is several yards from the Ohio riverbank.
2. A person who lives in Covington could visit a friend in Florence, Kentucky (roughly eight miles away) without violating the executive orders. But if she visited another friend in Milford, Ohio, about the same distance from Covington, she would violate the Executive Orders and have to be quarantined on return to Kentucky. Both these trips could

be on an expressway and would involve the same negligible risk of contracting the virus.

3. Family members, some of whom live in Northern Kentucky and some in Cincinnati less than a mile away, would be prohibited from visiting each other, even if social distancing and other regulations were observed.

4. Check points would have to be set up at the entrances to the many bridges connecting Kentucky to other states. The I-75 bridge connecting Kentucky to Ohio is one of the busiest bridges in the nation. Massive traffic jams would result. Quarantine facilities would have to be set up by the State to accommodate the hundreds, if not thousands, of people who would have to be quarantined.

5. People from states north of Kentucky would have to be quarantined if they stopped when passing through Kentucky on the way to Florida or other southern destinations.

6. Who is going to provide the facilities to do all the quarantining?

The Court questioned counsel for defendants Beshear and Friedlander during oral argument about some of these potential applications of the Travel Ban, and counsel indeed confirmed that the Court's interpretations were correct. (Doc. 38 at 9-13).

The Court is aware that the pandemic now pervading the nation must be dealt with, but without violating the public's constitutional rights. Not only is there a lack of procedural due process with respect to the Travel Ban, but the above examples show that these travel regulations are not narrowly tailored to achieve the government's purpose. See *Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) ("[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'") (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)).⁵

⁵ Minor amendments to the regulations might alleviate the problems. For example, the Ohio travel regulations only restrict travel into that state by a person who intends to "stay" in the state. While the word "stay" is perhaps vague, it certainly implies an intent to remain in the state at least 24 hours, so that persons stopping while driving through the state or changing planes at the airport would not face the risk of being unnecessarily quarantined for 14 days.

Further, the Ohio provisions are *requests* for the most part and recite that they have been issued for the "guidance" of the public. Nor do they apply "to persons who as part of their normal life live in one state and work or gain essential services in another state."

Ohio's rules, therefore, do not appear overbroad and have a rational basis for combating the coronavirus, while still preserving the population's constitutional rights.

Therefore, a preliminary injunction will enter declaring the Travel Ban orders invalid and prohibiting their enforcement.

Therefore, having reviewed this matter, and the Court being advised,

IT IS ORDERED that:

- (1) Plaintiffs' motion for a preliminary injunction (Doc. 7) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**;
- (2) Plaintiffs shall post a bond in the amount of \$1000.00. See Fed. R. 65 (c); and
- (3) A preliminary injunction consistent with this Memorandum Opinion and Order shall enter concurrently herewith.

This 4th day of May 2020.



Signed By:

William O. Bertelsman MOB

United States District Judge

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

MARYVILLE BAPTIST CHURCH, INC.,)
et al.,)

Plaintiffs,)

v.)

Civil Action No. 3:20-cv-00278-DJH

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

Defendant.)

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

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

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

up to date scientific and epidemiological medical advice how to best protect the public health of Kentucky citizens during the current international healthcare crisis.

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

General Nature of COVID-19:

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

epidemiologists are studying tirelessly, but much is still unknown about the spread and severity of the coronavirus. Combine these two concerns with the uncertainty and this presents a rapidly moving virus that our public health officials must remain vigilant in combating aggressively seven days a week.

Centers for Disease Control and Prevention Guidance:

14. On March 6, 2020, the Governor and the Cabinet for Health and Family Services encouraged adopting many guidelines from the Centers for Disease Control to combat the spread of the novel coronavirus COVID-19.
15. The CDC has communicated that COVID-19 spreads mainly among people who are in close contact with each other (within about 6 feet) for a prolonged period. The science behind this spread is that when an infected person coughs, sneezes, or talks, droplets from their mouth or nose are launched into the air and land in the mouths or noses of people nearby. The droplets can also be inhaled into the lungs. These droplets carry the infection from an individual infected with COVID-19 to an otherwise uninfected individual, and so on and so forth. There is a strong indication that people who are infected but do not have symptoms also play a role in the spread of COVID-19.
16. The CDC also has reason to believe that not only can COVID-19 pass through droplets in the air, but it also may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes.
17. Social distancing helps to combat the methods of transmission by limiting contact with infected people and contaminated surfaces.
18. The CDC generally defines social distancing as staying at least 6 feet from other people, not gathering in groups, staying out of crowded places, and avoiding mass gatherings
19. The CDC maintains that keeping space between you and others is one of the best tools we have to avoid being exposed to COVID-19 and slow its spread locally and across the country and world.
20. On March 29, 2020, the CDC revised its guidance on mass gatherings based on the guidance of The White House. Specifically, the CDC stated that during the next 30 days, individuals and organizations should cancel or postpone in-person events of 10 or more people throughout the United States.
21. The CDC has further provided guidance on what constitutes a gathering to include, but not be limited to, a friend's house, parks, restaurants, shops, or any other place.
22. The CDC did not advise that its guidance on social distancing and mass gatherings applied to people of a specific age, but specifically included children, teens, and adults of any age.
23. The CDC is working closely with state, local, tribal, and territorial partners, as well as public health partners, to respond to this situation. COVID-19 can cause mild to severe illness; most severe illness occurs in adults 65 years and older. Different parts of the country are seeing different levels of COVID-19 activity. The United States nationally is in the acceleration phase of the pandemic. The duration and severity of each pandemic can vary depending on the characteristics of the virus and the public health response.
24. The latest case counts, deaths, and a map of states with reported cases are available on the CDC webpage. As of May 5, 2020, the CDC reported within the United States 1,171,510 total cases, 68,279 total deaths, with all 50 states and the following territories reporting cases: District of Columbia, Guam, Puerto Rico, the Northern Mariana Islands, and the

U.S. Virgin Islands.

