

No. 20-5427

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**UNITED STATES COURT OF APPEALS  
for the SIXTH CIRCUIT**

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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  
NO. 3:20-CV-00278  
Before the Honorable David J. Hale

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**GOVERNOR ANDY BESHEAR'S RESPONSE IN OPPOSITION TO  
PLAINTIFFS-APPELLANTS' EMERGENCY MOTION  
FOR INJUNCTION**

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Defendant-Appellee Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, hereby responds in opposition to Plaintiffs'-Appellants' Emergency Motion. Plaintiffs fail to carry their burden to warrant emergency or preliminary relief, and misrepresent the facts. Accordingly, this Court should deny Plaintiffs' motion.

## **FACTUAL BACKGROUND**

### **I. Kentucky Acts Quickly To Prevent The Spread Of COVID-19.**

In Kentucky, Governor Beshear and the Cabinet for Health and Family Services (“CHFS”) began exercising their emergency powers under KRS Chapters 39A, 194A and 214 to contain the spread of the virus. On, March 6, the Governor declared a State of Emergency. (Ky. Exec. Order No. 2020-215).<sup>1</sup> As the number of confirmed COVID-19 cases increased, the Governor and CHFS took additional steps to prevent its spread.

On March 19, 2020, CHFS issued an Order prohibiting *all* mass gatherings, defined to include “any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.” (CHFS Order, Mar. 19, 2020).<sup>2</sup> Governor Beshear has taken additional measures to stop the pandemic, including by also closing all businesses that are not life-sustaining. (Ky. Exec. Order No. 2020-257).<sup>3</sup> Kentuckians have

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<sup>1</sup> Available at [https://governor.ky.gov/attachments/20200306\\_Executive-Order\\_2020-215.pdf](https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf) (last visited on May 1, 2020).

<sup>2</sup> Available at [https://governor.ky.gov/attachments/20200319\\_Order\\_Mass-Gatherings.pdf](https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf) (last visited May 1, 2020).

<sup>3</sup> Available at [https://governor.ky.gov/attachments/20200325\\_Executive-Order\\_2020-257\\_Healthy-at-Home.pdf](https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf) (last visited May 1, 2020).

answered the call of public officials. Data suggest social distancing is “flattening the curve.”<sup>4</sup>

## **II. Following The Guidance Of President Trump And The CDC, The Commonwealth Prohibits All Mass Gatherings.**

Like other emergency orders, the Order prohibiting mass gatherings was issued based on the guidance and recommendations of public health officials and the CDC and The White House, encouraging social distancing and recommending that people avoid large and small gatherings in private places and public spaces.<sup>5,6,7</sup> The CDC stresses that limiting face-to-face contact with others is the best way to

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<sup>4</sup> Shay McAlister and Andrea Ash, *Are Kentucky and Indiana actually ‘flattening the curve?’* (WHAS11 News, Mar. 26, 2020) (last updated Mar. 27, 2020) (last visited Apr. 16, 2020); Garrett Wymer, *In the middle of a ‘critical’ month, how does Kentucky’s ‘curve’ compare?*, WKYT (Apr. 16, 2020), available at <https://www.wkyt.com/content/news/In-the-middle-of-a-critical-month-is-Ky-flattening-the-curve-569701941.html> (last visited May 1, 2020).

<sup>5</sup> Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 1, 2020).

<sup>6</sup> Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents\\_FINAL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf) (last visited May 1, 2020).

<sup>7</sup> The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited May 16, 2020).

reduce the spread of COVID-19.<sup>8</sup> The CDC directs people to stay at least six feet away from each other, not gather in groups, and stay out of crowded places and avoid mass gatherings. *Id.* (See Affidavit of Dr. Steven Stack, Apr. 22, 2019, ¶¶ 15-18 (attached as Exhibit A).) On March 29, 2020, the CDC revised its guidance on mass gatherings based on the guidance of The White House. The CDC stated, “During the next 30 days, individuals and organizations should cancel or postpone in-person events that consist of 10 people or more throughout the U.S.”<sup>9</sup> The White House recommended avoiding social gatherings in groups of 10 or more people.<sup>10</sup>

Epidemiological evidence shows mass gatherings can result in the spread of COVID-19 and deaths. In mid-March, a mass gathering in Hopkins County resulted in an outbreak of COVID-19, with more than 50 people becoming infected

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<sup>8</sup> Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 1, 2020).

