Reply to Governor's Impeachment Response[1]

I. The Governor's puerile and juvenile attacks on these petitioners demonstrate further unfitness for office, in addition to a disgusting and wasteful use of public funds (and possibly yet another violation of the U.S. Constitution)

As opposed to addressing the merits and substance of the petition, Governor Beshear spends dozens of pages attacking these citizen petitioners and a puerile and juvenile fashion. It appears he has spent a troubling amount of taxpayer-funded time (the committee should consider investigating this abuse) scrolling through social media.

This is not terribly surprising: he went on his taxpayer-funded television show to do the same thing at the time of the filing of our petition. As a consequence, his supporters have threatened us (we have been threatened with people coming to our homes to assault us). We can only surmise that this was done intentionally to attempt to silence our efforts to petition this legislature for redress of grievances. We submit that this is First Amendment rights retaliation, yet another intentional and knowing U.S. Constitutional violation, and abuse of office. *Thaddeus-X v. Blatter*, 110 F.3d 1233 (6th Cir. 1997).

II. *Beshear v. Acree* is a results-oriented jurisprudential embarrassment, and the legislature, not the Kentucky Supreme Court, is the judge of constitutional violations in the impeachment context

Much of the Governor's defense relies upon his tortured reading of *Beshear v. Acree*, 2020 Ky. LEXIS 405 (Ky. 2020). We should probably begin by noting that the Governor made numerous public statements about the Kentucky Supreme Court before that decision and his belief that it would rule in his favor prior to the rendition of the opinion in *Acree*. Given that Kentucky Supreme Court Justices were making public social media posts about masking up (one of the issues in the *Acree* decision), and #TeamKentucky, the Governor's hash tag, reflecting the appearance of impropriety and bias (as well as apparent ethical issues), the results were hardly surprising:[2]

[1] This response is only from 3 of the Petitioners: Andrew Cooperrider, Tony Wheatley, and Jacob Clark; Randall Daniel desired to have additional time for review and response, and may be requesting that separately, but Cooperrider, Wheatley, and Clark recognize that time is of the essence, that the legislature's time in session is short, that the Committee has a scheduled a meeting to undertake review of these serious matters on January 27, 2021, and we also appreciate the opportunity to present this Reply. To be clear: this Reply only represents the views of Cooperrider, Wheatley, and Clark, and not Randall Daniel.

[2] Kentucky Judicial Canon 1.2 states: A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety. *See, also*, Canon 2.3.

Until 2020, and the results-oriented, #TeamKentucky approach by the Kentucky Supreme Court in *Acree*, Kentucky adhered to a strict separation of powers standard. *Bd. of Trs. of the Judicial Form Ret. Sys. v. AG*, 132 S.W.3d 770, 782 (Ky. 2003), "Kentucky holds to a higher standard ... Kentucky is more 'restrictive of powers granted' than the federal Constitution because the federal Constitution does not have a 'provision expressly forbidding the Congress to delegate its legislative powers,' as do Sections 27, 28, 29, and 60 of the Kentucky Constitution." *citing Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 390-91 (1939). Thus, "Kentucky law mandates that 'the legislature must lay down policies and establish standards.'" *Id.* This rule is enforced by this Court, and has been described as "not toothless." *Id.*

The laundry list of what constitutes an emergency, and the limitless standards in KRS Chapter 39A, are not and were not sufficient standards. *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 38 (Ky. 1938); *See also Diemer v. Commonwealth*, 786 S.W.2d 861, 864 (Ky. 1990) ("Kentucky is a strict adherent to the separation of powers doctrine.")*; Miller v. Covington Dev. Auth.*, 539 S.W.2d 1, 4-5 (Ky. 1976) (invalidating a statute because it so "lacked legislative criteria" as to impermissibly delegate lawmaking power to the executive); *AG*, 132 S.W.3d 770, 782; *State Board for Elementary and Secondary Education v. Howard*, Ky., 834 S.W.2d 657 (Ky. 1992) (finding a statute unconstitutional for vagueness because of the failure to define the word "activities"); *Bullitt Fiscal Court v. Bullitt County Bd. of Health*, 434 S.W.3d 29 (Ky. 2014) (inappropriate delegation).

Is this jurisprudential, results-oriented, embarrassment, a defense to impeachment? The answer is of course not. Section 109 of Kentucky's Constitution is clear: "The impeachment powers of the General Assembly shall remain inviolate," and are outside the scope of any judicial review. In short, what the legislature says is impeachable, is impeachable. And, the Kentucky Constitution, in Sections 66 and 68, rest such determinations squarely with the House of Representatives, subject to the review by the Kentucky Senate in a trial under Section 67.

III. The Governor's unauthorized unemployment loan was not addressed in *Beshear v. Acree*, but is a plain and palatable violation of the Kentucky Constitution.

The terms "loan," or "Section 49," are found nowhere in *Acree*. The term "unemployment" is found once, in a footnote, and does not substantively address the issues raised with the Section 49 violation.

That the Executive not be permitted to incur debts is a feature, not a impediment, as the Governor argues. The power of the purse is one of the fundamental checks and balances. And Section 49 could not be clearer:

> The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed five hundred thousand dollars, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts: Provided, The General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defense.

The Governor in response argues necessity: but he had the tools available to be able to incur debts outside of appropriations: he could have called a special session under Section 80 and obtained the General Assembly's permission. He made the choice not to. And this was in contravention of the law. *Billeter & Wiley v. State Highway Com.*, 203 Ky. 15 (1924).

IV. The Governor's Easter targeting of church goers and other religious discrimination violated the U.S. and Kentucky Constitutions, were knowing and intentional violations as documented by the Kentucky State Treasurer, were found by federal courts to violate the U.S. Constitution, and was not addressed in *Beshear v. Acree*.

The Governor argues that *Acree* is some sort of defense to the allegations concerning his abuse of office in targeting church-goers. The problem with that is the Kentucky Supreme Court specifically observed in *Acree* that it was not undertaking the issues raised in the federal proceedings: "The religious challenges have been litigated in federal court, and no religious organization or health care provider has appeared in this case to challenge the Governor's COVID-19 response." Id. at *9.

As demonstrated in the attached report by the Kentucky State Treasurer [**Exhibit 1**], the Governor did not only send the State Police to churches, he did so with knowledge that his orders were unconstitutional infringements on church goers.

As the Treasurer's report indicates, the Governor's office directed that certain churches (but not other businesses) "be monitored by Kentucky State Police, with a 'visible presence' 'by at least two uniformed officers.'" *Id.* at Report, p. 12. "At the same time, the KSP received a 'Church Protocol' document that was being circulated 'TO ALL Sheriffs,' and many local health officials, which listed possible offenses that could be used to charge non-compliant church officials." *Id.* at Report, p.12.

The public record communications attached to the report are stunning. They confirm deliberate and knowing violations of the United States Constitution by the Governor. The Kentucky State Police Commissioner, in a directive to KSP officers, observed that "this is **clearly a first amendment issue** and any action taken certainly has significant potential to result in litigation", and that "there is a potential for the need for force, although it is a very low potential." *Id.* at Report, p.13 (emphasis added). And yet, at the direction of the Governor, they charged full steam ahead into a series of unconstitutional actions.

The report confirms equally damning communications between the Governor's Chief of Staff, State Police, and Counsel for the Cabinet for Health and Family Services, documenting an intention to take further steps against church parishioners. *Id.* at Report, p.14-15. Simply put, the entirety of the Report, including the Exhibits to it, all of which are public records, demonstrate a direct targeting of religious services by the Governor. *Id.* at Report.

As demonstrated in the attached case documents, the Governor's actions and Easter Sunday targeting constituted clear First Amendment violations. [**Exhibit 2**, Maryville Baptist v. Beshear; **Exhibit 3**, Roberts v. Neace].

That, of course, wasn't all. In November, 2020, he engaged in religious discrimination yet again, when he shut down parochial schools. This prompted lawsuits by the Kentucky Attorney General and others. [**Exhibit 4**, Danville; **Exhibit 5**, Pleasant View]. Still pending is an individual capacity damages claim against the Governor in *Pleasant View Baptist Church v. Beshear* for money damages for violating clearly established rights. The Governor argues that a panel of the Sixth Circuit put a stay order on it in *Danville*; true enough, and then another panel of the Sixth Circuit rebuked that panel a few weeks later. [**Exhibit 6**].

Even worse, he continued his actions after the U.S. Supreme Court ruled in *Diocese of Brooklyn v. Cuomo* that such actions were unconstitutional on November 25, 2020. [**Exhibit 7**, *Cuomo*].

While the Governor argues now-overruled case law as some sort of defense (the so called "South Bay" decision – which is in actuality a single-justice concurrence), any such defense was non-existent on November 25, 2020 (and, as explained in *Cuomo*, by Chief Justice Roberts himself, before that).

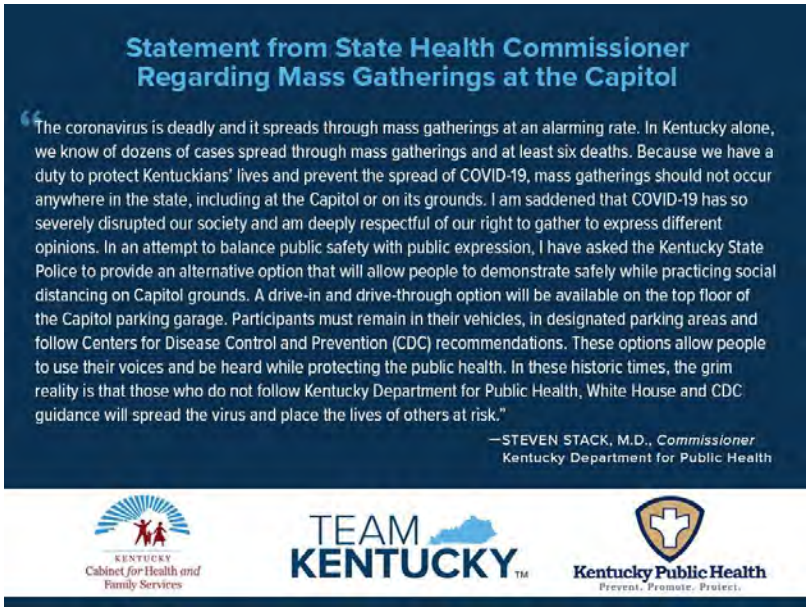
V. The Governor's abuse of the right to travel was found to exist by a federal court, and was not addressed in *Beshear v. Acree*.

The term "travel" was not found anywhere in the decision in *Acree*. But, again, the Governor was found to have violated the federal right to travel of millions of Kentuckians in *Roberts v. Neace*. [**Exhibit 8**]. Also, unaddressed in *Acree* is a Section 24 violation that states: "Emigration from the State shall not be permitted."

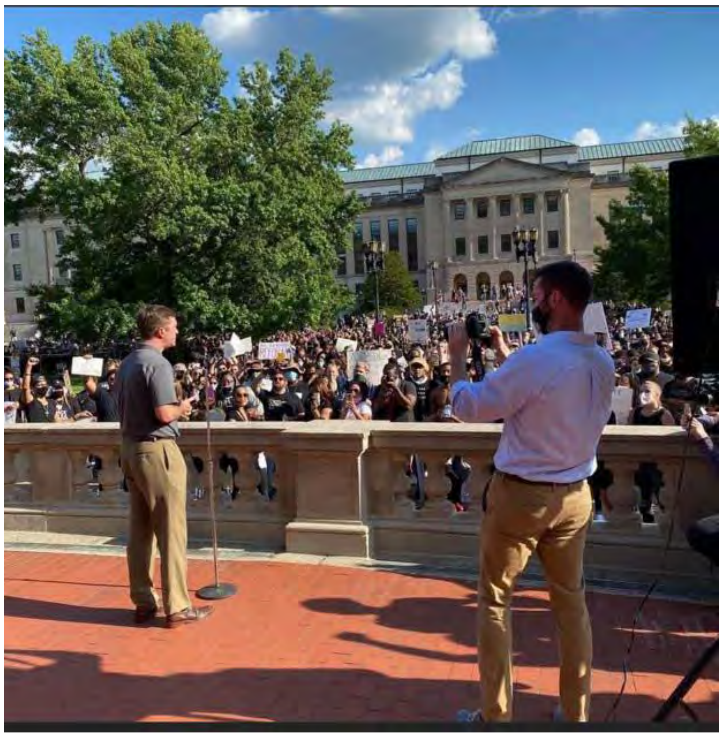
VI. The Governor's hypocritical violation of the right to assemble, free speech, and to petition, was found to exist by a federal court, and was not addressed in *Beshear v. Acree*.

The Governor's defense to his unconstitutional ban on protest activity is that he allegedly did not enforce it against anyone (he also mentions *Acree*, but, again, *Acree* does not mention this issue). The Sixth Circuit saw it differently and found this argument to be absurd and baseless – and specifically found that the Governor had enforced it against Kentucky citizens who disagreed with him (something, as mentioned in Part I, that is a troubling trend by this Governor). [**Exhibit 9**]. That enforcement included erecting barriers:

And setting up a Free Speech Zone that was out of sight and out of mind:



Again, the Governor violated his own mass gathering order a few weeks later, for a message he agreed with:



Yet another injunction was issued against him for this violation. [**Exhibit 10**].

VII. The Court cases herein have not been overruled

None of the cases cited by these petitioners have been overruled. All of these violations deserve redress.

VIII. The Governor's defense of "everyone else is doing it," or "the ends justify the means" is no defense at all

The Governor argues that other Governors have also flagrantly violated fundamental rights during the COVID-19 pandemic as a further defense. That is true. But it does not justify not exercising the legislature's co-equal role to remove him from office for such violations.

In World War II, out of perceived necessity, this country imprisoned millions of Japanese-Americans, and a court upheld it. *Korematsu v. United States*, 323 U.S. 214 (1944). Today, we recognize this race discrimination for the evil it is.

The Kentucky House of Representatives has a crucial role to play in the checks and balances in our system of government. The executive branch has overreached, violating the rights of millions of Kentuckians. Kentucky's judicial branch has publicly relegated itself to a #TeamKentucky cheerleader, and its decisions are entitled to no weight whatsoever as a result.

The question remains: will the Kentucky legislature permit itself to be relegated to the second-class status that the executive and judicial branches have defined for it? While the legislature has passed reform legislation, the writing is on the wall that the will of the representatives of the people will not be respected – not by Kentucky's executive, and not by its judicial branch.

The fundamental question is this: will this legislature exercise its constitutional prerogatives to appropriately take action to re-establish co-equal branches of government, or instead permit continued infringements to occur?

IX. The Governor's violations constitute violations of KRS 522.030

The court findings and other matters referenced all demonstrate unauthorized exercises of official functions under KRS 522.030. The only question is whether such violations were knowing. The Governor is the former Kentucky Attorney General and litigated constitutional cases. He is not a novice at the law. That is one reason why the KSP Commissioner recognized that the actions of targeting churches would lead to litigation and constitutional issues. But the history of litigation with the Governor and repeated rebukes in federal court demonstrate knowing violations as well. Collectively, there is a pattern and practice of knowing constitutional violations. KRS 522.030 was violated.

X. Conclusion

We would ask this honorable body to consider these charges. As demonstrated, the grounds are serious: they include demonstrated violations of the most sacred of Kentuckians rights. Given that we have made a colorable, non-frivolous, showing of these violations, we also ask for waiver of any fees and costs for exercising our fundamental right to petition for redress of grievances.

Respectfully Submitted,

Andrew Cooperrider

Tony Wheatley

Jacob Clark

Preliminary REPORT

FROM THE OFFICE OF THE

KENTUCKY STATE TREASURER

Accountability for State Expenditures During the Pandemic

Interim Joint Committee on Judiciary

Allison Ball
Kentucky State Treasurer

Noah Friend
General Counsel

Exhibit 1

EXECUTIVE SUMMARY

A general consensus exists regarding the unique challenge posed by the COVID-19 pandemic. The lives of all citizens of the Commonwealth have been touched in some way, whether by the health effects of the virus itself or the economic hardships resulting from lockdowns and business closures. For the citizens who have lost loved ones as a result of COVID-19, their sadness and grief will extend beyond any declaration of emergency. Acknowledging these very real and serious challenges, this report nevertheless seeks to shine a light on various decision points undertaken by the Beshear Administration in its handling of the on-going pandemic. In my role as Treasurer, I am responsible for ensuring that expenditures of the Commonwealth conform to the Constitutions of the United States and the Commonwealth of Kentucky. Accordingly, my Office has undertaken a review of documents received from multiple health departments, as well as the Kentucky State Police, regarding actions that were taken in relation to the First Amendment exercise of Kentucky citizens during the COVID-19 pandemic. This report shows:

- The targeted monitoring of churches by local health departments at the direction of state officials;
- The coordinated surveillance of churches by the Kentucky State Police, which included officers remaining posted outside church services where church-

goers were instructed that they faced the threat of repercussions, including criminal penalties and quarantine orders for their attendance;

- The disdain shown by the Administration for the sincerely held religious beliefs of the Commonwealth's citizens; and
- The enforcement distinctions drawn by the Administration between protests based on the subject matter of those protests.

The federal courts have been clear in their holdings that the Administration's orders have violated the Constitution. Even more concerning is the fact the Commonwealth is still under a state of emergency as declared by the Governor pursuant to KRS 39A, and he has made clear in federal court filings that he still seeks the authority to engage in the same sort of activities found to be unconstitutional by federal courts should, in his determination, the need arise. Thus, the threat to the Constitution posed by this Administration's decisions as they relate to the pandemic has not yet passed. This information is intended to assist the General Assembly as it weighs its legislative response to the pandemic and to ensure that the constitutional rights of Kentucky's citizens are respected and upheld. As U.S. District Judge Gregory Van Tatenhove explained in *Tabernacle Baptist Church v. Beshear*, "It would be easy to put [the Constitution] on the shelf in times like this, to be pulled down and dusted off when more convenient. But that is not our tradition. Its enduring quality requires that it be respected even when it is hard."

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APPENDICES

1. **Emails & Records: Governor's Office, CHFS, Law Enforcement & Health Departments**
2. **Executive Orders**

I. INTRODUCTION

A. ROLE OF STATE TREASURER

The State Treasurer is one of six independently-elected executive officers set forth in Kentucky's Constitution. Kentucky law tasks the Treasurer with the duty to execute payments on behalf of the Commonwealth. As part of this responsibility, the Treasurer has an obligation to ensure that all governmental expenditures are permitted under the Constitutions and laws of the United States and the Commonwealth of Kentucky.

B. NATURE OF INVESTIGATION

Significant concerns have been publicly raised regarding the legal permissibility of many actions taken by the Beshear Administration in response to the COVID-19 pandemic. Several of these actions resulted in court decisions overturning actions of the Administration. The Treasury, in response to the concerns of the public, issued several requests for documents to multiple health departments, as well as the Kentucky State Police, regarding actions that were being taken in relation to the First Amendment exercise of Kentucky citizens during the COVID-19 pandemic.

The Treasury reviewed documents from several of Kentucky's local health departments, as well as a limited set of non-sensitive documents from the Kentucky

State Police. The Treasury reviewed over 10,000 pages of responsive records in preparing this report.

The Treasury has not yet pursued any Open Records Appeals for a handful of local health departments who did not fully respond to the records requests, nor has the Treasury pursued any further review of redactions that were included in additional records.

C. LIMITED SCOPE OF REPORT

The Treasury's request for documents to local health departments and the Kentucky State Police were expressly limited to issues involving First Amendment activities. The Treasury, therefore, has not included in this report any information related to other potential constitutional or statutory violations committed by the Administration, including issues related to: the separation of powers; the non-delegation doctrine; violations of Chapter 13A; arbitrary action or other violations under Sections 1 and 2 of the Kentucky Constitution; generalized due process concerns; or, the creation and enforcement of the interstate travel ban.

This report is also limited in the amount of time covered. The requests covered terms such as "church," "congregation," or "protest" during the period from March 1, 2020, to approximately June 15, 2020. As some record responses were not received until September, a few responsive records occur after June 15, 2020.

D. GENERAL SUMMARY

The Treasury's review of the documentation reflected a few pivotal pieces of information. First, local health officials have been facing a massive task in their receipt of guidance from the state level and translating it into action; this guidance, particularly in the early stages of the pandemic, was voluminous, quickly changing, and often lacking in clarity and consistency. Despite all the challenges posed by the COVID crisis, local health officials have consistently stepped up to the behemoth task placed in front of them, and have performed admirably in communicating information to the public and enforcing the policies set forth by the Administration.

At the same time, however, the Administration's failures in creating a cooperative and constitutionally-permissible approach to First Amendment activities has caused or contributed to unnecessary conflict and unconstitutional enforcement in many instances. While many local health departments have been able to maintain productive, cordial and, it appears, legally compliant procedures regarding First Amendment exercise, others have taken a heavy-handed approach, encouraged by high-level officials within the Beshear Administration.

Based upon the Treasury's review, it is recommended that changes be made to Kentucky law to clarify limitations on the Governor's emergency authority under Chapter 39A. Local health officials expressed, on multiple occasions, that they felt

constrained to act in an unconstitutional manner, based on the directions received from high-level Administration officials. KRS Chapter 39A should be modified to provide protection and clarification not only for the people of the Commonwealth, but for local health and law enforcement officials who are tasked with enforcement efforts.

Finally, the Treasury will establish an additional means through which concerned state or local employees, or the general public, can provide confidential information regarding potential constitutional or legal violations, without fear of retaliation.

II. GENERAL BACKGROUND

The general background is familiar to most and can be easily found through a review of news stories and federal court decisions. A very brief summation is warranted related to the narrow scope of this report.

Throughout the COVID-19 pandemic, the Beshear Administration has acted through a lengthy series of all-encompassing executive orders, which seek to control an almost limitless scope of activities for individuals within the Commonwealth. The Attorney General, for example, estimates that, as of late August, there were approximately 150 "orders, guidance documents, and emergency regulations" issued in the wake of the initial March 6, 2020, emergency declaration.[1] Several of these orders were directly aimed at First Amendment activities.

On March 19, 2020, an Executive Order was entered banning "all mass gatherings" which specifically included "community, civic, public, leisure, [and] faith-based" gatherings. *See* Appendix 2, *March 19, 2020 Executive Order*. This executive order, however, excluded a large number of gatherings from its scope:

> For the avoidance of doubt, a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit. It also does not include typical office environments, factories or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.

[1] *See*, Brief for the Commonwealth of Kentucky, *Beshear v. Florence Speedway,* 2020-CA-000834, p. 4.

Id. at ¶ 3. On March 25, 2020, the Governor issued Executive Order 2020-257, which closed all businesses that "are not life-sustaining." Executive Order 2020-257 listed approximately six (6) pages of "life sustaining" businesses. *See* Appendix 2, *Executive Order 2020-257*.

Several federal lawsuits were initiated regarding the Governor's actions as they related to religious exercise. Two of the lawsuits arose from the Governor's use of Kentucky State Police to shut down services at Maryville Baptist Church in Bullitt County. On May 2, 2020, a panel of the United States Sixth Circuit Court of Appeals entered a preliminary injunction, which enjoined "[t]he Governor and all other Commonwealth officials…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." *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

On May 8, 2020, United States District Judge Gregory F. Van Tatenhove issued a preliminary injunction, allowing churches statewide to begin holding services, so long as they adhered "to applicable social distancing and hygiene guidelines." *Tabernacle Baptist Church, Inc. v. Beshear*, 3:20-cv-00033-GFVT, Docket Entry 24 (E.D. Ky. May 8, 2020). The following day, the Administration issued a new executive order excepting churches from the mass gathering prohibitions. *See* Appendix 2, *May 9, 2020 Executive Order.*

On the same day this updated Executive Order was issued, the Sixth Circuit Court of Appeals issued an injunction prohibiting the Governor and other state officials "from enforcing orders prohibiting in-person services at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities." *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). In finding that the Governor's orders had violated the United States Constitution, the Court noted as follows:

> Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.

Id. These decisions did not, however, end the litigation related to the Governor's actions.

On June 29, 2020, the Administration filed requests to dissolve the injunctions in both the *Maryville* and *Roberts* cases. The administration argued that the United States Supreme Court "has issued intervening law clarifying that enjoining the mass gatherings order was improper." *Maryville Baptist Church v. Beshear*, 3:20-cv-278 *Memorandum in Support of [Governor's] Motion to Dissolve the Preliminary Injunction & Injunction Pending Appeal* (Docket Entry 46) (June 29, 2020). The

Administration takes the position that the injunctions were wrongly issued, that they are "no longer good law" and that "it is entirely permissible for state officials to treat laundromats and offices differently from places of mass gathering." *Id.* at 4-5. The Administration believes that "like the California Governor, Governor Beshear should be afforded broad latitude" in his decisions, and that the court needs to "restore the leeway" the Governor needs "in the event the disease returns in force, *or some other emergency arises*." *Id.* at 5-6 (emphasis added).

On October 19, 2020, the Sixth Circuit issued an update to the *Maryville* and *Roberts* decisions, sending the *Roberts* case back to the District Court for further briefing. The Sixth Circuit's stated rationale is that, per the Court, "the Governor has raised the possibility of dissolving the injunction in the *Maryville Baptist Church* case on the ground that intervening legal developments make it wrong." *Roberts v. Neace*, 20-5465 Opinion at p.6 (6th Cir. Oct. 19, 2020). The Court noted that the Governor's position suggests that the Administration may seek to dissolve the injunction, and "that he wishes to have the authority to ban indoor church services again."

III. FINDINGS

THE GOVERNOR'S OFFICE, KENTUCKY STATE POLICE & THE CABINET FOR HEALTH & FAMILY SERVICES ENCOURAGED & PARTICIPATED IN THE UNCONSTITUTIONAL SUPPRESSION OF FIRST AMENDMENT EXERCISE

The free exercise of religious rights and the right of assembly lie at the heart of the First Amendment to the United States Constitution, as well as Sections 1 and 5 of the Kentucky Constitution. For sake of simplicity, this report will break the violations down into two sections: first, violations related to "religious assembly," and second, violations related to non-religious protests or "assembly."

As noted above in Section II(C), the investigation by the Treasury did not request information related to other potential violations of Kentucky's Constitution or statutes. Thus, this report will be limited to only First Amendment concerns.[2]

A. Violations Related to Religious Assembly

After the entry of the Governor's March 19, 2020, Executive Order, several of the responsive local health departments began a series of actions to monitor local churches,[3] with frequent requests for law enforcement assistance. In addition, the Administration took action directly related to religious assemblies, including directing law enforcement to monitor and shut down religious services. These

[2] There is ongoing litigation in the Kentucky Supreme Court related to, among other things, the constitutionality of the Administration's executive orders and the delegation of authority to the Governor pursuant to Chapter 39A.

[3] This report will utilize the term "churches" as the responsive records were overwhelmingly related to Christian houses of worship.

actions were not empty words but were consistently backed up with threats of criminal prosecution for failure to comply.

(1) Governor's Office & Law Enforcement

The Governor's daily press conferences and press releases[4] had numerous mentions of religious services and related admonitions regarding religious restrictions. On Saturday, March 28, 2020, for example, one local official properly characterized these statements during his press conferences as a "call out" of a local church, and emailed the local health department on the issue. The health department responded, saying "If you have an available police officer, can they swing by and just do a visual…". *See* Appendix 1, *Emails with NKY Health Department* (March 28, 2020). Emails reflect that the Governor directly contacted at least two judges-executive on or about April 7 and April 9, 2020, regarding concerns about churches holding services in their respective counties. *See* Appendix 1, *Emails with Bullitt and Jessamine County Health Departments* (April 7 & April 9, 2020).

During this time, law enforcement was directed by the Governor's Office to take action against local churches who were refusing to follow the March 19, 2020, shut-down Executive Order. In an email sent to numerous KSP officials throughout the state, Kentucky State Police Commissioner Rodney Brewer, indicated: "I am

[4] The daily press releases for at least ten dates between March 21, 2020 and April 12, 2020, specifically mentioned issues related to houses of worship. The press releases are available for review at: https://governor.ky.gov/news (last visited October 20, 2020).

attaching a flyer directed to me from the Governor's office via the local health department concerning churches in your post area that are expected to be non-compliant…Please see that the following actions are taken regarding this situation:

- A visible presence at or near the parking lot entrance by at least two uniformed troopers utilizing at least one marked SP as attendees are entering the parking lot for any in-person services that may occur on April 10th and 12th (Friday & Sunday);
- PPE masks and gloves may be utilized but are not mandatory;
- Units are not expected to enter the actual church building;
- Copies of the attached flyer concerning COVID guidelines and a self-imposed quarantine by those in attendance should be placed on the windshield of each car in the parking lot after the service begins.
- License plate numbers should be recorded for those vehicles present at each gathering.
- A list containing the name and address of each vehicle owner should be forwarded to your respective Troop Major by the close of business April 13th in order that the local health department can formally send out notices of violation.

Image 1. *See* Appendix 1, *Email from Commissioner Brewer to KSP Officials* (April 10, 2020). The following image were to be placed on any vehicles that were observed at the churches:

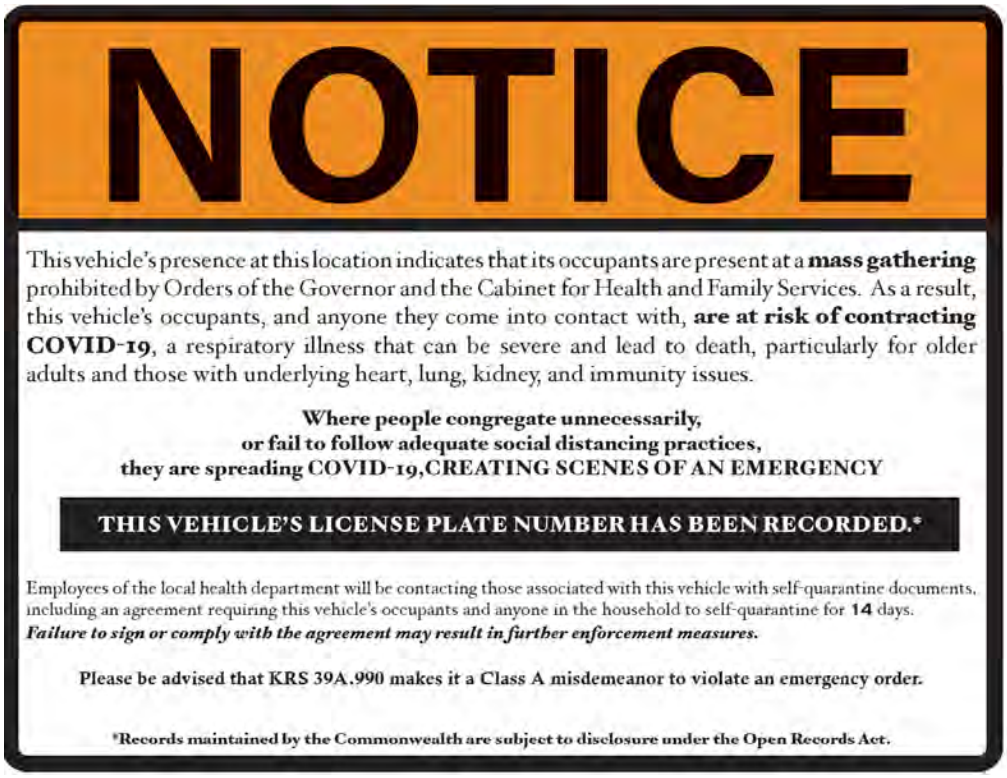


Image 2. *See* Appendix 1, *Email from Commissioner Brewer to KSP Officials* (April 10, 2020). The email included an attachment listing not only Maryville Baptist Church, but also: two other churches in Louisville; one in Falmouth; and, one in Morgantown. These churches were to be monitored by Kentucky State Police, with a "visible presence" "by at least two uniformed officers." In addition, on April 11, the COVID Shutdown flyer was forwarded to KSP officials to be used for an unnamed "Hopkinsville Church." Appendix 1, *"Fwd: Church detail" KSP Emails* (April 11, 2020). No other responsive information was provided regarding the outcome of this monitoring.

The "NOTICE" to be placed on the vehicles of any individuals attending a church included the notation: "Please be advised that KRS 39A.990 makes it a Class A misdemeanor to violate an emergency order." The "NOTICE" also told people that their license plate numbers were "[r]ecords maintained by the Commonwealth are subject to disclosure under the Open Records Act." Thus, the notice raised the specter of both criminal prosecution, and that an individual's license plate number and attendance would be publicly released.

At the same time, the KSP received a "Church Protocol" document that was being circulated "TO ALL Sheriffs," and many local health officials, which listed possible offenses that could be used to charge non-compliant church officials:

> [L]aw enforcement officials can cite for violations of KRS 39A.180 (using UOR Code 02689 for any misdemeanor charge not covered by

other code). Disorderly conduct under KRS 525.060 may also fit, as a subsection describes the element of "failing to disperse" when ordered.

The same guidance also noted that "[T]his is clearly a first amendment issue and any action taken certainly has significant potential to result in litigation" and that "[t]here is a potential for the need for force, although it is a very low potential." Appendix 1, *"Fw: Church Protocol" Email to Rodney Brewer* (April 10, 2020). All of this information was circulated, and the potential actions were being planned at a time when the Governor was noting in his press conferences that "99.8%" of houses of worship were shut down. *See* Governor Press Release April 11, 2020 (available online at https://governor.ky.gov/news (last visited October 20, 2020).[5]

On Sunday, April 12, as has been well-documented publicly, Kentucky State Police troopers placed the "NOTICES" on vehicles at Maryville Baptist Church, and recorded the license plate numbers of those in attendance. Emails obtained from the Kentucky State Police reflect, however, that several other churches were monitored by Kentucky State Police troopers on April 12, 2020. KSP Commissioner Brewer received email reports from Post 3 regarding the monitoring of churches located in Barren County, Butler County, and Logan County.[6] The following information was conveyed by the troopers to Commissioner Brewer:

[5] As can be seen in Image 5, reflecting totals from June, church congregations have proved to be a very limited source of Kentucky COVID-19 cases. This appears to remain the case, even as churches have reopened.

[6] None of these counties were included in our records requests to local health departments, and no further information is currently available beyond what is included in the KSP email.

At the location listed at the Brooklyn Missionary Baptist Church in Butler County, Sgt. [redacted] traveled to the location on Friday, April 10, 2020 and found no services (CAD#2020-004468906). On Sunday, April 12, 2020 he went back to the church and while placing the issued papers on the windshields was encountered by the parishioners. Sgt. [redacted] advised only 9 people were present and they were practicing social distancing. He provided them the papers and left without incident. He wrote down their registration information and placed it in the CAD if further action is requested. (CAD# 2020-0470337)

The second complaint was at the St Abram Orthodox Church located at 106 Wilson Road in Auburn, KY. It was reported that several cars were in the parking lot. Sgt. [redacted] went to the church and found only 6 or 8 cars present. He observed the location and no others arrived. He did not enter the church or take any further action. (CAD#2020-00470282)

The last complaint was at Westwood Church of Christ located at 106 Westwood St in Glasgow, KY. Information was received that parishioners were parking down the street and the church buses were taking them to the facility. Upon receiving the information I sent Trooper [redacted] to observe. Upon arrival he observed no cars at the church, but several parked down the road. He remained for approximately two hours and only observed three people leaving the facility. He did not attempt to enter the church or take any further action. (CAD#2020-00470371)

Image 3. This information indicates that troopers observed these locations, in one instance for approximately two hours, and in at least one instance, provided the "NOTICE" document to those in attendance. The "NOTICE" document was provided despite the fact that there were "only 9 people present and they were practicing social distancing."