25. The CDC reports that based on what we know now, those at high-risk for severe illness from COVID-19 are: people 65 years and older; people who live in a nursing home or long-term care facility; people of all ages with underlying medical conditions, particularly if not well controlled, including: people with chronic lung disease or moderate to severe asthma, people who have serious heart conditions, and people who are immunocompromised. Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications. Other high risk factors are people with severe obesity (body mass index [BMI] of 40 or higher), people with diabetes, people with chronic kidney disease undergoing dialysis, and people with liver disease.
26. Compared to other states, Kentucky has a higher percentage of persons with these risk factors. For example, Kentucky has the highest percentage of deaths in the United States from cancer and chronic respiratory disease, the fifth highest for kidney disease, the ninth highest for heart disease and diabetes, and tenth highest for flu and pneumonia according to statistics for the year 2017, compiled by the CDC.

Commonwealth of Kentucky Public Health Action:

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

Flattening the Curve:

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

Incidents within the Commonwealth:

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

- 43. Several of the attendees who were interviewed stated that the preacher leading the revival encouraged them not to self-quarantine and to still attend church services.
- 44. There were 54 confirmed COVID-19 cases that had known epidemiological links to this revival, with three probable additional cases.
- 45. Of the 54 cases connected to the revival in Hopkins County, Kentucky, six of those have resulted in death.
- 46. As of May 5, 2020 the Kentucky Department of Health has identified 204 COVID-19 cases in Hopkins County.
- 47. The damage of these COVID-19 cases did not end with the attendees of the revival and stay isolated to Hopkins County, but instead related cases have spread to Muhlenburg, Clark, and Warren Counties, Kentucky.
- 48. With the specific incident in Hopkins County recent in time, leading up to the Easter holiday celebrated by many faiths within the Commonwealth and nationwide, the Governor encouraged churches to explore other ways to worship, including online services and even drive-in church services, that could comply with the Governor's Executive Order 2020-215 and the March 19, 2020 Order issued by the Cabinet for Health and Family Services.
- 49. On April 12th, in non-compliance of the Commonwealth's orders, as well as the directives of President Donald Trump and the CDC, the Maryville Baptist Church in Bullitt County held in-person services. Based upon media reports, multiple individuals from outside of Bullitt County attended this service, and various media reports indicate individuals from New Jersey, one of the epicenters of the virus in the United States, attended this service.
- 50. To prevent a spread much like the one originating at the church service in Hopkins County, the Commonwealth provided those in attendance at the Bullitt County church service with notice to voluntarily self-quarantine for 14 days.
- 51. The Kentucky Department for Public Health is aware of at least 15 cases in which individuals have been ordered to quarantine involuntarily, pursuant to orders from Circuit Courts. To the Department's knowledge, no person who attended the Bullitt County church service on April 12th has been ordered to quarantine involuntarily.

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

Steven J. Stack

Dr. Steven J. Stack, M.D.

COMMONWEALTH OF KENTUCKY)
) :SS
COUNTY OF FRANKLIN)

The foregoing instrument was acknowledged before me this 6th day of May, 2020, by Dr. Steven J. Stack.

My Commission expires: 5/26/2020

MELISSA D. PITTMAN
NOTARY PUBLIC
STATE AT LARGE
KENTUCKY

Melissa D. Pittman
NOTARY PUBLIC 556485



EXHIBIT B

ANDY BESHEAR
GOVERNOR

TOURISM, ARTS AND HERITAGE CABINET

MICHAEL E.
BERRY

JACQUELINE
COLEMAN

MAYO-UNDERWOOD BUILDING, 5TH FLOOR
500 MERO STREET
FRANKFORT, KENTUCKY 40601
502-564-4270 - OFFICE
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April 9, 2020

Pursuant to the March 6, 2020 Executive Order of Governor Andy Beshear declaring a State of Emergency in the Commonwealth of Kentucky, and subsequent Executive Orders including, but not limited to, the March 18, 2020 Executive Order 2020-243 empowering state agencies to take all reasonable and necessary steps to ensure appropriate social distancing and to avoid overcrowding to prevent exposure to and the spread of COVID-19 and the March 25, 2020 Executive Order 2020-257 mandating social distancing and compliance with established hygiene guidance, I hereby direct and order that the following Kentucky State Parks will be closed through the month of April 2020:

Natural Bridge State Resort Park
Cumberland Falls State Resort Park

Other State Parks are subject to being closed if the social distancing and hygiene guidance from the CDC and the Kentucky Department of Public Health are not followed to the fullest extent practicable.

Pursuant to these same authorities, I further direct and order that as of Friday, April 3, 2020, all Kentucky State Parks will no longer will be open to the public for overnight stays. The facilities will be open for use during daytime hours as long as visitors maintain appropriate social distancing and hygiene measures. Other than as set forth above, Kentucky State Parks will be open to the public between the hours of 7 a.m. and 7 p.m.

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

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE

MARYVILLE BAPTIST CHURCH, INC.,)
et al.,)

Plaintiffs,)

v.)

Civil Action No. 3:20-cv-00278-DJH

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

Defendant.)

DECLARATION OF LEIUTENANT COLONEL PHILLIP BURNETT, JR.

Phillip Burnett, Jr. states as follows:

1. My name is Phillip Burnett, Jr. I am a Lieutenant Colonel, Executive Director of the Operations Division of the Kentucky State Police (KSP). I was appointed to this position in February, 2020. I make this affidavit on personal knowledge.
2. On March 19, 2020, an Order was issued by the Cabinet for Health and Family Services (CHFS) prohibiting mass gatherings.
3. From March 19, 2020 through April 21, 2020, KSP received approximately 70 complaints regarding groups of people not complying with the March 19, 2020 CHFS Order.
4. Uniformed KSP visited all locations of the complaints, including but not limited to, a hair salon, an arcade, gas stations, flea markets, in neighborhoods and personal residences, and issued no citations and took no other enforcement action.
5. Uniformed KSP responded to these complaints and did not intervene – they did not cite or arrest any individual.