<sup>9</sup> Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Document\\_FINAL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Document_FINAL.pdf) (last visited May 1, 2020).

<sup>10</sup> The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited May 1, 2020).

and, to date, the loss of six lives. (Stack Aff., ¶¶ 40-45.)<sup>11,12,13</sup> On March 27, 2020, Hopkins County had only two confirmed cases of COVID-19; two weeks later, it had 83 confirmed cases, making it the fastest-growing county in the Commonwealth.<sup>14</sup> In Pulaski and Calloway counties, two different church congregations of around 200 people went into self-quarantine after positive cases were confirmed in those counties.<sup>15</sup>

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<sup>11</sup> Bailey Loosemore and Mandy McClaren, *How a church revival in a small Kentucky town led to a deadly coronavirus outbreak*, The Courier-Journal (Apr. 2, 2020), available at <https://www.courier-journal.com/story/news/local/2020/04/02/coronavirus-kentucky-hopkins-county-church-revival-led-outbreak/5111379002/> (last visited May 1, 2020).

<sup>12</sup> Bailey Loosemore, *Kentucky church responds to 'unjust criticism' about revival at center of COVID-19 outbreak*, The Courier-Journal (Apr. 4, 2020), available at <https://www.courier-journal.com/story/news/local/2020/04/04/coronavirus-kentucky-hopkins-county-church-responds-criticism/2947251001/> (last visited May 1, 2020).

<sup>13</sup> Joe Sonka, et al., *Coronavirus hot spots plague Western Kentucky, Southeast Indiana and Northern Tennessee*, The Courier-Journal (Apr. 10, 2020), available at <https://www.courier-journal.com/story/news/politics/2020/04/10/coronavirus-hot-spots-plague-kentucky-indiana-and-tennessee/5103043002/> (last visited May 1, 2020).

<sup>14</sup> Joe Sonka, et al., *Coronavirus hot spots plague Western Kentucky, Southeast Indiana and Northern Tennessee*, The Courier-Journal (Apr. 10, 2020), available at <https://www.courier-journal.com/story/news/politics/2020/04/10/coronavirus-hot-spots-plague-kentucky-indiana-and-tennessee/5103043002/> (last visited May 1, 2020).

<sup>15</sup> Savannah Eadens, *Dozens in quarantine after being exposed to COVID-19 at churches in Calloway, Pulaski county*, The Courier-Journal (Mar. 20, 2020), available at <https://www.courier-journal.com/story/news/2020/03/20/coronavirus-kentucky-members-multiple-churches-quarantine/2888205001/> (last visited Apr. 17, 2020).

### III. The Majority Of Kentuckians Comply With Measures.

In Kentucky, the vast majority of groups have complied with social distancing measures and the prohibition on mass gatherings. Demonstrating the general applicability of the March 19 Order, on April 10, 2020, the Tourism, Arts and Heritage Cabinet continued its Order closing the Kentucky Performing Arts Center pursuant to the Order and Executive Orders 2020-243 and 2020-257.<sup>16</sup> The Department of Fish and Wildlife suspended all fishing tournaments in Kentucky and canceled all of its summer camps.<sup>17,18</sup> Sporting events have also been canceled during the pandemic. The Kentucky High School Athletic Association suspended the state basketball tournaments and indefinitely suspended all spring sports.<sup>19</sup> Amateur National Motocross events ky have been postponed indefinitely.<sup>20</sup>

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<sup>16</sup> Tourism, Arts and Heritage Cabinet Order (Apr. 10, 2020) (attached as Ex. B).

<sup>17</sup> Available at <https://fw.ky.gov/Fish/Pages/Tournament-Fishing.aspx> (last visited May 1, 2020).

<sup>18</sup> Available at <https://fw.ky.gov/Education/Pages/Summer-Camps.aspx> (last visited May 1, 2020).

<sup>19</sup> Jason Frakes, *KHSAA announces indefinite suspension of all spring sports because of coronavirus pandemic*, The Courier-Journal (Mar. 31, 2020), available at <https://www.courier-journal.com/story/sports/preps/kentucky/2020/03/31/coronavirus-khsaa-announces-suspension-all-spring-sports/5096810002/> (last visited May 1, 2020).

<sup>20</sup> Competition Bulletin 2020-5: Area Qualifiers Postponed Through March (Mar. 17, 2020), available at <https://www.courier-journal.com/story/sports/preps/kentucky/2020/03/31/coronavirus-khsaa-announces-suspension-all-spring-sports/5096810002/> (last visited May 1, 2020).