The information related to the church surveillance by the Kentucky State Police was sent directly by Commissioner Brewer to LaTasha Buckner, the Chief of Staff for Governor Beshear. Chief of Staff Buckner received the surveillance reports on April 13, 2020, and acknowledged receipt of the surveillance report within eleven minutes of receipt. Appendix 1, Emails Between Buckner and Brewer (April 13, 2020). That same date, the General Counsel for the Cabinet for Health and Family Services obtained a list of the license plate information, and advised the health department that if the individuals did not "sign a voluntary quarantine form" that

"further steps" can be discussed. Appendix 1 "License plate info for church goers" (April 13, 2020).

(2) State Health Officials

Several high-level state officials were directly involved in providing documentation and advising the Bullitt County Health Department on the Maryville Baptist Church incident. Emails were exchanged with Dr. Steven Stack, the Commissioner of the Department for Public Health (DPH), Kelly Alexander, the Chief of Staff for the DPH, and Wesley Duke, General Counsel for the Cabinet for Health and Family Services. *See, e.g.*, Appendix 1 *"Enforcement Notice Served" Email to Stack & Alexander* (April 7, 2020). These officials were not, however, only involved in Bullitt County, as they were tasked with statewide-level implementation and enforcement efforts.

On Sunday, March 22, 2020, a mere three days after entry of the Executive Order banning faith-based gatherings, a church in Northern Kentucky indicated to its congregation that it intended to try to go forward with services. Church correspondence obtained by the health department indicated that that services were going to be limited to a certain number of people "[T]his is to keep the proper distance between people to prevent contagion." People were also requested to sign-up online and were warned "[i]f you fail to sign up you may not be able to attend."

This information was conveyed by the health department to Dr. Stack, who tellingly responded:

Thank you, [redacted],

Sigh. No cure for ignorance or obstinacy.

Thanks for letting me know. I wish I had an answer to offer. One thing, certainly don't send in any armed officers. That would undermine our efforts to inspire people to be good citizens and do the right thing.

Steve

Steven J. Stack, MD, MBA, FACEP
Commissioner
Kentucky Department for Public Health

Kentucky Public Health
Prevent. Promote. Protect.

Image 4. Appendix 1, *Email from Stack to NKY Health Department* (March 22, 2020). Following Dr. Stack's comment that there was "no cure for ignorance or obstinacy" the local health official indicated that "I need to talk to you in more detail about this." *Id.* No further communication on the subject is available, and the other responding departments did not have additional direct correspondence with Dr. Stack regarding similar issues. No Open Record request has, as of this time, been sent to CHFS, DPH or Dr. Stack personally.

The responsive records included one document from the Kentucky Department of Public Health, dated June 26, 2020. The following image appears in the document:

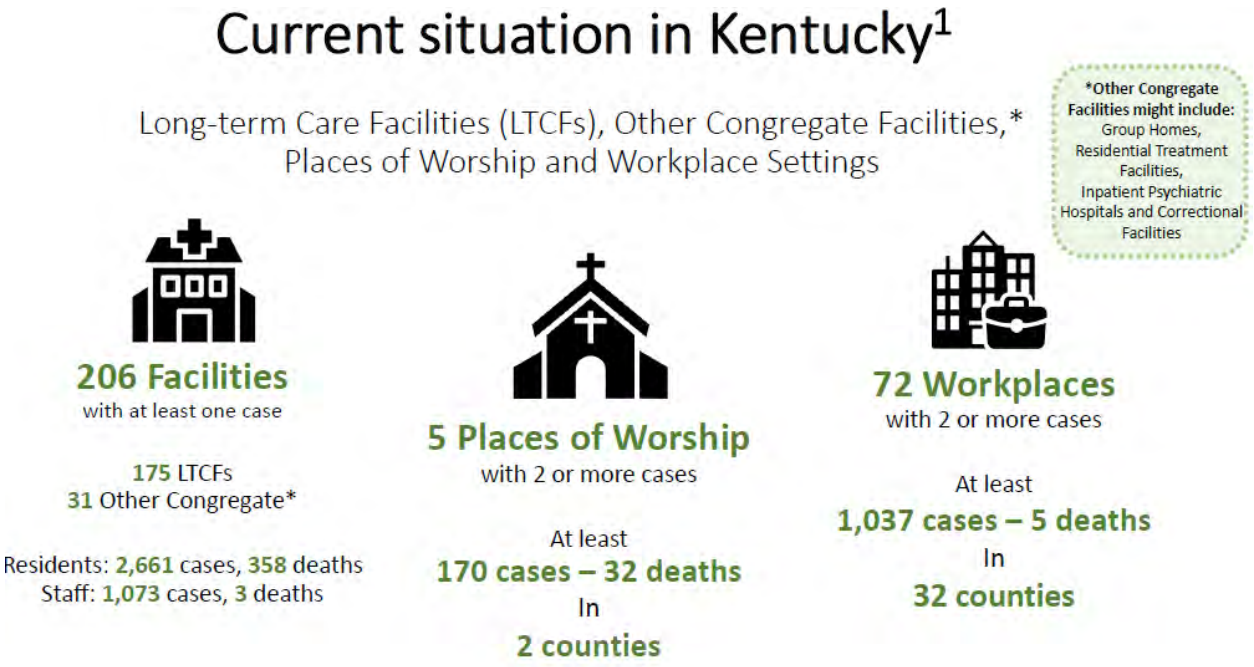


Image 5. *See* Appendix 1 (June 26, 2020). This image reflects that, taking the numbers at face value, as of June 26, 2020, there were 170 cases that were tied to houses of worship, out of 14,859 cases total. Thus, by the Administration's own statistics, 1.1% of all COVID-19 cases in Kentucky were tied to churches. On the other hand, 3,734 cases, or just slightly over 25% of cases, were tied to "long-term case facilities" or "other congregate facilities."

(3) Health Departments

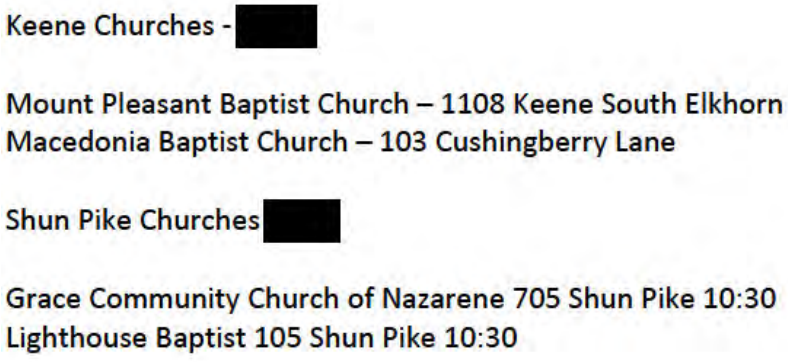
As an initial matter, it deserves restating that many of the records from local health departments reflect dedicated individuals trying to assist their local communities with respect and fairness in their approach. The last email attached to this report is a March 11, 2020, email that circulated among many health departments. The document is from a local health official, who gave a list of "suggestions" to local congregations, as well as his phone number and email. The official went through a great number of practical solutions, framed as responsible and reasonable ways that congregations could lessen the spread of COVID. *See* Appendix 1, *Church Suggestions Email* (March 11, 2020). There were many emails like this, where health officials appeared to do everything possible to be accommodating and kind to pastors and congregations. As the restrictions from the Governor's Executive Orders were being put in place, many local health officials indicated that they had to follow orders, even if some of them questioned whether they had the authority to proceed.

While the most pressing concerns regarding First Amendment activity appear to have direct involvement of state officials and state law enforcement, the records obtained from local health departments did reveal that some local departments, in response to the Governor's Executive Orders, engaged in surveillance of churches,

and utilized local law enforcement resources to either assist in surveillance or in closing down services.

For example, on March 21, 2020, a local health department requested that a local official "have an officer stop by the church to ensure they do not have service." The local official responded: "Police stopped by a couple of times to ensure the church was closed. By their 2nd visit it was mostly closed and empty." Appendix 1, "*Re: Church violating the social distancing and public gathering orders*" (March 21, 2020). It should be noted that, three days earlier, this same department had received a report of 300+ people working in a large business "many have flu like symptoms;" the only responsive document that is available states that the health department official was "not sure if we should reach out to them to provide guidance specifically or let it ride." Appendix 1, "Voicemail Notification" (March 18, 2020).

On the same weekend, March 22, 2020, another county health department specifically assigned several employees to go out and monitor churches on Sunday.


Keene Churches - [redacted]

Mount Pleasant Baptist Church – 1108 Keene South Elkhorn
Macedonia Baptist Church – 103 Cushingberry Lane

Shun Pike Churches [redacted]

Grace Community Church of Nazarene 705 Shun Pike 10:30
Lighthouse Baptist 105 Shun Pike 10:30

Image 6. Appendix 1 "FW: Churches" (March 22, 2020).

Our records request did not receive all reports from the employees who engaged in the surveillance. However, the single report that was returned, noted that the locations had been visited, how many cars were in the lot, and whether there were signs on the doors. The employee noted that one church was having a service in the parking lot, and it was "a stinking mess." Appendix 1, "*List of observation patrol churches 3.22 10A-12P*" (March 22, 2020).

The same county also indicated that it "would probably need" law enforcement assistance in closing a church that had been having a service. Appendix 1, March 23, 2020 Email re: Church (March 23, 2020). An email from approximately a week later regarding another church indicated that the department had "received a multitude of complaints from citizens as well as law enforcement with pictures that suggest the social distancing was not followed." Appendix 1, *Concerns* (March 30, 2020).

Included in the documents received from the responding health departments were, occasionally, communications from other health departments who were not subject to the records request. The following items were of interest, based upon the nature of the Treasury's inquiry.

A non-responding health department indicated that at some point prior to March 23, 2020, most likely either the 21st or the 22nd, the local Sheriff reached out to directly contact a minister who had planned to have a service on the 22nd. Per the

email, "[T]he sheriff called the minister, and about an hour later, the minister posted that the church would be closed." Appendix 1, *Enforcing Closures* (March 23, 2020). Earlier in the same email chain, a director from another local non-responding health department indicated that "[o]ur issue is with churches – and no one feels comfortable crossing that 'religion' line…". *Id.*

During early April, when the Governor's daily briefings and releases were replete with references to church services, it is also instructive to note an email that was circulated amongst all local health departments, from a District Director in a non-responding health department. The email stated that the District Director was "HIGHLY OFFENDED" by the fact that there were religious leaders who were standing against the Governor's orders. This Director indicated that "there is not a religious leader in this country that I would hesitate to go toe-to-toe with to debate saving lives by social distancing." The Director further noted that "I'm taking the reactions of our community members very personally." This email was circulated to at least one County Judge Executive, an official with CHFS, and numerous officials in the local school systems, as well as all Local Health Department Directors throughout the state. Appendix 1, *FW: Situation Report* (April 10, 2020).

B. Violations Related to "Non-Religious" First Amendment Exercise

On April 15, 2020, a crowd of approximately 100 individuals organized a protest at the State Capitol during the Governor's press conference. After this protest, the Kentucky State Police restricted public access to areas around the southeast side of the Capitol building, and placed barriers around certain areas. These barriers had signage to the effect that the areas were "restricted zones" and failure to adhere to them could result in criminal penalties. This event, along with a later event on May 2, when KSP allegedly blocked off additional areas for "drive through" protesting, resulted in a federal lawsuit. On June 24, 2020, United States District Judge Gregory F. Van Tatenhove entered a Preliminary Injunction, finding that the Governor's actions related to First Amendment gatherings, had gone too far. *See Ramsek v. Beshear*, 3:20-cv-00036-GFVT, Docket Entry 47 (E.D. Ky. June 24, 2020).

Unlike the religious exercise and assembly issues previously discussed, there do not appear to be widespread violations of general, non-religious gatherings, where people are attempting to exercise their First Amendment rights. Other than the issues set forth in the *Ramsek* case, the only instance uncovered during a review

of documents was a single incident where a health department advised that a local official "may" use police to break up a protest by parents who were protesting a graduation cancellation, as it "technically goes against the Governor's order related to mass gatherings." *See* Appendix 1, Emails *May 7, 2020*.

Indeed, by mid-June, high-level officials at CHFS emailed all local health departments, and informed them that health departments were not to attempt enforcement against the ongoing protests that were taking place in many areas throughout the state. Appendix 1, *Email from Wes Duke to LHDs* (June 12, 2020).

APPENDIX 1

Emails & Records: Governor's Office, CHFS, Law Enforcement & Health Departments

From: [redacted] behalf of [redacted]@nkyhealth.org>
To: Communicable Disease Response Team
Subject: Fwd: FreePBX Voicemail Notification
Date: Wednesday, March 18, 2020 12:28:52 PM
Attachments: [redacted]

Allegedly a large business [redacted] where multiple people (300+) and many have flu like symptoms....not sure if we should reach out to them to provide guidance specifically or let it ride...

[redacted]

Northern Kentucky Health Department
New address: 8001 Veterans Memorial Drive, Florence, KY 41042
Office: [redacted] | Fax: [redacted]
[redacted]@nkyhealth.org

---------- Forwarded message ---------
From: **FreePBX Phone System** <asterisk@freepbx.sangoma.local>
Date: Wed, Mar 18, 2020 at 11:39 AM
Subject: FreePBX Voicemail Notification
To: [redacted]@nkyhealth.org>

[redacted],

There is a new voicemail in mailbox 2009:

From: "FLS CHURCH,VA" <[redacted]>
Length: 0:44 seconds
Date: Wednesday, March 18, 2020 at 03:39:33 PM

Dial *98 to access your voicemail by phone.
Visit http://AMPWEBADDRESS/ucp to check your voicemail with a web browser.

--

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF LEGAL SERVICES

Andy Beshear
Governor

275 East Main Street, 5W-B
Frankfort, KY 40621
502-564-7905
502-564-7573
www.chfs.ky.gov

Eric C. Friedlander
Acting Secretary

Wesley W. Duke
General Counsel

ORDER

March 19, 2020

On March 6, 2020, Governor Andy Beshear signed Executive Order 2020-215, declaring a state of emergency in the Commonwealth due to the outbreak of COVID-19 virus, a public health emergency. Pursuant to the authority in KRS 194A.025, KRS 214.020, KRS Chapter 39A, and Executive Orders 2020-215 and 2020-243, the Cabinet for Health and Family Services, Department of Public Health, hereby orders the following directives to reduce and slow the spread of COVID-19:

1. All mass gatherings are hereby prohibited.
2. 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.
3. For the avoidance of doubt, a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit. It also does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.
4. Any gathering, regardless of whether it is a mass gathering prohibited under this Order, shall to the extent practicable implement Centers for Disease Control guidance, including:
    - maintaining a distance of 6 feet between persons;

- encouraging good hygiene measures, including regular, thorough handwashing, and providing adequate hygiene materials, including hand sanitizing options;
- encouraging people who are sick to remain home or leave the premises; and
- regularly cleaning and disinfecting frequently touched objects and surfaces.

5. The Department of Public Health hereby delegates to local health departments the authority to take all necessary measures to implement this Order.

The Cabinet for Health and Family Services will monitor these directives continuously and may extend the directives beyond their current expiration date. The Cabinet will continue to provide information and updates to healthcare providers during the duration of this Public Health Emergency.

Steven J. Stack, M.D.
Commissioner of Public Health
Department of Public Health
Cabinet for Health and Family Services

Eric Friedlander
Acting Secretary
Governor's Designee

From: [redacted] on behalf of [redacted]@covingtonky.gov>
To: [redacted]
Cc:
Subject: Re: Church violating the social distancing and public gathering orders
Date: Saturday, March 21, 2020 11:07:15 PM

Police stopped by a couple of times to ensure the church was closed. By their 2nd visit it was mostly closed and empty.

On Mar 21, 2020 5:23 PM, [redacted] <[redacted]@nkyhealth.org> wrote:
Mayor [redacted],

I spoke to the pastor of the church by phone a bit ago. I identified myself and who I was with. I told him that the Ky Governor has directed that all in-person services be cancelled until further notice due to Coronavirus. I described the issue with him in plain language several times and why it is important to close the church to keep parishioners from spreading the illness. He said he would not hold service and would send people away when they showed up. I reinforced this was a state wide order for all churches.

However I have the feeling that may not happen. Could you have an officer stop by the church to ensure they do not have service? [redacted] will also be calling you to request this to address the concern expressed by you and community members as well as the health department.

Sincerely,

[redacted]

Northern Kentucky Health Department
8001 Veterans Memorial Drive, Florence, KY 41042
Office: [redacted] | Fax: [redacted]
[redacted]@nkyhealth.org

EEO/M/F/Vets/Disabled/H

On Mar 21, 2020, at 4:59 PM, [redacted] <[redacted]@nkyhealth.org> wrote:

> More detailed information.
>
> [redacted]

[redacted]

Northern Kentucky Health Department
8001 Veterans Memorial Drive, Florence, KY 41042
Office: [redacted]
[redacted] nkyhealth.org

---------- Forwarded message ---------
From: [redacted]@covingtonky.gov>
Date: Sat, Mar 21, 2020 at 3:41 PM
Subject: Church violating the social distancing and public gathering orders
To: [redacted]@nkyhealth.org>

[redacted],

I received a plea from a concerned citizen. Ministerio Jesus Liberta church in Covington is staying open and does masses with over 60 people in attendance. The Pastor refuses to close it despite Governor's order. It is an hispanic church and many parishioners are listening to their pastor and doing sleepovers overnight at church. Can you please send someone to talk to them and get them to close their church just for now. Our police department is available for backup if the church declines to obey the health department.

Address: Ministerio Jesus Liberta, 16 E 9th st, covington, KY 41011. Pastor Jose Luis Lopez.

[redacted]

[redacted]
City of Covington, Office of the Mayor
20 West Pike St., Covington, KY 41011
direct | 859-292-2127 main
fax 859-292-2137
Facebook | Twitter
www.covingtonky.gov
Sign up to receive our Eblasts

[redacted]

From: [redacted] (LHD-Jessamine Co)
Sent: Thursday, June 25, 2020 10:29 AM
To: [redacted] (LHD- Jessamine Co)
Subject: FW: Churches

From: [redacted] (LHD- Jessamine Co) [redacted]@ky.gov>
Sent: Sunday, March 22, 2020 9:28 AM
To: [redacted] (LHD - Jessamine Co) <[redacted]@ky.gov>; [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>
Cc: [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>; [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>; [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>
Subject: FW: Churches

[redacted] – House of God 108 Stephens has been added to your churches. Thanks

---

From: [redacted] (LHD- Jessamine Co)
Sent: Sunday, March 22, 2020 9:15 AM
To: [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>; [redacted] (LHD - Jessamine Co) <[redacted]@ky.gov>
Cc: [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>; [redacted] (LHD-Jessamine Co) [redacted]@ky.gov) [redacted]@ky.gov>; [redacted] LHD-Jessamine Co) [redacted]@ky.gov>
Subject: Churches

Keene Churches - [redacted]

Mount Pleasant Baptist Church – 1108 Keene South Elkhorn
Macedonia Baptist Church – 103 Cushingberry Lane

Shun Pike Churches [redacted]

Grace Community Church of Nazarene 705 Shun Pike 10:30
Lighthouse Baptist 105 Shun Pike 10:30

[redacted]
Jessamine County Health Department
210 East Walnut Street
Nicholasville, KY 40356
Office: [redacted] **; Fax:** [redacted]

Email: [redacted]@ky.gov

From: [redacted]
To: [redacted] (LHD- Jessamine Co); [redacted] LHD-Jessamine Co)
Cc: [redacted] (LHD - Jessamine Co); [redacted] (LHD - Jessamine Co); [redacted] (LHD-Jessamine Co)
Subject: [redacted]'s list of observation patrol churches 3.22 10A-12P
Date: Sunday, March 22, 2020 12:19:26 PM

St Athnasius- 7 cars in lot- sign on door
Ignite - service in parking lot but tons of ppl not doing social distancing - a stinking mess- called [redacted]
East Maple- closed- no sign
Faith Baptist- 3 cars and sign on door
Nichlolasville Christian- no cars and sign on door
St Luke- closed and sign
Nicholasville Church of Christ- no sign but no cars either
Jehova's witness- closed- no sign but no cars
Generations- closed w sign on door
Harmony- 3 cars and practicing social distancing when dude in truck was talking to them outside
New beginnings- closed no sign or cars

Sent from my iPhone

[redacted]

From: [redacted] (LHD [redacted] Co)
Sent: Monday, March 23, 2020 11:23 AM
To: [redacted]
Cc: [redacted] (LHD [redacted] Co)
Subject: RE: [redacted] Church

Thanks [redacted] ..we will be having a conversation with them and let them know if they can't control the crowd, we will have to disallow and would probably need your assistance.

Thanks,

[redacted]
[redacted] **Health Department**
[redacted]
Email: [redacted]@ky.gov
[redacted]

From: [redacted].org>
Sent: Monday, March 23, 2020 10:48 AM
To: [redacted] (LHD [redacted] Co) [redacted]@ky.gov>
Subject: [redacted] Church

Not sure who to report this to but [redacted] Church on [redacted] had service yesterday. They said it was a outdoor service but lots of them were out of their cars hugging and shaking hands and not staying away from each other. I also noticed that they are inside their building today. I was told maybe doing something with food for the needy and I get that but if they continue what they are doing we will see a rise I am afraid.

[redacted]

--
Sgt. [redacted]
Public Information Officer
[redacted]
[redacted] Police Department
[redacted]

From: [redacted]@nkyhealth.org>
To: Stack, Steven J (CHFS DPH)
Cc: Kelly N Alexander JD, MA
Subject: Re: FW: from_the_pastor_coronavirus_letter_2.pdf [IMAN-DMS.FID583416]
Date: Monday, March 23, 2020 11:35:00 AM

Are you saying that we should just leave it alone? I need to talk to you in more detail about this.

[redacted]

Northern Kentucky Health Department
8001 Veterans Memorial Drive, Florence, KY 41042
[redacted] nkyhealth.org

On Sun, Mar 22, 2020 at 6:07 PM Stack, Steven J (CHFS DPH) <steven.stack@ky.gov> wrote:

> Thank you, [redacted],
>
> Sigh. No cure for ignorance or obstinacy.
>
> Thanks for letting me know. I wish I had an answer to offer. One thing, certainly don't send in any armed officers. That would undermine our efforts to inspire people to be good citizens and do the right thing.
>
> Steve
>
> *Steven J. Stack, MD, MBA, FACEP*
>
> Commissioner

Kentucky Department for Public Health

Kentucky Public Health
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From: [redacted]@nkyhealth.org>
Sent: Sunday, March 22, 2020 5:15 PM
To: Stack, Steven J (CHFS DPH) <steven.stack@ky.gov>
Subject: Fwd: FW: from_the_pastor_coronavirus_letter_2.pdf [IMAN-DMS.FID583416]

[redacted], advised me to forward this email to you as a heads up. We have history with this Church (Assumption) in Walton and are still in litigation. A little over a week ago, we had checked to see if they were closed and it appeared they had. We reviewed the steps they were taking that were consistent with the Governor's recommendation. Evidently when the Governor ordered no faith-based gatherings, they decided to go in a different direction (see attached). We learned about this from [redacted] last night. As you can see, our attorney has reached out to the AG's office and will work with [redacted] and the county attorney to determine the best next steps to address.

Am happy to explain more as you see fit.

[redacted]

Northern Kentucky Health Department
8001 Veterans Memorial Drive, Florence, KY 41042
[redacted]

From: Stack, Steven J (CHFS DPH) on behalf of Stack, Steven J (CHFS DPH) <steven.stack@ky.gov>
To: [redacted]@nkyhealth.org
Cc: Alexander, Kelly N (CHFS DPH)
Subject: RE: FW: from_the_pastor_coronavirus_letter_2.pdf [IMAN-DMS.FID583416]
Date: Sunday, March 22, 2020 6:07:49 PM

Thank you, [redacted],

Sigh. No cure for ignorance or obstinacy.

Thanks for letting me know. I wish I had an answer to offer. One thing, certainly don't send in any armed officers. That would undermine our efforts to inspire people to be good citizens and do the right thing.

Steve

Steven J. Stack, MD, MBA, FACEP
Commissioner
Kentucky Department for Public Health

Kentucky Public Health
Prevent. Promote. Protect.

From: [redacted]@nkyhealth.org>
Sent: Sunday, March 22, 2020 5:15 PM
To: Stack, Steven J (CHFS DPH) <steven.stack@ky.gov>
Subject: Fwd: FW: from_the_pastor_coronavirus_letter_2.pdf [IMAN-DMS.FID583416]

[redacted], advised me to forward this email to you as a heads up. We have history with this Church (Assumption) in Walton and are still in litigation. A little over a week ago, we had checked to see if they were closed and it appeared they had. We reviewed the steps they were taking that were consistent with the Governor's recommendation. Evidently when the Governor ordered no faith-based gatherings, they decided to go in a different direction (see attached). We learned about this from [redacted] last night. As you can see, our attorney has reached out to the AG's office and will work with [redacted] and the county attorney to determine the best next steps to address.

Am happy to explain more as you see fit.

From: [redacted] (LHD [redacted]) on behalf of [redacted] (LHD- [redacted]) [redacted] @ky.gov>
To: [redacted]; LHD Directors; [redacted] (CHFS [redacted]); [redacted] (CHFS [redacted])
Subject: RE: Enforcing Closures
Date: Monday, March 23, 2020 12:36:25 PM

We had an issue with a church posting on facebook that it would be open for worship service Sunday. This was brought to the attention of public officials. The sheriff called the minister, and about an hour later, the minister posted that the church would be closed. Our sheriff handled it very professionally. We have had more issues with enforcing social distancing in businesses that have call centers, with employees sitting less than 6 feet away from each other. Our environmentalists have been meeting with management of those businesses and making recommendations on how to comply.

From: [redacted] @ky.gov>
Sent: Monday, March 23, 2020 10:45 AM
To: [redacted]
Subject: RE: Enforcing Closures

Our issue is with churches—and no one feels comfortable crossing that "religion" line…

From: [redacted] Dist)
Sent: Monday, March 23, 2020 10:44 AM
To: [redacted] ky.gov>
Subject: RE: Enforcing Closures

We have had a few businesses that were refusing but the community does a wonderful job of "publicly shaming" to assist with these efforts☺. We have only had a few where we had to use law enforcement but our local law enforcement in every community stands behind us. I hope you all are finding the same in your communities.

From: [redacted] @lcdhd.org]
Sent: Monday, March 23, 2020 11:41 AM
To: LHD Directors <LHDDirectors@ky.gov>; [redacted] (CHFS DPH DWH) [redacted] @ky.gov>; [redacted] (CHFS [redacted]) [redacted]
Subject: Enforcing Closures

I'm trying to get a sense of how difficult it is for LHDs to enforce all the mandatory closing. Most facilities comply. The ones that don't, are fiercely oppositional.

[redacted]....any guidance on how to enforce this, other than taking people to court (which no one has the time to do)?

[redacted]
Director, [redacted] Health Department
[redacted]
[redacted] org
[redacted]

[redacted] OF CONFIDENTIALITY: This e-mail, including any attachments, is intended only for the use of the individual or entity to which it is addressed and may contain confidential information that is legally privileged and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are notified that any review, use, disclosure, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please contact the sender by reply e-mail and destroy all copies of the original message.

From: [redacted]@nkyhealth.org>
To: [redacted]
Subject: Re: Florence Walmart
Date: Saturday, March 28, 2020 10:39:29 AM

I've also checked in with [redacted]. If you have an available police officer, can they swing by and just do a visual and let you or [redacted] or I know what they see?

Sent from my iPhone
[redacted]
Northern Kentucky Independent District Health Department
Accredited Health Department, Public Health Accreditation Board
610 Medical Village Drive, Edgewood, KY 41017
[redacted]@nkyhealth.org

Promoting and protecting the health of Northern Kentucky by providing public health services essential for a safe and healthy community.

> On Mar 28, 2020, at 9:45 AM, [redacted]@florence-ky.gov> wrote:
>
> Do you have any update on the church of Scientology? Do you believe that is the church in Florence that the governor called out yesterday in his press conference? Or are there others?
>
> > On Mar 27, 2020, at 6:29 PM, [redacted]@nkyhealth.org> wrote:
> >
> > Forwarding on to our Env. Health Manager. I can vouch for her description of Costco - my husband went there yesterday and reported to me the same thing.
> >
> > [redacted]
> >
> > **Northern Kentucky Health Department**

8001 Veterans Memorial Drive, Florence, KY 41042
Office: [redacted]
[redacted] nkyhealth.org

On Fri, Mar 27, 2020 at 6:23 PM [redacted]@florence-ky.gov> wrote:

Begin forwarded message:

From: [redacted]>
Date: March 27, 2020 at 6:18:45 PM EDT
To: [redacted]@Florence-KY.gov>
Subject: Florence Walmart

Hi [redacted],
Thanks for providing your email address to the public.
My husband and I visited the Florence Walmart this afternoon. We went shopping for staples last week and at that time Walmart was not busy. However, this afternoon, we went to Walmart to get a pick-up order and purchase a couple other necessities. Walmart was crazy!!! People were not practicing social distancing, handling clothes and jewelery, and milling around in aisles.
We left Walmart to swing by Costco for a couple of staple items. Costco had an employee posted out front to limit the number of customers coming in the store. When we were able to go in, we picked up our items and exited the store in just a few minutes without coming close to anyone.
My suggestion: please confirm that Walmart limit the number of people in the store at one time.
Thanks for your time.
[redacted]

[redacted] (LHD-Jessamine Co)

From: [redacted] (LHD-Jessamine Co)
Sent: Monday, March 30, 2020 12:00 PM
To:
Cc: [redacted] (LHD- Jessamine Co)
Subject: Concerns

Good morning Mr. [redacted]

I appreciate the work you've tried to do to ensure everyone worships in a socially distanced manner during your "drive-in" service the past two weeks. Unfortunately, people just don't always adhere to the message given them as we are seeing so often during these difficult times. I received a multitude of complaints from citizens as well as law enforcement with pictures that suggest the social distancing was not followed and although you did provide them the guidance and messaging they needed. We've both made a concerted effort to try and make this unique idea work. Unfortunately, it doesn't seem to be working in the way we need and is initiating a social gathering in which social distancing is not being met. I respectfully request you make the decision to go to an on-line service like most all other churches have done to protect the health and well being of our community with greatest regard given to the most vulnerable among us. Please accept much thanks for continuing to feed those who may have need and doing it in a very effective way. Please let me know if you have questions.

Regards,

[redacted]
Jessamine County Health Department
210 East Walnut Street
Nicholasville, KY 40356
Cell: [redacted]; Office: [redacted]
Email: [redacted]@ky.gov
JCHD

Enforcement Notice served

[redacted] (LHD-Bullitt Co) [redacted]@ky.gov>
Tue 4/7/2020 2:47 PM

To: Stack, Steven J (CHFS DPH) <steven.stack@ky.gov>
Cc: Alexander, Kelly N (CHFS DPH) <kelly.alexander@ky.gov>

Good a. ernoon Dr. Stack,
I wanted to give you a heads up. Unfortunately, today, we did have to serve the Pastor of Maryville Baptist Church with an enforcement notice to cease operations for mass gatherings. Our County Attorney worked with us on the wording of the notice and he, along with our Judge Executive, have been in contact with the Governor's Office. When served the notice, the Pastor informed our Environmental Supervisor that a lawsuit was in the works and that he intends to hold service tomorrow evening. I want to assure you that we tried reasoning and educating before we took this step. If you have any questions, please do not hesitate to call me. My cell is [redacted].

I cannot thank you and your team enough for the support and guidance given to local health departments. So proud to be a part of #TeamKentucky.

Happy Public Health Week,
[redacted]

[redacted]
Bullitt County Health Department
Office: [redacted]
Fax [redacted]

Tell us: How are we doing? Please take our survey to let us know!

https://www.surveymonkey.com/r/33JXVVT

[redacted] (LHD-Jessamine Co)

From: [redacted] (LHD-Jessamine Co)
Sent: Thursday, April 9, 2020 3:34 PM
To: [redacted]
Cc: [redacted] (LHD- Jessamine Co)
Subject: RE: Concerns

Hello John...I wanted to follow up with communication regarding your planning of Ignite's Drive-In service this weekend. First, I wanted to see if there was any information or collaboration you need from us to ensure the service is done in compliance with the Governor's orders. Secondly, the Governor had communication directly with our Judge Executive to reiterate the protocols for church's. Following is the specific criteria he gave:

1) Vehicles must be at least 6' apart
2) People must stay in their vehicle
3) Only one family per vehicle
4) Nothing can be passed from one vehicle to another
5) Social Distancing must be utilized by the band, speakers, etc.

Please confirm you can meet these requirements for your service. I pray you have a successful Easter service while meeting the compliance guidelines as set forth.

Please let me know if you have any questions.

Blessings,

[redacted]
Jessamine County Health Department
210 East Walnut Street
Nicholasville, KY 40356
Cell: [redacted] ; Office: [redacted]
Email: [redacted]@ky.gov

From: [redacted]
Sent: Wednesday, April 1, 2020 9:54 AM
To: [redacted] (LHD-Jessamine Co) <[redacted]@ky.gov>
Subject: Re: Concerns

Hello,
I did not respond to the last email as I was in prayer concerning you "request." As of yesterday the governor said that drive in church's as allowed and have guidelines as to the conduct of the service. As we took every measure to walk in accordance with you we will take ever measure to ensure we walk in accordance to those standards.

[redacted]

From: Brewer, Rodney W (KSP)
Sent: Friday, April 10, 2020 2:49 PM
To: [redacted] (KSP); [redacted] (KSP); [redacted] (KSP)
Cc: [redacted] (KSP); [redacted] (KSP); [redacted] (KSP)
Subject: Church detail
Attachments: Active Churches (4-10-20)-final.pdf; COVID NOTICE2.pdf

Captains----
I am attaching a flyer directed to me from the Governor's office via the local health department concerning churches in your post area that are expected to be non-compliant to the current Executive Order regarding public gatherings during the COVID pandemic this weekend. Please see that the following actions are taken regarding this situation:

- A visible presence at or near the parking lot entrance by at least two uniformed troopers utilizing at least one marked SP as attendees are entering the parking lot for any in-person services that may occur on April 10th and 12th (Friday & Sunday);
- PPE masks and gloves may be utilized but are not mandatory;
- Units are not expected to enter the actual church building;
- Copies of the attached flyer concerning COVID guidelines and a self-imposed quarantine by those in attendance should be placed on the windshield of each car in the parking lot after the service begins.
- License plate numbers should be recorded for those vehicles present at each gathering.
- A list containing the name and address of each vehicle owner should be forwarded to your respective Troop Major by the close of business April 13th in order that the local health department can formally send out notices of violation.

I appreciate your continued efforts as we try to minimize the spread of the COVID-19. Please feel free to contact me should you have any questions or concerns at [redacted].