6. Troopers received approximately six complaints regarding Maryville Baptist Church having in-person services on April 12, 2020 and responded to the complaints.
7. Uniformed KSP recorded license plate information of vehicles in the parking lot of Maryville Baptist Church on April 12, 2020.
8. Uniformed KSP placed notices on vehicles in the parking lot of Maryville Baptist Church that provided notification of the potential consequences of participating in a mass gathering.
9. Uniformed KSP did not intervene, did not issue any citations and did not arrest any individual at Maryville Baptist Church on April 12, 2020, and have not issued any citations or made any arrests at Maryville Baptist Church subsequent to April 12, 2020.
10. KSP provided the license plate information of vehicles in the parking lot of Maryville Baptist Church to local public health officials.
11. KSP has not returned to Maryville Baptist Church parking lot since April 12, 2020.
12. KSP has not mailed any document to any individual present at Maryville Baptist Church on April 12, 2020, or any other date.
13. KSP has increased routine patrols overall due to the statewide COVID-19 pandemic.
14. Between March 19, 2020 and May 4, 2020, KSP patrolled approximately 2,175 retail locations a total of 9,240 times.

Further declarant sayeth naught.

Dated: May 6, 2020

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



LTC. Phillip Burnett, Jr.

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

MARYVILLE BAPTIST CHURCH, INC.,)
et al.,)

Plaintiffs,)

v.)

Civil Action No. 3:20-cv-00278-DJH

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

Defendant.)

DECLARATION OF KIMBERLEE C. PERRY

Kimberlee C. Perry states as follows:

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

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

5. Since April 1, 2020, the Department of Workplace Standards has received referrals of 220 complaints from the KY-SAFER noncompliance reporting hotline for investigation and possible enforcement action through closure orders, citations, and fines.

6. Of those 220 complaints, 113 involve businesses or organizations deemed life-sustaining under Executive Order 2020-257, and 107 involve business or organization deemed not to be life-sustaining under Executive Order 2020-257.

7. The Department of Workplace Standards, through its own investigators and investigators assigned by the Public Protection Cabinet to assist, has performed in-person investigations of 179 of the 220 complaints. The remaining 41 are awaiting in-person inspection or have been investigated or counseled on proper compliance with Executive Order 2020-257 by telephone.

8. The Department of Workplace Standards, through its own investigators and investigators assigned by the Public Protection Cabinet to assist, has verified through its in-person investigations that 119 businesses or organizations were in compliance with Executive Order 2020-257 or that the complaints were otherwise unverified.

9. The Department of Workplace Standards, through its own investigators and investigators assigned by the Public Protection Cabinet to assist, has issued a total of 60 closure orders based on its in-person investigations. A closure order is issued if the business or organization is not life-sustaining, or if the business or organization is life-sustaining, but is not properly implementing CDC protocols regarding social distancing as required in Executive Order 2020-257.

10. The Department of Workplace Standards has approved a total of 18 life-sustaining businesses or organizations to reopen after those entities provided evidence that they will properly implement CDC protocols regarding social distancing in the future.

Further declarant sayeth naught.

Dated: May 6, 2020

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


KIMBERLEE C. PERRY



KENTUCKY LABOR CABINET

Andy Beshear
Governor

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Larry L. Roberts
Secretary

Jacqueline Coleman
Lieutenant Governor

ORDER

March 31, 2020

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

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

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

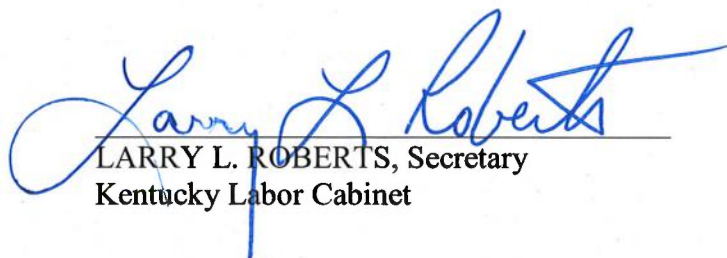
NOW THEREFORE under the authority granted under Executive Order 2020-257 to the Secretary of the Labor Cabinet as a member of the Governor's Executive Cabinet as set forth in KRS 11.065 to effectuate the various public health and safety orders issued under the State of Emergency, I order as follows:

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

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

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

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


LARRY L. ROBERTS, Secretary
Kentucky Labor Cabinet

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:20cv054 (WOB-CJS)

THEODORE JOSEPH ROBERTS,
ET AL.

PLAINTIFFS

VS.

ORDER

HON. ROBERT NEACE,
ET AL.

DEFENDANTS

This matter is before the Court on plaintiffs' emergency motion to stay (Doc. 49), and for the reasons stated in this Court's Memorandum Opinion and Order (Doc. 46),

IT IS ORDERED that plaintiffs' motion to stay (Doc. 49) be, and is hereby, **DENIED**.

This 5th day of May 2020.



Signed By:

William O. Bertelsman *WOB*

United States District Judge

The State of New Hampshire
MERRIMACK SUPERIOR COURT

BINFORD ET AL

v.