Religious faiths of different denominations have held virtual services or drive-in services that adhere to proper social distancing and CDC hygiene measures. On Easter Sunday, multiple churches in Kentucky that had reportedly planned to hold in-person services changed to virtual or drive-in services. Churches in Harlan County that planned to hold in-person services opted for drive-in services instead.<sup>21</sup> Contrary to Plaintiffs' representations in their emergency motion, Governor Beshear and public health officials have repeatedly encouraged drive-in and virtual faith-based services, so long as social distancing and hygiene measures are implemented and followed. (Stack Aff., ¶¶ 46.)<sup>22</sup>

On April 12, the Kentucky State Police received and responded to 42 complaints from concerned citizens and community leaders about non-compliance with executive emergency orders on mass gatherings and social distancing associated with faith-based organizations. (Affidavit of Commissioner Rodney Brewer, Apr. 22, 2020, ¶¶ 6-9 (attached as Exhibit C).) In the end, only one of the

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<sup>21</sup> Sarah Ladd, Easter churchgoers defiant after Kentucky troopers write down their license plate numbers, *The Courier-Journal* (Apr. 12, 2020), available at <https://www.courier-journal.com/story/news/2020/04/12/kentucky-churches-hold-in-person-easter-services-despite-order/5127260002/> (last visited May 1, 2020).

<sup>22</sup> See, e.g., Governor Andy Beshear, *Update on COVID-19 in Kentucky – 3.20.2020 PM*, YouTube (Mar. 20, 2020), at 46:45-47:15, available at [https://youtu.be/vG\\_nreWckWw](https://youtu.be/vG_nreWckWw) (last visited May 1, 2020); Governor Andy Beshear, *Update on COVID-19 in Kentucky – 4.11.2020*, YouTube (Apr. 11, 2020), at 52:08-55:27, available at [https://youtu.be/X\\_1NS02f0CI](https://youtu.be/X_1NS02f0CI) (last visited May 1, 2020).

subjects of those complaints refused to comply with the executive orders. (*Id.*, ¶ 10-11.) That organization – Maryville Baptist Church in Bullitt County – held in-person church services on April 12, with about 50 people attending; it had held another in-person service the prior Wednesday, with more than 40 people attending. *Id.* Based on media reports, those who attended the service inside were not following CDC social distancing guidelines.<sup>23</sup>



Neither did those entering and exiting follow them or wear personal protective equipment.

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<sup>23</sup> See Eileen Street, *Maryville Baptist Church Holds In-Person Service*, Spectrum News 1 (Apr. 12, 2020), available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/maryville-baptist-church-easter-sunday-in-person-service> (last visited Apr. 17, 2020).





*Id.*

Most attendees of the April 12 service were not Bullitt County residents.<sup>24</sup>

At least two people who attended the in-person service were residents of New Jersey, one of the epicenters of the pandemic in America, *id.*, who were photographed shaking the pastor's hand.



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<sup>24</sup> Shellie Sylvestri, *Most attendees of Easter service in Maryville not Bullitt Co. residents*, Wave 3 News (Apr. 14, 2020), available at <https://www.wave3.com/2020/04/14/most-attendees-easter-service-maryville-not-bullitt-co-residents/> (last visited Apr. 17, 2020).



As of the date of this filing, New Jersey has more than 121,000 confirmed cases of COVID-19, and more than 7,000 deaths.<sup>25</sup>

The pastor recognized the danger to those attending in-person services, saying prior to April 12 that, “I’ve told my son, ‘Don’t come to church.’ I’ve told other folks, ‘Don’t come to church ... watch the live stream.’”<sup>26</sup> Yet the pastor still refused to comply with the mass gatherings Order and hold in-person services.

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<sup>25</sup> New Jersey COVID-19 Dashboard, available at <https://covid19.nj.gov/#live-updates> (last visited May 1, 2020).

<sup>26</sup> Jessie Cohen, *Maryville Baptist Church holds Bible study against Gov. Beshear’s recommendation*, WHAS 11 (Apr. 9, 2020), available at <https://www.whas11.com/article/news/health/coronavirus/maryville-baptist-church-holds-wednesday-bible-study-against-beshear-recommendation/417-22c63bd4-1875-4055-9a8d-47eb9235c572> (last visited May 1, 2020).