Commissioner Rodney Brewer
Kentucky State Police
919 Versailles Road
Frankfort, Kentucky 40601
[redacted]

"Good is the enemy of great"
---Jim Collins

Active Churches 4/10/2020 11:21 AM

Church	Address	City	Health Department	Status
Brooklyn Missionary Baptist Church	3130 Brooklyn Rd	Morgantown	Barren River/Butler	LHD confirms church is open and refuses to close; pastor is also doing door to door visitation of members.
Maryville Baptist Church	130 Smith Lane	Louisville	Bullitt	LHD confirms church is open and refuses to close.
Kingdom Center	12610 Taylorsville Road	Louisville	Jefferson	No word from LHD
Centennial Olivet Baptist Church	1541 W. Oak Street	Louisville	Jefferson	No word from LHD
Falmouth Baptist Church	303 West Shelby Street	Falmouth	Three Rivers/Pendleton	No word from LHD

NOTICE

This vehicle's presence at this location indicates that its occupants are present at a **mass gathering** prohibited by Orders of the Governor and the Cabinet for Health and Family Services. As a result, this vehicle's occupants, and anyone they come into contact with, **are at risk of contracting COVID-19**, a respiratory illness that can be severe and lead to death, particularly for older adults and those with underlying heart, lung, kidney, and immunity issues.

Where people congregate unnecessarily,
or fail to follow adequate social distancing practices,
they are spreading COVID-19,CREATING SCENES OF AN EMERGENCY

THIS VEHICLE'S LICENSE PLATE NUMBER HAS BEEN RECORDED.*

Employees of the local health department will be contacting those associated with this vehicle with self-quarantine documents, including an agreement requiring this vehicle's occupants and anyone in the household to self-quarantine for **14** days.
Failure to sign or comply with the agreement may result in further enforcement measures.

Please be advised that KRS 39A.990 makes it a Class A misdemeanor to violate an emergency order.

***Records maintained by the Commonwealth are subject to disclosure under the Open Records Act.**

From: [redacted]
To: Brewer, Rodney W (KSP)
Subject: Fwd: (EXTERNAL)Fw: Church Protocol
Date: Friday, April 10, 2020 11:43:12 AM
Attachments: Church Protocol.docx
ATT00001.htm
20200319_Order_Mass-Gatherings (1).pdf
ATT00002.htm

****CAUTION** PDF attachments may contain links to malicious sites. Please contact the COT Service Desk ServiceCorrespondence@ky.gov for any assistance.**

(INTERNAL)
FYI

Sent from my iPhone

Begin forwarded message:

From: [redacted] (LHD-Franklin Co)" [redacted]@ky.gov>
Date: April 10, 2020 at 8:01:09 AM EDT
To: [redacted] (LHD-Franklin Co)" [redacted]@ky.gov>,
[redacted] (LHD-Franklin Co)" [redacted]@ky.gov>,
[redacted] (CHFS LHD - Franklin Co)" [redacted]@ky.gov>,
[redacted] (CHFS DIS CSE CO Franklin)"
[redacted]@franklincountyky.com>, [redacted]@frankfort.ky.gov>
Subject: (EXTERNAL)Fw: Church Protocol

FYI

From: [redacted]@franklincountyky.com>
Sent: Thursday, April 9, 2020 8:53 PM
To: [redacted]@frankfort.ky.gov>; [redacted] (LHD-Franklin Co) <WesleyJ.Clark@ky.gov>
Subject: Fwd: Church Protocol

****CAUTION** PDF attachments may contain links to malicious sites. Please contact the COT Service Desk ServiceCorrespondence@ky.gov for any assistance.**

Hello
This was from our association
Just FYI what's being pushed out to sheriffs.

Have a good night.

Begin forwarded message:

From: [redacted]@KENTONCOUNTY.ORG>
Date: April 9, 2020 at 4:47:18 PM EDT
Subject: FW: Church Protocol

Sheriffs

Please see the attachment above and context from emails from legal counsel that we have consulted. Please use this as a guide as everyone situation is unique within their jurisdictions.

I agree with the advice given, and largely agree that the health department should take the lead on the civil side, with any cease and desist warnings or injunctive relief. However law enforcement can cite for violation of KRS 39A.180 (using UOR Code 02689 for any misdemeanor charge not covered by other code.) Disorderly conduct under KRS 525.060 may also fit, as a subsection describes the element of "failing to disperse" when ordered. I mention this because in addition to the civil remedies all law enforcement is charged with enforcing these law, and when in consult with the County Attorney and authorized by their employing Sheriff, citing to Court or even arresting may be appropriate or necessary.

1. This is clearly a first amendment issue and any action taken certainly has significant potential to result in litigation. To that end, a court order is highly advised and self-initiated activity is not advised. 2. Diplomacy and persuasion are the preferred methods for compliance. 3. Even if a court order is issued, the Sheriff has the ability to disregard it. However, that too may have consequences. 3. There is a potential for the need for force, although it is a very low potential. The issuance of emergency and court orders do not relieve a Sheriff or his deputies from the requirement that any force used be objectively reasonable.

April 9, 2020

TO ALL Sheriffs:

We have received information from Sheriffs from across the Commonwealth about churches that are having services or going to have services during the Holy Week. We have spoken to legal counsel in reference what we should do. We have not seen any order specifically banning church services, although this may change.

- Does your county have a protocol in place with the local Health Department to investigate a gathering if a complaint is lodged?
- The local Health Department has been directed to take the lead and go to the Pastor or Minster to speak to them about holding services.
- If the Pastor or Minister refuses and is going to continue, then the health department should ~~go to~~ consult the appropriate state agency and the County Attorney to see what actions will be taken. Will a criminal summons or warrant be issued for the Pastor or Minster if they hold services? Will a court order be sought, direct~~ing~~ the services be shut down?
- If a court order is issued directing the Sheriff or his deputy to shut down a church service, it is highly suggested that the health department take the lead and request the services be shut down voluntarily. If a court order is issued the sheriff should speak to the Judge issuing the order before carrying out the court order, specifically addressing what action the Judge ~~we~~ would like the Sheriff or his deputies to take. Those actions should be spelled out clearly in the order, to include citing or arresting the Minster or Pastor, including the appropriate charge~~,~~ or allow services to continue and issuing a summons for the Minster or Pastor after the services.
- ***IT IS HIGHLY SUGGESTED THAT ANY ACTION TAKEN BY THE SHERIFF VIA A COURT ORDER CLOSING DOWN A CHURCH SERVICE ~~SHOULD~~ BE VIDEO AND AUDIO RECORDED FROM THE TIME YOU WALK ONTO THE CHURCH~~ES~~ PROPERTY UNTIL THE TIME YOU LEAVE THE CHURCH PROPERTY.***
- ***Sheriffs should meet with his or her legal counsel, the County Attorney, the health department and the Judge to formulate a plan of action to ~~prevent a~~ ~~future~~ potential litigation on the Sheriffs' office and the County.***

From: [redacted] ky.gov>
To: LHD Directors
Subject: FW: [redacted] Situation Report
Date: Friday, April 10, 2020 7:15:26 PM
Attachments: Churches.pdf
ChildCareLDCguidance.pdf
State of Emergency Executive-Order_2020-215.pdf
Mass-Gatherings Order.pdf
SitRep 4-10-20.pdf
image001.png
image005.png

From: [redacted]@ky.gov>
Sent: Friday, April 10, 2020 7:11 PM
To: LHD [redacted] District [redacted] District@ky.gov>; [redacted] .kyschools.us>; [redacted] countyky.us>; [redacted] EMA Deputy <emadeputy@[redacted] .kyschools.us>; [redacted] Judge [redacted] judgeexec@gmail.com>; [redacted] emadirector@[redacted] .kyschools.us>; [redacted] countyky.us>; [redacted] .kyschools.us>; [redacted] firerescue@gmail.com>; [redacted] County Superintendent [redacted] kyschools.us>; [redacted] County EMS ADM [redacted] countyky.us>; [redacted] County Vol Fire Dept [redacted]

[redacted] fiscalcourt.com>; [redacted]
[redacted] countygov.us>; [redacted]
[redacted] .kyschools.us>; [redacted]
[redacted] @VA.gov>; [redacted]
[redacted] .kyschools.us>; [redacted] (CHFS DPH DPHPS) [redacted] @ky.gov>
Subject: [redacted] Situation Report

****CAUTION** PDF attachments may contain links to malicious sites. Please contact the COT Service Desk ServiceCorrespondence@ky.gov for any assistance.**

Please see the attached documents for our churches. Related to religion, I feel the need to share a little bit about myself. I was raised by an Appalachian Southern Baptist Granny who lived through the Great Depression. I am HIGHLY OFFENDED by the religious leaders who are trying to make an epidemiological attempt to control a disease into an attack on religion or a political rant. In addition to my granny's teachings, I have a doctorate in public health from [redacted], so I feel qualified to speak on the subject. There is not a religious leader in this country that I would hesitate to go toe-to-toe with to debate saving lives by social distancing. This is not about religion or politics – it's about not spreading this virus and saving lives!

A few months ago, I was battling for the very existence of [redacted] due to retirement contributions and taxes, now we are on the very front line of everything. [redacted] folks are working tirelessly in our counties to control this virus. I could not be more proud of them. My own family at home is also on the front line of this battle. [redacted] As you can see, I'm taking the reactions of our community members very personally.

[redacted]
District Director
[redacted] Health Department | [redacted]
[redacted]
[redacted]
[redacted]

From: [redacted] (KSP)
To: [redacted] (KSP)
Subject: Fwd: Church detail
Date: Saturday, April 11, 2020 9:56:07 AM
Attachments: Active Churches (4-10-20)-final.pdf
COVID NOTICE2.pdf

For Hopkinsville church.

[redacted]
West Troop Commander

Kentucky State Police
919 Versailles Road, Frankfort, KY 40601
[redacted]ky.gov

From: Brewer, Rodney W (KSP)[redacted]
Sent: Friday, April 10, 2020 2:48:31 PM
[redacted]
Subject: Church detail

Captains----
I am attaching a flyer directed to me from the Governor's office via the local health department concerning churches in your post area that are expected to be non-compliant to the current Executive Order regarding public gatherings during the COVID pandemic this weekend. Please see that the following actions are taken regarding this situation:

- A visible presence at or near the parking lot entrance by at least two uniformed troopers utilizing at least one marked SP as attendees are entering the parking lot for any in-person services that may occur on April 10th and 12th (Friday & Sunday);
- PPE masks and gloves may be utilized but are not mandatory;
- Units are not expected to enter the actual church building;
- Copies of the attached flyer concerning COVID guidelines and a self-imposed quarantine by those in attendance should be placed on the windshield of each car in the parking lot after

the service begins.

- License plate numbers should be recorded for those vehicles present at each gathering.
- A list containing the name and address of each vehicle owner should be forwarded to your respective Troop Major by the close of business April 13th in order that the local health department can formally send out notices of violation.

I appreciate your continued efforts as we try to minimize the spread of the COVID-19. Please feel free to contact me should you have any questions or concerns at [redacted].

Commissioner Rodney Brewer
Kentucky State Police
919 Versailles Road
Frankfort, Kentucky 40601
[redacted]
[redacted]

"Good is the enemy of great"
---Jim Collins

[redacted]

From: Buckner, La Tasha A (Gov Office)
Sent: Monday, April 13, 2020 9:01 AM
To: Brewer, Rodney W (KSP)
Subject: RE: Church detail

Thank you.

From: Brewer, Rodney W (KSP) [redacted]@ky.gov>
Sent: Monday, April 13, 2020 8:50 AM
To: Buckner, La Tasha A (Gov Office) [redacted]@ky.gov>
Subject: FW: Church detail

From: [redacted] (KSP) [redacted]@ky.gov>
Sent: Sunday, April 12, 2020 3:56 PM
To: [redacted] (KSP) [redacted]@ky.gov>; [redacted] (KSP) [redacted]@ky.gov>
Subject: Fwd: Church detail

Information on Churches in Post 3 area and action taken.
[redacted]

[redacted]
West Troop Commander

Kentucky State Police
919 Versailles Road, Frankfort, KY 40601
[redacted]

From: [redacted] (KSP) [redacted]@ky.gov>
Sent: Sunday, April 12, 2020 3:30:25 PM
To: [redacted] (KSP) [redacted]@ky.gov>
Subject: FW: Church detail

In regards to non-compliance regarding public gathering at church services in the Post 3 area the following action has been taken.

At the location listed at the Brooklyn Missionary Baptist Church in Butler County, Sgt. [redacted] traveled to the location on Friday, April 10, 2020 and found no services (CAD#2020-004468906). On Sunday, April 12, 2020 he went back to the church and while placing the issued papers on the windshields was encountered by the parishioners. Sgt. [redacted] advised only 9 people were present and they were practicing social distancing. He provided them the papers and left without incident. He wrote down their registration information and placed it in the CAD if further action is requested. (CAD# 2020-0470337)

The second complaint was at the St Abram Orthodox Church located at 106 Wilson Road in Auburn, KY. It was reported that several cars were in the parking lot. Sgt. [redacted] went to the church and found only 6 or 8 cars present. He observed the location and no others arrived. He did not enter the church or take any further action. (CAD#2020-00470282)

The last complaint was at Westwood Church of Christ located at 106 Westwood St in Glasgow, KY. Information was received that parishioners were parking down the street and the church buses were taking them to the facility. Upon receiving the information I sent Trooper [redacted] to observe. Upon arrival he observed no cars at the church, but several parked down the road. He remained for approximately two hours and only observed three people leaving the facility. He did not attempt to enter the church or take any further action. (CAD#2020-00470371)

[redacted]
Commander- Post 3/Bowling Green
3119 Nashville Road
Bowling Green, KY 42101
[redacted]

From: Brewer, Rodney W (KSP)
Sent: Friday, April 10, 2020 1:49 PM
To: [redacted] (KSP) [redacted]@ky.gov>; [redacted] (KSP) [redacted]@ky.gov>; [redacted] (KSP) [redacted]@ky.gov>
Cc: [redacted] (KSP) [redacted]@ky.gov>; [redacted] (KSP) [redacted]@ky.gov>; [redacted] (KSP) [redacted]@ky.gov>
Subject: Church detail

CAUTION PDF attachments may contain links to malicious sites. Please contact the COT Service Desk ServiceCorrespondence@ky.gov for any assistance.

Captains----

I am attaching a flyer directed to me from the Governor's office via the local health department concerning churches in your post area that are expected to be non-compliant to the current Executive Order regarding public gatherings during the COVID pandemic this weekend. Please see that the following actions are taken regarding this situation:

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- PPE masks and gloves may be utilized but are not mandatory;
- Units are not expected to enter the actual church building;
- Copies of the attached flyer concerning COVID guidelines and a self-imposed quarantine by those in attendance should be placed on the windshield of each car in the parking lot after the service begins.
- License plate numbers should be recorded for those vehicles present at each gathering.
- A list containing the name and address of each vehicle owner should be forwarded to your respective Troop Major by the close of business April 13th in order that the local health department can formally send out notices of violation.

I appreciate your continued efforts as we try to minimize the spread of the COVID-19. Please feel free to contact me should you have any questions or concerns at [redacted].

Commissioner Rodney Brewer
Kentucky State Police
919 Versailles Road
Frankfort, Kentucky 40601
[redacted]

"Good is the enemy of great"
---Jim Collins

RE: license plate info for church goers

Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Mon 4/13/2020 4:35 PM
To: [redacted] (LHD-Bullitt Co) [redacted]@ky.gov>

Sounds good. Do you have the addresses for the non-Bullitt County people on the list?

From: [redacted] (LHD-Bullitt Co) [redacted]@ky.gov>
Sent: Monday, April 13, 2020 4:26 PM
To: Duke, Wesley W (CHFS OLS) [redacted]@ky.gov>
Subject: RE: license plate info for church goers

Dr. Stack agreed that cer. fied letter was sufficient as to avoid the "honeybee" effect and to decrease exposure to our staff.

From: Duke, Wesley W (CHFS OLS) [redacted]@ky.gov>
Sent: Monday, April 13, 2020 4:20 PM
To: [redacted] (LHD-Bullitt Co) [redacted]@ky.gov>
Cc: Alexander, Kelly N (CHFS DPH) [redacted]@ky.gov>
Subject: RE: license plate info for church goers

[redacted]

It is my understanding that for the Bullitt County individuals the LHD needs to attempt to go to the residence and get them to sign a voluntary quarantine form. If they will not just let me know and we can discuss further steps.

From: [redacted] (LHD-Bullitt Co) [redacted]@ky.gov>
Sent: Monday, April 13, 2020 3:54 PM
To: Duke, Wesley W (CHFS OLS) [redacted]@ky.gov>
Cc: Alexander, Kelly N (CHFS DPH [redacted]@ky.gov>
Subject: license plate info for church goers

Good afternoon Mr. Duke,
Could you please contact me regarding the handling of license plate information? My cell phone is [redacted]. I've attached a letter that was changed to address the situation and the self-monitor restricted movement agreement.

Here's the breakdown of the license plates that were recorded at Maryville Baptist Church:
33 recorded (including duplicated license plates)
13 Bullitt County
7 Jefferson
2 Nelson
1 Grayson
1 Boone
1 Christian
1 Scott
1 Rowan
1 Whitley
3 out of state (Maine, Massachusetts, and Colorado)

[redacted]
Bullitt County Health Department
181 Lees Valley Road
Shepherdsville, KY 40165
Office [redacted]
Fax [redacted]

From: [redacted]nkyhealth.org>
To: [redacted]
Cc: [redacted]
Subject: Re:
Date: Thursday, May 7, 2020 3:53:41 PM

Thanks for the heads up, Mayor [redacted]. We will check out the Lucky Duck situation. Hopefully, the protest planned at the school board building will follow social distancing/face mask guidelines at least. I'll leave it up to you and the Chief whether the police will pay a visit while they are protesting at the site. If it's more than 10 people it technically goes against the Governor's order related to mass gatherings.

Steve

[redacted]

Northern Kentucky Health Department
8001 Veterans Memorial Drive, Florence, KY 41042
Office: [redacted] | Fax: [redacted]
[redacted]@nkyhealth.org

On Thu, May 7, 2020 at 2:55 PM [redacted]@florence-ky.gov> wrote:

> So there is a large gathering of parents planned at the school board office this afternoon at 4:00
>
> Also saw on Facebook that the Lucky Duck Restaurant at Oakbrook was doing a "cookout" and inviting the public.
>
> Don't know if either of those rise up to your level of concern, but just a couple of things I am aware of.
>
> People are getting antsy and it's a little concerning.

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF THE SECRETARY

Andy Beshear
Governor

275 East Main Street, 5W-A
Frankfort, KY 40621
502-564-7042
502-564-7091
www.chfs.ky.gov

Eric C. Friedlander
Secretary

ORDER

May 9, 2020

On March 6, 2020, Governor Andy Beshear signed Executive Order 2020-215, declaring a state of emergency in the Commonwealth due to the outbreak of COVID-19 virus, a public health emergency. Pursuant to the authority in KRS 194A.025, KRS 214.020, and Executive Orders 2020-215, 2020-243, 2020-257 and 2020-323, the Cabinet for Health and Family Services, Department of Public Health, hereby orders the following directives to reduce and slow the spread of COVID-19:

1. The March 19, 2020 Order of the Cabinet for Health and Family Services concerning mass gatherings (the "Mass Gatherings Order") is hereby amended as follows.

2. Effective immediately, the Mass Gatherings Order shall not apply to in-person services of faith-based organizations. Faith-based organizations that have in-person services must implement and follow the Guidelines for Places of Worship, which are attached hereto and incorporated by reference herein. The Guidelines for Places of Worship are available online at healthyatwork.ky.gov.

3. For the avoidance of doubt, nothing in this Order or the Mass Gatherings Order prohibits drive-in or virtual, televised, or radio services of faith-based organizations, so long as appropriate social distancing and hygiene measures as recommended by the Centers for Disease Control and Prevention are implemented and followed.

4. The Mass Gatherings Order remains in full force and effect except as amended herein.

5. Any gathering, regardless of whether it is a mass gathering prohibited under this Order, shall to the fullest extent practicable implement Centers for Disease Control and Prevention guidance, including:

- maintaining a distance of 6 feet between persons;
- encouraging good hygiene measures, including regular, thorough handwashing, and providing adequate hygiene materials, including hand sanitizing options;
- encouraging people who are sick to remain home or leave the premises; and
- regularly cleaning and disinfecting frequently touched objects and surfaces.

5. The Department of Public Health hereby delegates to local health departments the authority to take all necessary measures to implement this Order.

The Cabinet for Health and Family Services will monitor these directives continuously. The Cabinet will continue to provide information and updates to healthcare providers during the duration of this Public Health Emergency.

Steven J. Stack, M.D.
Commissioner of Public Health
Department of Public Health
Cabinet for Health and Family Services

Eric Friedlander
~~Acting~~ Secretary
Governor's Designee

Additional information from LHD/DPH Covid Webinar from Wes Duke

[redacted] (CHFS DPH DPHPS) [redacted] @ky.gov>
Fri 6/12/2020 7:47 AM
To: LHD Directors [redacted] **@ky.gov>**; CHFS DPH PHP Coordinators (Listserv) [redacted] **DPH LHD Environmental Directors** [redacted] ; **DPH LHD Environmentalists** [redacted] **>;** [redacted] @ky.gov>

Good morning,

Please see the email below that Wes Duke asked me to share with you. It contains additional information on the protests specifically that there would be no LHD enforcement against those events.

[redacted]

From: Duke, Wesley W (CHFS OLS) [redacted] @ky.gov>
Sent: Thursday, June 11, 2020 6:08 PM
To: [redacted] (CHFS DPH DPHPS) [redacted] @ky.gov>
Subject:

Can you send a clarification email to all LHD's in regard to the protests. Just to clarify that there would be no health department enforcement against those events.

Get Outlook for iOS

** Internal Work Document **

Kentucky Public Health

Prevent. Promote. Protect.

2019 Novel Coronavirus Key Points
6-26-2020

KENTUCKY[1]

State of Emergency declared March 6, 2020

14,859
Cases (↑242)

553
Deaths (↑7)

3.7%
Mortality Rate

119 counties
with at least one case

UNITED STATES[2]

Risk to Americans is widespread

2,414,870
Cases (↑40,588)

124,325
Deaths (↑2,516)

5.1%
Mortality Rate

56 states + territories
with at least one case

WORLD[3]

WHO declared pandemic on March 11, 2020

9,473,214
Cases (↑177,012)

484,249
Deaths (↑5,116)

5.1%
Mortality Rate

215 countries
with at least one case

[1]Kentucky Department for Public Health
[2]The Centers for Disease Control and Prevention https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html
[3]The World Health Organization https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/

Current situation in Kentucky[1]

Long-term Care Facilities (LTCFs), Other Congregate Facilities,* Places of Worship and Workplace Settings

***Other Congregate Facilities might include:** Group Homes, Residential Treatment Facilities, Inpatient Psychiatric Hospitals and Correctional Facilities

206 Facilities
with at least one case

175 LTCFs
31 Other Congregate*

Residents: **2,661** cases, **358** deaths
Staff: **1,073** cases, **3** deaths

5 Places of Worship
with 2 or more cases

At least
170 cases – 32 deaths
In
2 counties

72 Workplaces
with 2 or more cases

At least
1,037 cases – 5 deaths
In
32 counties

[1]Kentucky Department for Public Health

Hello All, This is [redacted] with the [redacted] Health Dept. I would like to give you basic information about the Corona Virus(COVID-19) and offer you the opportunity to ask questions anytime. You can call me back on my phone listed below or email. You can also go to the [redacted] Health Dept facebook or website and find general information.

To my knowledge there are currently no cases of the COVID-19 virus in [redacted] or Kentucky. However, we should think about the precautions we use for the Flu as a general ongoing precaution. Most people recover from this virus or have a mild case however at this time there is no vaccination for the virus so more severe cases could happen. Given there is no vaccination at this time, see the following suggestions as things you can consider.

Here are suggestions for you to consider in your services:

Social distancing- how can you rearrange your sitting arrangements so people can still attend the service but not sit next directly next to each other?

Hand Shake/hugging- encouraging your congregation to refrain from this particularly during outbreak times is very beneficial. One of the ways that viruses spread the easiest is by people putting their hands on their faces/mouth after having a virus on their hands. I realize eliminating hand shakes/hugging would possibly anger some people, but this is a great way to help your congregation stay healthy.

On line Services- some churches already have this option and this is a great way in an outbreak to have people still participate in the service without being present in the building. I realize if people aren't in the building that other things might be affected, i.e.-offering, communion, etc. but this is a option.

Communion- many churches pass the bread plate and everyone grabs a piece of bread out of it. While quick, this also allows everyone to touch multiple pieces of bread while grabbing their own. This is a great way to spread germs. I may be wrong but I think the bread/juice can be bought in separate packages that each individual gets that eliminates this issue. If you are a church that everyone drinks out of the same cup for the juice, obviously this can spread germs quickly as the mouth is a gateway to the immune system for germs.

Extra cleaning- I'm sure that churches regularly clean on a weekly basis. Adding extra cleaning of surfaces particularly in childcare rooms, pews and classrooms can help stop the spread of viruses.

Hand Washing- Encourage your congregation to wash hands frequently or use hand sanitizer if hand washing is not possible. This is vital if you have meals at the church, work in the childcare area, cooking food for members, etc.

Coughing/Sick-encourage all members who are sick or show signs of sickness to stay home from the service.

Personal Health- please have a conversation with your congregation about everyone being responsible for their own health. Obviously anyone can get sick at anytime including disease. One of the best prevention methods each of us has is being as healthy as we can to build our immune system. This discussion would include healthy eating, exercise, rest, physical exams, etc.

While any of us can get a disease at anytime, I truly believe that helping our congregations be as healthy as possible is part of the kingdom work!

Please call/email/text me anytime and I will be glad to discuss options with you at anytime.

[redacted] Health Dept

APPENDIX 2

Executive Orders

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF LEGAL SERVICES

Andy Beshear
Governor

275 East Main Street, 5W-B
Frankfort, KY 40621
502-564-7905
502-564-7573
www.chfs.ky.gov

Eric C. Friedlander
Acting Secretary

Wesley W. Duke
General Counsel

ORDER

March 19, 2020

On March 6, 2020, Governor Andy Beshear signed Executive Order 2020-215, declaring a state of emergency in the Commonwealth due to the outbreak of COVID-19 virus, a public health emergency. Pursuant to the authority in KRS 194A.025, KRS 214.020, KRS Chapter 39A, and Executive Orders 2020-215 and 2020-243, the Cabinet for Health and Family Services, Department of Public Health, hereby orders the following directives to reduce and slow the spread of COVID-19:

1. All mass gatherings are hereby prohibited.

2. 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.

3. For the avoidance of doubt, a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit. It also does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.

4. Any gathering, regardless of whether it is a mass gathering prohibited under this Order, shall to the extent practicable implement Centers for Disease Control guidance, including:

    - maintaining a distance of 6 feet between persons;

- encouraging good hygiene measures, including regular, thorough handwashing, and providing adequate hygiene materials, including hand sanitizing options;
- encouraging people who are sick to remain home or leave the premises; and
- regularly cleaning and disinfecting frequently touched objects and surfaces.

5. The Department of Public Health hereby delegates to local health departments the authority to take all necessary measures to implement this Order.

The Cabinet for Health and Family Services will monitor these directives continuously and may extend the directives beyond their current expiration date. The Cabinet will continue to provide information and updates to healthcare providers during the duration of this Public Health Emergency.

Steven J. Stack, M.D.
Commissioner of Public Health
Department of Public Health
Cabinet for Health and Family Services

Eric Friedlander
Acting Secretary
Governor's Designee

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

STATE OF EMERGENCY

Background

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

To help protect our community from the spread of COVID-19, Kentuckians are encouraged to remain Healthy at Home. By staying home and limiting your in-person contact, you can stop the spread of COVID-19, which endangers public health and safety. If we do not work together to contain the disease, COVID-19 threatens to overwhelm the Commonwealth's healthcare resources.

The Centers for Disease Control and Prevention (CDC) and the Kentucky Department of Public Health have recommended that everyone practice social distancing, meaning staying home when possible and otherwise maintaining six feet of distance from other individuals, to minimize the spread of the disease. Where people congregate unnecessarily, or fail to follow adequate social distancing practices, they are spreading the disease, creating scenes of an emergency.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to suspend state statutes and regulations, and to command individuals to disperse from the scene of an emergency. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth.

I am now issuing this Order to take additional steps to encourage Kentuckians to remain Healthy at Home, and to do everything in their power to stop the spread of the

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

disease. This Order should be construed broadly to prohibit in-person work that is not necessary to protect or sustain life.

Order

I, Andy Beshear, Governor of the Commonwealth of Kentucky, by virtue of authority vested in me pursuant to the Constitution of Kentucky and by KRS Chapter 39A, do hereby Order and Direct as follows:

1. **Only Life-Sustaining Businesses May Remain Open.** All businesses that are not life-sustaining shall cease operations effective Thursday, March 26, 2020, at 8:00 p.m., except as needed to conduct Minimum Basic Operations, as defined in this Order. For the purposes of this Order, Life-Sustaining Businesses are all businesses that allow Kentuckians to remain Healthy at Home, including:

    a. **CISA List**. All businesses operating in the federal critical infrastructure sectors, as outlined at https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.

    b. **Life-sustaining Retail**. In-person retail businesses that provide life-sustaining goods, consistent with Executive Order 2020-246, as well as businesses that supply life-sustaining retail and their administrative support operations. In addition, the following additional categories of retail are designated as life-sustaining under this Order:

        i. hardware stores and businesses that sell electrical, plumbing, and heating material;
        ii. agricultural supply and equipment stores;
        iii. medical product supply and equipment stores; and
        iv. stores that supply first responders and other critical government and healthcare workers.

    The life-sustaining retail stores listed above shall, to the fullest extent possible, permit customers to use delivery or curbside service.

    c. **Food, beverage, and agriculture.** Food and beverage manufacturing, production, processing, and cultivation, including farming, livestock, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption; and businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, rescues, shelters, kennels, and adoption facilities.

Secretary of State
Frankfort
Kentucky

d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or special populations, individuals who need assistance as a result of this emergency, and people with disabilities. These organizations have a special responsibility to implement social distancing to the fullest extent possible, and to take all necessary actions to stop the spread of disease, including by stopping in-person retail operations.

e. **Media**. Newspapers, television, radio, and other media services.

f. **Gas stations and businesses needed for transportation**. Gas stations and auto-supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities; bicycle repair shops and related facilities; and motorcycle repair shops.

g. **Financial Services**. Depository institutions, including but not limited to banks and credit unions; Non-depository institutions, including but not limited to consumer, industrial and mortgage loan companies, mortgage loan brokers, originators and processors, deferred deposit, check cashers, and payday lending companies, title pledge lenders, and money transmitters; securities institutions, including but not limited to brokers, agents, advisers and issuers; appraisers, financial markets, bond issuers, or institutions selling financial products to the extent they are providing financial services; and pawnbrokers, to the extent they are providing check-cashing or similar financial services, or to the extent they are selling firearms and ammunition pursuant to Paragraph 9 of this Order.

h. **Housing, Buildings and Construction**. To ensure Kentuckians can remain Healthy at Home, businesses providing construction or maintenance of residential, commercial, or governmental structures, including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff, security staff, operating engineers, HVAC, painting, landscaping, moving and relocation services, necessary for sustaining the safety, sanitation and operation of structures.

i. **Mail, post, shipping, logistics, delivery, and pick-up services**. Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, beverages, goods or services to end users or through commercial channels.

j. **Laundry services**. Laundromats, dry cleaners, industrial laundry services, and laundry service providers.

Secretary of State
Frankfort
Kentucky

k. **Restaurants for consumption off-premises**. Carry-out, delivery, and drive-through food and beverage sales may continue, consistent with the March 16, 2020 Order of the Cabinet for Health and Family Services and the Department of Public Health and the March 19, 2020 Order of the Public Protection Cabinet.

l. **Supplies for Life-Sustaining Businesses**. Businesses that sell, manufacture, or supply other Life-Sustaining Businesses with the support or materials necessary to operate, including computers, audio and video electronics, household appliances; IT and telecommunication equipment; hardware, paint, flat glass; electrical, plumbing and heating material; sanitary equipment; personal hygiene products; food, food additives, ingredients and components; medical and orthopedic equipment; optics and photography equipment; diagnostics, food and beverages, chemicals, soaps and detergent; and firearm and ammunition suppliers and retailers for purposes of safety and security.

m. **Transportation**. Airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, and other private, public, and commercial transportation and logistics providers necessary for Kentuckians to safely remain Healthy at Home, and to access Life-Sustaining Businesses.

n. **Home-based care and services**. Home-based care for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, and other in-home services including meal delivery.

o. **Professional services**. Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services). Professional services firms must implement telecommuting and remote work to the fullest extent possible, and should only use in-person interaction to support Minimum Basic Operations or where telecommuting is impossible.

p. **Manufacture, distribution, and supply chain for critical products and industries**. Manufacturing companies, distributors, and supply chain companies producing and supplying critical products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, mineral extraction, construction, national defense, communications, as well as products used by other Life-Sustaining Businesses, or products that can be used to treat or prevent COVID-19.

q. **Critical labor union functions**. Labor Union critical activities including the administration of health and welfare funds and personnel checking on the well-being and safety of members providing services in Life-Sustaining Businesses, provided that these checks should be done by telephone or remotely where possible.

r. **Hotels and motels**. Hotels and motels, to the extent used for lodging and delivery or carry-out food services.

s. **Funeral services**. Funeral, mortuary, cremation, burial, cemetery, and related services, subject to restrictions on mass gathering and appropriate social distancing.

2. **Telework Permitted**. The prohibition does not apply to virtual or telework operations.

3. **Social Distancing and Hygiene Required.** All businesses permitted to operate, including Life-Sustaining Businesses and businesses conducting Minimum Basic Operations, must follow, to the fullest extent practicable, social distancing and hygiene guidance from the CDC and the Kentucky Department of Public Health. Failure to do so is a violation of this Order, and could subject said business to closure or additional penalties as authorized by law. Social distancing and hygiene guidance includes:

   a. ensuring physical separation of employees and customers by at least six feet when possible;

   b. ensuring employees practice appropriate hygiene measures, including regular, thorough handwashing or access to hand sanitizer;

   c. regularly cleaning and disinfecting frequently touched objects and surfaces;

   d. permitting employees to work from home when feasible; and

   e. identifying any sick employees and ask theming to leave the premises. Employers are strongly encouraged to offer these employees paid leave.

4. **Minimum Basic Operations**. Minimum Basic Operations are the minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, facilitate telecommuting, and other related functions.

5. **Evictions Suspended**. Pursuant to the authority vested in me by KRS Chapter 39A, evictions within the Commonwealth are suspended, and all state, county, and local law enforcement officers in the Commonwealth are directed to cease

enforcement of orders of eviction for residential premises for the duration of the State of Emergency under Executive Order 2020-215. No provision contained within this Order shall be construed as relieving any individual of the obligation to pay rent, to make mortgage payments, or to comply with any other obligation that an individual may have under tenancy or mortgage.