GOVERNOR SUNUNU

DOCKET NO. 217-2020-CV-00152

ORDER ON PLAINTIFFS' PETITION FOR PRELIMINARY INJUNCTION AND
DEFENDANT'S MOTION TO DISMISS

The plaintiffs, David W. Binford, Eric Couture, and Holly Rae Beene (collectively "Plaintiffs") have filed an Emergency Motion for Preliminary Injunction and Permanent Injunction against Governor Christopher Sununu in his official capacity as Governor of the State of New Hampshire (hereinafter the "State") on March 18, 2020. See Compl. (Doc. 1). Plaintiffs request an immediate preliminary injunction prohibiting the enforcement of Governor Sununu's Emergency Order # 2 (the "Emergency Order #2 ") issued on March 16, 2020 pursuant to Executive Order 2020-04 ("EO 2020-04). Id. at Prayer A–B. In the alternative, Plaintiffs request a declaratory judgment rendering the Emergency Order advisory as opposed to mandatory. Id. at ¶ 46. The Court held an emergency hearing on the matter on March 20, 2020 ("March 20 Hearing"). Immediately prior to the hearing, the State filed an objection to Plaintiff's request for preliminary and permanent injunction and a motion to dismiss. See State's Obj. (Doc. 5) and State's Mot. Dis. (Doc. 6). For the following reasons, Plaintiffs' petition for preliminary injunction is **DENIED**, and the State's motion to dismiss is **GRANTED**.

FACTS

The following facts are derived from the undisputed offers of proof at the March 20 Hearing and the undisputed facts contained within EO 2020-04 declaring a State of Emergency¹.

The Novel Coronavirus (“COVID-19”) first appeared in Wuhan, China in December of 2019. Doc.5, Ex. A at 1. On January 23, 2020, the Centers for Disease Control and Prevention (the “CDC”) activated its emergency response system to provide ongoing support in the United States in response to the growing number of cases of COVID-19 across the United States. Id. On January 30, 2020, the World Health Organization (the “WHO”) declared a public health emergency “of International Concern” related to COVID-19. Id. The following day, the United States Department of Health and Human Services (“USDHHS”) declared a national public health emergency concerning COVID-19. Id. On March 11, 2020, the WHO declared COVID-19 a global pandemic, expressing that in the coming weeks the number of cases, hospitalizations, and deaths would substantially increase. Id.

On March 12, 2020, the Division of Public Health (“DPH”) and the Division of Homeland Security and Emergency Management (“DHS”) announced that “211 NH” had been mobilized to handle all COVID-19 related calls in New Hampshire. Id. By March 13, 2020, various world health organizations reported over 124,000 confirmed cases of COVID-19 with 4,163 deaths worldwide. Id. Of those cases, 1,663 were confirmed in the United States, including six in New Hampshire. Id. at 2. On March 13, 2020, the President of the United States declared a National Emergency under the

¹ The Court notes that although Plaintiffs’ complaint argues that the factual basis contained within EO 2020-04 are insufficient to give rise to a state of emergency, Plaintiffs do not challenge the truth of the facts contained therein.

Stafford Act due to the global pandemic and national spread of COVID-19. Id. At the same time, DHS and the Department of Safety activated State Emergency Operations Centers to provide support to New Hampshire state and local authorities dealing with the crisis. Id.

The same day, Governor Sununu issued EO 2020-04, declaring a State of Emergency due to COVID-19. Id. Governor Sununu set forth seventeen recitations of fact upon which the EO was issued, including details about the threats to the health and safety of New Hampshire residents posed by the outbreak and the response necessary to combat the spread. Id. In EO 2020-04, Governor Sununu acknowledged that, although the majority of cases of COVID-19 will result in mild symptoms, many will require hospitalization and may lead to death. Id. As a result, Governor Sununu noted:

[I]f COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources, and controlling outbreaks minimizes the risk to the public, maintains the health and safety of the people of New Hampshire, and limits the spread of infection in our communities and within the healthcare delivery system

Id. Consequently, Governor Sununu articulated the need for New Hampshire to “implement measures to mitigate the spread of COVID-19, and to prepare and respond to an increasing number of individuals requiring medical care and hospitalization.” Id.

Pursuant to EO 2020-04, Governor Sununu invoked his powers under RSA 4:45 and 4:47. He further noted in EO 2020-04 that “additional temporary orders, directives, rules, and regulations may be issued either by the Governor or by designated state officials within the written approval of the Governor.” See id. at 6. Thereafter, on March 16, 2020, he issued Emergency Order #2, which provides:

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1. In accordance with CDC guidelines, the following activities are prohibited within the State of New Hampshire:

Scheduled gatherings of 50 people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition does not apply to the General Court or to the day-to-day operations of businesses.

2. Food and beverage sales are restricted to carry-out, delivery, curbside pick up, and drive through only, to the extent permitted by current law. No onsite consumption is permitted, and all onsite consumption areas in restaurants, diners, bars, saloons, private clubs, or any other establishment that offers food and beverages for sale shall be closed to customers.
3. Section 2 of this order shall not apply to food and beverage service in (a) healthcare facilities, (b) airports, or (c) cafeterias located within a private business which are primarily intended to serve the employees of that business.
4. The Division of Public Health shall enforce this Order and if necessary may do so with the assistance of State or local police.
5. This Order shall remain in effect until Monday, April 6, 2020.

Doc. 5, Ex. B.

As of March 19, 2020, there were 44 confirmed cases of COVID-19 within the State of New Hampshire. In addition, there were 630 tests pending in the New Hampshire Public Health Laboratories, and 575 people were being monitored.

ANALYSIS

In response to Emergency Order #2, Plaintiffs brought this action on March 17, 2020. See Doc. 1. Plaintiffs seek an emergency and permanent injunction on Emergency Order #2 or, in the alternative, a declaratory judgment rendering Emergency Order #2 advisory rather than mandatory. Id. Plaintiffs argue that the governor does not have the authority to issue Emergency Order #2, the spread of COVID-19 does not

amount to an emergency under RSA 21-P:35, and Emergency Order #2 is unconstitutional. Id. The State objects arguing that the governor has the authority pursuant to RSA 4:45, Emergency Order #2 is enforceable, and it is constitutional. See Doc. 5. For the same reasons, the State also moves to dismiss. See Doc. 6

I. Motion for Preliminary Injunction

“A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” DuPont v. Nashua Police Dep’t, 167 N.H. 429, 434 (2015) (quotation omitted). It is the moving party’s burden to “show among other things that it would likely succeed on the merits.” Id. (quotation and brackets omitted). In addition to success on the merits, “[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, [and] there is no adequate remedy at law.” Pike v. Deutsche Bank Nat’l Trust Co., 168 N.H. 40, 45 (2015) (quotation omitted). “The trial court retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity.” Id.