Businesses and groups that have endangered Kentuckians' lives by refusing to comply have faced consequences. Between April 1 and 21, the Department of Workplace Standards within the Labor Cabinet received referrals of 170 complaints from the KYSafer non-compliance citizen reporting hotline. (Affidavit of Commissioner Kimberlee C. Perry, Apr. 21, 2020, ¶ 5 (attached as Ex. D).) The Department performed in-person investigations of 130 of those complaints; of the remaining 40 complaints, the Department is awaiting investigation or has counseled the business on proper compliance. (*Id.*, ¶ 7.) The investigations verified that 89 businesses or organizations were complying or that the complaints were not verified. (*Id.*, ¶ 8.) As of April 21, the Department had issued 41 closure orders to businesses or organizations, including, but not limited to, ones that are not life-sustaining but continued to operate and others that had not implemented social distancing and hygiene measures as recommended by the CDC.<sup>27</sup>

From March 19 through April 21, 2020, the Kentucky State Police received approximately 70 complaints from concerned citizens about non-compliance with the March 19 Order. (Brewer Aff., ¶ 3.) The complaints referenced mass gatherings at various locations, including hair salons, gas stations, and flea

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<sup>27</sup> See Eileen Street, *Attendees at Maryville Baptist Service Face No Charges*, Spectrum News 1 (Apr. 13, 2020), available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/kentucky-no-charges-maryville-baptist-church-bullitt-county-> (last visited Apr. 17, 2020); (*Id.*, ¶ 9.)

markets, and in neighborhoods and personal residences, and the majority of the groups dispersed prior to Troopers' arrival. (*Id.*, ¶¶ 4-5.) The Kentucky State Police has increased routine patrols, patrolling about 839 retail locations a total of 6,173 times. (*Id.*, ¶¶ 12-13.)

#### **IV. Plaintiffs File Suit.**

On April 17, 2020, Plaintiffs filed suit. The District Court denied the motion for temporary restraining order the next day. Plaintiffs appealed the District Court's Order to this Court six days later and the same day filed in the District Court an emergency motion for injunction pending appeal. The District Court conducted a telephonic conference regarding that motion on April 30, 2020.

Plaintiffs blatantly misrepresent the facts of the action pending in the District Court on their motion for an emergency injunction pending appeal. First, during the telephonic conference with the Magistrate on April 30, Plaintiffs' counsel actually asked for a delay in the deadline to file their reply, from May 7 until May 8, when the Magistrate suggested the reply be due on May 7 because of Plaintiffs' counsel's stated urgency for briefing on the motion. In addition, upon the Magistrate asking counsel for the parties if they desired oral argument, Plaintiffs' counsel waived oral argument and the Magistrate stated she would inform the presiding Judge that the parties waived oral argument. At no point during the telephonic conference or between the Magistrate's text Order scheduling it, did

Plaintiffs or their counsel urge a decision on their motion prior to Sunday, May 3 or Wednesday, May 6. In fact, Plaintiffs' counsel did not assert during the telephonic conference that their motion be decided without a response from Governor Beshear, and they did not object to Governor Beshear being provided an opportunity to be heard through a response. Contrary to Plaintiffs' argument (*see* Doc. 4-1, Pages: 10-12), neither the District Court nor the Magistrate demonstrated a commitment to a particular resolution by scheduling expedited briefing on Plaintiffs' motion below. Instead, Plaintiffs agreed upon the briefing schedule and, in turn, agreed that a decision on the motion would not come until after the ensuing Sunday and Wednesday.

As for Appellants' contention that the District Court delay in entering an order after denying the temporary restraining order requires an emergency injunction here, the District Court denied the motion on April 18 (Doc. 4-1), and Plaintiffs waited until April 24 to file their notice of appeal (Doc. 4-3). At no time between – which included a Sunday and a Wednesday – did Appellant file any pleading in the District Court requesting that it enter an order setting an expedited briefing schedule on the motion for a preliminary injunction, or an order scheduling a telephonic conference, or requesting emergency relief.

In their motion, Plaintiffs claim the Governor “tacitly agreed” that the District Court lacks jurisdiction to hear the motion Plaintiffs filed and asked the

District to Decide. (Doc. 4-1, Page 5 n. 3.) Plaintiffs again misrepresent the facts in an attempt to obtain emergency relief from this Court that is not warranted. During the telephonic conference with the Magistrate, Plaintiffs' counsel argued the District Court lacked jurisdiction because of their notice of appeal, but asserted the District Court should decide the motion before they could file the same motion here. Counsel for Governor Beshear did not state any position on Plaintiffs' jurisdiction argument; however, counsel did inform the Magistrate of the briefing schedule of this Court. Informing the Magistrate of the briefing schedule of this Court was not agreement with Plaintiffs' argument on jurisdiction, tacitly or otherwise.

