No. 20-5427

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARYVILLE BAPTIST CHURCH, INC.; DR. JACK ROBERTS

Plaintiffs–Appellants

v.

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

Defendant–Appellee

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

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

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

Attorneys for Plaintiffs–Appellants

CORPORATE DISCLOSURE STATEMENT

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

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RELIEF SOUGHT

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

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

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

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

FACTUAL GROUNDS FOR RELIEF

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

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

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

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

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

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

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

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

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

B. Factual Summary.[4]

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

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

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

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

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[5] The TRO/PI Order also denied Appellants' request for assignment of their case to Judge Walker as a related case. (TRO/PI Order 2.)

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

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

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

LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted:

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

Attorneys for Plaintiffs–Appellants

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DATED this April 30, 2020.

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

CERTIFICATE OF SERVICE

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

DATED this April 30, 2020.

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