Plaintiffs have the burden to demonstrate that all three factors are met in order for the Court to order the extraordinary relief of a preliminary injunction. As the Court finds that Plaintiffs are unlikely to succeed on the merits, it need not consider whether there is irreparable harm or an adequate remedy at law. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that courts need not consider the party’s remaining arguments where one or more is dispositive of the case). Accordingly, the Court will limit its analysis to whether Plaintiffs are likely to succeed on the merits of the case.

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In support of their position that they are likely to succeed on the merits, Plaintiffs argue: (1) Governor Sununu does not have the authority to issue Emergency Order #2; (2) Emergency Order #2 has no enforcement mechanism; and (3) Emergency Order #2 is unconstitutional under the State and Federal Constitutions. See Doc. 1 ¶¶ 23–45. The State asserts that Governor Sununu: (1) properly declared a state of emergency pursuant to RSA 4:45; (2) may use his emergency powers to temporarily suspend or limit fundamental rights if he does so in good faith and with a sufficient factual basis; and (3) Emergency Order #2 is a permissible time, place, and manner restriction on Plaintiffs' fundamental rights. See Doc. 5 a 10–20.

A. Executive Authority

Plaintiffs first argue that Governor Sununu lacks the authority to declare a state of emergency because he cannot meet the burden of showing that an emergency exists under RSA 141-C:14-a or RSA 4:45. Doc. 1 ¶ 27. As an initial matter, the governor's authority is not derived from RSA 141-C:14-a, which contemplates the power of the Commissioner of the Department of Health and Human Services. See RSA 141-C:2, IX. Rather, the governor's power to declare a state of emergency is derived from RSA 4:45 and RSA 4:47. As a result, the Court will consider the parties arguments under the aegis of RSA 4:45 and 4:47.

RSA 4:45, I provides:

The governor shall have the power to declare a state of emergency, as defined in RSA 21-P:35, VIII, by executive order if the governor finds that a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

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Once the governor has declared a state of emergency, he has “[t]he power to make, amend, suspend, and rescind necessary orders, rules and regulations to carry out the provisions of this subdivision in the event of a disaster beyond local control.” RSA 4:47, III. As the governor’s powers under a state of emergency are broad, invocation of the provisions in RSA 4:45 and RSA 4:47 requires the governor to specify the factual conditions that have brought about the emergency and the nature of the emergency itself. RSA 4:45, I(a)–(c). These factual assertions must establish that a state of emergency exists as defined in RSA 21-P:35, VIII, which states:

“State of emergency” means that condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm.

Here, Plaintiffs contend that Governor Sununu lacks the authority to declare a state of emergency because the circumstances surrounding the COVID-19 outbreak do not amount to an emergency under the definition of emergency in RSA 21-P:35. Doc. 1 ¶¶ 27–31. Plaintiffs argue that “New Hampshire has had just 17 people diagnosed with [COVID-19], and ZERO deaths. In a state of over 1 million people, those numbers alone make it clear this is not an ‘emergency.’” *Id.* ¶ 28 (emphasis in original). This argument is without merit.

It would be irrational to find that the governor must wait for the health care system of New Hampshire to be overwhelmed with patients suffering from COVID-19 before he is authorized to declare a state of emergency and take preventative measures to slow the spread of a highly contagious and potentially deadly disease. Indeed, RSA 4:45 contemplates the need to take preemptive action and explicitly authorizes the

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governor to do so. Specifically, RSA 4:45, I permits the governor to declare a state of emergency where a disaster is “imminent or has occurred within this state.” (Emphasis added). As a result, Governor Sununu is expressly authorized to declare a state of emergency and order measures designed to address an imminent threat to New Hampshire public health and safety. That said, RSA 4:45 requires the governor to assert the factual basis or bases upon which the declaration rests. EO 2020-04 more than satisfies this requirement.

As stated in EO 2020-04, at the time of the March 20 Hearing, COVID-19 had infected roughly 124,000 people globally, of which nearly 5,000 have died. The WHO declared that COVID-19 is a global pandemic and warned the world to take precautions to slow the spread of the disease. The world’s experts on infectious diseases, including the WHO, CDC, and USDHHS, agree that these numbers will increase exponentially over the coming weeks and months, particularly if no measures are taken to stop the spread of COVID-19. This presents an enormous risk to the residents of New Hampshire, as the state only has limited local medical resources to combat the outbreak. As a result, “if COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources.” Doc. 5, Ex. A at 2. Correspondingly, “controlling outbreaks minimizes the risk to the public” and minimizes the strain on the state’s limited resources. Id. With this in mind, the Court finds that there is overwhelming factual and legal support evincing Governor Sununu’s authority to declare a state of emergency. Accordingly, the Court finds that EO 2020-04 sets out a sufficient factual basis to conclude that “a natural, technological, or man-made disaster of major

proportions is imminent” such that the governor is authorized to declare a state of emergency pursuant to RSA 4:45 and to issue executive orders designed to address the spread of COVID-19 pursuant to RSA 4:47, III.

Plaintiffs next argue that, even if the governor is authorized to declare a state of emergency and to issue executive orders related thereto, Emergency Order #2 lacks any legal enforcement mechanism and should therefore be declared advisory. Doc. 1 ¶¶ 44–46. Plaintiffs specifically point to RSA 21-P:47, which states “[i]f any person violates or attempts to violate any order, rule, or regulation made pursuant to this subdivision, such person shall be guilty of a misdemeanor.” Plaintiffs assert that the language “pursuant to this subdivision” expressly limits the governor’s enforcement power to orders issued pursuant to RSA 21-P. Plaintiffs argue that the legislature would have included express language indicating the governor’s power to enforce orders issued pursuant to RSA 4:45 if it had intended him to have the enforcement authority pursuant to that chapter.