6. **Additional Orders.** The following designees may provide guidance, clarification or modification of this Order to industries or businesses, and may otherwise issue orders necessary to the operation of government during the State of Emergency: the Governor's Executive Cabinet, as set forth in KRS 11.065; the Commissioner of Public Health; the Director of the Division of Emergency Management; and the Director of the Kentucky Office of Homeland Security. Local health departments may take all necessary measures to implement this Order.

7. **In-Person Government Services.** All in-person government activities at the state, county, and local level that are not necessary to sustain or protect life, or to supporting Life-Sustaining Businesses, are suspended.

    a. For purposes of this Order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders. Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

    b. Any in-person government services that continue must operate consistent with social distancing, as set forth in Paragraph 3 of this Order.

    c. Any statutory deadlines that conflict with the suspension of in-person government activities are hereby suspended during the pendency of this Order.

    d. Nothing in this Order should be interpreted to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

8. **Prior Orders Remain In Effect**. All prior Executive Orders, and Orders issued by Cabinets pursuant to Executive Order 2020-215, remain in full force and effect, except to the extent they conflict with this Order. For the avoidance of doubt, mass gatherings remain prohibited pursuant to the March 19, 2020 Order of the Cabinet for Health and Family Services and the Department of Public Health. Non-life sustaining retail operations may continue to provide local delivery and curbside service of online or telephone

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

orders, consistent with Executive Order 2020-246. Violations of these and other Orders issued pursuant to Executive Order 2020-215 are punishable as provided in KRS Chapter 39A.

9. **Firearms**. Consistent with KRS 39A.100(1)(h) and (3), nothing in this Order should be construed to interfere with the lawful sale of firearms and ammunition. Any businesses engaged in the lawful sale of firearms and ammunition must follow social distancing and hygiene guidance from the CDC and the Kentucky Department of Public Health, including: ensuring physical separation of employees and customers by at least six feet when possible; ensuring employees practice appropriate hygiene measures, including regular, thorough handwashing; regularly cleaning and disinfecting frequently touched objects and surfaces; and ordering sick individuals to leave the premises. Failure to do so is a violation of this Order, and could subject said business to closure.

This Order shall be in effect for the duration of the State of Emergency herein referenced, or until this Executive Order is rescinded by further order or by operation of law.

ANDY BESHEAR, Governor
Commonwealth of Kentucky

MICHAEL G. ADAMS
Secretary of State

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF THE SECRETARY

Andy Beshear
Governor

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Eric C. Friedlander
Secretary

ORDER

May 9, 2020

On March 6, 2020, Governor Andy Beshear signed Executive Order 2020-215, declaring a state of emergency in the Commonwealth due to the outbreak of COVID-19 virus, a public health emergency. Pursuant to the authority in KRS 194A.025, KRS 214.020, and Executive Orders 2020-215, 2020-243, 2020-257 and 2020-323, the Cabinet for Health and Family Services, Department of Public Health, hereby orders the following directives to reduce and slow the spread of COVID-19:

1. The March 19, 2020 Order of the Cabinet for Health and Family Services concerning mass gatherings (the "Mass Gatherings Order") is hereby amended as follows.

2. Effective immediately, the Mass Gatherings Order shall not apply to in-person services of faith-based organizations. Faith-based organizations that have in-person services must implement and follow the Guidelines for Places of Worship, which are attached hereto and incorporated by reference herein. The Guidelines for Places of Worship are available online at healthyatwork.ky.gov.

3. For the avoidance of doubt, nothing in this Order or the Mass Gatherings Order prohibits drive-in or virtual, televised, or radio services of faith-based organizations, so long as appropriate social distancing and hygiene measures as recommended by the Centers for Disease Control and Prevention are implemented and followed.

4. The Mass Gatherings Order remains in full force and effect except as amended herein.

5. Any gathering, regardless of whether it is a mass gathering prohibited under this Order, shall to the fullest extent practicable implement Centers for Disease Control and Prevention guidance, including:

- maintaining a distance of 6 feet between persons;
- encouraging good hygiene measures, including regular, thorough handwashing, and providing adequate hygiene materials, including hand sanitizing options;
- encouraging people who are sick to remain home or leave the premises; and
- regularly cleaning and disinfecting frequently touched objects and surfaces.

5. The Department of Public Health hereby delegates to local health departments the authority to take all necessary measures to implement this Order.

The Cabinet for Health and Family Services will monitor these directives continuously. The Cabinet will continue to provide information and updates to healthcare providers during the duration of this Public Health Emergency.

Steven J. Stack, M.D.
Commissioner of Public Health
Department of Public Health
Cabinet for Health and Family Services

Eric Friedlander
~~Acting~~ Secretary
Governor's Designee

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0136p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARYVILLE BAPTIST CHURCH, INC.; DR. JACK ROBERTS,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

No. 20-5427

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:20-cv-00278—David J. Hale, District Judge.

Decided and Filed: May 2, 2020[*]

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

COUNSEL

ON BRIEFS: Matthew D. Staver, Horatio G. Mihet, Roger K. Gannam, LIBERTY COUNSEL, Orlando, Florida, for Appellants; Carmine G. Iaccarino, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Amicus Curiae in support of Appellants. S. Travis Mayo, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, for Appellee; Richard B. Katskee, Alex J. Luchenitser, AMERCIANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amicus Curiae in support of Appellee.

[*]This decision was originally filed as an unpublished order on May 2, 2020. The court has now designated the order for publication.

ORDER

PER CURIAM. Maryville Baptist Church and its pastor, Dr. Jack Roberts, appeal the district court's order denying their emergency motion for a temporary restraining order. The Church claims that the district court's order effectively denied their motion for a preliminary injunction to stop Governor Andy Beshear and other Commonwealth officials from enforcing and applying two COVID-19 orders. The orders, according to the Church, prohibit its members from gathering for drive-in and in-person worship services regardless of whether they meet or exceed the social distancing and hygiene guidelines in place for permitted commercial and other non-religious activities. The Church moves for an injunction pending appeal, which the Attorney General supports as amicus curiae. The Governor opposes the motion.

Governor Beshear issued two pertinent COVID-19 orders. The first order, issued on March 19, prohibits "[a]ll mass gatherings," "including, but not limited to, community, civic, public, leisure, faith-based, or sporting events." R. 1-5 at 1. It excepts "normal operations at airports, bus and train stations, . . . shopping malls and centers," and "typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." *Id.*

The second order, issued on March 25, requires organizations that are not "life-sustaining" to close. R. 1-7 at 2. According to the order, religious organizations are not "life-sustaining" organizations, except when they function as charities by providing "food, shelter, and social services." *Id.* at 3. Laundromats, accounting services, law firms, hardware stores, and many other entities count as life-sustaining.

On April 12, Maryville Baptist Church held a drive-in Easter service. Congregants parked their cars in the church's parking lot and listened to a sermon over a loudspeaker. Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act. The officers recorded congregants'

license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction.

The Church says these orders and enforcement actions violate its congregants' rights under Kentucky's Religious Freedom Restoration Act and the free-exercise guarantee of the First and Fourteenth Amendments to the U.S. Constitution.

We have jurisdiction over the appeal. "Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions" are immediately appealable. 28 U.S.C. § 1292(a)(1). As a general rule, we do not entertain appeals from a district court's decision to grant or deny a temporary restraining order. That's because temporary restraining orders are usually "of short duration and usually terminate with a prompt ruling on a preliminary injunction, from which the losing party has an immediate right of appeal." *Ne. Ohio Coal. for the Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006). But usually is not always, and the label a district court attaches to an order does not control. When an order "has the practical effect of an injunction," *id.*, and an appeal "further[s] the statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence," *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981), we will review it. We also tend to wait until the claimant seeks a stay from the district court, and the court rules on it. Claimants sought a stay on April 30. The district court has not yet ruled. But one explanation for the stay motion is tomorrow's Sunday service. Under these circumstances, no one can fairly doubt that time is of the essence. The case will become moot just over three Sundays from now, May 20, when the Governor has agreed to permit places of worship to reopen. And the district court's order has the practical effect of denying the Church's motion for a preliminary injunction, especially if no service, whether drive-in or in-person, is allowed in the interim.

We review four factors when evaluating whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation omitted).

Likelihood of success. The Church is likely to succeed on its state and federal claims, especially with respect to the ban's application to drive-in services. Start with the claim under Commonwealth law—Kentucky's Religious Freedom Restoration Act. "Government shall not substantially burden" a person's "right to act . . . in a manner motivated by a sincerely held religious belief," it guarantees, "unless the government proves by clear and convincing evidence" that it "has used the least restrictive means" to further "a compelling governmental interest in infringing the specific act." Ky. Rev. Stat. § 446.350. The point of the law is to exercise an authority every State has: to provide more protection for religious liberties at the state level than the U.S. Constitution provides at the national level. In this instance, the purpose of the Kentucky RFRA is to provide more protection than the free-exercise guarantee of the First Amendment, as interpreted by *Employment Division v. Smith*, 494 U.S. 872 (1990). The Kentucky requirements parallel in large measure the RFRAs enacted by other States and one enacted by Congress, all of which share the goal of imposing strict scrutiny on laws that burden sincerely motivated religious practices. *See, e.g.*, Tex. Civ. Prac. & Rem. § 110.003; *see* 42 U.S.C. § 2000bb-1.

Application of this test requires little elaboration in most respects. The Governor's actions substantially burden the congregants' sincerely held religious practices—and plainly so. Religion motivates the worship services. And no one disputes the Church's sincerity. Orders prohibiting religious gatherings, enforced by police officers telling congregants they violated a criminal law and by officers taking down license plate numbers, amount to a significant burden on worship gatherings. *See Gonzales v. O Centro Espirita Beneficiente Uniao*, 546 U.S. 418, 428–32 (2006); *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009). At the same time, the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus. All accept these conclusions.

The likelihood-of-success inquiry instead turns on whether Governor Beshear's orders were "the least restrictive means" of achieving these public health interests. Ky. Rev. Stat. § 446.350. That's a difficult hill to climb, and it was never meant to be anything less. *See Barr*, 295 S.W.3d at 289; *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). The way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches. The orders permit uninterrupted functioning of

"typical office environments," R. 1-5 at 1, which presumably includes business meetings. How are in-person meetings with social distancing any different from drive-in church services with social distancing? Kentucky permits the meetings and bans the services, even though the open-air services would seem to present a lower health risk. The orders likewise permit parking in parking lots with no limit on the number of cars or the length of time they are there so long as they are not listening to a church service. On the same Easter Sunday that police officers informed congregants they were violating criminal laws by sitting in their cars in a parking lot, hundreds of cars were parked in grocery store parking lots less than a mile from the church. The orders permit big-lot parking for secular purposes, just not for religious purposes. All in all, the Governor did not narrowly tailor the order's impact on religious exercise.

In responding to the state and federal claims, the Governor denies that the ban applies to drive-in worship services, and the district court seemed to think so as well. But that is not what the Governor's orders say. By their terms, they apply to "[a]ll mass gatherings," "including, but not limited to, . . . faith-based . . . events." R. 1-5 at 1. In deciding to open up faith-based events on May 20, and to permit other events before then such as car washes and dog grooming, *see Healthy at Work: Phase 1 Reopening*, https://govstatus.egov.com/ky-healthy-at-work (last visited May 2, 2020), the Governor did not say that drive-in services are exempt. And that is not what the Governor has done anyway. Consistent with the Governor's threats on Good Friday, state troopers came to the Church's Easter service, told congregants that they were in violation of a criminal law, and took down the license plate numbers of everyone there, whether they had participated in a drive-in or in-person service.

It bears noting that neither the Governor nor the Attorney General has raised sovereign immunity as a defense to this claim. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). That is within their rights, *see Wis. Dep't. of Corr. v. Schacht*, 524 U.S. 381, 389 (1998), and perhaps springs from a commendable recognition that, with or without a pandemic, no one wants to ignore state law in creating or enforcing these orders.

The Governor's orders also likely "prohibit[] the free exercise" of "religion" in violation of the First and Fourteenth Amendments, especially with respect to drive-in services. U.S. Const amends. I, XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). On the one hand, a

generally applicable law that incidentally burdens religious practices usually will be upheld. *See Smith*, 494 U.S. at 878–79; *New Doe Child #1 v. Congress of the United States*, 891 F.3d 578, 591–93 (6th Cir. 2018). On the other hand, a law that discriminates against religious practices usually will be invalidated unless the law "is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeh*, 508 U.S. 520, 553 (1993).

Discriminatory laws come in many forms. Outright bans on religious activity alone obviously count. So do general bans that cover religious activity when there are exceptions for comparable secular activities. *See Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365–67 (3d Cir. 1999). As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. *Ward*, 667 F.3d at 738. "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740. As just shown, the Governor's orders do not seem to survive strict scrutiny, particularly with respect to the ban on outdoor services. The question, then, is one of general applicability.

The Governor's orders have several potential hallmarks of discrimination. One is that they prohibit "faith-based" mass gatherings by name. R. 1-5 at 1. But this does not suffice by itself to show that the Governor singled out faith groups for disparate treatment. The order lists many other group activities, and we accept the Governor's submission that he needed to mention faith groups by name because there are many of them, they meet regularly, and their ubiquity poses material risks of contagion.

The real question goes to exceptions. The Governor insists at the outset that there are "no exceptions at all." Appellee Br. at 21. But that is word play. The orders allow "life-sustaining" operations and don't include worship services in that definition. And many of the serial exemptions for secular activities pose comparable public health risks to worship services. For example: The exception for "life-sustaining" businesses allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other

health-related precautions. R. 1-7 at 2–6. But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors.

We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth's citizens. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). And we agree that no one, whether a person of faith or not, has a right "to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one.

Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name." Matthew 18:20; *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at *7–8 (W.D. Ky. Apr. 11, 2020). As individuals, we have some sympathy for Governor DeWine's approach—to allow places of worship in Ohio to hold services but then to admonish them all (we assume) that it's "not Christian" to hold in-person services during a pandemic. Doral Chenoweth III, *Video: Dewine says it's "not Christian" to hold church during coronavirus*, Columbus Dispatch, April 1, 2020. But this is not about sympathy. And it's exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it. *Smith*, 494 U.S. at 886–87.

Keep in mind that the Church and Dr. Roberts do not seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to

follow any hygiene requirements. They are not asking to share a chalice. The Governor has offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same. Are they not often the same people, going to work on one day and attending worship on another? If any group fails, as assuredly some groups have failed in the past, the Governor is free to enforce the social-distancing rules against them for that reason.

The Governor claims, and the district court seemed to think so too, that the explanation for these groups of people to be in the same area—intentional worship—distinguishes them from groups of people in a parking lot or a retail store or an airport or some other place where the orders allow many people to be. We doubt that the reason a group of people go to one place has anything to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another? If the problem is numbers, and risks that grow with greater numbers, then there is a straightforward remedy: limit the number of people who can attend a service at one time.

Other factors. Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). That's true here with respect to the ban on drive-in worship services. As for harm to the claimants, the prohibition on attending any worship service this Sunday and the Sundays through May 20 assuredly inflicts irreparable harm. *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). As for harm to others, an injunction appropriately permits religious services with the same risk-minimizing precautions as similar secular activities, and permits the Governor to enforce social-distancing rules in both settings. As for the public interest, treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees. *See Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012).

The balance is more difficult when it comes to in-person services. Allowance for drive-in services this Sunday mitigates some harm to the congregants and the Church. In view of the

fast-moving pace of this litigation and in view of the lack of additional input from the district court, whether of a fact-finding dimension or not, we are inclined not to extend the injunction to in-person services at this point. We realize that this falls short of everything the Church has asked for and much of what it wants. But that is all we are comfortable doing after the 24 hours the plaintiffs have given us with this case. In the near term, we urge the district court to prioritize resolution of the claims in view of the looming May 20 date and for the Governor and plaintiffs to consider acceptable alternatives. The breadth of the ban on religious services, together with a haven for numerous secular exceptions, should give pause to anyone who prizes religious freedom. But it's not always easy to decide what is Caesar's and what is God's—and that's assuredly true in the context of a pandemic.

Accordingly, the plaintiffs' motion for an injunction pending appeal, and their motion to expedite briefing, oral argument and submission on the briefs, is **GRANTED IN PART**. 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.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0144p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THEODORE JOSEPH ROBERTS, RANDALL DANIEL, and SALLY O'BOYLE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ROBERT D. NEACE, in his capacity as Boone County Attorney, ANDREW G. BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky, ERIC FRIEDLANDER, in his official capacity as Acting Secretary of the Cabinet for Health and Family Services,

Defendants-Appellees.

No. 20-5465

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 2:20-cv-00054—William O. Bertelsman, District Judge.

Decided and Filed: May 9, 2020[*]

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

COUNSEL

ON BRIEFS: Christopher Wiest, CHRIS WIEST, ATTORNEY AT LAW, PLLC, Crestview Hills, Kentucky, for Appellants; Barry L. Dunn, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky for Amicus Curiae in support of Appellants. Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Appellee Neace. S. Travis Mayo, Taylor Payne, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, Wesley W. Duke, CABINET FOR HEALTH AND FAMILY SERVICES, Frankfort, Kentucky, for Appellees Beshear and Friedlander.

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[*]This decision was originally filed as an unpublished order on May 9, 2020. The court has now designated the order for publication.

ORDER

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

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

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

On April 12, Maryville Baptist Church held an Easter service. Some congregants went into the church. Others parked their cars in the church's parking lot and listened to the service over a loudspeaker. Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance, whether in the church or outdoors, amounted to a criminal act.

The officers recorded congregants' license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction.

Theodore Joseph Roberts, Randall Daniel, and Sally O'Boyle all attended this Easter service, and they all complied with the State's social-distancing and hygiene requirements during it. At some point during the service, the state police placed attendance-is-criminal notices on their cars. In response, the three congregants sued Governor Beshear, another state official, and a county official, claiming that the orders and their enforcement actions violate their free-exercise and interstate-travel rights under the U.S. Constitution.

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

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

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

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

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

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

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

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

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

Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so. As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. *Ward*, 667 F.3d at 738. "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

The Governor insists at the outset that there are "no exceptions." ROA (20-5427) 13-1 at 25. But that is word play. The orders allow "life-sustaining" operations and don't include worship services in the definition. And many of the serial exemptions for secular activities pose comparable public health risks to worship services. For example: The exception for "life-

sustaining" businesses allows law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate so long as they follow social-distancing and other health-related precautions. R. 1-7 at 2–6. But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of the other services.

Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.

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

Some groups in some settings, we appreciate, may fail to comply with social-distancing rules. If so, the Governor is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not. What he can't do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings. We have plenty of company in ruling that at some point a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one. *See, e.g.*, *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165–70 (3d Cir. 2002); *Fraternal Order of Police*, 170 F.3d at 365; *see also Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 196–98 (2d Cir. 2014).

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

Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is "government *neutrality*," not "governmental avoidance of bigotry." *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). A law is not neutral and generally applicable unless there is "neutrality between religion and non-religion." *Hartmann*, 68 F.3d at 978. And a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones. *See id.* at 979; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1233–35, 1234 n.16 (11th Cir. 2004); *see also Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus.").

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

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

The question is whether the orders amount to "the least restrictive means" of serving these laudable goals. That's a difficult hill to climb, and it was never meant to be anything less. *See Lukumi*, 508 U.S. at 546. There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of "typical office environments," R. 1-4 at 1, which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.

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

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

The Governor suggests that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport. But the reason a group of people go to one place has nothing to do

with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services. If the problem is numbers, and risks that grow with greater numbers, there is a straightforward remedy: limit the number of people who can attend a service at one time. All in all, the Governor did not customize his orders to the least restrictive way of dealing with the problem at hand.

Other factors. Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). Just so here. The prohibition on attending any worship service through May 20 assuredly inflicts irreparable harm by prohibiting them from worshiping how they wish. *See Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). As for harm to others, an injunction appropriately permits religious services with the same risk-minimizing precautions as similar secular activities, and permits the Governor to enforce social-distancing rules in both settings. As for the public interest, treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees. *See Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012).

In the week since our last ruling, the Governor has not answered our concerns that the secular activities permitted by the order pose the same public-health risks as the kinds of in-person worship barred by the order. As before, the Commonwealth remains free to enforce its orders against all who refuse to comply with social-distancing and other generally applicable public health imperatives. All this preliminary injunction does is allow people—often the same people—to seek spiritual relief subject to the same precautions as when they seek employment, groceries, laundry, firearms, and liquor. It's not easy to decide what is Caesar's and what is God's in the context of a pandemic that has different phases and afflicts different parts of the country in different ways. But at this point and in this place, the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot co-exist

with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment.

The plaintiffs' motion for an injunction pending appeal is **GRANTED**. The Governor and the other defendants are enjoined, during the pendency of this appeal, from enforcing orders prohibiting in-person services at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for "life-sustaining" entities.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT
Electronically filed

DANVILLE CHRISTIAN ACADEMY, INC.

and

COMMONWEALTH OF KENTUCKY, *ex rel.* Attorney General Daniel Cameron

Plaintiffs

v.

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

Defendant

Civil Action No. _____

VERIFIED COMPLAINT

"[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."

- Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020)

Religious education and religious worship go hand-in-glove. Indeed, "[r]eligious education is vital to many faiths practiced in the United States." *Id.* For example, "[i]n the Catholic tradition, religious education is 'intimately bound up with the whole of the Church's life.'" *Id.* at 2065 (quoting Catechism of the Catholic Church 8 (2d ed. 2016)). And, "Protestant churches, from the earliest settlements in this

country, viewed education as a religious obligation." *Id.* "The contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts." *Id.* In Islam, the importance of education "is traced to the Prophet Muhammad, who proclaimed that '[t]he pursuit of knowledge is incumbent on every Muslim.'" *Id.* "The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education," and Seventh-day Adventists "trace the importance of education back to the Garden of Eden." *Id.* at 2066. In short, religious education is so central to religious exercise that to burden the former is to burden the latter.

The absence of government-imposed burdens on religious exercise is one of the foundations of the American Republic. "Since the founding of this nation, religious groups have been able to 'sit in safety under [their] own vine and figtree, [with] none to make [them] afraid.'" *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (quoting Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)). This is the promise of America. It is one of the Nation's "most audacious guarantees." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 906 (W.D. Ky. 2020).

But this audacious guarantee has been threatened repeatedly this year by Governor Andrew Beshear. Just before Easter, he purported to outlaw religious services in the Commonwealth by executive order, and then he sent Kentucky State Police troopers to record the license plate numbers of churchgoers. The Sixth Circuit halted his discriminatory actions not once, but *twice*. *See generally Roberts v. Neace*,

958 F.3d 409 (6th. Cir. 2020) (per curiam); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam). This Court did as well. *See generally Tabernacle Baptist Church, Inc. v. Beshear*, 459 F. Supp. 3d 847 (E.D. Ky. 2020).

On Wednesday, November 18, 2020, Governor Beshear issued Executive Order ("EO") 2020-969, which prohibits all public and private schools from meeting in-person for the next several weeks.[1] The order contains no accommodations for religious education, despite such education being recognized by the Supreme Court as a "vital" part of many faiths. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064. And, like the Governor's previously enjoined orders, the latest order burdens religious institutions while arbitrarily allowing other gatherings that pose similar health risks to continue.

Regardless of how well-intentioned the Governor might be, his actions violate the federal and state constitutions and Kentucky's Religious Freedom Restoration Act. His actions also infringe on the autonomy of religious institutions and violate the Constitution's Establishment Clause.

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[1] The next day, the Director of the Centers for Disease control announced, "We should be making data driven decisions when we are talking about what we should be doing for institutions or what we should be doing for commercial closures. For example, as we mentioned, last spring CDC did not recommend school closures nor did we recommend their closures today. . . . K through 12 schools can operate with face to face learning and they can do it safely and they can do it responsibly." *See* "CDC Director Redfield Says It Does Not Recommend Closing Schools, Covid Acquired 'In The Household'" (Nov. 19, 2020) available at https://www.youtube.com/watch?v=sxKhJaqEkcY (last visited Nov. 20, 2020). He further stated "[t]he truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school," and that it is "counterproductive . . . from a public health point of view, just in containing the epidemic, if there was an emotional response, to say, 'Let's close the schools.'" Ryan Saavedra, *CDC Director: Schools Among 'Safest Places' Kids Can Be, Closing Schools An 'Emotional Response' Not Backed By Data*, The Daily Wire, November 19, 2020, https://www.dailywire.com/news/cdc-director-schools-among-safest-places-kids-can-be-closing-schools-an-emotional-response-not-backed-by-data.

Among the schools impacted by the Governor's actions is Danville Christian Academy ("Danville Christian"), which practices its faith in Boyle County, Kentucky. Danville Christian's founders created the school to mold Christ-like scholars, leaders, and servants who will advance the Kingdom of God. To that end, Danville Christian provides students with a Christ-centered environment along with academic excellence so they may grow spiritually, academically, and socially. And Danville Christian accomplishes this religious calling by educating students with a Christian worldview in a communal in-person environment.

For these reasons, the Plaintiffs bring this suit against the Governor, and for their Complaint for declaratory and injunctive relief state as follows:

PARTIES

1. Daniel Cameron is the duly elected Attorney General of the Commonwealth of Kentucky. As such, he is the lawyer for the people of Kentucky. Ky. Rev. Stat. ("KRS") 15.020; *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016).

2. Attorney General Cameron brings this suit on behalf of the Commonwealth of Kentucky. As the chief law officer of the Commonwealth, Attorney General Cameron can challenge the "authority for and constitutionality of the Governor's actions." *Commonwealth ex rel. Beshear*, 498 S.W.3d at 363.

3. Plaintiff Danville Christian Academy, Inc. is a Christian school and a religious nonprofit corporation, the principal office of which is located at 2170 Shakertown Road, Danville, Boyle County, Kentucky 40422.

4. Defendant Andrew Beshear is the Governor of Kentucky. Governor Beshear is the "Chief Magistrate" of the Commonwealth, Ky. Const. § 69, charged with "tak[ing] care that the laws be faithfully executed," Ky. Const. § 81.

JURISDICTION AND VENUE

5. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367 because the Commonwealth, through Attorney General Cameron, and Danville Christian Academy, Inc., assert claims against Governor Beshear arising under the Constitution of the United States, as well as claims under Kentucky law over which this Court has supplemental jurisdiction. This declaratory judgment action is further authorized by 28 U.S.C. §§ 2201 and 2202.

6. The Court has personal jurisdiction over Governor Beshear because he resides in Kentucky, holds office in Franklin County, Kentucky, and engaged in the acts giving rise to this complaint in Franklin County, Kentucky.

7. This Court is the proper venue under 28 U.S.C. § 1391 because a "substantial part of the events . . . giving rise to the claim[s] occurred" in this district.

8. Under Local Rule 3.2(a)(2)(A), the Central Division of the Eastern District of Kentucky at Frankfort is the proper division for this action because a substantial part of the events giving rise to this action occurred in Franklin County, Kentucky, where Governor Beshear issued the orders at the heart of this suit.

FACTUAL BACKGROUND

The COVID-19 outbreak

9. Since the initial outbreak, coronavirus has spread through the United States, with each state experiencing varying rates of infection and hospitalization.

North Dakota, for example, leads the nation with an overall infection rate of 9,027 cases per 100,000 population since the beginning of the outbreak.[2] Vermont has the lowest rate at 505 per 100,000 population.[3] And Kentucky is roughly in the middle with a rate of 3,240 per 100,000.[4]

10. States have also experienced varying survival rates resulting from COVID-19. New Jersey's survival rate is the lowest at 99.81%, and Vermont's is the highest at 99.99%.[5] Kentucky's survival rate of 99.96% is just below West Virginia's rate of 99.97%, and just above Tennessee's rate of 99.94%.[6]

11. States have also pursued varying policies in dealing with COVID-19, with some being more aggressive than others.

12. On March 6, 2020, Governor Beshear declared a State of Emergency and activated his emergency authority under KRS Chapter 39A.

13. Over the next several weeks, Governor Beshear issued a series of executive orders implementing a growing set of restrictions and purporting to suspend laws where he saw fit.

14. Before and after Governor Beshear declared a State of Emergency, many religious organizations took voluntary measures to prevent the spread of coronavirus and practice social distancing.

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[2] *See* CDC COVID Data Tracker, available at *https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k* (last accessed November 20, 2020).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

Governor Beshear's initial infringements on religious liberty

15. On March 19, 2020, Governor Beshear took his first step to outright ban religious gatherings across the state. Purportedly acting through Secretary Eric Friedlander, of the Cabinet for Health and Family Services, the Beshear administration issued an order stating that "[a]ll mass gatherings are hereby prohibited."

16. In the March 19th order, the Beshear administration vaguely described the scope of the order 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."

17. Thus, the order specifically banned "faith-based" gatherings by name.

18. The ban was a broad one, not simply aimed at narrowly banning large gatherings. It did not define mass gatherings based on the number of people coming together, nor did it limit the prohibition to the kind of indoor or closed-space gatherings that increase the risk of community transmission of the virus. Rather, Governor Beshear's March 19 Order broadly banned any activity "that brings together groups of individuals," which specifically included "faith-based" gatherings.

19. However, the March 19 Order did not apply equally without exception. In fact, the order specifically exempted two kinds of activities from the prohibition.

20. First, the order stated that "a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping

malls and centers, or other spaces where persons may be in transit." Religious organizations were not included within that exemption.

21. Second, the order stated that a mass gathering "does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." Like the first group of exemptions, religious organizations were not included.

22. Thus, under the March 19 Order, faith-based activities were expressly singled out for prohibition, while secular organizations and activities received exemptions—even when gatherings at those secular activities include large numbers of people.

23. Six days after prohibiting the vaguely-defined-but-broadly-applicable "mass gatherings," on March 25, Governor Beshear issued an executive order closing all organizations that are not "life sustaining." *See* Executive Order 2020-257.[7]

24. "Life sustaining" was defined in the order as any organization "that allow[s] Kentuckians to remain Healthy at Home." *Id.* The order also included nineteen different categories of business that are "life sustaining" and therefore were free to remain open. *Id.*

25. Among the exceptions for "life sustaining" activity was "Media," which the order defined as, "Newspapers, television, radio, and other media services." *Id.* The order also allowed organizations like law firms to continue operating under the

[7] Executive Order 2020-257 (March 25, 2020), available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited Nov. 20, 2020).

category of "Professional services," which includes "legal services, accounting services, insurance services, real estate services (including appraisal and title services)." *Id.*

26. Governor Beshear's order did not consider religious organizations to be "life sustaining."

27. The order did not permit religious organizations to continue providing spiritual nourishment in any way that would constitute a "mass gathering" as might be sincerely required by their members according to the tenets of their faith.

Governor Beshear specifically targets religious activity

28. On Good Friday, two days before Easter Sunday, Governor Beshear held his daily press conference. During his presentation, Governor Beshear announced that his administration would be taking down the license plate numbers of any person attending an in-person church service on Easter Sunday.[8] Then, he said, local health officials would be contacting each person and requiring a mandatory 14-day quarantine. Under Kentucky law, violation of such an order is a misdemeanor punishable by criminal prosecution. *See* KRS 39A.990.

29. So, even though countless Kentuckians were permitted to gather in offices, big box stores, bus stations, and grocery stores in communities with high numbers of infected individuals, residents of counties like Bell—where there were no diagnosed cases of COVID-19 at the time—were not permitted to attend church.

[8] Alex Acquisto, Kentucky COVID-19 cases up by 242. Total is 1,693. State to quarantine churchgoers. Lexington Herald Leader, updated Apr. 10, 2020, available at https://www.kentucky.com/news/coronavirus/article241923521.html (last visited Nov. 20, 2020)

30. On Easter Sunday, Governor Beshear followed through with his threat. Kentucky State Police troopers, acting on Governor Beshear's orders, traveled to the Maryville Baptist Church to record license plate numbers of those attending the church's Easter service. The troopers also provided churchgoers with written notices that their attendance at the service constituted a criminal act. Afterward, the vehicle owners received letters ordering them to self-quarantine for 14 days or else be subject to further sanction.

The Sixth Circuit rules against Governor Beshear twice.

31. On Saturday, May 2, 2020, the Sixth Circuit enjoined Governor Beshear from prohibiting drive-in church services so long as the churches adhered to the same public health requirements mandated for "life-sustaining" entities. *See Maryville Baptist Church v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam).

32. In reaching that conclusion, the Sixth Circuit observed that "[t]he Governor's orders have several potential hallmarks of discrimination." *Id.* at 614. For example, the orders prohibited faith-based mass gatherings by name. *Id.* And they contained broad exceptions that inexplicably allowed some groups to gather while prohibiting faith-based groups from doing so. *See id.*

33. The court further noted that:

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

Id. at 615.

34. The court concluded that there were much less burdensome means of combatting the COVID-19 outbreak than banning religious gatherings, noting that:

> The Governor has offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same. Are they not often the same people, going to work on one day and attending worship on another? If any group fails, as assuredly some groups have failed in the past, the Governor is free to enforce the social-distancing rules against them for that reason.

Id. And the court also pointed out that "[i]f the problem is numbers, and risks that grow with greater numbers, then there is a straightforward remedy: limit the number of people who can attend a service at one time." *Id.*

35. One week later, on Saturday, May 9, 2020, the Sixth Circuit again enjoined Governor Beshear. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam).

36. Whereas the May 2 decision enjoined the Governor's ability to stop drive-in church services, the May 9 decision went further and also enjoined his ability to prohibit in-person church services.

37. The court held that the Governor's orders contained so many exceptions permitting non-religious gatherings that they effectively discriminated against religious exercise.

38. The court further held that the orders could not satisfy strict scrutiny:

> There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the

> Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of "typical office environments," R. 1-4 at 1, which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.
>
> Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25; *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, --- F. Supp. 3d ---, 2020 WL 1820249, at *7–8 (W.D. Ky. Apr. 11, 2020).

Id. at 415.

39. The court thus enjoined the Governor again, holding that "at this point and in this place, the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment." *Id.* at 416.

40. One day earlier, this Court granted a temporary restraining order stopping the Governor from restricting religious practices.

41. In *Tabernacle Baptist Church of Nicholasville, Inc. v. Beshear*, 459 F. Supp. 3d 847 (E.D. Ky. 2020), this Court concluded that "[e]ven viewed through the state-friendly lens of *Jacobson* [*v. Massachusetts*], the prohibition on religious services presently operating in the Commonwealth is 'beyond what was reasonably required for the safety of the public.'" *Id.* at 854–55 (citation omitted).

Governor Beshear orders the closure of schools, including private religious schools

42. On November 18, 2020, Governor Beshear issued Executive Order 2020-969.[9] A copy of that order is attached as **Exhibit 1**.

43. This order purports to:

a. Close all in-person instruction at all public and private elementary, middle, and high schools in the Commonwealth as of November 23, 2020;

b. Require all middle and high schools in the Commonwealth to remain closed at least until January 4, 2021;

c. Only permit elementary schools to reopen for in-person instruction between December 7, 2020 and January 4, 2021 if the school is not located in a "Red Zone County" as provided by the Kentucky Department of Health, and the school follows all expectations in the Kentucky Department of Education Healthy at School Guidance on Safety Expectations and Best Practices for Kentucky Schools.

44. The order allows schools to provide small group in-person targeted services as provided in Kentucky Department of Education guidance. On information and belief, such services do not include in-person classroom instruction.