This argument ignores the rest of the subdivision contained within RSA 21-P. RSA 21-P:45, titled “Enforcement,” expressly includes language authorizing enforcement of executive orders issued under RSA 4:45:

It shall be the duty of every organization for emergency management established under this subdivision and of the officers of such organization to execute and enforce such orders, rules, and regulations as may be made by the governor under authority of this subdivision or RSA 4:45.

(Emphasis added). RSA 21-P:45 expressly authorizes the governor to enforce emergency orders, while RSA 21-P:47 sets forth the penalty for failure to comply with emergency orders issued pursuant to RSA 4:45. Accordingly, the Court finds that not only does Governor Sununu have the authority to declare a state of emergency, but the

legislature has also imbued the executive with the authority to enforce emergency orders made pursuant to RSA 4:45. As a result of this clear legislative authority, the Court declines the request that Emergency Order #2 be declared advisory as opposed to mandatory.

B. Constitutionality of Emergency Order #2

Plaintiffs argue that Emergency Order #2 is unconstitutional because: (1) it violates their right to assemble under the First Amendment of the U.S. Constitution and Part I, art. 32 of the New Hampshire Constitution; (2) it violates their right to religious freedom under the First Amendment of the U.S. Constitution and Part I, art. 5 of the New Hampshire Constitution; (3) it violates the Part I, art. 34 New Hampshire Constitution prohibition on Martial Law; (4) it constitutes an unconstitutional taking under the U.S. Constitution; and (5) it violates their privilege of Habeas Corpus under Part 2, art. 91 of the New Hampshire Constitution. See Doc. 1. In response, the State contends: (1) during a state of emergency, executives are granted broad latitude to suspend civil liberties in order to address the emergency; and (2) even if the governor does not have broad latitude to suspend civil liberties during the state of emergency, Emergency Order #2 is a permissible time, place, and manner restriction on assembly and religion. Doc. 5 at 13–18. The State further maintains that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped, conclusory statements of the law that are without merit and do not warrant judicial review. Id. at 18–19.

As an initial matter, the Court agrees with the State that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped

and without merit. Plaintiffs do not assert any facts that would lead the Court to conclude that Governor Sununu has declared martial law, has taken any property from Plaintiffs without just compensation, or has exercised impermissible control over Plaintiffs' bodies. See Doc. 1. Accordingly, the Court will only consider Plaintiffs' developed arguments concerning freedom of assembly and freedom of religion.

i. Governor's Authority to Suspend Civil Liberties

As the State points out, there is not a wealth of case law in New Hampshire concerning the governor's authority to enact emergency orders during a state of emergency. As a result, the Court looks to other jurisdictions for guidance regarding the limit of the governor's authority under these circumstances.

Multiple jurisdictions have contemplated the executive's authority to suspend or infringe upon certain civil liberties during states of emergency. See e.g. Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended."); United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971) ("The invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected."); In re Juan C., 33 Cal. Rptr.2d 919, 922 (Ct. App. 1994) ("An inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife. The desire for free and unfettered discussion and movement must be balanced against the desire to protect and preserve life and property from destruction."); ACLU of W. Tenn., Inc. v. Chandler, 458 F. Supp 456, 460 (W.D. Tenn. 1978) (explaining that the governor has the authority to impose "limitation on the exercise of [First Amendment rights] only in very unusual

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circumstances were extreme action is necessary to protect the public from immediate and grave danger”).

The 11th Circuit has articulated a two-prong test to determine whether an executive order passes constitutional muster during a state of emergency. See Avino, 91 F.3d 105. In Avino, the Governor of the State of Florida issued an executive order declaring a state of emergency in the wake of Hurricane Andrew. Id. at 108. This executive order provided that Miami city and Metropolitan Dade County officials could impose curfews from August 24, 1992 through December 21, 1992. Id. The Miami Dade county manager set the curfew from 7:00 pm to 7:00 am and called in the National Guard and other law enforcement officials to aid local police. Id. By October 2, 1992, the curfew was in effect from 10:00 pm through 5:00 am. Id. County residents were required to stay in their homes during the curfew hours unless otherwise authorized. Id. The curfew was ultimately lifted on November 16, 1992. Id. The plaintiffs, residents of Dade County, filed suit against Metropolitan Dade County and the county manager, arguing that the curfew ordinance was unconstitutional. Id. at 107.

The Avino court began its analysis by establishing that the curfew ordinance must be considered “in the circumstances under which the curfew was instituted.” Id. at 108. The Avino court noted that the State of Florida was devastated by Hurricane Andrew and that all parties agreed that “[p]olice action was clearly required.” Id. at 109. The court went on to note that “[c]ases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction.” Id. (citing Chalk, 441 F.2d 1277; In re Juan C., 33 Cal. Rptr.2d 919; and Moorhead v.

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Farrelly, 727 F. Supp. 193 (D.V.I. 1989)). The Avino court articulated that in a state of emergency, “governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency.” Id. Accordingly, the court held that “when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality is limited to a determination whether the executive’s actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order.” Id. The Avino court went on to hold that there was no suggestion that the Dade County officials acted in bad faith. Id. The Avino court further found that a factual emergency existed necessitating emergency intervention. Id. The court ultimately concluded that under extreme emergency circumstances, “fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.” Id.

The case currently before the Court concerns a ban on gatherings in excess of 50 people and a ban on dining in at food and beverage service establishments in order to prevent the spread of a highly infectious and deadly disease. The Court finds that this type of ban is sufficiently analogous to a curfew in response to a riot or natural disaster such that the 11th Circuit’s two-prong test established in Avino would apply. The Court is also sufficiently persuaded by the 11th Circuit’s reasoning in Avino, and adopts that two-prong test here. Accordingly, the Court will review the constitutionality of Emergency Order #2 by examining whether: (1) the Governor has acted in good faith; and (2) whether the Governor has asserted a sufficient factual basis showing that the restrictions imposed were necessary.