45. The order also does not shut down colleges, universities, or childcare centers.

[9] Executive Order 2020-969 (November 18, 2020), available at https://governor.ky.gov/attachments/20201118_Executive-Order_2020-969_State-of-Emergency.pdf (last visited November 20, 2020).

46. On the same day that he issued Executive Order 2020-969, Governor Beshear also issued Executive Order 2020-968.[10] A copy is attached as **Exhibit 2**.

47. Executive Order 2020-968 permits secular establishments like libraries, distilleries, fitness centers, and indoor recreation facilities to continue operating at limited capacity.

48. Executive Order 2020-968 also permits venues, event spaces, and theaters to continue operating with a maximum of 25 people per room.

49. Executive Order 2020-968 also permits office-based businesses to continue operating as long as no more than 33% of employees are physically present on any given day.

50. The day after Governor Beshear issued Executive Order 2020-969 purporting to close all in-person instruction at all public and private elementary, middle, and high schools in the Commonwealth as of November 23, the director of the Centers for Disease control announced "[t]he truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school," and that it is "counterproductive . . . from a public health point of view, just in containing the epidemic, if there was an emotional response, to say, 'Let's close the schools.'"[11]

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[10] Executive Order 2020-968 (November 18, 2020), available at https://governor.ky.gov/attachments/20201118_Executive-Order_2020-968_State-of-Emergency.pdf (last visited November 20, 2020).

[11] Ryan Saavedra, *CDC Director: Schools Among 'Safest Places' Kids Can Be, Closing Schools An 'Emotional Response' Not Backed By Data*, The Daily Wire, November 19, 2020, https://www.dailywire.com/news/cdc-director-schools-among-safest-places-kids-can-be-closing-schools-an-emotional-response-not-backed-by-data.

51. In response to questions from citizens about the applicability of Executive Order 2020-969 to religious schools, the Attorney General's Office reached out to the Governor's Office for clarification.

52. The Governor's General Counsel responded as follows in an email that is attached as **Exhibit 3**:

> The order concerning schools applies to all public and private schools engaged in primary or secondary education (K-12), regardless of whether they are religiously affiliated. The order does not apply to other forms of instruction or places of worship. Accordingly, a place of worship that provides religious instruction as part of its services – for example, Sunday School or bible study – may do so.
>
> I hope this answers your question.

53. Thus, houses of worship may continue to operate and may conduct Bible studies any day of the week in enclosed spaces. They may also hold Sunday school on their premises in enclosed locations. But the Governor refuses to allow religious schools to conduct nearly identical activities.

54. Moreover, shortly after Governor Beshear ordered religious schools to close their doors, Kentucky's top education official warned certified school personnel who violate the Governor's executive order of licensure consequences. Specifically, Kentucky's Commissioner of Education wrote that "[c]ertified school employees are bound by the Professional Code of Ethics and may be subject to disciplinary action by the Education Professional Standards Board (EPSB) for violation of the Professional Code of Ethics." A copy of this email is attached as **Exhibit 4**.

55. The EPSB is responsible for "issuing, renewing, suspending, and revoking Kentucky certificate certificates for professional school personnel."[12]

Danville Christian Academy

56. Danville Christian is a Christian school and a religious nonprofit corporation the principal office of which is located at 2170 Shakertown Road, Danville, Kentucky 40422. It provides pre-K through 12th grade classes at its facilities. Its Headmaster is James S. Ward II.

57. In 1994, members of Calvary Baptist Church of Danville, Kentucky, formed a committee to study the idea of starting a Christian school in Danville, Kentucky. After two years of prayer and preparation, they created Danville Christian, which opened for operation on August 15, 1996, at Calvary Baptist Church.

58. As stated in Danville Christian's Articles of Incorporation, attached to this Complaint as **Exhibit 7**, the purpose of Danville Christian is "to provide a creative, loving, academic environment for children to grow socially, emotionally, physically, academically, and spiritually through individual and group learning experiences under the guidance and nurture of carefully chosen Christian teachers, administrators, and under the Lordship of Jesus Christ. It shall be the purpose of the Danville Christian Academy to encourage all students to grow in a personal relationship with Jesus Christ and to emphasize the value of the eternal soul, the worth of the individual, the love of God for man, and the kinship of all peoples as

[12] http://www.epsb.ky.gov/ (last visited Nov. 20, 2020).

taught in the Holy Scriptures, while providing students with the opportunity for achieving academic excellence."

59. Danville Christian's vision is to mold Christ-like scholars, leaders, and servants who will advance the Kingdom of God.

60. Danville Christian's mission statement is to provide students with a Christ-centered environment along with academic excellence so they may grow spiritually, academically, and socially.

61. Danville Christian has adopted a Statement of Faith that expresses the school's core religious beliefs, including its beliefs about God, the Bible, Jesus Christ, and the afterlife, among other things.

62. Danville Christian has also adopted what it terms Three Core Beliefs: that Christ is at the center of all that we do; that DCA students and staff are lifelong learners; and that DCA students and staff are ambassadors for Christ.

63. Danville Christian's Board of Directors prays before its meetings. One of the Board's standing committees is the Committee on Spiritual Life.

64. Danville Christian believes its responsibility is to inspire children to know and love God; that the purpose of a Christian education is to present students the truth about God's relationship to them personally, to life, the world, and everything in it; that students must be shown that the Word of God is the authoritative source upon which to build a life that has both purpose and meaning; that the philosophy of Christian education calls for an educational process that puts the Bible at the center of all learning and asks the student and the teacher to evaluate

all they see in the world—through the eyes of God; that Jesus said, "I am the Way, the Truth, and the Life" (John 14:6); that in Christian education, students learn to use the Bible to evaluate all of life—including what they learn in the classroom.

65. Danville Christian's educational philosophy is Kingdom Education, which focuses on bringing the home, church, and school into a partnership for the purpose of training the next generation. Kingdom Education is defined as the life-long, Bible-based, Christ-centered process of leading a child into a new identity with Christ, developing a child according to his/her specific abilities given to him by Christ, so that a child is empowered to live a life characterized by love, trust, and obedience to Christ.

66. Danville Christian requires its staff and administrators to affirm its Statement of Faith and have a saving relationship with Jesus Christ.

67. Danville Christian requires that at least one parent of each of its students have a saving relationship with Jesus Christ.

68. A key component of Danville Christian's purpose and educational philosophy is its belief that its students should be educated with a Christian worldview in a communal, in-person environment.

69. Danville Christian would be unable to fulfill its religious purpose and mission—or implement its religious educational philosophy—and its religious beliefs would be substantially burdened, if it were prohibited from offering in-person, in-class instruction to its students.

70. All Danville Christian elementary, middle school, and high school students receive daily Bible classes each day of the school year. Danville Christian high school students are required to earn four credits of Bible courses in order to graduate. Danville Christian uses Biblically-based curriculum for many of its courses, and all Danville Christian teachers are required to incorporate Biblical worldview and instruction into all classes and subject matters taught.

71. All Danville Christian students attend one of two socially distanced chapel services every week provided in the gymnasium. Chapel services include religious instruction and preaching, corporate prayer, musical worship, communal recognition, and encouragement of individual students.

72. Danville Christian holds corporate prayer at the beginning of each school day as a school, followed by corporate prayer in each individual classroom. Individual classrooms hold corporate prayer before lunch. Danville Christian holds corporate prayer before school events, including athletic events.

73. Danville Christian's student activities include outreach and mercy ministries such as Operation Christmas Child and the Day of Giving, which provide evangelism and material goods to people in need.

74. Each year Danville Christian high school students are provided local, regional, and foreign mission opportunities.

75. Danville Christian's students range from three-year-old pre-school through 12th grade. The school day begins at 8:05 a.m. and ends at 3:15 p.m.

76. Danville Christian has a total of 234 students. Classroom sizes range from 4 students to 20 students, with most classes ranging from 12 to 17 students.

Danville Christian Academy's COVID-19 Reopening Plan

77. Prior to the beginning of the 2020-2021 school year, Danville Christian collaborated with local health officials and consultants—including three medical doctors, among others—to plan the reopening and operation of the school and the safe return of its students and staff during the COVID-19 pandemic.

78. Danville Christian's reopening and operational plan was submitted to and approved by the director of the Boyle County Health Department, who repeatedly has expressed his approval of the plan and has stated that Danville Christian is "doing it right."

79. Other schools have contacted and visited Danville Christian for help with their reopening and operational plans.

80. In accordance with its reopening and operational plan, on August 12, 2020, Danville Christian reopened with direct in-class instruction in which Danville Christian's teachers provide in person instruction to its students in its classrooms.

81. Attached to this Complaint as **Exhibit 5** is the "DCA Reopen FAQ," which was provided to Danville Christian students and families before the start of the school year. Much of Danville Christian's plan is explained in the DCA Reopen FAQ. Procedures mandated by Danville Christian's plan include, among other things:

a. Except for pre-school students, students and staff must wear masks when entering, exiting, and moving about the building, such as during classroom changes.

b. Each student receives a temperature check before entering the building. If a fever (100.4 degrees Fahrenheit) is detected, the individual is not allowed to enter the building and must be fever free for 72 hours and visit a doctor for re-admittance to the building.

c. Immediately upon entering the building, each student and staff member enters one of two kiosks outfitted with a thermal camera and face recognition software to receive a second temperature check. If a mask has been removed an oral computerized command reminds the individual to re-mask. If a fever (100.4 degrees Fahrenheit) is detected an audible alarm is triggered and the individual is removed from the student population and is not allowed to remain at school, and must be fever free for 72 hours and visit a doctor for re-admittance to the building. The same protocol is applied if a fever is detected later in the school day.

d. Only if sitting and socially distanced may students remove their masks, and then only if parental permission to do so has been provided.

e. Student work areas in each classroom have been socially distanced. In areas where adequate social distancing is not possible, Danville

Christian installed large wood-framed plexiglass dividers to separate one student from another.

f. Teachers wear masks or faceshields while instructing students and maintain social distancing.

g. Before leaving a classroom, Danville Christian requires all students to wipe down their desk or work area with a disinfectant spray reported to be effective against the novel coronavirus.

h. Students may access their lockers only at designated times during the day, separated by grade level, and provided that masks and social distance are maintained.

i. Danville Christian moved lunch service to assigned-seat cubicles in the gymnasium to provide better social distancing. These cubicles are divided by wood-framed plexiglass dividers to separate one student from another.

j. All students are required to follow a set schedule of multiple hand washings throughout the school day.

k. Eight hand sanitizing stations have been installed in the building and gymnasium.

l. All water fountains are closed. Bottled water is provided by Danville Christian. Danville Christian has ordered and is awaiting delivery of retro-fitted touchless water stations designed to refill water bottles.

m. In addition to the normal night custodians, Danville Christian hired a day-time custodian for an additional four hours of cleaning per day to clean all bathrooms during the school day and to help clean the lunch area.

n. Personalized virtual classroom options are provided for students or families who would prefer an alternative to in-person instruction. Only five of Danville Christian's students have chosen this option.

82. Danville Christian' Headmaster estimates that it has spent between $20,000.00 and $30,000.00 on pandemic-related safety precautions and protocols for the 2020-2021 school year.

83. In October, Danville Christian became aware that a student had tested positive for the novel coronavirus. In conjunction with the local health department, Danville Christian determined through contact tracing which student should be quarantined. The student who tested positive and any other students exposed to him, were required to quarantine away from the school for fourteen days.

84. In early November, Danville Christian became aware of a teacher and three students who tested positive for the novel coronavirus. In response, and in coordination with the local health department, on November 9, Danville Christian ceased in-person instruction for 10 days while it monitored student health. On November 18, Danville Christian began bringing its students back for in-person instruction a few grades at a time staggered over several days. The final grades are to return November 23.

85. The virtual option that Danville Christian has provided to a few of its students severely burdens Danville Christian's ability to carry out its religious purpose and mission, implement its Kingdom Education philosophy, and fulfill its religious vision for those students due to the necessity for an in-person, communal environment. Succeeding in these things to any extent with these few virtual students hinges on Danville Christian's ability to continue to provide in-person instruction to the rest of its students.

86. The Governor's recent order for schools to cease in-person instruction beginning November 23 will prevent Danville Christian from carrying out its religious purpose and mission, implementing its Kingdom Education philosophy, and fulfilling its religious vision.

87. For example, without in-person instruction, Danville Christian will be unable to provide the Christ-centered, creative, loving, academic environment required for its students to grow and develop in accordance with Danville Christian's religious purpose, mission and vision. It will be unable to have the weekly in-person chapel services and corporate prayer that are a key component to implementing its Kingdom Education philosophy. It will be unable to provide the in-person group experiences central to developing Christ-like scholars, leaders, and servants who will advance the Kingdom of God. It will be unable to provide the in-person interaction with Danville Christian's carefully selected Christian instructors and staff needed to inspire its students to know and love God and to empower its students to live a life characterized by love, trust, and obedience to Christ. It will be unable to assemble

together in-person with staff and students as it believes God through the Bible commands it to do.

88. Danville Christian has a sincerely held religious belief that it is called by God to have in-person religious and academic instruction for its students. It is imperative to DCA's religious purpose, mission and vision, and its Kingdom Education philosophy, that DCA continue in-person instruction of its students.

COUNT I
Violation of the Free Exercise Clause of the First Amendment to the United States Constitution

89. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

90. The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const., amend. I.

91. The right to freely exercise one's religion is incorporated against the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

92. Under the First Amendment, state officials cannot target religious activity for disfavored treatment without satisfying "the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

93. Only a law that is both neutral and generally applicable can avoid this heightened review. But facial neutrality is not enough. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. And the government "cannot in

a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543.

94. Executive Order 2020-969 is neither neutral nor generally applicable.

95. The terms of the order are clear: *all* in-person religious schooling must end, regardless of whether the religious school is taking safety precautions, practicing social distancing, implementing appropriate hygiene standards, or otherwise following all of the requirements imposed on the secular activities that are exempt from the order.

96. And the list of permissible secular activities is long. On the same day that Governor Beshear *closed* religious schools, he issued an order allowing "office-based businesses" to continue operating in person so long as they limit capacity to 33 percent of their employees. His other preexisting regulations for offices require that employees wear masks while interacting with co-workers or in common areas, and he urges businesses to limit in-person contact with customers "to the greatest extent practicable." [*See* **Exhibit 6**, Requirements for Office-Based Businesses, at 1]. He has not imposed time limitations that prohibit employees from working together in the same workspace for more than 4, 6, 8, or even 10 hours at a time. Instead, he asks "office-based businesses" to abide by simple social-distancing rules and a capacity limit.

97. Governor Beshear also issued an order allowing venues and event spaces to continue operating with up to "25 people per room"—which is more than many classrooms. The order does not impose a time limit on how long people can

gather in a venue or event space. So long as this basic capacity limitation is adhered to, and people follow generally applicable social-distancing and hygiene requirements, they are free to gather in public spaces of no more than 25 people per room.

98. Gyms also are free to continue operating, so long as they limit capacity to 33 percent of their occupancy limits. *See id.* That means Kentuckians are allowed to run on treadmills, lift weights, or do pilates six feet apart, for unlimited durations, but they cannot sit in a classroom with the same amount of space between them.

99. The list continues: if the Governor's Order is allowed to take effect, on November 23 in Kentucky, one will be free to crowd into retail stores, go bowling with friends, attend horse shows, go to the movies, attend concerts, tour a distillery, or get a manicure or massage or tattoo. Although there are limits and restrictions that govern how these in-person activities must operate, the Governor has not prohibited them. Yet, starting on November 23, no one in Kentucky is permitted to attend in-person school, even when religious education is a deep and sincere facet of one's faith, and even when those operating religious schools are abiding by strict social distancing and hygiene standards.

100. Governor Beshear's orders are arbitrary and underinclusive toward secular conduct that creates the same potential risk as the prohibited religious activity.

101. Governor Beshear's orders do not give religious schools the same opportunities to continue operating as secular establishments like event venues and theaters.

102. Governor Beshear's actions are not narrowly tailored to the interest that he intends to advance.

103. Governor Beshear's actions burden religious exercise, and they do so in an undue manner.

104. The restrictions on private religious schools in Executive Order 2020-969 cannot satisfy strict scrutiny.

105. Governor Beshear's actions violate the First Amendment Free Exercise rights of Kentuckians, including, but not limited to, Danville Christian.

106. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare unlawful those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor Beshear from further enforcement of that unconstitutional restriction on religious activity.

107. Danville Christian asks the Court to declare unlawful those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor

Beshear from further enforcement of Executive Order 2020-969 against Danville Christian.

108. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT II
Violation of Section 1 and Section 5 of the Kentucky Constitution

109. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

110. Section 1 of the Kentucky Constitution provides that everyone has the "certain inherent inalienable right[ ] . . . of worshipping Almighty God according to the dictates of their consciences."

111. Section 5 of the Kentucky Constitution provides that "the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching," and that "[n]o human authority shall, in any case whatever, control or interfere with the rights of conscience."

112. These two provisions protect the right to the free exercise of religion in the same manner as the First Amendment to the United States Constitution. *See Gingerich v. Commonwealth*, 382 S.W.3d 835, 839 (Ky. 2012).

113. Thus, because Governor Beshear's executive orders target religious activity for disfavored treatment and are not narrowly tailored to meet the state's interest, the orders unconstitutionally infringe on Kentuckians' rights under Sections 1 and 5 of the Kentucky Constitution.

114. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Sections 1 and 5 of the Kentucky Constitution are violated by those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor Beshear from further enforcement of unconstitutional restriction on religious activity.

115. Danville Christian asks the Court to declare that Sections 1 and 5 of the Kentucky Constitution are violated by those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor Beshear from further enforcement of Executive Order 2020-969 against Danville Christian.

116. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT III

Violation of religious entities' First Amendment right to religious autonomy

117. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

118. Governor Beshear's executive order impermissibly infringes on the autonomy of religious institutions and churches in violation of the First Amendment.

119. The Governor, consistent with the First Amendment, cannot tell religious institutions and churches that they *can* hold in-person worship services but *cannot* hold in-person schooling.

120. Yet, that is exactly what the Governor's executive order does.

121. It accordingly cannot stand under the First Amendment.

122. Governor Beshear's November 18 executive order bans in-person schooling at all private, religious schools starting on Monday, November 23, 2020.

123. At the same time, however, Governor Beshear has specifically permitted in-person worship services to continue.

124. In Executive Order 2020-968, Governor Beshear ordered that his new limits on gatherings "does not apply to in-person services at places of worship, which must continue to implement and follow the Guidelines for Places of Worship."

125. Thus, viewing the Governor's two executive orders together, he has prohibited all in-person religious schooling while simultaneously allowing in-person worship services to continue. This he cannot do.

126. Just this year, the United States Supreme Court held, by a 7–2 vote, that the First Amendment protects the right of religious institutions and churches to make decisions about how to direct religious schooling. *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (2020).

127. If religious institutions get to decide for themselves who teaches their children about religious faith, as *Our Lady of Guadalupe* holds, it follows that

religious institutions get to decide in the first instance whether to provide religious schooling.

128. The government can no more tell religious institutions not to provide religious schooling than it can tell them to employ certain people to accomplish this mission. Each is "essential to the institution's central mission." *See id.* at 2060.

129. Governor Beshear's executive orders tell religious institutions and churches that they cannot open their doors to schoolchildren, and it does so in an especially pernicious way. Not only has Governor Beshear told religious schools that they cannot hold in-person classes, but he is simultaneously permitting religious institutions to hold in-person worship services. That is to say, Governor Beshear has declared that certain religious activities are legal—namely, in-person worship—while others are illegal—specifically, in-person religious schooling. The First Amendment forbids this direct "intru[sion]" onto the "autonomy" of churches and religious institutions.

130. As noted above, the Governor's top lawyer acknowledges that Governor Beshear is dictating what services religious institutions can and cannot provide. According to the Governor's General Counsel, in-person schooling is off-limits, but in-person "religious instruction as part of its services—for example, Sunday School or [B]ible study" is permissible.

131. This divvying up of religious services as legal and illegal by Governor Beshear irretrievably intrudes on religious institutions' "autonomy," and it cannot satisfy strict scrutiny.

132. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Executive Order 2020-969 violates religious entities' First Amendment right to religious autonomy, and to enjoin Governor Beshear from further enforcement of that order against religious entities.

133. Danville Christian, as a religious entity, asks the Court to declare that Executive Order 2020-969 violates its First Amendment right to religious autonomy, and to enjoin Governor Beshear from further enforcement of that order against Danville Christian.

134. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT IV
Violation of the Establishment Clause of the First Amendment to the United States Constitution

135. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

136. The Establishment Clause demands neutrality by the government toward religious groups. *See Larsen v. Valentine*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

137. The Governor's executive order violates this core principle by favoring religious organizations that provide in-person worship services over those that provide in-person schooling.

138. Governor Beshear's executive orders permit all manner of in-person worship to continue—Sunday services, Sunday school, Bible studies, and Wednesday night services. A religious organization that wishes to provide these services can continue doing so.

139. However, if the religious organization desires to open its doors to schoolchildren, it is forbidden.

140. The Establishment Clause prohibits Governor Beshear from favoring some religious organizations—those that only offer in-person worship services—and disfavoring other religious organizations—those that offer in-person schooling.

141. Neutrality toward religious organizations is the standard, and the Governor's executive order are anything but neutral.

142. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Executive Order 2020-969 violates the Establishment Clause of the First Amendment, and to enjoin Governor Beshear from further enforcement of that order against religious entities.

143. Danville Christian asks the Court to declare that Executive Order 2020-969 violates the Establishment Clause, and to enjoin Governor Beshear from further enforcement of that order against Danville Christian.

144. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT V
Violation of the Kentucky Religious Freedom Restoration Act

145. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

146. Kentucky's Religious Freedom Restoration Act ("RFRA") is clear: "Government shall not substantially burden a person's freedom of religion." KRS 446.350.

147. A "burden" is defined to include even "indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." *Id*.

148. As with the strict scrutiny analysis in the constitutional context above, to survive under RFRA the government must show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.

149. There is no question that the Governor's executive order bars "access" to religious facilities—the Governor has, after all, ordered that no children may attend in-person instruction. Executive Order 2020-969 ("All public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction.").

150. There is, likewise, no question that the Governor's order has imposed penalties.

151. In an e-mail dated November 19, 2020, the Commissioner of the Department Education has ominously warned that "[c]ertified school employees . . .

may be subject to disciplinary action by the Education Professional Standards Board (EPSB) for violation of the Professional Code of Ethics" and that "KRS 156.132 provides for the removal or suspension of public school officers, including local board members, for immorality, misconduct in office, incompetence, willful neglect of duty or nonfeasance."

152. Thus, the Beshear administration has threatened to revoke the certifications for school employees that do "not follow the Governor's order."

153. These actions infringe upon religious freedom.

154. The Governor cannot prove "by clear and convincing evidence that [he] has a compelling governmental interest in" such infringement, nor can he prove by clear and convincing evidence that he has used the "least restrictive means to further that interest." KRS 446.350.

155. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that the portions of Executive Order 2020-969 that restrict religious activity violate the Kentucky Religious Freedom Restoration Act, and to enjoin Governor Beshear from further enforcement of that order in ways that would violate the Kentucky Religious Freedom Restoration Act.

156. Danville Christian asks the Court to declare that Executive Order 2020-969 violates its rights under the Kentucky Religious Freedom Restoration Act, and to enjoin Governor Beshear from further enforcement of that order against Danville Christian.

157. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

PRAYER FOR RELIEF

WHEREFORE, Danville Christian requests the following relief on behalf of itself, and Attorney General Daniel Cameron requests the following relief on behalf of the Commonwealth of Kentucky:

A. A declaration that Executive Order 2020-969, as applied to in-person instruction at Danville Christian Academy and other religious institutions, violates: the Free Exercise and Establishment Clauses of the First Amendment; the right under the First Amendment for religious entities to exercise autonomy over their religious worship and services; the rights guaranteed by Sections 1 and 5 of the Kentucky Constitution; and the rights protected by the Kentucky Religious Freedom Restoration Act;

B. A temporary restraining order, preliminary injunction, and permanent injunction prohibiting Governor Beshear and any of his officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with him, from enforcing Executive Order 2020-969 against Danville Christian Academy and any other religious entity.

C. Any other relief in law or equity to which the Commonwealth of Kentucky *ex rel.* Attorney General Cameron and Danville Christian might be entitled.

Respectfully submitted by,

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(**pro hac vice* application forthcoming)

DECLARATIONS

On behalf of Danville Christian Academy, Inc., pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing paragraphs no. 56 to 88 are true and correct.

Executed on November 20, 2020 — /s/ James S. Ward II (with permission)
James S. Ward II

On behalf of the Commonwealth of Kentucky, pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 2020 — /s/ Victor B. Maddox
Victor B. Maddox

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

PLEASANT VIEW BAPTIST CHURCH, **PLEASANT VIEW BAPTIST SCHOOL,** **PASTOR DALE MASSENGALE,**	:	Case No.
VERITAS CHRISTIAN ACADEMY,	:	
HIGHLANDS LATIN SCHOOL	:	
MARYVILLE BAPTIST CHURCH, **MICAH CHRISTIAN SCHOOL,** **PASTOR JACK ROBERTS,**	:	
MAYFIELD CREEK BAPTIST CHURCH, **MAYFIELD CREEK CHRISTIAN SCHOOL,** **PASTOR TERRY NORRIS**	:	
FAITH BAPTIST CHURCH, **FAITH BAPTIST ACADEMY,** **PASTOR TOM OTTO,**	:	
WESLEY DETERS, MITCH DETERS, On behalf of themselves and their minor children **MD**, **WD**, and **SD**,	:	
CENTRAL BAPTIST CHURCH, **CENTRAL BAPTIST ACADEMY,** **PASTOR MARK EATON,**	:	
CORNERSTONE CHRISTIAN SCHOOL, **JOHN MILLER,** on behalf of himself and his minor children, **BM, EM, HM**	:	
AUSTIN AND SARA EVERSON, on Behalf of themselves and their minor children **QR, WK, TK, AE, EE, EO, and AE2**,	:	
NICOLE AND JAMES DUVALL, on behalf of themselves and their minor children, **JD, KD, VD, JD2, AD, RD, JD3, AD, CD**,	:	
LEE WATTS, and	:	

TONY WHEATLEY, :

Plaintiffs :

v.

:

LYNNE M. SADDLER
In her official capacity :

ANDREW BESHEAR :
In his official and individual capacities

PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE RELIEF, AND DAMAGES WITH JURY DEMAND ENDORSED HEREON

Plaintiffs Pleasant View Baptist Church, Pleasant View Baptist School, Pastor Dale Massengale, Veritas Christian Academy, Highlands Latin School, Maryville Baptist Church, MICAH Christian School, Pastor Jack Roberts, Mayfield Creek Baptist Church, Mayfield Creek Christian School, Pastor Terry Norris, Faith Baptist Church, Faith Baptist Academy, Pastor Tom Otto, Wesley Deters, Mitch Deters, on behalf of themselves and their minor children, MD, WD, and SD, Central Baptist Church, Central Baptist Academy, Pastor Mark Eaton, Cornerstone Christian Church, Cornerstone Christian School, John Miller, on behalf of himself and his minor children BM, EM, and HM, (collectively the "Christian School Plaintiffs"), and Plaintiffs Austin and Sara Everson, on behalf of themselves and their minor children QR, WK, TK, AE, EE, EO, and AE2 and Nicole and James Duvall, on behalf themselves and their minor children JD, KD, VD, JD2, AD, RD, JD3, AD, CD (collectively the "More Than 8 Member Family Plaintiffs"), and Lee Watts and Tony Wheatley (collectively the "Political Gathering Plaintiffs") for their Verified Complaint *for Declaratory, Injunctive Relief, and Damages* (the "Complaint"), state and allege as follows:

INTRODUCTION

1. This action involves the deprivation of Plaintiffs' well-established First and Fourteenth Amendment rights by the official capacity Defendants and individual capacity Defendant named herein. Specifically, this action is in response to the unconstitutional actions by the official capacity Defendants herein in shutting down all private, parochial schools in the Commonwealth, allegedly due to COVID-19 (the disease caused by the Coronavirus).

2. This unconstitutional action is particularly shocking because: (1) U.S. Center for Disease Control ("CDC") guidance and CDC official statements confirm that school shutdowns are not recommended,[1] (2) schools have not been proven to be places of transmission for COVID-19 and, in fact, in-school attendance has been proven to be safer for both children and their communities than having those children remain at home with aging grandparents or other vulnerable family members, and (3) in-person instruction is far preferable from a learning perspective.[2]

JURISDICTION AND VENUE

3. Subject matter jurisdiction over the claims and causes of action asserted by Plaintiffs in this action is conferred on this Court pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, 28 U.S.C.

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[1] https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/index.html (last visited 11/20/2020).

[2] https://www.washingtonexaminer.com/news/school-is-safest-place-for-kids-to-be-cdc-director-says (last visited 11/20/2020).
https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools&fbclid=IwAR1Kp3HKvUhZu8CJ1F8tGSISsMtnP0zNDJ3598kSC7sYffb6kDjhKS90zC0 (last visited 11/20/2020) (CDC Director confirming that all existing data demonstrates K-12 schools are not transmission pathways for the virus, in part due to safety protocols in place in schools).

§1331, 28 U.S.C. § 1343, 28 U.S.C. 1367, 28 U.S.C. §§ 2201 and 2202, and other applicable law.

4. Venue in this District and division is proper pursuant to 28 U.S.C. §1391 and other applicable law, because much of the deprivations of Plaintiffs' Constitutional Rights occurred in counties within this District and division, within Kentucky, and future deprivations of their Constitutional Rights are threatened and likely to occur in this District. Furthermore, the first named Defendant is located in this division.

The Defendants, and their activities and COVID-19 orders

5. Defendant, Lynne M. Saddler is the District Director of Health for the Northern Kentucky Independent Health Disrtict. Among other things, she is charged with, and as explained herein, actually enforces, the mandates that are challenged in this action. Specifically, her department enforces and has threatened enforcement of the challenged mandates against the Duvall facility as respects their family gatherings and the Deters family insofar as the private religious school is concerned.
6. Defendant Hon. Andrew Beshear is the duly elected Governor of Kentucky. He is sued in his individual and official capacities.
7. Among other things, Governor Beshear enforces and is charged with the enforcement or administration of Kentucky's laws under KRS Chapter 39A, KRS Chapter 214 and KRS 220, including the orders and actions complained of herein.
8. In March, 2020 and in the weeks that followed, Governor Beshear issued a number of restrictions related to COVID-19.
9. On March 19, 2020, Governor Beshear implemented an outright ban on religious gatherings across the state. Specifically, Governor Beshear, acting through Secretary Eric Friedlander of

the Cabinet for Health and Family Services, issued an order stating that "[a]ll mass gatherings are hereby prohibited."

10. In the March 19, 2020 Order, Governor Beshear broadly described the scope of his prohibition 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."

11. Thus, the order, while very broad, specifically banned "faith-based" gatherings by name. The order did not define mass gatherings merely based on the number of people coming together, nor did it narrow its prohibition to the kind of indoor or closed-space gatherings that increase the risk of community transmission of the virus. Rather, Governor Beshear's March 19, 2020 Order broadly banned any activity "that brings together groups of individuals," which specifically included any and all "faith-based" gatherings.

12. However, in an exercise in unconstitutional word play, and due to an unconstitutional value judgment, the order carved out purely secular activities from the scope of its prohibition. Specifically, the order went on to state that "a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit."

13. The order also stated that a mass gathering "does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.".

14. Thus, under the March 19, 2020 Order, mass gatherings with a faith-based purpose were expressly singled out for prohibition, while mass gatherings of secular organizations and

their activities were not—even when those secular activities involved large numbers of people.

15. On Good Friday, two days before Easter Sunday, Governor Beshear held his daily press conference. During his presentation, Governor Beshear announced that his administration would be taking down the license plate numbers of any person attending an in-person church service on Easter Sunday. Then, he said, local health officials would be contacting each person and requiring a mandatory 14-day quarantine. Under Kentucky law, violation of such an order is a misdemeanor punishable by criminal prosecution. See KRS 39A.990.

16. On Easter Sunday, Governor Beshear acted on his unconstitutional threat. Kentucky State Police troopers, acting on Governor Beshear's orders, traveled to the Maryville Baptist Church to record license plate numbers of those attending the church's Easter service. The troopers also provided churchgoers with written notices that their attendance at the service constituted a criminal act. Afterward, the vehicle owners received letters ordering them to self-quarantine for 14 days or else be subject to further sanction.

In two stunning, Saturday Injunctions Pending Appeal, the Sixth Circuit repeatedly rebuked Governor Beshear's religious discrimination, creating clearly established law on the issue. Further, the Governor has infringed on other fundamental liberties

17. On Saturday, May 2, 2020, and as a result of an emergency appeal, the Sixth Circuit enjoined Governor Beshear from prohibiting drive-in church services so long as the churches adhered to the same public health requirements mandated for "life-sustaining" entities. *See Maryville Baptist Church v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam).

18. In reaching that conclusion, the Sixth Circuit observed that "[t]he Governor's orders have several potential hallmarks of discrimination." *Id.* at 614. For example, the orders prohibited faith-based mass gatherings by name. *Id.* And they contained broad exceptions that

inexplicably allowed some groups to gather while prohibiting faith-based groups from doing so. *Id.*

19. The court further noted that:

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

20. One week later, on Saturday, May 9, 2020, again as a result of an emergency appeal, the Sixth Circuit again enjoined Governor Beshear. *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam), which extended Maryville to re-open in-person worship in the Commonwealth.

21. *Roberts* contains a number of observations and findings that are particularly relevant here:

> There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of "typical office environments," R. 1-4 at 1, which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.
>
> Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25; *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20- CV-264-JRW, --- F. Supp. 3d ---, 2020 WL 1820249, at *7–8 (W.D. Ky. Apr. 11, 2020). *Id.* at 415.

22. The court thus enjoined the Governor again, holding that "at this point and in this place, the unexplained breadth of the ban on religious services, together with its haven for numerous

secular exceptions, cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment." *Id.* at 416.

23. One day earlier, this Court granted a temporary restraining order stopping Governor Beshear from restricting religious practices. In *Tabernacle Baptist Church of Nicholasville, Inc. v. Beshear*, 459 F. Supp. 3d 847 (E.D. Ky. 2020), this Court concluded that "[e]ven viewed through the state-friendly lens of Jacobson [v. Massachusetts], the prohibition on religious services presently operating in the Commonwealth is 'beyond what was reasonably required for the safety of the public.'" *Id.* at 854–55 (citation omitted).

24. But religious liberty was not the only Constitutional right infringed by Governor Beshear. This Court found that he also violated the First Amendment guaranties of Free Speech and Assembly for political protests. *Ramsek v. Beshear*, 2020 U.S. Dist. LEXIS 110668, --- F.Supp.3d --- (EDKY 2020).

25. As demonstrated below, Governor Beshear's violations of the Constitution continue.

The First Amendment and the November 18, 2020 Orders

26. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). Religious education and religious worship are inseparable. Indeed, "[r]eligious education is vital to many faiths practiced in the United States." *Id.* For example, "[i]n the Catholic tradition, religious education is 'intimately bound up with the whole of the Church's life.'" *Id.* at 2065 (quoting Catechism of the Catholic Church 8 (2d ed. 2016)). And, "Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation." Id. "The contemporary American Jewish community continues to place the

education of children in its faith and rites at the center of its communal efforts." Id. In Islam, the importance of education "is traced to the Prophet Muhammad, who proclaimed that '[t]he pursuit of knowledge is incumbent on every Muslim.'" *Id.* "The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education," and Seventh-day Adventists "trace the importance of education back to the Garden of Eden." *Id.* at 2066. "Since the founding of this nation, religious groups have been able to 'sit in safety under [their] own vine and figtree, [with] none to make [them] afraid.'" *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (*quoting* Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)). In other words, the Constitutional right to attend religious instruction and education is one of the Nation's "most audacious guarantees." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 906 (W.D. Ky. 2020).

27. In the face of this well-established law, on November 18, 2020, Governor Beshear issued two executive orders, Executive Order 2020-968, and 2020-969, which are attached hereto, respectively, as **Exhibits A** and **B**.

28. Executive Order 2020-968 ("Home Gathering Ban"), which exempted from its purview education, childcare, and healthcare, prohibits and criminalizes any "social gathering," including within any private residence, of more than 8 people. This includes, among other things, and upon confirmation with the Local Health Departments, family dinners where there are more than 8 people in attendance, and group meetings, including meetings for political purposes and gatherings.

29. Executive Order 2020-969 ("School Ban") prohibits and criminalizes in-person instruction for all schools, including private, religious schools, in grades K-12. Consequently, this

School Ban unconstitutionally infringes on the rights of certain of these Plaintiffs, who include religious education and worship services as part of their educational mission, which is based upon their sincerely held beliefs.

30. While banning in-person religious education and instruction, the Governor permits a number of comparable secular activities of varying sizes.

31. The Governor permits childcare programs to continue, including limited duration child care centers,[3] which are permitted to have children in group sizes of 15, and, depending on the space of the facility, hundreds of children. Just as schools do, these facilities provide meals for children, and instruct children in classroom set ups identical to schools.[4] These centers are permitted to, and do, provide secular education instruction as part of their programming, including assisting children with school assignments.

32. Governor Beshear permits unlimited sizes of persons to assemble in factories and manufacturing, with social distancing, and, indeed, classroom instruction can occur in these settings.[5]

33. Governor Beshear permits movie theaters to operate, with children in attendance, at 50% capacity.[6]

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[3] A limited duration center was a "pop up" center, often hosted by local YMCA's, were originally set up for the children of "essential" healthcare workers, first responders, and others. They have had favored status for months, and, with the recent school shutdown, that favored status remains even more apparent.

[4] https://apps.legislature.ky.gov/law/kar/922/002/405E.pdf (last visited 11/20/2020).

[5] https://govsite-assets.s3.amazonaws.com/s47CFNaSK6YhJMGPHBgB_Healthy%20at%20Work%20Reqs%20-%20Manufacturing%20Distribution%20Supply%20Chain%20-%20Final%20Version%203.0.pdf (last visited 11/20/2020).

[6] https://govsite-assets.s3.amazonaws.com/0iTtfR0ET2GFa05zMWie_2020-7-1%20-%20Healthy%20at%20Work%20Reqs%20Movie%20Theaters%20-%20Final%20Version%203.0.pdf (last visited 11/20/2020)

34. Executive Order 2020-968 permits gyms and fitness centers to operate at 33% capacity.

35. Governor Beshear permits auctions to operate at 50% capacity indoors, and unlimited capacity outdoors.[7]

36. Gas stations, grocery stores, retail establishments, and other businesses also remain open.

37. Governor Beshear permits gaming facilities to remain open.[8]

38. Governor Beshear permits secular colleges and universities to remain open.

39. Most of the aforementioned executive orders reference K.R.S. 39A and/or K.R.S. Chapter 214 as authority for their promulgation.

40. Both of those Chapters contain criminal penalties, such as K.R.S. 39A.990, establishing as a Class A misdemeanor any violations of orders issued under that Chapter, and K.R.S. 220.990, which generally provides as a Class B misdemeanor for any violations of orders under that Chapter. K.R.S. 39A.190 gives police officers authority to "arrest without a warrant any person violating or attempting to violate in the officer's presence any order or administrative regulation made pursuant to" KRS Chapter 39A.

41. Amazingly, the very day after Governor Beshear issued Executive Order 2020-969, which as of November 23 closed, and criminalized attendance at, all in-person instruction at all public and private elementary, middle, and high schools in the Commonwealth, the director of the CDC announced "[t]he truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school," and that it is "counterproductive . . . from a public health

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[7] https://govsite-assets.s3.amazonaws.com/VTgkgeDSbmgsImOob3lA_2020-7-22%20-%20Healthy%20at%20Work%20Reqs%20-%20Auctions%20-%20Version%203.1.pdf (last visited 11/20/2020)

[8] https://www.kentuckytoday.com/stories/as-many-mitigate-restriction-damages-gaming-venues-keep-rolling,29171 (last visited 11/21/2020).

point of view, just in containing the epidemic, if there was an emotional response, to say, 'Let's close the schools.'"[9]

42. Houses of worship may continue to operate and may conduct Bible studies any day of the week in enclosed spaces. They may also hold Sunday school on their premises in enclosed locations. But, Governor Beshear refuses to allow religious schools to conduct nearly identical activities in, at least for some of these Plaintiffs, the same exact space.

The Plaintiffs, and their Protected Activities

43. Plaintiffs Pleasant View Baptist Church, Pleasant View Baptist School, Pastor Dale Massengale operate and run a church and school in McQuady, Breckenridge County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 70 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

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[9] https://www.washingtonexaminer.com/news/school-is-safest-place-for-kids-to-be-cdc-director-says (last visited 11/20/2020). https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools&fbclid=IwAR1Kp3HKvUhZu8CJ1F8tGSISsMtnP0zNDJ3598kSC7sYffb6kDjhKS90zC0 (last visited 11/20/2020) (CDC Director confirming that all existing data demonstrates K-12 schools are not transmission pathways for the virus, in part due to safety protocols in place in schools).

44. Veritas Christian Academy is located in Lexington, Fayette County. The school is an extension of ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 170 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the parents and students. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the schools.

45. Highlands Latin School is located in Louisville, Jefferson County. The school is an extension of ministry and, as part of the school curriculum, the children have religious education. Approximately 700 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the parents and students. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the schools.

46. Plaintiffs Maryville Baptist Church, MICAH Christian School, and Pastor Jack Roberts operate and run a church and school in Hillview, Bullitt County, Kentucky. The school is an

extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 175 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

47. Plaintiffs Mayfield Creek Baptist Church, Mayfield Creek Christian School, and Pastor Terry Norris operate and run a church and school in Bardwell, Carlisle County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 45 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

48. Plaintiffs Faith Baptist Church, Faith Baptist Academy, Pastor Tom Otto operate and run a church and school in Bardwell, Carlisle County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 31 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

49. Plaintiffs Wesley Deters, Mitch Deters, on behalf of themselves and their minor children, MD, WD, and SD bring suit for the private, parochial school shutdown as well. The children attend parochial schools within the Covington Diocese of the Catholic Church. The Diocese has indicated that it would keep the children in-person for instruction but-for the challenged school shutdown orders and, thus, an order enjoining enforcement of these orders redresses the injury to these Plaintiffs. Tens of thousands of students attend these diocesan schools. The diocesan schools are an extension of the church and ministry and, as part of the schools' curriculum, the children have religious education and chapel service. Attendance at the schools by the children and the instruction provided by the schools is part of the sincerely held religious beliefs of the members of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the schools have

implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within any of the diocesan schools.

50. Plaintiffs Central Baptist Church, Central Baptist Academy, Pastor Mark Eaton operate and run a church and school in Mount Vernon, Rockcastle County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 10 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

51. Cornerstone Christian Church and Cornerstone Christian School operates and runs a church and school in London, Laurel County, Kentucky, and John Miller is the President of the Board of the school and a parent who brings the case on his own behalf and those of his minor children who attend the school, BM, EM, and HM. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 115 children attend the school, which offers

classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

52. Collectively, the preceding Plaintiffs, the "Christian School Plaintiffs" would be unable to fulfill their religious purpose and mission—or implement their religious educational philosophy—and their religious beliefs would be substantially burdened, if the schools were prohibited from offering in-person, in-class instruction to their students.

53. Plaintiffs Austin and Sara Everson bring suit on their own behalf and on behalf of their minor children QR, WK, TK, AE, EE, EO, and AE2. They reside in Scott County, Kentucky. Because Governor Beshear has criminalized their daily family dinner and other in-home family activities, they bring suit.

54. Nicole and James Duvall bring suit on their own behalf and on behalf of their minor children, JD, KD, VD, JD2, AD, RD, JD3, AD, CD. They reside in Boone County, Kentucky. Because Governor Beshear has criminalized their daily family dinner and other in-home family activities, they bring suit.

55. Pastor Lee Watts and Tony Wheatley are both politically active individuals and, among other things, have historically, and intend in the future, to host politically-related peaceful assemblies of 15-20 individuals at their homes and their properties and curtilage surrounding

their homes. With COVID-19, they intend to implement social distancing and other mitigation measures. The Governor has criminalized such activities.

Additional Allegations Concerning Standing

56. Governor Beshear is empowered, charged with, and authorized to enforce and carry out Kentucky's emergency power laws and health related laws under K.R.S. Chapter 39A, and KRS Chapters 221 and 214. Moreover, Governor Beshear actually does enforce and administer these laws.

57. After Governor Beshear's announcement of his edicts and orders challenged herein, several of the named Plaintiffs called the Northern Kentucky Independent Health District, Lexington Fayette County Health Department, Louisville Metro Health Department, Wedco Health Department, and Daviess County Health Department (collectively the "Local Health Departments"). During those telephone calls, each Local Health Department confirmed that they: (i) received and accepted complaints from the public; and (ii) would take enforcement action against any person violating the challenged edits and orders. Of particular relevance, the telephoning Plaintiffs received confirmation that any group of people who exceeded 8 persons within a home, for any purpose, was a violation of the orders, which violation would be enforced by these Local Health Departments, as would the orders to close schools.

58. Further, each of the Local Health Departments admitted[10] to the Plaintiffs that these orders and mandates were required and would be enforced; the Local Health Departments would first issue a notice of correction directing the schools to shut down if they learned the schools had not shut down as ordered and, if the schools refused to do so, the Local Health

[10] Certain of these conversations were recorded by the Plaintiffs.

Departments would go into the schools with the Labor Cabinet and/or local law enforcement and ensure they shut down.

59. For the restrictions on in-home groups, the Local Health Departments indicated that they would enforce those restrictions by ensuring that the restrictions were known to the public and, if they received complaints, would refer the complaints to local police departments to disperse the crowds and cite non-compliant individuals.

60. The Plaintiffs have also confirmed with two separate local law enforcement agencies that if the law enforcement agencies become aware of more than 8 people within any private residence, they will disperse those persons and issue criminal citations.

61. Governor Beshear, himself, has directed the enforcement of his COVID-19 related orders including, without limitation, orders relating to religion. Governor Beshear has directed the Kentucky State Police and other law enforcement agencies to enforce his orders, and they have done so. Governor Beshear has issued, and continues to issue, directives to the Local Health Departments to direct their enforcement activities as explained herein.

62. As for Maryville Baptist Church and Pastor Roberts, they have been threatened with criminal prosecution by State Police dispatched by the Governor.

63. Plaintiffs, having been personally threatened with enforcement as explained herein, have demonstrated that Governor Beshear has an intention and has directed the threat of enforcement of the challenged orders.

64. Furthermore, and in furtherance of the enforcement threats, any teachers instructing at private schools have been threatened publicly by the Kentucky Commissioner of Education and his

spokesman with having their teaching certificates subject to discipline if they teach in contravention to Governor Beshear's orders.[11]

COUNT I – Violation of the Free Exercise Clause of the First Amendment (Christian School Plaintiffs

65. The First Amendment of the Constitution protects the "free exercise" of religion. Fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts...[such as the] freedom of worship and assembly."). The Free Exercise Clause was incorporated against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

66. Because of this fundamental protection, "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). The requirements to satisfy this scrutiny are so high that the government action will only survive this standard in rare cases and the government bears the burden of meeting this exceptionally demanding standard. Id. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." Id.at 533.

67. Governor Beshear's prohibition of any and all in-person private religious school instruction, in the name of fighting Covid-19, is not generally applicable. There are numerous secular exceptions to the Order, as explained herein.

68. Executive Order 2020-969 is neither neutral nor generally applicable.

[11] https://www.courier-journal.com/story/news/education/2020/11/18/kentucky-restrictions-k-12-classes-go-virtual-rest-semester/3768641001/ (last visited 11/21/2020).

69. Governor Beshear's orders not narrowly tailored, substantially burden religious exercise, are arbitrary and underinclusive toward secular conduct that creates the same or even greater potential risk as the prohibited religious activity.

70. Governor Beshear's executive orders, which constitute his political value judgment, unconstitutionally infringe on the autonomy of religious institutions and churches in violation of the First Amendment. Governor Beshear, consistent with the First Amendment, cannot tell religious institutions and churches that they can hold in-person worship services, but cannot hold in-person schooling. In Executive Order 2020-968, Governor Beshear ordered that his new limits on gatherings "does not apply to in-person services at places of worship, which must continue to implement and follow the Guidelines for Places of Worship."

71. Just this year, the United States Supreme Court held that the First Amendment protects the right of religious institutions and churches to make decisions about how to direct religious schooling. *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (2020).

72. If religious institutions get to decide for themselves who teaches their children about religious faith, as *Our Lady of Guadalupe* holds, it follows that the schools themselves can determine the manner in which they provide such education.

73. Not only has Governor Beshear told religious schools that they cannot hold in-person classes, but he is simultaneously permitting religious institutions to hold in-person worship services. That is to say, Governor Beshear has declared that certain religious activities are legal—namely, in-person worship—while others are illegal—specifically, in-person religious schooling. The First Amendment forbids this direct "intru[sion]" into the "autonomy" of churches and religious institutions.

74. The Christian School Plaintiffs ask the Court to declare unlawful as violative of the Free Exercise Clause those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks, but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor Beshear from further enforcement of Executive Order 2020-969 against them, and to extend such relief to other private religious schools.

75. Because the actions of Governor Beshear in prohibiting religious school in-person instruction violate the clearly established law set forth in *Roberts*, 958 F.3d 409 and *Our Lady of Guadalupe*, 140 S. Ct. at 2055, Governor Beshear is divested of qualified immunity and, as such, the Christian School Plaintiffs (except Highlands Latin School) seek compensatory damages against him in an individual capacity in amount to be determined at trial.

76. The Christian School Plaintiffs (except Highlands Latin School) further seek punitive damages against Governor Beshear in his individual capacity, since the actions complained of involve reckless or callous indifference to the federally protected rights of Plaintiffs, in an amount to be determined at trial.

COUNT II – Violation of the Establishment Clause of the First Amendment (Christian School Plaintiffs

77. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

78. The Establishment Clause demands neutrality by the government toward religious groups. *Larsen v. Valentine*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

79. Governor Beshear's executive order violates this core principle by favoring religious organizations that provide in-person worship services over those that provide in-person schooling.

80. Governor Beshear's executive orders permit all manner of in-person worship to continue—Sunday services, Sunday school, Bible studies, and Wednesday night services. A religious organization that wishes to provide these services, including providing these services to school age children, can continue doing so. However, if the religious organization desires to keep open its school doors to school age children for daily religious instruction, it is forbidden. The Establishment Clause prohibits Governor Beshear from favoring some religious organizations—those that only offer in-person worship services—and disfavoring other religious organizations—those that offer in-person schooling.

81. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Executive Order 2020-969 violates the Establishment Clause of the First Amendment, and to enjoin Governor Beshear from further enforcement of that order against religious entities.

82. The Christian School Plaintiffs ask the Court to declare unlawful as violative of the Establishment Clause those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor Beshear from further enforcement of Executive Order 2020-969 against them, and to extend such relief to other private religious schools.

COUNT III – Right to private education and for parents to control their children's education (Christian School Plaintiffs)

83. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

84. The School Ban, Executive Order 2020-969, contravenes the Christian School Plaintiffs (including the parents and children's) fundamental right to receive a private education, and unreasonably interferes with the parents' rights to control their children's education. *Pierce*

v. Society of Sisters, 268 U.S. 510 (1925); *Meyer v. State of Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

85. The Christian School Plaintiffs ask the Court to declare that Executive Order 2020-969 violates their fundamental rights under the Fourteenth Amendment to receive a private education and to direct their children's education, and to enjoin Governor Beshear from further enforcement of that order against them, and any other private religious school.

COUNT IV – Violation of Freedom to Peaceably Assemble and Freedom of Association (All Plaintiffs)

86. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

87. The First Amendment also guaranties the right "of the people peaceably to assemble." This guaranty has also been incorporated against the states. *DeJonge v. Oregon*, 299 U.S. 353 (1937); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460-461 (1958).

88. The right to conduct peaceful assembly is embedded at the very core of First Amendment protection. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Gregory v. Chicago*, 394 U.S. 111 (1969).

89. The School Ban, Executive Order 2020-969 and Home Group Ban, Executive Order 2020-969, both violate the Freedom of Assembly.

90. The Plaintiffs ask the Court to declare that Executive Order 2020-969 and Executive Order 2020-968 violates their fundamental rights to peaceably assemble, and to enjoin Governor Beshear from further enforcement of those orders as to private schools or in-home assemblies.

COUNT V – Violation of Right to Live together as a Family (Everson and Duvall Plaintiffs)

91. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

92. Families have a fundamental right to live together, which cannot be interfered without a compelling governmental interest, and only with restrictions that are narrowly tailored. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Troxell v. Granville*, 530 U.S. 57 (2000).

93. Governor Beshear's criminalization of family dinner (and a host of other everyday family events) for large families, such as the Everson and Duvall Plaintiffs, contravenes these guaranties.

94. The Evrson and Duvall Plaintiffs ask the Court to declare that Executive Order 2020-968 violates their fundamental rights to live together as a family, and to enjoin Governor Beshear from further enforcement of those orders as to families and households of more than 8 people.

COUNT VI – Freedom of Speech (Watts and Wheatley)

95. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

96. The prohibition on permitting gatherings of people in the homes to conduct political-related gatherings and speech is subject to the strict of scrutiny. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("[a] special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there."); *Russell v. Lundergan-Grimes*, 769 F.3d 919 (6th Cir. 2014).

97. Mr. Watts and Mr. Wheatley seek a declaration Governor Beshear's order is unconstitutional under the First Amendment's Free Speech Clause, and injunction enjoining Executive Order

2020-968 insofar as it violates their freedom of speech to hold politically-related gatherings in their private homes, or on the property surrounding those homes.

COUNT VII – Substantive Due Process (Everson and Duvall Plaintiffs)

98. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

99. Substantive due process affords government officials substantial discretion, particularly in a pandemic, but this review is not absolutely meaningless. *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 Fed. Appx. 125, --- F.3d --- (6th Cir. 2020).

100. There is no rational basis for government, even in a pandemic, to prohibit members of the same household from gathering, yet, as applied to large families such as the Everson and Duvall Plaintiffs, that is what the Governor has mandated.

101. On this, the eve of Thanksgiving, the Governor has mandated that the Eversons and Duvalls select some of their children, one supposes, to eat outside, away from the remainder of the family, even though the family sleeps under the same roof, shares the same household ventilation system, and otherwise lives in close quarters throughout the day.

102. While substantive due process is broad, it is not limitless, and as applied to large families, the no gatherings over 8 violates substantive due process.

Injunctive Relief

103. Plaintiffs have and continue to have their fundamental constitutional rights violated by this official capacity Defendants, who are personally involved with the enforcement and/or threatened enforcement of the challenged orders. Plaintiffs will be irreparably harmed if injunctive relief is not issued. Further, the public interest is served by the vindication of constitutional rights, and the weighing of harms warrants issuing injunctive relief.

Generally

104. Governor Beshear abused the authority of his office and, while acting under color of law and with knowledge of Plaintiffs' established rights, used his office to violate Plaintiffs' Constitutional rights, privileges, or immunities secured by the Constitution and laws.

105. Thus, under 42 U.S.C 1983, Plaintiffs seek declaratory relief and injunctive relief. Pursuant to 42 U.S.C. 1988, Plaintiffs further seek their reasonable attorney fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants as prayed for, including:

A. That this Court issue a declaration that the challenged orders are unconstitutional.

B. That this Court enter permanent injunctive relief to prohibit enforcement of the challenged orders.

C. That Plaintiffs be awarded their costs in this action, including reasonable attorney fees under 42 U.S.C. § 1988;

D. That the Christian School Plaintiffs (except Highlands Latin School) be awarded reasonable compensatory damages against the individual capacity Defendant and a jury trial on those claims; and

E. Such other relief as this Court shall deem just and proper.

JURY DEMAND

Plaintiffs demand trial by jury for all claims so triable.

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)

Respectfully submitted,

/s/ Christopher Wiest
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Attorneys for Plaintiffs

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-968
November 18, 2020

STATE OF EMERGENCY

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to command individuals to disperse from the scene of an emergency and to perform and exercise other functions, powers, and duties necessary to promote and secure the safety and protection of the civilian population. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth. The Centers for Disease Control and Prevention (CDC) has concluded that COVID-19 most commonly spreads during close contact between people, and can sometimes be spread through airborne transmission, particularly among individuals in enclosed spaces. As a result, scenes of emergency exist where people gather together, potentially spreading COVID-19.

Kentucky is now experiencing a potentially catastrophic surge in COVID-19 cases, which threatens to overwhelm our healthcare system and cause thousands of preventable deaths. Despite Red Zone Reduction Recommendations, Kentucky is faced with exponential growth of COVID-19 cases.

Accordingly, new public health measures are required to slow the spread of COVID-19. Kentuckians can save lives if they remain Healthy at Home, which will continue to help protect our community from the spread of COVID-19.

Order

I, Andy Beshear, by virtue of authority vested in me pursuant to the Constitution of Kentucky and by KRS Chapter 39A, do hereby Order and Direct as follows:

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-968
November 18, 2020

1. All prior orders and restrictions remain in full force and effect, except as modified below. In particular, all Kentuckians should continue to wear face coverings to protect themselves and others, as set forth in Executive Order 2020-931 (and any order renewing it) and 902 KAR 2:210E. Current guidance and restrictions shall continue to apply to any activity not listed below.

2. This Order does not apply to education, childcare, or healthcare, which operate under separately issued guidance and orders. Current guidance for all entities is available online at the Healthy at Work website (https://govstatus.egov.com/ky-healthy-at-work).

3. These restrictions shall take effect on Friday, November 20, 2020, at 5 p.m. local time, and shall expire on Sunday, December 13, 2020, at 11:59 p.m. local time.

4. **Restaurants and Bars.** All restaurants and bars must cease all indoor food and beverage consumption. Restaurants and bars may provide delivery and to-go service to the extent otherwise permitted by law. Restaurants and bars may provide outdoor service, provided that all customers are seated at tables, table size is limited to a maximum of eight (8) people from a maximum of two (2) households, and tables are spaced a minimum of six (6) feet apart. For the avoidance of doubt, this restriction applies to indoor dining facilities at retail locations, including food courts. A household is defined as individuals living together in the same home. Additional guidance for outdoor dining is available online at the Healthy at Work website (https://govstatus.egov.com/ky-healthy-at-work).

5. **Social Gatherings.** All indoor social gatherings are limited to a maximum of two (2) households and a maximum of eight (8) people. A household is defined as individuals living together in the same home.

6. **Gyms, Fitness Centers, Pools, and Other Indoor Recreation Facilities.** Gyms, fitness centers, swimming and bathing facilities, bowling alleys, and other indoor recreation facilities must limit the number of customers present inside any given establishment to 33% of the maximum permitted occupancy and ensure that individuals not from the same household maintain six (6) feet of space between each other. Indoor group activities, group classes, team practices, and team competitions are prohibited. Notwithstanding 902 KAR 2:210E, Section 2(3)(j), all individuals inside such facilities must wear face coverings at all times, including while actively engaged in exercise. For the avoidance of doubt, this provision does not apply to athletic activities at schools, for which separate guidance will be provided by KHSAA, or athletic activities at institutions of higher education.

7. **Venues, Event Spaces, and Theaters.** Indoor venues, event spaces, and theaters are limited to 25 people per room. This limit applies to indoor weddings and funerals. For the avoidance of doubt, this limit does not apply to in-person services at places of worship, which must continue to implement

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-968
November 18, 2020

and follow the Guidelines for Places of Worship available online at the Healthy at Work website (https://govstatus.egov.com/ky-healthy-at-work).

8. **Professional Services.** All professional services and other office-based businesses must mandate that all employees who are able to work from home do so, and close their businesses to the public when possible. Any office that remains open must ensure that no more than 33% of employees are physically present in the office any given day.

9. Nothing in this Order should be interpreted to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

ANDY BESHEAR, Governor
Commonwealth of Kentucky

MICHAEL G. ADAMS
Secretary of State

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-969
November 18, 2020

STATE OF EMERGENCY

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to command individuals to disperse from the scene of an emergency and to perform and exercise other functions, powers, and duties necessary to promote and secure the safety and protection of the civilian population. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth. The Centers for Disease Control and Prevention (CDC) has concluded that COVID-19 most commonly spreads during close contact between people, and can sometimes be spread through airborne transmission, particularly among individuals in enclosed spaces. As a result, scenes of emergency exist where people gather together, potentially spreading COVID-19.

Kentucky is now experiencing a potentially catastrophic surge in COVID-19 cases, which threatens to overwhelm our healthcare system and cause thousands of preventable deaths. Despite Red Zone Reduction Recommendations, Kentucky is faced with exponential growth of COVID-19 cases. Accordingly, Executive Order 2020-968, issued today, imposed new public health measures to slow the spread of COVID-19.

Additional public health measures concerning elementary, middle, and high schools are necessary to further slow the spread of COVID-19 now. These measures are intended to ensure that as many schools as possible may safely return to in-person instruction in the near future.

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-969
November 18, 2020

Order

I, Andy Beshear, by virtue of authority vested in me pursuant to the Constitution of Kentucky and by KRS Chapter 39A, do hereby Order and Direct as follows:

1. All public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction and transition to remote or virtual instruction beginning November 23, 2020.

2. All middle and high schools (grades 6 through 12) shall remain in remote or virtual instruction and not resume in-person instruction prior to January 4, 2021.

3. For the period from December 7, 2020 to January 4, 2021, all elementary schools (kindergarten through grade 5) may reopen for in-person instruction, provided:

    a. The school is not located in a Red Zone County, as provided by the Kentucky Department for Public Health on the COVID-19 website (available at https://govstatus.egov.com/kycovid19); ***and***

    b. The school follows all expectations in the KDE Healthy at School Guidance on Safety Expectations and Best Practices for Kentucky Schools (available at https://govstatus.egov.com/ky-healthy-at-school).

4. Nothing in this Order shall prohibit schools from providing small group in-person targeted services, as provided in KDE guidance.

5. This Order shall apply to all institutions of public and private elementary and secondary education, but does not apply to private schools conducted in a home solely for members of that household.

Andy Beshear

ANDY BESHEAR, Governor
Commonwealth of Kentucky

Michael G. Adams

MICHAEL G. ADAMS
Secretary of State

VERIFICATION

Pursuant to 28 U.S.C. 1746, I, Dale Massengale, on behalf of myself, and Pleasant View Baptist Church and Pleasant View Baptist School, declare under penalty of perjury that I have read the foregoing Verified Complaint, that I am competent to testify in this matter, that the facts contained therein are true and correct, and are based information personally known and observed by me

Executed on 11-20-2020.

Dale Massengale

VERIFICATION

Pursuant to 28 U.S.C. 1746, I, Johnathan Miller, on behalf of myself, and Cornerstone Christian School ~~Church~~, declare under penalty of perjury that I have read the foregoing Verified Complaint, that I am competent to testify in this matter, that the facts contained therein are true and correct, and are based information personally known and observed by me

Executed on 11/21/20.

Jonathan Miller

Johnathan Miller

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0392p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MONCLOVA CHRISTIAN ACADEMY; ST. JOHN'S JESUIT HIGH SCHOOL & ACADEMY; EMMANUEL CHRISTIAN SCHOOL; CITIZENS FOR COMMUNITY VALUES dba Ohio Christian Education Network,

Plaintiffs-Appellants,

v.

TOLEDO-LUCAS COUNTY HEALTH DEPARTMENT,

Defendant-Appellee.

No. 20-4300

On Motion for Preliminary Injunction Pending Appeal.
United States District Court for the Northern District of Ohio at Toledo;
No. 3:20-cv-02720—Jeffrey James Helmick, District Judge.

Decided and Filed: December 31, 2020

Before: KETHLEDGE, BUSH, and NALBANDIAN, Circuit Judges.

COUNSEL

ON MOTION AND REPLY: Michael A. Roberts, Brian W. Fox, GRAYDON HEAD & RITCHEY LLP, Cincinnati, Ohio, for Appellants. **ON RESPONSE:** Kevin A. Pituch, John A. Borell, Evy M. Jarrett, LUCAS COUNTY PROSECUTOR'S OFFICE, Toledo, Ohio, for Appellee. **ON BRIEF:** Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Amicus Curiae.

ORDER

On November 25, 2020, the defendant in this case, the Toledo-Lucas County Health Department, issued a resolution closing every school in the county—public, private, and more to

the point here, parochial—for grades 7-12, effective December 4. The shutdown's purpose was to slow the spread of COVID-19. Yet—in the same county—gyms, tanning salons, office buildings, and a large casino have remained open. The plaintiffs here are nine Christian schools (three suing in their own names, another six as part of a coalition) who argue that the closure of their schools, when measured against the more favorable treatment afforded these secular actors, amounts to a prohibition of religious exercise in violation of the First Amendment. The district court denied the plaintiffs' motion to enjoin the resolution as applied to their schools, reasoning that it was a neutral law of general application, as defined by the Supreme Court's precedents. We respectfully disagree with that determination and grant the plaintiffs' motion for an injunction pending appeal.

By way of background, nobody disputes that, before the December 4 shutdown, the plaintiff schools employed "strict social distancing and hygiene standards," which included the use of "thermal temperature scanners" and plexiglass dividers, along with spacing desks at least six feet apart and a mandate that everyone wear masks at all times. Complaint ¶¶ 16, 31-34, 43-45, 55-60. Moreover, as the Department itself stated in its resolution closing the schools, "little in-school transmission has been documented." But the Department closed all the schools in its jurisdiction anyway, on the ground that "[c]ommunity spread conditions continue to worsen in Lucas County[.]" Specifically, the Department issued Resolution No. 2020.11.189, which ordered every school in the county, "for Grades 7-12 (or 9 to 12 depending on school configuration)[,]" to close from December 4, 2020 to "January 11, 2021 at 8:00 am."

Plaintiffs brought this suit on December 7. A week later, the district court denied the plaintiffs' motion for a temporary restraining order. On December 16, the district court denied the plaintiffs' motion for a preliminary injunction. The plaintiffs then brought this appeal, which the Ohio Attorney General supports as amicus curiae. We have jurisdiction under 28 U.S.C. § 1292(a)(1).

We consider four factors when deciding whether to grant an injunction pending appeal: (1) whether the applicant is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably harmed absent the injunction; (3) whether the injunction will injure the other parties; and (4) whether the public interest favors an injunction. *Roberts v. Neace*,

958 F.3d 409, 413 (6th Cir. 2020) (per curiam). Here, we agree with the district court that the dispositive issue is legal, namely whether the Resolution violates the plaintiffs' First Amendment right of free exercise of religion. We review the district court's decision on that issue de novo.

"The Free Exercise Clause protects religious observers against unequal treatment[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (internal quotation marks and alteration omitted). To that end, a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id*. at 546. Here, the Department suggests that the Resolution's closure of the plaintiffs' schools does not burden their religious practice at all, because the Resolution provides that "[s]chools may open to hold religious educational classes or religious ceremonies." That proviso is evidence of the Resolution's neutrality, and indeed no one argues that the Department has targeted the plaintiffs' schools or acted with animus toward religion here. But the plaintiffs argue that the exercise of their faith is not so neatly compartmentalized. To the contrary, they say, their faith pervades each day of in-person schooling. "Throughout each school day and class," for example, Monclova Christian Academy "makes every effort to point students to a dependency on Christ in every situation of life, whether that situation is intellectual or interpersonal." Complaint ¶ 27. At St. John's Jesuit High School and Academy, to cite another example, "[m]ost class periods begin with prayer or prayer intentions," and "Catholic social teaching is interwoven into many secular subjects[.]" *Id*. ¶ 40. And the plaintiffs emphasize that "a communal in-person environment" is critical to the exercise of their faith. Complaint ¶¶ 28, 38, 53. We have no basis to second-guess these representations. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724-25 (2014). The Department's closure of the plaintiffs' schools therefore burdens their religious practice.

Next comes whether the Resolution is "of general application." *Lukumi*, 508 U.S. at 546. A rule of general application, in this sense, is one that restricts religious conduct the same way that "analogous non-religious conduct" is restricted. *Id.* That is why the Free Exercise Clause does not guarantee better treatment for religious actors than for secular ones; instead, the Clause "prohibits government officials from treating religious exercises worse than comparable secular

activities[.]" *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J. concurring).

Whether conduct is analogous (or "comparable") for purposes of this rule does not depend on whether the religious and secular conduct involve similar forms of activity. Instead, comparability is measured against the *interests* the State offers in support of its restrictions on conduct. Specifically, comparability depends on whether the secular conduct "endangers these interests in a similar or greater degree than" the religious conduct does. *Lukumi*, 508 U.S. at 543. In *Cuomo*, for example, the Court said that activities at "acupuncture facilities, camp grounds, garages," and retail stores were comparable to "attendance at houses of worship"—precisely because that secular conduct presented a "more serious health risk" than the religious conduct did. 141 S. Ct. at 66-67. Mitigation of that risk, of course, was the State's asserted interest in support of its restrictions on attendance at religious services; the State did not extend those restrictions to comparable secular conduct; and thus, the Court held, "the challenged restrictions" were not "of 'general applicability[.]'" *Id*. at 67 (quoting *Lukumi*, 508 U.S. at 546). It followed as a matter of course that the restrictions were invalid.

We therefore consider whether the Resolution here treats the plaintiffs' schools less favorably than it does "comparable secular facilities." *Cuomo*, 141 S. Ct at 66. As an initial matter, the Department suggests that, under our recent decision in *Kentucky ex. rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505 (6th Cir. 2020), the only "secular facilities" we may consider for this purpose are other schools. That case, like this one, involved an order closing "all public and private schools" in the relevant jurisdiction. And we have no quarrel with the conclusion in *Beshear* that the order there—considered solely within its four corners—did not discriminate against Danville Christian Academy in violation of the Free Exercise Clause. *Id.* at 509. But our opinion there said nothing about the question that the plaintiffs present here: namely, whether an order closing public and parochial schools violates the Clause if it leaves *other* comparable secular actors less restricted than the closed parochial schools. Meanwhile, when Danville Christian Academy sought review of our decision in the Supreme Court, a majority of the justices denied review largely because of "the timing and the impending expiration" of the challenged order, and invited Danville to seek "a new preliminary injunction if

the Governor" renewed it; and two justices said that "[w]hether discrimination is spread across two orders or embodied in one makes no difference; the Constitution cannot be evaded merely by multiplying the decrees." *Danville Christian Academy, Inc. v. Beshear*, 2020 WL 7395433, at *1; *id*. at *2 (Gorsuch, J., dissenting). Respectfully, therefore, we will consider the broader question presented here.