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Here, there is no allegation that Governor Sununu has acted in bad faith. Indeed, at the March 20 Hearing, Plaintiffs conceded that Governor Sununu acted in good faith in issuing Emergency Order #2. As a result, the Court need only consider whether the Governor has articulated a sufficient factual basis demonstrating that the restrictions imposed were necessary. Plaintiffs challenge Emergency Order #2's ban on gatherings of 50 or more people and ban on dine in services in public restaurants, alleging that there is no sufficient factual basis to conclude that these measures are necessary to combat COVID-19. The Court disagrees.

As stated above, EO 2020-04 set out ample factual bases to conclude that the Governor had the authority to declare a state of emergency concerning the global pandemic caused by COVID-19. These facts establish a strong need for immediate intervention. By March 16, 2020, both the United States District Court for the District of New Hampshire and the New Hampshire Supreme Court had issued orders suspending hearings and jury trials and restricting the number of people that had access to the courts. On March 16, 2020, the CDC and the White House put forth social distancing guidelines, recommending that events of ten or more people should be cancelled or held virtually. That day, Governor Sununu issued the ban on gatherings in excess of 50 people and suspended dine-in services at restaurants. These actions are consistent with similar actions taken by New Hampshire courts and are clearly supported by the recommendations put forth by the CDC and the White House. In issuing Emergency Order #2, the Governor acknowledged the ongoing emergency presented by the spread of COVID-19 and articulated the relationship between a ban on large gatherings and

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dine-in services and addressing the emergency. Accordingly, the Court finds that there is a sufficient factual basis for the prohibitions contained within Emergency Order #2.

Further buttressing the Court's finding that the Governor's actions are constitutional is the fact that there are multiple checks on Governor Sununu's authority to enforce Emergency Orders pursuant to EO 2020-04. Absent a renewed factual finding by the Governor, EO 2020-04 will be in effect for only 21 days. RSA 4:45, I(d). In addition, the legislature has the authority "by concurrent resolution" to end the state of emergency at any time and can block the governor from renewing the state of emergency at the expiration of 21 days. RSA 4:45, II(c). Furthermore, Emergency Order #2 is in effect for a limited duration, beginning on March 16, 2020 and ending April 6, 2020. See State's Ex. B. During that time, should the factual bases for enforcing the Emergency Order change, it is subject to review by the Court. See Moorhead, 727 F. Supp. 193 ("A court's role in the aftermath of an emergency...is to review, with deference, the decision of the executive.").

In sum, because Governor Sununu has acted in good faith, and because there is a sufficient factual basis on which to conclude that the prohibitions contained within Emergency Order #2 are necessary, and because there are sufficient checks and balances on executive orders during a state of emergency, the Court finds that Emergency Order #2 passes constitutional muster.

ii. Time/Place/Manner Restrictions on Freedom of Speech and Freedom of Assembly

Although the Court finds that the Governor may suspend or limit constitutional rights during a state of emergency, for the purpose of establishing a complete record, the Court will also analyze the facial constitutionality of Emergency Order #2.

Part I, art. 32 of the New Hampshire Constitution provides: “The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good.” “This provision guarantees the same right to free speech and association as does the First Amendment to the Federal Constitution.” Opinion of the Justices (Voting Age in Primary Elections II), 158 N.H. 661, 667 (2009). “In interpreting Part I, Article 32, therefore, [the Court] rel[ies] upon federal cases interpreting the First Amendment to the Federal Constitution for guidance.” Id.

“The State constitutional right of free speech, N.H. CONST. pt. I, arts. 22 & 32, is not absolute, but may be subject to reasonable time, place and manner regulations.” State v. Comely, 130 N.H. 688, 691 (1988). “Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000). “Where ... a law regulates speech only incidentally, as a consequences of expressly regulating conduct, it will withstand first amendment scrutiny if, in its application to incidental speech, it is no more restrictive than a time, place, and manner regulation.” Comely, 130 N.H. at 691 (citing United States v. O’Brien, 391 U.S. 367, 376–77 (1968)). Determining whether a time, place, and manner regulation comports with the Constitution, requires the Court to

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employ a three-prong test. Comely, 130 N.H. at 691. The Court must determine whether the regulation: (1) is content-neutral; (2) narrowly serves a significant governmental interest; and (3) allows for other opportunities for expression. Id. Although these cases consider laws rather than emergency orders, the effect of the emergency order is functionally the same. As a result, the Court concludes that the same standard is generally applicable to emergency orders enacted pursuant to RSA 4:45.

The first step of the analysis is to determine whether the restrictions contained within Emergency Order #2 are content neutral. Comely, 130 N.H. at 691. Plaintiffs contend that Emergency Order #2 is expressly content based because of the language in paragraph 1 banning “[s]cheduled gatherings of 50 people or more for social, spiritual and recreational activities.” See Doc. 1, Ex. A. Plaintiffs argue that inclusion of the word “spiritual” expressly targets religious activities and is therefore not content neutral. This argument ignores the remainder of paragraph one which includes an illustrative list detailing the types of events to which Emergency Order #2 applies. Id. (banning gatherings in excess of 50 people for events “including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities”). Based on the inclusion of this illustrative list, Emergency Order #2 is clearly content neutral in that it prohibits any gathering in excess of 50 people, regardless of the content of the event. Accordingly, the Court finds that Emergency Order #2 is content neutral and thereby satisfies the first prong of the time, place, and manner test.

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The second step of the analysis is to determine whether the restriction is narrowly tailored to serve a significant government interest. Comely, 130 N.H. at 691. Courts have long held that public health, safety, and welfare constitute a significant government interest. See e.g. Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995). EO 2020-04 clearly declared a state of emergency as the result of an impending public health crisis in the State of New Hampshire, and Emergency Order #2 was issued by Governor Sununu to address the public health crisis established in that executive order. See Doc. 5, Ex. A. As a result, the State has established that it has a significant interest in promoting public health and safety as related to the spread of COVID-19.