That question is whether we may consider only the secular actors (namely, other schools) regulated by the specific provision here in determining whether the plaintiffs' schools are treated less favorably than comparable secular actors are. We find no support for that proposition in the relevant Supreme Court caselaw. The Free Exercise Clause, as noted above, "protects religious observers against unequal treatment[.]" *Lukumi*, 508 U.S. at 542. That guarantee transcends the bounds between particular ordinances, statutes, and decrees. In *Lukumi* itself, for example, the Court said that "the four substantive ordinances [at issue] may be treated as a group for neutrality purposes." *Id.* at 540. True, the issue as to neutrality there was whether the City had targeted the plaintiff's practice of ritual animal sacrifice; but a similarly broad inquiry could just as easily reveal disparate treatment of religious and secular conduct for purposes of the "general application" inquiry. And the Court's test for identifying comparable secular conduct for purposes of that inquiry routinely identifies as comparable, as shown above, activities that are in other ways very different—attendance at church services and patronizing "acupuncture facilities[,]" for example. *Cuomo*, 141 S. Ct. at 66-67. Those activities might therefore be regulated by different statutes or decrees.

A myopic focus solely on the provision that regulates religious conduct would thus allow for easy evasion of the Free Exercise guarantee of equal treatment. That one order governed all the different conduct at issue in *Cuomo*, for example, was a mere fortuity. Suppose instead that the Governor in one order imposed a 25-person limit on larger facilities like houses of worship and "microelectronics" plants, and in another order allowed the very same "essential" businesses to "admit as many people as they wish." *Id.* The former order might impose uniform burdens so far as it went, but the Court's reasoning provides zero reason to think the case would have come out differently. Conversely—in *Employment Division v. Smith*, 494 U.S. 872 (1990)—suppose that, rather than ban the possession of "Schedule I" drugs across the board, Oregon law had

banned the possession of peyote but imposed no restrictions at all on the possession of other hallucinogenic drugs. Considered solely within its four corners, that provision would impose its burdens equally, because nobody could possess peyote. But viewed in the context of state law as a whole, the provision would bar members of the "Native American Church" from using peyote "for sacramental purposes[,]" *id*. at 874, while allowing secular actors to use comparable hallucinogenic drugs for recreational purposes. That "unequal treatment" would violate the Free Exercise Clause, assuming the peyote-only ban failed strict scrutiny. *Lukumi*, 508 U.S. at 542. The myopic approach would thus lead to results plainly contrary to the Court's caselaw. The relevant inquiry should therefore simply be whether the "government, in pursuit of legitimate interests," has imposed greater burdens on religious conduct than on analogous secular conduct. *Id.* at 543.

That inquiry leads directly to the conclusion that the Resolution's restrictions are not of "general applicability[.]" *Id.* at 546. In Lucas County, the plaintiffs' schools are closed, while gyms, tanning salons, office buildings, and the Hollywood Casino remain open. *Cuomo* makes clear that those secular facilities are "comparable" for purposes of spreading COVID-19. 141 S. Ct. at 66; *see also, e.g.*, *Roberts*, 958 F.3d at 414. The Resolution's restrictions therefore impose greater burdens on the plaintiffs' conduct than on secular conduct.

The Department offers one final argument to the contrary: that under Ohio law the Department lacks authority to close facilities other than schools. *See* Ohio Rev. Code § 3707.26. But the Department itself acknowledges that it is a "political subdivision" whose authority is delegated to it by the State. Indeed, under Ohio law the Department is a state agency that acts as an "administrative arm[] of the Ohio Department of Health." *Jonson's Markets, Inc. v. New Carlisle Dep't of Health*, 567 N.E.2d 1018, 1023-24 (Ohio 1991). And the Ohio Department of Health has chosen to leave open the secular facilities described above. Measured against the State's restrictions as a whole, therefore, the Resolution's restrictions are not of general application.

The Department's closure of plaintiffs' schools is thus subject to strict scrutiny. *Cuomo*, 141 S. Ct. at 67. The Department does not argue that its action can survive that scrutiny. Nor do we see any reason why it would. The closure of the plaintiffs' schools therefore violates their

rights under the Free Exercise Clause, which means they should succeed on the merits of their appeal. Finally, "[p]reliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Roberts*, 958 F.3d at 416. That is the situation here, again because the Department makes no argument that it should prevail in light of those factors. We will therefore grant the plaintiffs' motion.

* * *

The plaintiffs' motion for an injunction pending appeal is granted. The Toledo-Lucas County Health Department is enjoined, during the pendency of this appeal, from enforcing Resolution No. 2020.11.189 or otherwise prohibiting in-person attendance at the plaintiffs' schools.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25,2020]

PER CURIAM.

The application for injunctive relief presented to JUSTICE BREYER and by him referred to the Court is granted. Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

* * * * * *

This emergency application and another, Agudath Israel of America, et al. v. Cuomo, No. 20A90, present the same issue, and this opinion addresses both cases.

Both applications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated

entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included. Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.

The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.

Likelihood of success on the merits. The applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993). As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the "'ultra-Orthodox [Jewish] community.'" ___ F. 3d ___, ___, 2020 WL 6750495, *5 (CA2, Nov. 9, 2020) (Park, J., dissenting). But even if we put those comments aside, the regulations cannot be viewed

as neutral because they single out houses of worship for especially harsh treatment.[1]

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. See New York State, Empire State Development, Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders, https://esd.ny.gov/guidance-executive-order-2026. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could "literally have hundreds of people shopping there on any given day." App. to Application in No. 20A87, Exh. D, p. 83. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19, *id.*, Exh. H, at 3; App. to Application in No. 20A90, pp. 98, 100, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not "neutral" and

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[1] Compare *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 29) (directive "neutral on its face").

of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. *Church of Lukumi*, 508 U. S., at 546. Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are far more restrictive than any COVID–related regulations that have previously come before the Court,[2] much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. The District Court noted that "there ha[d] not been any COVID–19 outbreak in any of the Diocese's churches since they reopened," and it praised the Diocese's record in combatting the spread of the disease. ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *2 (EDNY, Oct. 16, 2020). It found that the Diocese had been constantly "ahead of the curve, enforcing stricter safety protocols than the State required." *Ibid.* Similarly, Agudath Israel notes that "[t]he Governor does not dispute that [it] ha[s] rigorously implemented and adhered to all health protocols and that there has been no outbreak of COVID–19 in [its] congregations." Application in No. 20A90, at 36.

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected

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[2] See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020) (directive limiting in-person worship services to 50 people); *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020) (Executive Order limiting in-person worship to 25% capacity or 100 people, whichever was lower).

by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

Irreparable harm. There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance. App. to Application in No. 20A90, at 26–27.

Public interest. Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious

examination of the need for such a drastic measure.

The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed.

There is no justification for that proposed course of action. It is clear that this matter is not moot. See *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 462 (2007); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000). And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. See, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 158 (2014). The Governor regularly changes the classification of particular areas without prior notice.[3] If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained. At most Catholic churches, Mass is celebrated daily, and "Orthodox Jews pray in [Agudath Israel's] synagogues every day." Application in No. 20A90, at 4. Moreover, if reclassification occurs late in a week, as has happened in the past, there may not be time for applicants to seek and obtain relief from this Court before another Sabbath passes. Thirteen days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago. While we could presumably act more

[3] Recent changes were made on the following dates: Monday, November 23; Thursday, November 19; Wednesday, November 18; Wednesday, November 11; Monday, November 9; Friday, November 6; Wednesday, October 28; Wednesday, October 21.

swiftly in the future, there is no guarantee that we could provide relief before another weekend passes. The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.

For these reasons, we hold that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE GORSUCH, concurring.

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993). Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

Today's case supplies just the latest example. New York's Governor has asserted the power to assign different color codes to different parts of the State and govern each by executive decree. In "red zones," houses of worship are all but closed—limited to a maximum of 10 people. In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum. In "orange zones," it's not much different. Churches and synagogues are limited to a maximum of 25 people. These restrictions apply even to the largest cathedrals and synagogues, which ordinarily hold hundreds. And the restrictions apply no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.

At the same time, the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.

Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples. See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___, ___ (2020) (GORSUCH,

J., dissenting). In far too many places, for far too long, our first freedom has fallen on deaf ears.

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What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in *South Bay Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. *Post*, at 5 (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

Not only did the *South Bay* concurrence address different circumstances than we now face, that opinion was mistaken from the start. To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905). But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.

Start with the mode of analysis. Although *Jacobson* predated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5

fine, or establish that they qualified for an exemption. *Id.*, at 25 (asking whether the State's scheme was "reasonable"); *id.*, at 27 (same); *id.*, at 28 (same). Rational basis review is the test this Court *normally* applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest. *Church of Lukumi*, 508 U. S., at 546.

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied "substantive due process" right to "bodily integrity" that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption. 197 U. S., at 13–14. This Court disagreed. But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.

Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. *Id.*, at 12, 14. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily

survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors. *Id.*, at 36, 38–39. Here, by contrast, the State has effectively sought to ban all traditional forms of worship in affected "zones" whenever the Governor decrees and for as long as he chooses. Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument." *Id.*, at 25.

Tellingly no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic. In fact, today the author of the *South Bay* concurrence even downplays the relevance of *Jacobson* for cases like the one before us. *Post*, at 2 (opinion of ROBERTS, C. J.). All this is surely a welcome development. But it would require a serious rewriting of history to suggest, as THE CHIEF JUSTICE does, that the *South Bay* concurrence never really relied in significant measure on *Jacobson*. That was the first case *South Bay* cited on the substantive legal question before the Court, it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers. See, *e.g., Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F. 3d 341, 347 (CA7 2020); *Legacy Church, Inc.* v. *Kunkel*, ___ F. Supp. 3d ___, ___ (NM 2020).

Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other

circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.

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That leaves my colleagues to their second line of argument. Maybe precedent does not support the Governor's actions. Maybe those actions do violate the Constitution. But, they say, we should stay our hand all the same. Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.

To my mind, this reply only advances the case for intervention. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.

Even our dissenting colleagues do not suggest this case is

moot or otherwise outside our power to decide. They counsel delay only because "the disease-related circumstances [are] rapidly changing." *Post*, at 5 (opinion of BREYER, J.). But look at what those "rapidly changing" circumstances suggest. Both Governor Cuomo and Mayor de Blasio have "indicated it's only a matter of time before [all] five boroughs" of New York City are flipped from yellow to orange. J. Skolnik, D. Goldiner, & D. Slattery, Staten Island Goes 'Orange' As Cuomo Urges Coronavirus 'Reality Check' Ahead of Thanksgiving, N. Y. Daily News (Nov. 23, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-thanksgiving-20201123-yyhxfo3kzbdinbfbsqos3tvrku-story-html. On anyone's account, then, it seems inevitable this dispute will require the Court's attention.

It is easy enough to say it would be a small thing to require the parties to "refile their applications" later. *Post*, at 3 (opinion of BREYER, J.). But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services. Whether this Court could decide a renewed application promptly is beside the point. The parties before us have already shown their entitlement to relief. Saying so now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long.

It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE KAVANAUGH, concurring.

I vote to grant the applications of the Roman Catholic Diocese of Brooklyn and Agudath Israel of America for temporary injunctions against New York's 10-person and 25-person caps on attendance at religious services. On this record, temporary injunctions are warranted because New York's severe caps on attendance at religious services likely violate the First Amendment. Importantly, the Court's orders today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

To begin with, New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID–19 is more prevalent) are much more severe than most other States' restrictions, including the California and Nevada limits at issue in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). In *South Bay*, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity). And in *Calvary*, houses of worship were limited to 50 people.

New York has gone much further. In New York's red zones, most houses of worship are limited to 10 people; in

orange zones, most houses of worship are limited to 25 people. Those strict and inflexible numerical caps apply even to large churches and synagogues that ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more than 10 or 25 people.

Moreover, New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.

The State's discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 537–538 (1993); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 884 (1990). But New York has not sufficiently justified treating houses of worship more severely than secular businesses.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. See *Lukumi*, 508 U. S., at 537–538; *Smith*, 494 U. S., at 884; see also *Calvary*, 591 U. S., at ___

(KAVANAUGH, J., dissenting from denial of application for injunctive relief) (slip op., at 7). Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. Here, therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses. See *Lukumi*, 508 U. S., at 537–538; *Smith*, 494 U. S., at 884. The State has not done so.

To be clear, the COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2) (internal quotation marks and alteration omitted). Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. See *ibid.* But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

In light of the devastating pandemic, I do not doubt the State's authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings alike. But the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake. To reiterate, New York's restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in *South Bay* and *Calvary*, and much more severe than the restrictions that most other States are imposing

on attendance at religious services. And New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.

For those reasons, I agree with THE CHIEF JUSTICE that New York's "[n]umerical capacity limits of 10 and 25 people . . . seem unduly restrictive" and that "it may well be that such restrictions violate the Free Exercise Clause." *Post*, at 1. I part ways with THE CHIEF JUSTICE on a narrow procedural point regarding the timing of the injunctions. THE CHIEF JUSTICE would not issue injunctions at this time. As he notes, the State made a change in designations a few days ago, and now none of the churches and synagogues who are applicants in these cases are located in red or orange zones. As I understand it, THE CHIEF JUSTICE would not issue an injunction unless and until a house of worship applies for an injunction and is still in a red or orange zone on the day that the injunction is finally issued. But the State has not withdrawn or amended the relevant Executive Order. And the State does not suggest that the applicants lack standing to challenge the red-zone and orange-zone caps imposed by the Executive Order, or that these cases are moot or not ripe. In other words, the State does not deny that the applicants face an imminent injury *today*. In particular, the State does not deny that some houses of worship, including the applicants here, are located in areas that likely will be classified as red or orange zones in the very near future. I therefore see no jurisdictional or prudential barriers to issuing the injunctions now.

There also is no good reason to delay issuance of the injunctions, as I see it. If no houses of worship end up in red or orange zones, then the Court's injunctions today will impose no harm on the State and have no effect on the State's response to COVID–19. And if houses of worship end up in red or orange zones, as is likely, then today's injunctions will ensure that religious organizations are not subjected to

the unconstitutional 10-person and 25-person caps. Moreover, issuing the injunctions now rather than a few days from now not only will ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

* * *

On this record, the applicants have shown: a likelihood that the Court would grant certiorari and reverse; irreparable harm; and that the equities favor injunctive relief. I therefore vote to grant the applications for temporary injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

CHIEF JUSTICE ROBERTS, dissenting.

I would not grant injunctive relief under the present circumstances. There is simply no need to do so. After the Diocese and Agudath Israel filed their applications, the Governor revised the designations of the affected areas. None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek.

Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause. It is not necessary, however, for us to rule on that serious and difficult question at this time. The Governor might reinstate the restrictions. But he also might not. And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic. If the Governor does reinstate the numerical restrictions the applicants can return to this Court, and we could act quickly on their renewed applications. As things now stand, however, the applicants have not demonstrated their entitlement to "the extraordinary remedy of injunction."

Nken v. *Holder*, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). An order telling the Governor not to do what he's not doing fails to meet that stringent standard.

As noted, the challenged restrictions raise serious concerns under the Constitution, and I agree with JUSTICE KAVANAUGH that they are distinguishable from those we considered in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). See *ante,* at 1, 3–4 (concurring opinion). I take a different approach than the other dissenting Justices in this respect.

To be clear, I do not regard my dissenting colleagues as "cutting the Constitution loose during a pandemic," yielding to "a particular judicial impulse to stay out of the way in times of crisis," or "shelter[ing] in place when the Constitution is under attack." *Ante,* at 3, 5–6 (opinion of GORSUCH, J.). They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.

One solo concurrence today takes aim at my concurring opinion in *South Bay*. See *ante,* at 3–6 (opinion of GORSUCH, J.). Today's concurrence views that opinion with disfavor because "[t]o justify its result, [it] reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905)." *Ante,* at 3. Today's concurrence notes that *Jacobson* "was the first case *South Bay* cited on the substantive legal question before the Court," and "it was the only case cited involving a pandemic." *Ante,* at 5. And it suggests that, in the wake of *South Bay*, some have "mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic." *Ibid.* But while *Jacobson* occupies three pages of today's concurrence, it warranted exactly one sentence in *South Bay*. What did that one sentence say? Only that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the

politically accountable officials of the States 'to guard and protect.'" *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring) (quoting *Jacobson*, 197 U. S., at 38). It is not clear which part of this lone quotation today's concurrence finds so discomfiting. The concurrence speculates that there is so much more to the sentence than meets the eye, invoking—among other interpretive tools—the new "first case cited" rule. But the actual proposition asserted should be uncontroversial, and the concurrence must reach beyond the words themselves to find the target it is looking for.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

New York regulations designed to fight the rapidly spreading—and, in many cases, fatal—COVID–19 virus permit the Governor to identify hot spots where infection rates have spiked and to designate those hot spots as red zones, the immediately surrounding areas as orange zones, and the outlying areas as yellow zones. Brief in Opposition in No. 20A87, p. 12. The regulations impose restrictions within these zones (with the strictest restrictions in the red zones and the least strict restrictions in the yellow zones) to curb transmission of the virus and prevent spread into nearby areas. *Ibid.* In October, the Governor designated red, orange, and yellow zones in parts of Brooklyn and Queens. Brief in Opposition in *Agudath Israel of America* v. *Cuomo*, O. T. 2020, No. 20A90, pp. 10–11 (Brief in Opposition in No. 20A90). Among other things, the restrictions in these zones limit the number of persons who can be present at one time at a gathering in a house of worship to: the lesser of 10 people or 25% of maximum capacity in a red zone; the lesser of 25 people or 33% of maximum capacity in an orange zone; and 50% of maximum capacity in a yellow zone. *Id.,* at 8–9.

Both the Roman Catholic Diocese of Brooklyn and Agudath Israel of America (together with Agudath Israel of

Kew Garden Hills and its employee and Agudath Israel of Madison and its rabbi) brought lawsuits against the Governor of New York. They claimed that the fixed-capacity restrictions of 10 people in red zones and 25 people in orange zones were too strict—to the point where they violated the First Amendment's protection of the free exercise of religion. Both parties asked a Federal District Court for a preliminary injunction that would prohibit the State from enforcing these red and orange zone restrictions.

After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations were "crafted based on science and for epidemiological purposes." ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *10 (EDNY, Oct. 16, 2020). It wrote that they treated "religious gatherings . . . more favorably than similar gatherings" with comparable risks, such as "public lectures, concerts or theatrical performances." *Id.,* at *9. The court also recognized the Diocese's argument that the regulations treated religious gatherings less favorably than what the State has called "essential businesses," including, for example, grocery stores and banks. *Ibid.* But the court found these essential businesses to be distinguishable from religious services and declined to "second guess the State's judgment about what should qualify as an essential business." *Ibid.* The District Court denied the motion for a preliminary injunction. The Diocese appealed, and the District Court declined to issue an emergency injunction pending that appeal. The Court of Appeals for the Second Circuit also denied the Diocese's request for an emergency injunction pending appeal, but it called for expedited briefing and scheduled a full hearing on December 18 to address the merits of the appeal. This Court, unlike the lower courts, has now decided to issue an injunction that would prohibit the State from enforcing its fixed-capacity restrictions on houses of worship in red and orange zones while the parties await the Second Circuit's decision. I cannot agree with

that decision.

For one thing, there is no need now to issue any such injunction. Those parts of Brooklyn and Queens where the Diocese's churches and the two applicant synagogues are located are no longer within red or orange zones. Brief in Opposition in No. 20A90, at 17. Thus, none of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications. The specific applicant houses of worship are now in yellow zones where they can hold services up to 50% of maximum capacity. And the applicants do not challenge any yellow zone restrictions, as the conditions in the yellow zone provide them with more than the relief they asked for in their applications.

Instead, the applicants point out that the State might reimpose the red or orange zone restrictions in the future. But, were that to occur, they could refile their applications here, by letter brief if necessary. And this Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours. Why should this Court act now without argument or full consideration in the ordinary course (and prior to the Court of Appeals' consideration of the matter) when there is no legal or practical need for it to do so? I have found no convincing answer to that question.

For another thing, the Court's decision runs contrary to ordinary governing law. We have previously said that an injunction is an "extraordinary remedy." *Nken* v. *Holder*, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). That is especially so where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts' determination. Here, we consider severe restrictions. Those restrictions limit the number of persons who can attend a religious service to 10 and 25 congregants (irrespective of mask-wearing and social distancing). And those numbers are indeed low. But whether, in present circumstances, those low numbers violate the Constitution's Free Exercise Clause is far from clear, and, in my view, the

applicants must make such a showing here to show that they are entitled to "the extraordinary remedy of injunction." *Ibid.* (internal quotation marks omitted).

COVID–19 has infected more than 12 million Americans and caused more than 250,000 deaths nationwide. At least 26,000 of those deaths have occurred in the State of New York, with 16,000 in New York City alone. And the number of COVID–19 cases is many times the number of deaths. The Nation is now experiencing a second surge of infections. In New York, for example, the 7-day average of new confirmed cases per day has risen from around 700 at the end of the summer to over 4,800 last week. Nationwide, the number of new confirmed cases per day is now higher than it has ever been. Brief in Opposition in No. 20A87, at 1; COVID in the U. S.: Latest Map and Case Count (Nov. 24, 2020), http://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states; New York COVID Map and Case Count (Nov. 24, 2020), http://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html.

At the same time, members of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other. Brief in Opposition in No. 20A87, at 3 (citing the World Health Organization); Brief of the American Medical Association as *Amici Curiae* 5–6. Thus, according to experts, the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces. *Id.,* at 3–6. The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges. That fact, along with others that JUSTICE SOTOMAYOR describes, means that the applicants' claim of

a constitutional violation (on which they base their request for injunctive relief) is far from clear. See *post*, p. 1 (dissenting opinion). (All of these matters could be considered and discussed in the ordinary course of proceedings at a later date.) At the same time, the public's serious health and safety needs, which call for swift government action in ever changing circumstances, also mean that it is far from clear that "the balance of equities tips in [the applicants'] favor," or "that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008).

Relevant precedent suggests the same. We have previously recognized that courts must grant elected officials "broad" discretion when they "undertake to act in areas fraught with medical and scientific uncertainties." *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring) (slip op., at 2) (alteration omitted). That is because the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Ibid.* (alterations and internal quotation marks omitted). The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to "changing facts on the ground." *Id.,* at 3. And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.

I add that, in my view, the Court of Appeals will, and should, act expeditiously. The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York. But I see no practical

need to issue an injunction to achieve these objectives. Rather, as I said, I can find no need for an immediate injunction. I believe that, under existing law, it ought not to issue. And I dissent from the Court's decision to the contrary.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York's public health measures aimed at containing the spread of COVID–19 in areas facing the most severe outbreaks. Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. See *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020); *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). I see no justification for the Court's change of heart, and I fear that granting applications such as the one filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation's suffering.[1]

South Bay and *Calvary Chapel* provided a clear and workable rule to state officials seeking to control the spread of COVID–19: They may restrict attendance at houses of

[1] Ironically, due to the success of New York's public health measures, the Diocese is no longer subject to the numerical caps on attendance it seeks to enjoin. See Brief in Opposition in *Agudath Israel of America* v. *Cuomo*, No. 20A90, p. 17. Yet the Court grants this application to ensure that, should infection rates rise once again, the Governor will be unable to reimplement the very measures that have proven so successful at allowing the free (and comparatively safe) exercise of religion in New York.

worship so long as comparable secular institutions face restrictions that are at least equally as strict. See *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring) (slip op., at 2). New York's safety measures fall comfortably within those bounds. Like the States in *South Bay* and *Calvary Chapel*, New York applies "[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Ibid.* Likewise, New York "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Ibid.* That should be enough to decide this case.

The Diocese attempts to get around *South Bay* and *Calvary Chapel* by disputing New York's conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. Application in No. 20A87, p. 23 (Application). But the District Court rejected that argument as unsupported by the factual record. ___, F. Supp. 3d ___, ___–___, 2020 WL 6120167, *8–*9 (EDNY, Oct. 16, 2020). Undeterred, JUSTICE GORSUCH offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York's rules (*e.g.,* going to the liquor store or getting a bike repaired). *Ante*, at 2 (concurring opinion). But JUSTICE GORSUCH does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. See App. to Brief in Opposition in No. 20A87, pp. 46–51 (declaration of Debra S. Blog, Director of the Div. of Epidemiology, NY Dept. of Health); Brief for the American Medical Association et al.

as *Amicus Curiae* 3–6 (Brief for AMA). Unlike religious services, which "have every one of th[ose] risk factors," Brief for AMA 6, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. *Id.,* at 7 ("Epidemiologists and physicians generally agree that religious services are among the riskiest activities"). Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.

In truth, this case is easier than *South Bay* and *Calvary Chapel*. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators. Compare, *e.g.*, *Calvary Chapel*, 591 U. S., at ___ (KAVANAUGH, J., dissenting) (slip op., at 8) (noting that Nevada subjected movie theaters and houses of worship alike to a 50-person cap) with App. to Brief in Opposition in No. 20A87, p. 53 (requiring movie theaters, concert venues, and sporting arenas subject to New York's regulation to close entirely, but allowing houses of worship to open subject to capacity restrictions). And whereas the restrictions in *South Bay* and *Calvary Chapel* applied statewide, New York's fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases.

The Diocese suggests that, because New York's regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Application 22. Thus, the argument goes, the regulation must, *ipso facto*, be subject to strict scrutiny. It is true that New York's policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious in-

stitutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.[2]

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York's regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID–19 cases among New York's Orthodox Jewish community. Application 24. The Diocese suggests that these comments supply "an independent basis for the application of strict scrutiny." Reply Brief in No. 20A87, p. 9. I do not see how. The Governor's comments simply do not warrant an application of strict scrutiny under this Court's precedents. Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a "Muslim Ban," originally conceived of as a "'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'" *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 27). If the

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[2] JUSTICE KAVANAUGH cites *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 537–538 (1993), and *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 884 (1990), for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship. *Ante*, at 2 (concurring opinion). But those cases created no such rule. *Lukumi* struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a "'religious gerrymander'" targeted at the Santeria faith. 508 U. S., at 535. *Smith* is even farther afield, standing for the entirely inapposite proposition that "the right of free exercise does not 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)." 494 U. S., at 879 (internal quotation marks omitted).

President's statements did not show "that the challenged restrictions violate the 'minimum requirement of neutrality' to religion," *ante*, at 2 (quoting *Lukumi*, 508 U. S., at 533), it is hard to see how Governor Cuomo's do.

* * *

Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one. But those principles are not at stake today. The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives. Because New York's COVID–19 restrictions do just that, I respectfully dissent.

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

[1] The 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

[2] Another 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]

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

B. Travel Ban[4]

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 WOB
United States District Judge

No. 20-5542

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 23, 2020
DEBORAH S. HUNT, Clerk

TONY RAMSEK, FRANK HARRIS; THEODORE JOSEPH ROBERTS; TONY WHEATLY,

Plaintiffs-Appellants,

v.

ANDREW G. BESHEAR, Governor of KY; ERIC FRIEDLANDER; DR. STEVEN STACK, M.D., All defendants sued in their official capacities only,

Defendants-Appellees.

O R D E R

Before: SUHRHEINRICH, GILMAN, and LARSEN, Circuit Judges.

Plaintiffs appeal the district court's opinion and order denying their motion for a preliminary injunction for lack of standing. A district court's order granting or denying a preliminary injunction is immediately appealable pursuant to 28 U.S.C. § 1292(a)(1). Plaintiffs move for an injunction pending a decision on the merits of their appeal. The district court has denied a similar motion. *See* Fed. R. App. P. 8(a)(1). Defendants respond in opposition.

Plaintiffs are protesters and organizers of protests related to the actions taken by Governor Andy Beshear and other Commonwealth officials in response to the COVID-19 pandemic. On March 6, 2020, the Governor signed an executive order declaring a state of emergency in the Commonwealth due to the outbreak of the COVID-19 virus, a public health emergency. To slow the spread of the virus, an order was issued on March 19, 2020, prohibiting all mass gatherings,

including any event or convening that brings together groups of individuals. Although there are exceptions, none apply to political protests. The Mass Gathering Order has criminal penalties, and the Governor has set up a COVID-19 reporting hotline so that members of the public can report violations of the Order. Plaintiffs are planning a "Re-Open Kentucky Protest" at the Kentucky Capitol later today—May 23, 2020—and anticipate that 3,000 to 5,000 protesters will attend. They ask for an injunction pending appeal "both (i) on their right to gather and protest, and (ii) for an injunction enjoining Defendants from criminally prosecuting or quarantining plaintiffs for having attended prior protests."

We evaluate four factors when deciding whether to grant a stay or injunction under Federal Rule of Appellate Procedure 8(a): "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal.*, 945 F.2d at 153.

We first consider the likelihood that the district court's denial of a preliminary injunction will be reversed on appeal. "[T]he standard of review for a district court decision regarding a preliminary injunction with First Amendment implications is de novo." *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (citation omitted). When First Amendment rights are implicated, the first factor—likelihood of success on the merits—will determine the outcome. The public interest analysis and the question of whether the plaintiffs will suffer irreparable injury depend on whether the mass gathering prohibition is constitutional. *See id.*

The district court never reached this issue because the court found that plaintiffs lacked standing. The party invoking federal jurisdiction bears the burden of establishing an '"injury in fact' that is 'fairly traceable to the challenged action of the defendant' and is capable of being 'redressed' by the court." *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 560–61 (1992)). The district court ruled that plaintiffs "failed to show a likelihood of success in establishing any of the *McKay* factors."

We question this conclusion. There appears to be a history of previous enforcement of the Order against the plaintiffs and other citizens because on at least one previous occasion the police blocked protestors from conducting a drive-through protest on public roads around the state Capitol. The defendants claim that the state has affirmatively disavowed future enforcement because on May 19 the state police commissioner submitted a declaration stating that the order will not be enforced against any protestors on May 23. This, however, is insufficient for two reasons. First, we generally give little weight to ad hoc carve-outs to criminal prohibitions created mid-litigation that do not alter the provision criminalizing the plaintiff's conduct. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987). Second, the state police commissioner does not have authority to determine whether to prosecute violators of the Order. Accordingly, we conclude the plaintiffs have standing.

Turning now to the merits, we ask whether the protestors are likely to succeed in showing that the Mass Gathering Order is constitutional as it applies to political protests. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v.*

Rock Against Racism, 491 U.S. 781, 791 (1989). The state argues that the Order is content-neutral, "the distinction is not one of content of speech, but as a matter of public health." The requirement of narrow tailoring is satisfied if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id*. This is easily met, according to the state, because absent the prohibition on mass gatherings, COVID-19 would spread in crowds. Lastly, the state claims, this temporary prohibition on mass gathering does not foreclose alternative channels for communication, but that gatherings of 3,000 to 5,000 individuals at this time present a substantial risk to public health.

The protestors, on the other hand, argue that the Order is not content neutral. It permits mass gatherings in some contexts and not in others, resulting in "subtle and insidious discrimination based on the class, purpose and identity of the speaker." In addition, the Order is not narrowly tailored: it fails to define the size of the mass gathering that is permitted or allowed. Furthermore, they claim, the Order has been used to foreclose alternative means of communication. When protestors in cars attempted to drive around the Capitol they were blocked by the Kentucky State Police.

The protestors are likely to succeed in showing that the Order is a content-based restriction. In an earlier case, we held that the Order likely discriminated against religion because the Order at that time permitted citizens to gather in retail stores and airports so long as they practiced social distancing, but did not permit them to gather for religious services. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020). The same logic applies here—and indeed with more force. Because the Order permits citizens to gather in retail stores, airports, parking lots, *and churches*, but does not permit them to gather for a protest, it discriminates against political speech.

Because the Order is not content neutral, its prohibition on group protests is subject to strict scrutiny. For the reasons we articulated in *Maryville Baptist*, the application of strict scrutiny is likely fatal to this prohibition, at least with respect to drive-in and drive-through protests:

> The Governor claims . . . that the explanation for these groups of people to be in the same area—[political protest]—distinguishes them from groups of people in a parking lot or a retail store or an airport or some other place where the orders allow many people to be. We doubt that the reason a group of people go to one place has anything to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another? If the problem is numbers, and risks that grow with greater numbers, then there is a straightforward remedy: limit the number of people who can attend a service at one time.

Id.

That said, for the same reasons we articulated in *Maryville Baptist*, we are not able on this exceptionally short notice to conclude that the prohibition on in-person protests would likely fail strict scrutiny:

> The balance is more difficult when it comes to in-person [protests]. Allowance for drive-[through] [protests today] mitigates some harm to the [protestors]. In view of the fast-moving pace of this litigation and in view of the lack of additional input from the district court, whether of a fact-finding dimension or not, we are inclined not to extend the injunction to in-person [protests] at this point. We realize that this falls short of everything the [protestors] ha[ve] asked for and much of what [they] want[]. But that is all we are comfortable doing after the 24 hours the plaintiffs have given us with this case. In the near term, we urge the district court to prioritize resolution of the claims in view of [other planned protests] and for the Governor and plaintiffs to consider acceptable alternatives.

Id. Nor does our subsequent order in *Roberts v Neace*, No. 20-5465 (6th Cir. May 9, 2020), resolve the question, because there may be features of large in-person protests that distinguish them from in-person religious services.

The remaining three factors also favor the protestors. By showing that they are likely to succeed on the merits of their First Amendment claim, the protestors have established irreparable

harm. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("With regard to the factor of irreparable injury . . . it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality))). As to harm to others, this injunction appropriately permits protests with even more protections than state requires for other permitted mass gatherings. "As for the public interest, treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-[speech] guarantees." *Maryville Baptist Church*, 957 F.3d 610.

Accordingly, the protestors' motion for an injunction pending appeal is **GRANTED** in part. During the pendency of this appeal, the state is enjoined from prohibiting protesters from gathering for drive-in and drive-through protests, provided the protesters practice social distancing and otherwise comply with the Order's regulations on lawful gatherings.

SUHRHEINRICH, J., concurring in part and dissenting in part.

I concur in the majority's decision to grant an injunction allowing the plaintiffs to protest in their cars. But I dissent because the majority does not go far enough in protecting the plaintiffs' rights under the First Amendment. I see no reason to depart from the core logic of *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427 (6th Cir. May 2, 2020), which is that Kentucky's citizens should be trusted to exercise their First Amendment rights in a way that adheres to generally applicable public health guidelines. *See also Roberts v. Neace*, No. 20-5465 (6th Cir. May 11, 2020).

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

TONY RAMSEK, *et al*.,	)	
	)	
Plaintiffs,	)	Civil No. 3:20-cv-00036-GFVT
	)	
v.	)	
	)	**OPINION**
ANDREW BESHEAR, in his Official Capacity as Governor of Kentucky, *et al*.,	)	**&**
	)	**ORDER**
	)	
Defendants.		