The CDC and the White House have put forth guidelines recommending that gatherings be limited to ten people or fewer in order to slow the spread of COVID-19. Emergency Order #2 follows these guidelines, but is not so restrictive, allowing for gatherings of fewer than 50 people. Doc. 5 at 17. Emergency Order #2 also prohibits the onsite consumption of food or beverages in “restaurants, diners, bars, saloons, private clubs, or any other establishment.” Doc. 1, Ex. A ¶ 2. However, it does not completely prevent the sale of food and beverages, expressly authorizing “carry-out, delivery, curbside pick up, and drive through” services. Id. Thus, the only two restrictions imposed on public assembly are that scheduled gatherings cannot have in excess of 50 people, and dine-in services at public restaurants are suspended. The restrictions contained within Emergency Order #2 paragraphs 1 and 2 were specifically designed to comport with relevant CDC guidelines to slow the spread of COVID-19. See Doc. 1, Ex. A; see also Doc. 5, Ex. A at 3. In addition, Emergency Order #2 is not a permanent ban on all gatherings in excess of 50 people or dining-in at restaurants.

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Rather, Emergency Order #2 has a fixed expiration date, April 6, 2020. Doc. 1, Ex. A ¶ 5. Should Governor Sununu determine that a sufficient factual basis exists to extend the state of emergency and thereafter extends the duration of Emergency Order #2, that expansion must only last for the duration necessary to respond to the public health emergency.

Accordingly, because Emergency Order #2 limits its restrictions to those suggested by the CDC to slow the spread of COVID-19, and because the effects of Emergency Order #2 have a limited duration, the Court finds that Emergency Order #2 is narrowly tailored to serve the government's significant interest.

The final step of the analysis is to determine whether Emergency Order #2 allows for alternative opportunities for expression. Comely, 130 N.H. at 691. This prong of the test is clearly satisfied. As stated above, Emergency Order #2 only bans scheduled gatherings of 50 or more people and dine-in restaurant services. People are free to attend scheduled gatherings with fewer people. They can attend impromptu gatherings of any kind. They are free to communicate via the internet or telephone. They may tune into televised events. They can continue to dine together in their homes or outdoors. There are a wealth of opportunities for individuals to exercise their right to freely assemble and associate that do not require them to gather in large groups or eat at a restaurant during a public health emergency. Accordingly, the Court finds that Emergency Order #2 allows for alternative opportunities of expression.

Because Emergency Order #2 is content neutral, narrowly tailored to serve the government's interest in slowing the spread of COVID-19, of a limited duration, and allows for alternative methods of speech, assembly, and association, the Court

concludes that it constitutes a reasonable time, place, and manner restriction, comporting with the precepts of the First Amendment and Part I, art. 32 of the New Hampshire Constitution.

iii. Restrictions of Freedom of Religion

The Free Exercise clause of the First Amendment prohibits the government from seeking “to ban such acts or abstentions only when they are engaged in for religious reasons.” Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (superseded by statute on different grounds as stated in Holt v. Hobbs, 574 U.S. 352 (2015)). That said, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

As established above, Emergency Order #2 is content neutral. Nothing in Emergency Order #2 suggests that it is intended to target any religion or specific religious practice. While a ban on scheduled gatherings of 50 or more people may have an impact on the ability for a congregation to assemble at church, the Court concludes that such an impact is merely incidental to the neutral regulation and is otherwise reasonable given the limited duration of the order and public health threat facing the citizens of this State. Accordingly, for all the reasons set forth in the section above, the Court finds that Emergency Order #2 does not unconstitutionally infringe upon Plaintiffs’ freedom of religion.

Because the Court finds that Governor Sununu has the authority to suspend or limit fundamental rights during a state of emergency, and because Emergency Order #2

constitutes a reasonable time, place, and manner restriction, the Court finds that Plaintiffs are unlikely to succeed on the merits of their claim. Consequently, Plaintiffs' motion for preliminary injunction is **DENIED**.

II. Motion to Dismiss

In ruling on a motion to dismiss, the Court considers whether the allegations in the plaintiff's "pleadings are reasonably susceptible of a construction that would permit recovery." Riso v. Dwyer, 168 N.H. 652, 654 (2016) (quotation omitted). The Court must assume the truth of the factual allegations outlined in the complaint, and construe all reasonable inferences in the light most favorable to the plaintiff. Id. The Court does not, however, "assume the truth of the statements in the [third-party] complaint that are conclusions of law." Id. (quotation omitted). In other words, because the Court is only required to accept "well-pleaded facts," it is not required to accept conclusory allegations which contain no articulable facts that can be tested. See Snierson v. Scruton, 145 N.H. 73, 76 (2000); Baxter Int'l Inc. v. State, 140 N.H. 214, 218–19 (1995). The pertinent inquiry is whether the facts alleged constitute a basis for relief. Riso, 168 N.H. at 654. If they do not, the Court shall grant the State's motion to dismiss. Id.

Plaintiffs have challenged the constitutionality of EO 2020-04 and Emergency Order #2 on their face, rather than as applied. As a result, the Court is presented with a question of law rather than fact, which can be appropriately decided on a motion to dismiss. The Court has already considered the merits of Plaintiffs' arguments, supra at 5–20, and has found that Plaintiffs cannot succeed on the merits of their claim as the governor's emergency declarations pass constitutional muster. It logically follows that,

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for the same reasons stated above, Plaintiffs have failed to state a claim for which relief may be granted. Consequently, the State's motion to dismiss is **GRANTED**.

CONCLUSION

For the forgoing reasons, Plaintiffs petition for preliminary injunctive relief is **DENIED**, and the State's motion to dismiss is **GRANTED**.

SO ORDERED.

3/25/2020
DATE



John C. Kissinger
Presiding Justice