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

Trust us. That is the position the Governor takes in this case. Trust us, as policy makers, to make the best decisions for the citizens of the Commonwealth in responding to a pandemic. In large measure the Governor is right. The political branches, the policy makers, are far better provisioned than judges to gather the information needed to make informed decisions.

But in one respect the Governor is wrong. His power is not absolute. When it comes to restrictions on our liberty, courts must not accept as sufficient whatever explanation is offered. In exercising its constitutional function, it is not enough to simply "trust" the conclusion of the political process that a restriction is necessary or right. The teaching of the cases is clear. Even in times of crisis, the Constitution puts limits on governmental action.

As explained below, a blanket prohibition on gathering in large groups to express constitutionally protected speech is unconstitutional. When liberty is at stake, policy makers must be more precise.

I

On March 19, 2020, as part of broader efforts to "flatten the curve," acting Secretary of the Cabinet for Health and Family Services Eric Friedlander, issued an order prohibiting "mass gatherings." [R. 1-4.] Per Secretary Friedlander's Order, mass gatherings include "any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." *Id.* Some activities which necessarily involve large groups of individuals were excluded. "[A]irports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit" were not included within the definition of "mass gathering," nor were "typical office environments, factories, or retail or grocery stores[.]" *Id.* As Plaintiffs emphasize, protests are not included in this list of exemptions. [R. 6-1 at 4.]

Plaintiffs are four Kentucky residents who are deeply concerned about Governor Beshear's actions in response to Covid-19 and desire to express their views through protesting. [R. 6-1 at 1–2.] On April 15, approximately 100 individuals organized a protest at the State Capitol during the Governor's press conference. [R. 1 at ¶ 30.] Concerned about the Commonwealth's economy, protestors expressed their opposition to the restrictions the Governor has put in place during the coronavirus pandemic. *Id*. In response, Governor Beshear took steps to minimize the impact of the protests during his daily press conference. *Id*. at ¶ 31. The Kentucky State Police (KSP) restricted the public's access to the area on the southeast side of the Capitol building where the Governor's briefings take place. *Id.* They placed saw-horse barriers on the patio of the Capitol and encircled the lawn outside the Governor's office suite with yellow tape. *Id*. A sign attached to the barrier states, "Pursuant to 200 K.A.R. 3:020, the Kentucky

State Police has deemed this area a restricted zone. No one is permitted past this point. Failure to adhere to this Regulation may result in Criminal Penalty under K.R.S. 511.070." *Id*.

During the Governor's daily briefing on April 16, further measures were taken by the State Health Commissioner, Dr. Steven Stack, when he released a public announcement in regard to in-person mass gatherings at the Capitol. *Id*. at ¶ 33. Dr. Stack created an alternative option for people to protest on Capitol grounds, in which people may drive-in and drive-through the top floor of the Capitol parking garage. *Id*. However, "participants must remain in their vehicles, in designated parking areas and follow Centers for Disease Control and Prevention (CDC) recommendations." *Id*. Dr. Stack said, "these options allow people to use their voices and be heard while protecting the public health." *Id*. For Plaintiffs, this alternative is not good enough. They complain that the designated area only has space for approximately 300 vehicles and is too far away from the Capitol to be seen or heard. *Id*. at ¶ 35. Plaintiffs also argue these accommodations are accommodations in name only.

According to Plaintiffs, at a rally held on May 2, KSP blocked streets surrounding the Capitol to prevent drive-through protesting, and eventually blocked off the entire perimeter of the protest. *Id*. at ¶¶ 41, 45. Plaintiff Ramsek complains that he attempted to utilize the designated zone, but police blocked the entrance of the parking garage. *Id*. at ¶ 42. Defendants disagree with these allegations and state that these areas were accessible on that date. [R. 19 at 8–9.] They explain that certain entrances and exits were blocked in order to ensure an orderly flow of traffic during the protest, in consideration of both social distancing and safety protocols.

Over the next month, there were many changes to restrictions as the Commonwealth started to gradually reopen. On May 8, two district courts in Kentucky issued orders that preliminarily enjoined the Governor from enforcing the prohibition on mass gatherings with

respect to any in-person religious service which adheres to applicable social distancing and hygiene guidelines. *Maryville Baptist Church, Inc. v. Beshear*, 2020 U.S. Dist. LEXIS 70072 (W.D. Ky. May 8, 2020); *Tabernacle Baptist Church, Inc. of Nicholasville, Kentucky v. Beshear*, 2020 U.S. Dist. LEXIS 81534 (E.D. Ky. May 8, 2020). The following day, the Secretary amended the Mass Gatherings Order by removing "in-person services of faith-based organizations" from the prohibition on mass gatherings, so long as the services follow the guidelines for places of worship and social distancing guidance. [*See* R. 19 at 3 n.4.] On May 11, the Governor began reopening sectors of the economy that were closed due to Covid-19. [R. 45 at 4.] However, each entity reopening must meet certain minimum requirements such as social distancing and certain hygiene measures. *Id*. On May 22, restaurants were allowed to reopen at 33% capacity, and the Mass Gatherings Order was amended to allow for groups of up to 10 to gather. [R. 44 at 3.] On June 29, the Mass Gatherings Order is set to be amended again to allow groups of up to 50 to gather. *Id*.

This brings the Court back to the present case. Plaintiffs filed their Complaint on May 10 [R. 1] and Motion for Temporary Restraining Order (TRO) [R. 6] on May 12, which the Court ultimately denied on May 15 [R. 10]. Following the initial hearing, Plaintiff Ramsek submitted an application to hold an event on the Capitol grounds on May 23.[1] [R. 19 at 8.] After reviewing the application, Defendants tried to negotiate with Plaintiffs in regard to the restrictions protestors would need to follow if the permit were granted. Under Defendants' proposal, protestors would have access to the upper or top level of the parking structure next to

[1] 200 KAR 3:020 Section 2.(1) requires any "visitor seeking to hold an event at a state facility or on state grounds" to complete an application that requires information regarding the place, time, and number of people attending the event. Any application may be denied if the event poses a safety or security risk. *Id*. at Section 2.(1)(d)3. No party is contesting this Regulation, as evidenced by the parties' attempts to negotiate the terms of such a permit.

the Capitol Annex Building, the parking lots behind the Capitol Annex Building, as well as the parking lot next to the Capitol. *Id*. The public thoroughfare that loops around the Capitol would also be accessible by any vehicle, so long as no vehicle blocked ingress and egress for emergency vehicles, and did not prevent public business from being conducted. *Id*. Individuals would be required to engage in social distancing and hygiene measures recommended by the CDC and public health officials. *Id*. A resolution was never reached by the parties.

Thereafter, the Court denied Plaintiffs' Emergency Motion for Preliminary Injunction, finding that Plaintiffs lacked standing. [R. 22.] Plaintiffs appealed this decision to the Sixth Circuit [R. 23] and requested this Court issue an injunction pending appeal [R. 24], which was also denied [R. 27]. On May 23, the Sixth Circuit entered an order concluding Plaintiffs do have standing, and granting, in part, their motion for an injunction pending appeal. [R. 29.] The Sixth Circuit enjoined Defendants from prohibiting protesters from gathering for drive-in and drive-through protests but did not determine whether Plaintiffs may conduct in-person protests. *Id*. On May 29, the Sixth Circuit vacated this Court's order denying Plaintiffs' preliminary injunction and determining Plaintiffs lacked standing. [R. 31.] The Sixth Circuit remanded the case for additional findings of fact and conclusions of law "concerning a prohibition on in-person protests and whether there are features of large in-person protests that distinguish them from other mass gatherings, such as at retail venues, which the Order permits, and church, which our prior decisions permit." *Id*.

In light of the Sixth Circuit Opinion, Plaintiffs filed an Emergency Motion for Discovery requesting to depose Dr. Steven Stack in order to develop the factual record. [R. 30.] The Court held a telephonic status conference on June 1, at which the parties discussed the potential impact of the recent Supreme Court decision in *South Bay United Pentecostal Church v. Newsom*, 140

S. Ct. 1613 (May 29, 2020) (Mem). The Court directed the parties to file simultaneous briefing in regard to this issue and Plaintiffs' Motion for Expedited Discovery in preparation for a hearing held on June 4. [R. 33.]

Following the hearing, the Court granted Plaintiffs' Motion for Expedited Discovery and ordered Plaintiffs to promptly notice Dr. Steven Stack for deposition in regard to the issue of differences between in-person protests and other mass gatherings currently allowed under the Mass Gatherings Order. [R. 38.] During the deposition, Dr. Stack confirmed that the orders issued during the pandemic are generated based on his assessment of risks and how to best minimize the risks of spreading the virus. [R. 43 at 9.] Dr. Stack emphasized that "large mass gatherings are an elevated risk of spreading this infection." *Id*. at 97. The risk of transmission of disease and infection increases as the crowd grows larger and spacing between individuals becomes more difficult. *Id*. at 58. The virus can be spread by droplets from coughing, sneezing, speaking, shouting and singing. *Id*. at 12–13. While Kentucky's Mass Gathering Order prohibits gathering in groups of more than ten, Dr. Stack explained that the CDC defines "mass gathering" as a group of more than 250 people. *Id.* at 68.[2]

As Dr. Stack inferred, outdoor gatherings are less risky than indoor gatherings. *Id*. at 50–51. Many regulated activities such as church services and restaurants have 33% capacity requirements, but these are only for indoor gatherings. *Id*. at 28–33, 39–40. There are no limits on the number of people who can attend permitted outdoor activities, such as church and auctions, as long as they keep six feet apart and adhere to the regulations. *Id*. at 36–38. Office-

[2] The varied use of the term "mass gathering" is confounding. Kentucky's current Order currently prohibits "mass gatherings" of more than 10 individuals. In contrast, the CDC defines a "mass gathering" as a group of 250 people or more. Dr. Stack refers to groups of 250 people or more as a "*large* mass gathering." [R. 43 at 97 (emphasis added).] Regardless of the nomenclature, groups of more than ten are presently prohibited from congregating together in Kentucky. On June 29, Kentucky plans to amend its order to allow groups of fifty or less to meet.

based businesses are allowed to open, but no more than 50% of employees are to be physically present in the office, and they must adhere to the guidelines. *Id*. at 48.

Dr. Stack testified that control measures could be placed on protests, but his concern was that previous protests were not organized to encourage precautions of social distancing and mask wearing. *Id*. at 56. Social distancing, mask wearing, and handwashing are the most important measures to minimize the risk of infection during such gatherings, but they are hard to enforce on a large crowd. *Id*. at 61. Dr. Stack also explained that transitory activities, such as grocery stores, are less risky than communal activities, such as church, factories, or offices. *Id*. at 84. The Court ordered simultaneous briefing upon the parties' receipt of the deposition transcript. [R. 38.] Limited discovery and simultaneously briefing are now complete. [R. 43; R. 44; R. 45.]

II

A

This is an odd case. It is odd because other than a disagreement about access to the Capitol grounds in Frankfort on one occasion, there is no evidence in the record that Plaintiffs have faced any sanction for having exercised their First Amendment rights related to protest-related gatherings. Actually, no one has.

Once more, the Governor has expressly declared that even though violating an order of the Executive Branch is punishable as a misdemeanor, he will not seek that consequence for anyone. So, the position of the Executive Branch is that you must not assemble in large groups to protest but there will be no legal consequence if you do.

Words aside, it is difficult to see how the Secretary's order is anything but advisory. Nevertheless, the plain language of the order is proscriptive. And this Court is bound to accept as settled that these Plaintiffs have standing despite a lack of specific injury. [R. 29.]

Across the country courts are being asked to review state executive branch actions being taken in the face of the Covid-19 pandemic. One case has even reached the Supreme Court, albeit only in the context of a plea for preliminary relief. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613. It is this case that Defendants believe decides this matter. For several reasons, that demands too much of the preliminary views of one Justice.

In *South Bay*, plaintiffs filed suit challenging the application of California's stay-at-home order to in-person religious services. *See S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). After both the district court and Ninth Circuit denied plaintiffs' application for injunction pending appeal, the Supreme Court similarly denied relief in a 5-4 decision. 140 S. Ct. 1613. Chief Justice Roberts issued a concurring opinion, which was not joined by any other Justice, expounding on the reasons for denial.[3] *See id.* Defendants now contend this concurring opinion "decisively resolves this case." [R. 36 at 2.] Plaintiffs disagree, arguing that Justice Roberts' opinion "does not create any precedent, much less binding precedent." [R. 35 at 5.]

The Court finds that, while informative, Justice Roberts' concurring opinion does not create precedent which controls in this case. To start, Justice Roberts analyzed a different executive order as it concerned a separate First Amendment right in a distinct factual

[3] The other four Justices who voted to deny relief gave no indication as to the basis for their decisions. On the other hand, three of the four Justices who voted to grant the application for relief—Justices Kavanaugh, Thomas, and Gorsuch—joined in a dissenting opinion authored by Justice Kavanaugh which clearly laid out the basis for their respective decisions. 140 S. Ct. 1613 (Kavanaugh, J., joined by Thomas & Gorsuch, JJ., dissenting). In an opinion that quoted heavily from the Sixth Circuit's decision in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), Justice Kavanaugh concluded that "California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment." *Id.* (citation omitted). In reaching this conclusion, the dissenting Justices explained that California had failed to provide "a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subjected to an occupancy cap." *Id.*

circumstance. Separately, and perhaps most importantly, the Court finds significant the procedural context in which the Supreme Court acted.

On review, a denial of injunctive relief pending appeal by the Supreme Court is similar in many ways to a denial of a writ of certiorari. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989); *see also Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1181 (1996) (Scalia, J. dissenting). Like a denial of writ of certiorari, a variety of considerations underlie a denial of injunctive relief—considerations beyond simply the merits of the case. *See, e.g.*, *Janklow*, 517 U.S. at 1181 (Scalia, J. dissenting) (describing such decisions as "discretionary (and unexplained) denials"); *Brown v. Gilmore*, 533 U.S. 1301 (2001) (Rehnquist, C.J.). Indeed, in *Respect Maine PAC v. McKee*, the Supreme Court explained that to warrant such relief "demands a significantly higher justification than a request for a stay, because unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." 562 U.S. 996 (2010) (cleaned up). The legal principles applied by the Supreme Court in this context lead naturally to a conclusion that, like opinions accompanying the denial of certiorari, opinions accompanying the denial of injunctive relief pending appeal "cannot have the same effect as decisions on the merits." *Teague*, 489 U.S. at 296; *see also Janklow*, 517 U.S. at 1181 (Scalia, J. dissenting) (explaining the impropriety of lower courts possibly giving authoritative effect to a two-Justice opinion concurring in a denial of an injunctive relief pending appeal).

Notwithstanding the above considerations, certain lower courts have accorded significant weight to Justice Roberts' concurring opinion, without any extended analysis of the precedential considerations laid out above. *See, e.g.*, *Calvary Chapel Lone Mountain v. Sisolak*, No. 220CV00907RFBVCF, 2020 WL 3108716, at *2 (D. Nev. June 11, 2020). At the very least, if

the concurring opinion is to be accorded weight, then the fact that no other Justices joined the opinion must be acknowledged and considered.[4] In *Marks v. United States*, the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of the five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). In expanding on this principle, the *Marks* court addressed cases decided on the merits and the principle articulated has since been applied in those circumstances. *See id.* at 193–94 (discussing concurring opinions in First Amendment decisions). Logically, where a concurring opinion accompanies a decision in which the court did not fully address the merits, like here, the opinion cannot be said to carry *more* weight than an opinion accompanying a decision on the merits. At the very most, the grounds set forth by Justice Roberts in support of his decision to deny injunctive relief in *South Bay* should be interpreted as narrowly as possible. *Marks*, 430 U.S. at 193.

So, what was the basis for Justice Roberts' decision? Defendants argue that Justice Roberts' concurrence "conclusively explains that state elected officials have broad latitude to enact public health measures . . . ." [R. 36 at 2.] True, in analyzing the California restrictions, Justice Roberts found they "appear[ed] consistent with the Free Exercise Clause of the First Amendment." *Id.* And, he further explained that a state has broad latitude in restricting social activities in times of emergency which "should be subject to second-guessing" only where those broad limits are exceeded. *Id.* But Justice Roberts' analysis must be viewed in light of the standard applied.

[4] The Court has no reason to speculate that, even though they did not join the opinion, the other four Justices who voted to deny relief agreed with Justice Roberts' basis for denying relief.

As Justice Roberts noted, the standard for the Supreme Court to grant an injunction pending appeal is a high bar: "This power is used where 'the legal rights at issue are indisputably clear . . . .'" *South Bay*, 140 S. Ct. 1613 (citation omitted). This is so because, as noted above, "unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC*, 562 U.S. 996 (cleaned up). So, applying these principles, Justice Roberts denied relief, concluding that "[t]he notion that it is 'indisputably clear' that the [California] limitations are unconstitutional seems improbable." *Id.* at *2.

Accordingly, the Court declines to accord too broad of a precedential effect to Justice Roberts' concurrence in *South Bay*. A narrow reading is required and simply leads to the conclusion that Justice Roberts found that it was not "indisputably clear" that the California law restricting in-person religious services violated the Free Exercise Clause. While informative, this conclusion does not create precedent which controls in this case.

Also relevant is the Sixth Circuit's recent teaching on similar issues. In *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), and *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020), the Sixth Circuit reviewed the constitutionality of the Mass Gatherings Order at issue in this case. In both instances, plaintiffs argued they could show a likelihood of success on the merits in proving that the Mass Gatherings Order violated the Free Exercise Clause as applied to church services. The Sixth Circuit agreed, finding that the Mass Gatherings Order had "several potential hallmarks of discrimination."[5] *Maryville Baptist*, 957 F.3d at 612–14; *Roberts*, 958 F.3d at 413.

[5]As of May 9, 2020, the order prohibiting mass gatherings has been amended to allow in-person services of faith-based organizations, provided those present abide by Kentucky's Guidelines for Places of Worship. [*See* R. 19 at 3 n.4.]

Justice Roberts' concurrence in *South Bay*—which can fairly be read to express disagreement with the Sixth Circuit's reasoning in these cases—*may* indicate that five members of the Supreme Court would decide the cases differently. But, for the reasons set forth above, the Court declines to conclude definitively that they would—and the Court will certainly not conclude, as Defendants propose, that the "Supreme Court has now rejected" the Sixth Circuit's reasoning. [*See* R. 36 at 4.] At this juncture, the *Roberts* and *Maryville Baptist* decisions remain good law which this Court must follow to the extent those holdings are applicable. These precedential considerations resolved, the Court now turns to the substance of Plaintiffs' First Amendment claim.

B

To issue a preliminary injunction, the Court must consider: 1) whether the movant has shown a strong likelihood of success on the merits; 2) whether the movant will suffer irreparable harm if the injunction is not issued; 3) whether the issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by issuing the injunction. *Overstreet v. Lexington–Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002) (citations omitted). The Court of Appeals clarified that, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir.2012)). However, even if the plaintiff is unable "to show a strong or substantial probability of ultimate success on the merits" an injunction can be issued when the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re*

Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985).

1

Plaintiffs' alleged irreparable injury is a violation of their First Amendment rights. [R. 6-1 at 5.] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably assemble, and to petition the Government for a redress of grievances."[6] U.S. Const. Amend. I. Plaintiffs complain that the Mass Gathering Order abridges their freedom of speech by prohibiting political protests, and their freedom to assemble and petition the government by limiting the number of people who may gather for that purpose. [R. 1 at ¶¶ 59–80.]

Of course, these rights are not absolute. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375, 375 (6th Cir. 2008). There is a push and pull between the public's privileges and the government's power to regulate in this arena. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. For Krishna Consciousness*, 452 U.S. 640, 467 (1981). At the same time, "to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such 'traditional public fora.'" *Pleasant Grove v. Summum*, 555 U.S. 460, 469 (2009) (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

Although the First Amendment protects several categories of rights, it is often difficult in practice to determine where one right ends and the next begins. This is particularly true with

[6] The First Amendment was made applicable to the states through the Fourteenth Amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

freedom of speech and freedom of assembly. *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."). Consequently, Courts typically evaluate free speech, assembly and petition claims under the same analysis. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also Citizens for Tax Reform*, 518 F.3d at 379; *Stagman v. Ryan*, 176 F.3d 986, 999 (7th Cir. 1999); *United States v. Winslow*, 116 Fed. App'x 703, 704 (6th Cir. 2004). This is so because it is not just the speaking, chants and signs that are expressive; it is also the message implicit in the size of a crowd. *Cf. NAACP v. Button*, 371 U.S. 415, 430 (1963) (finding that "the First and Fourteenth Amendments protect certain forms of orderly group activity"); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association[.]"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.") (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

a

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Plaintiffs wish to gather in protest on the Kentucky State Capitol grounds. The parties agree the state Capitol grounds are a public forum.[7] Public forums are places "which by long tradition . . . have

[7] Plaintiffs characterize the Capitol building as "a traditional public forum and/or a designated public forum[.]" [R. 6-1 at 5.] In their briefing, Defendants refer to the Capitol as simply a public forum. [R. 19 at 15.] Whether the Capitol is a traditional public forum or a designated public forum is of no effect. In either type of public forum, "[r]easonable time, place, and manner regulations are permissible, and a

been devoted to assembly and debate[.]" *Id.* at 45. Content-based restrictions on expressive activity in public forums are subject to strict scrutiny. *See Miller v. City of Cincinnati*, 622 F.3d 524, 534 (6th Cir. 2010). That is, a content-based restriction must be necessary to serve a compelling state interest, and any restriction must be narrowly tailored to achieve that interest. *Id.* A content-based restriction on speech is one that singles out a specific subject matter for differential treatment. *See Reed v. Town of Gilbert*, 576 U.S. 155, 157 (2015). In contrast, content-neutral time, place, and manner restrictions on speech are permissible to the extent they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The same is true of expressive conduct—such as gathering—in a public forum. *See Winslow*, 116 Fed. App'x at 704 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The unprecedented nature of the times in which we live, and the complexity of constitutional law generally, make the regulation challenged here difficult to place. The challenged Order explicitly prohibits "mass gatherings" which "include any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based,[8] or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." [R. 1-4.]. The Supreme Court has instructed that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of

content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n*, 460 U.S. at 46.

[8] As previously mentioned, the order prohibiting mass gatherings has been amended to allow in-person services of faith-based organizations, provided those present abide by Kentucky's Guidelines for Places of Worship. [*See* R. 19 at 3 n.4.]

disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Further, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

Here, the Order prohibiting mass gatherings existed prior to Plaintiffs' message. In fact, Plaintiffs' protest—and their beliefs about fully reopening the economy—are a response to the Order. Governor Beshear may disagree with the content of the protestors' message, but it cannot be said it was enacted with the intent to suppress Plaintiffs' political point of view. Nor has it been used to stifle the political expression of others. In the wake of the death of George Floyd in Minneapolis, the Black Lives Matter movement migrated to Kentucky. Mike Stunson, *Kentuckians Protested for George Floyd, Breonna Taylor Last Weekend. See the Scenes*, LEXINGTON HERALD-LEADER (June 1, 2020), http://www.kentucky.com/news/state/kentucky/article 243161386.html. Although public demonstrations have been occurring almost daily throughout Kentucky, there have been no reports of any enforcement actions taken against participants for violating the Mass Gathering Order. In fact, Governor Beshear attended and spoke at a Black Lives Matter rally on June 5, 2020. [R. 45 at 6.]

Plaintiffs imply the lack of enforcement and the Governor's attendance is further evidence of discriminatory treatment against Plaintiffs. They go too far. Perhaps if Plaintiffs had been prosecuted for gathering to protest coronavirus restrictions this argument would be justified. But as previously explained, other than a disagreement about access to the Capitol grounds in Frankfort on one occasion, there is no evidence in the record that the Plaintiffs have faced any sanction for having exercised their First Amendment rights.

Related to this argument is Plaintiffs' contention that the Mass Gatherings Order is an impermissible content-based restriction on speech based on the identity of the speaker. [R. 45 at 11.] Plaintiffs point out "[i]f the Governor wants to give a press briefing at the Capitol, i.e., his own personal mass gathering, it is permitted. But, if a group of peaceful protestors want to gather to criticize certain unconstitutional actions of the Governor, too bad because the Governor has banned it." *Id.* Upon a preliminary review, the Court finds this argument is without merit.

The First Amendment does not regulate government speech. "The First Amendment prohibits Congress and other government entities and actors from 'abridging the freedom of speech'; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (citing *Pleasant Grove v. City of Summum*, 555 U.S. 460, 467 (2009)). Although Plaintiffs' briefs do not attempt to address the distinction between private and government speech, the Governor's official press briefings are government speech not subject to First Amendment scrutiny. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015). Despite Plaintiffs' attempts to manufacture it, there is no evidence in the record that the Governor "adopted a regulation of speech because of disagreement with the message it conveys." *Rock Against Racism*, 491 U.S. at 791.

Far from an interdiction on political speech, the Mass Gatherings Order is one of many orders issued by the state designed to curb the spread of the coronavirus by limiting Kentuckians' interactions with one another, thereby decreasing opportunity for spread. [*See* R. 43-4; R. 43-5; R. 43-6; R. 43-7; R. 43-10.] And although the Court does not believe it is Defendants' objective, by prohibiting gatherings, the Order incidentally prohibits public political protests like Plaintiffs'. This matters, because this case is not just about what is being said in

speeches and chants and signs. It's about what is being said with numbers. And the Constitution protects that as well. While not "speech" in the purest sense of the word, gathering, picketing, and parading "constitute methods of expression, entitled to First Amendment protection." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969) (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)). Therefore, it appears the Mass Gathering order fits the mold of "a regulation that serves purposes unrelated to the content of expression," but which has an incidental effect on speech. Applying this Supreme Court precedent, the Order is content-neutral.

Still, Plaintiffs argue that the Mass Gatherings Order is a content-based restriction on speech because it permits people to "gather" in some places—namely, airports, bus stations, and grocery stores—but not others, such as the Capitol grounds for purpose of political protest. [R. 6 at 16.] There is nuance here, and unlike the Sixth Circuit, this Court has had the benefit of time to grapple with it. The First Amendment protects the freedom of assembly just as much as it protects freedom of speech. And the right to freedom of speech also covers expressive conduct, which is "conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Restrictions on either must be content-neutral and narrowly tailored to serve a significant government interest.

Plaintiffs' previous and future-planned protests are plainly speech. Also, it is easy to see how simply gathering together, in a time where gathering is prohibited due to a global pandemic, might fall under the umbrella of "expressive conduct" if one's intent is to protest that prohibition. But Plaintiffs do not go so far as arguing that individuals making regular use of airports, bus stations, and grocery stores are doing so with an intention to communicate anything. Unlike an individual protesting on the Capitol lawn, one who is grocery shopping or traveling is not, by

that action, engaging in protected speech. *See Dallas v. Stanglin*, 409 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meetings one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). To say then that the Order is content-based because it prohibits gathering in certain places, but permits individuals to make use of public transport, grocery stores and the like, is counter intuitive.

Supreme Court precedent constrains the Court to conclude that the Mass Gatherings Order is a content-neutral time, place, and manner restriction on Kentuckian's First Amendment rights. It restricts the manner in which Plaintiffs may protest by prohibiting large gatherings. And it circumscribes the time Plaintiffs may gather in protest to the duration state of emergency declaration. But it only incidentally does either. Because it is content-neutral, the Order will be upheld if the Governor can show it is "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 46.

b

Plaintiffs do not dispute that the Governor has a significant interest in protecting Kentuckians from Covid-19. They simply argue the Governor has gone too far in his pursuit of that interest. Based upon the record before it, the Court agrees. Plaintiffs are likely to succeed in showing that the Mass Gatherings Order is not narrowly tailored.

A regulation is narrowly tailored if it promotes the significant government interest without unnecessarily abridging speech. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015). Under immense time pressure, the Sixth Circuit reasoned that the Mass Gatherings

Order was content-based, and therefore Plaintiffs were likely to succeed on the merits of their claim, because "the Order permits citizens to gather in retail stores, airports, parking lots, *and churches*, but does not permit them to gather for a protest[.]" [R. 29 at 4.] Upon further consideration and development of the record, this Court believes the order is content-neutral.[9] *See supra* section II.B.1.a. The Sixth Circuit's observation is relevant for another reason: retail stores, airports, churches and the like serve as an inconvenient example of how the Mass Gathering Order fails at narrow tailoring.

A blanket ban on large gatherings, including political protests, is not the only way to protect the public health. Clearly, policymakers have some tools at their disposal which will help mitigate the spread of coronavirus while still allowing Kentuckians to exercise their First Amendment freedoms. As Dr. Stack explained in his deposition, maintaining a social distance of six feet, wearing masks, and frequent and thorough handwashing each help to reduce the likelihood of transmission of coronavirus from person to person. [R. 43 at 72.] The Commonwealth has required implementation of these tools in places like restaurants, office buildings, and auctions, but continues to wholly prohibit gatherings for political protest above a set number no matter the circumstance. *See id.*

This is problematic. Defendants are correct that there are certain attributes of political protests that make it inherently more difficult to contain spread of the coronavirus; they are organic, there is little ability to monitor who comes and who goes, people travel out of their communities to attend, and people who are impassioned tend to shout, sing, and embrace. [R. 43

[9] In certain instances, a Sixth Circuit ruling made on preliminary injunction review may warrant "law of the case" treatment—precluding a district court from reconsidering issues addressed in that ruling. *Howe v. City of Akron*, 801 F.3d 718, 739–41 (6th Cir. 2015). The Sixth Circuit has explained, however, that such treatment is only proper "when a court reviewing the propriety of a preliminary injunction issues a fully considered ruling on an issue of law with the benefit of a fully developed record." *Id.* at 740. As explained, the Sixth Circuit did not have those advantages in this case.

at 56.] Because of the nature of protests, participants might be more likely to contract coronavirus during a protest than they are in a restaurant operating at 33% capacity. But it is the right to protest—through the freedom of speech and freedom of assembly clauses— that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction. Kentucky must do better than prohibiting large gatherings for protest outright.

As it currently stands, the state is enjoined from prohibiting drive-through protests, provided those participating practice social distancing. [R. 29 at 6.] With this Order, they are also enjoined from enforcing the prohibition on mass gatherings as it relates to in-person, political protests. Now, using the tools available, Defendants must amend the Mass Gatherings Order to allow for both drive-through and in-person protests in a manner consistent with the medical and scientific realities, while bearing in mind the constitutional protections accorded such behavior. The Court expressly declines to opine on what such an Order might include.

As the Sixth Circuit recognized before remand, the panel had "no way to determine what the facts are concerning a prohibition on in-person protests and whether there are features of large in-person protests that distinguish them from other mass gatherings[.]" [R. 31 at 1.] With the deposition testimony of Dr. Stack, this Court has the benefit of more facts than were available to the Sixth Circuit. And their Order granting injunction pending appeal hinted that more flexibility in the context of in-person protests might be constitutionally required. That is precisely the type of policymaking best left to Defendants, and they are ordered to engage in it. In the case of political protests, it is suspect that a generally applicable ban of groups larger than ten—or fifty, beginning June 29—is narrowly tailored, when nothing but the size of the gathering is taken into consideration. Defendants must devise a way to utilize mitigation measures such as social distancing, mask wearing, handwashing, and a recommendation for

outdoor over indoor events—as they have done in other contexts— that more liberally allows gathering for the purpose of protest. Nevertheless, it is not the role of the Court to dictate the exact restrictions to be put in place. Defendants have managed to make the necessary adjustments as it concerns other constitutionally protected activities, and the Court is confident they can do so here. As written, the Order is not narrowly-tailored, and the blanket ban on mass gatherings must fail.[10]

c

In reaching this conclusion, the Court is cognizant of the rule espoused in *Jacobson v. Massachusetts* and Chief Justice Roberts' reasoning in his concurring opinion in *South Bay*. *See supra* section II.A. In *Jacobson*, the Supreme Court considered whether, when faced with an outbreak of smallpox, the city of Cambridge could constitutionally require its adult residents to receive vaccinations against the disease. *See Jacobsen*, 197 U.S. at 25–26. Those who refused to vaccinate were subjected to a fine. *Id.* at 26. Although the defendant argued the law was an invasion of his liberty and violative of due process, the Supreme Court upheld the vaccination requirement based on public health concerns. *Id.* at 39.

Thus, *Jacobson* allows states considerable leeway in enacting public health measures during a public health emergency, provided "the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020)

[10] The Court concludes that Plaintiffs have demonstrated a likelihood of success on the merits. The likelihood of success on the merits is largely determinative in constitutional challenges like this one, however, the remaining factors also mitigate in favor of Plaintiffs. The Supreme Court has held "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). No harm will come to Defendants if they are enjoined from enforcing the existing Order, which they have repeatedly stated they will not enforce. Finally, the public interest favors enjoinment of a constitutional violation. *See Martin-Marietta Corp v. Bendix Corp.*, 60 F.2d 558 568 (6th Cir. 1982).

(citing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905)). Under *Jacobson*, courts are to be circumspect second-guessing the policy decisions of public officials responding to a public health emergency. *See id.*

Justice Roberts echoed that sentiment, recognizing, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *South Bay United Pentecostal Church v. Newson*, 140 S. Ct. 1613. Therefore, public officials should be afforded wide latitude "to act in areas fraught with medical and scientific uncertainties." *Id.* Justice Roberts goes on to say that "[w]here those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.*

Defendants argue that *Jacobson* and Justice Roberts' concurrence in *South Bay* "decisively resolve[] this case." [R. 36 at 2.] Defendants contend they have not exceeded the "broad limits" of *Jacobson*, and therefore this Court should not "engage in an impermissible second-guessing of the Mass Gatherings Order[.]" *Id.* at 5. Further, Defendants read Justice Roberts' opinion in *South Bay* as "expressly forbid[ding] this sort of probing review" into the facts underlying Defendants' policy decisions undertaken through the deposition of Dr. Stack. *Id.* at 6.

The Court has already addressed what it thinks is the precedential value of Justice Roberts' concurrence in *South Bay*. *Supra* section II.A. And while courts should refrain from second-guessing the efficacy of a state's chosen protective measures, "an acknowledged power of a local community to protect itself against an epidemic . . . might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to

interfere[.]" *Jacobson*, 197 U.S at 28. "[E]ven under *Jacobson*, constitutional rights still exist." *On Fire Christian Ctr.*, 2020 U.S. Dist. LEXIS 65924, at * 15. There is a difference between second-guessing the efficacy of instituting a Mass Gatherings Order in the first instance—which the Court does not do—and requiring the Governor to use his discretion to craft an Order that does not completely eliminate Kentuckians' ability to gather for in-person exercise of their First Amendment rights. The Court does the latter.

III

If you think about it, the very nature of a pandemic threatens our liberty in every conceivable way. A perfect response would require everyone to stay put and limit contact with everyone else. But that is not the world we live in.

Policy makers are necessarily balancing interests. And courts should give them deference to do this difficult and important task. While that deference may be robust in a time of crisis it is not absolute. The Governor has gone too far here. The Motion for a Preliminary Injunction [R. 6] will be **GRANTED**.

This the 24th day of June, 2020.

Gregory F. Van Tatenhove
United States District Judge