### **ARGUMENT**

Plaintiffs seek the extraordinary remedy of an emergency injunction pending their interlocutory appeal (IPA). This Court lacks jurisdiction to grant such relief. Not only is the remedy extraordinary by its own right, Plaintiffs seek the remedy before this Court while simultaneously seeking the same relief before the District Court. *See* Plaintiffs' Emergency Motion for Injunction Pending Appeal, *Maryville Baptist Church, et al. v. Beshear*, Case 3:20-cv-00278-DJH, Doc. 17, PageID #: 254 (W.D.Ky Apr. 24, 2020). As required by Fed. R. App. P. 8(a)(1)(C), before seeking the IPA from this Court, Plaintiffs first sought the IPA from the District

Court. Yet, before allowing the District Court a chance to rule on the motion, Plaintiffs filed this motion. The federal rules do not permit such relief.

Plaintiffs contend the IPA meets the requirements of Fed. R. App. P. 8(a)(2)(A), but their filing of emergency request for IPA before the District Court precludes the application of that Rule. Moreover, Plaintiffs cannot meet the standard set forth in Fed. R. App. P 8(a)(2)(A). Clearly, “moving first in the district court” was not “impracticable,” because the record indicates that Plaintiffs did move for this relief in the District Court. Nor has the District Court “denied the motion or failed to afford the relief requested[.]” Just yesterday, the parties participated in a scheduling conference and agreed to a briefing schedule on the emergency request for IPA in the District Court. Then, Plaintiffs sought – and received – *additional time* to brief their motion, beyond the schedule proposed by the District Court.

This Court should deny Plaintiffs’ motion while they seek the same relief from the lower court. Nevertheless, beyond the procedural pitfalls of their motion, Plaintiffs are not entitled to the requested relief because they cannot demonstrate a strong likelihood of success on the merits, irreparable injury or a balance of the equities in their favor.



**I. Plaintiffs Cannot Succeed On The Merits.**

As this Court recently noted, “We generally lack jurisdiction to hear an appeal of a district court’s decision to grant or deny a TRO.” *PRE-TERM Cleveland, et al. v. Attorney General of Ohio, et al.*, Case No. 20-3365, 2020 WL 1673310, \*1 (6th Cir. Apr. 6, 2020). This Court stated it would only entertain “interlocutory appeals of TROs that threaten to inflict irretrievable harms or consequences before the TRO expires or, rather than preserving the status quo, act as a mandatory injunction requiring affirmative action.” *Id.* (citation omitted). The Court determined it lacked jurisdiction over an appeal of a temporary restraint of an Ohio order prohibiting constitutionally-protected elective procedures. *Id.*

Here, Plaintiffs do not attempt to demonstrate they can clear this jurisdictional hurdle. Their failure to argue an “irretrievable harm or consequence” or a requirement of “affirmative action” precludes this Court from exercising jurisdiction over the interlocutory appeal. *See id.*, at \*2. Instead, Plaintiffs argue the merits of the claims below as if that alone gets them access to this Court before the District Court has taken any action other than denying the motion for a temporary restraining order. Again, Plaintiffs attempt to jump the gun to bypass the

lower court. Regardless, Plaintiffs' arguments would still not meet the standard to warrant an injunction pending the interlocutory appeal.<sup>28</sup>

The Governor has authority to issue the emergency order challenged here. KRS 39A.100(1)(j) authorizes the Governor "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population" during a declared state of emergency. KRS 39A.100(1)(f) authorizes the Governor "[t]o exclude all nonessential, unauthorized, disruptive, or otherwise uncooperative personnel from the scene of an emergency, and to command those groups assembled at the scene to disperse." KRS 39A.100(1)(b) allows the Governor to require state agencies to respond to the emergency or disaster in the manner directed.

Here, in accordance with the authority under KRS Chapters 39A, 194A and 214, CHFS, as a designee of the Governor, issued the Order prohibiting all mass gatherings. The intent of the Order is to implement CDC guidelines to limit groups of people gathering in close proximity for a prolonged period. The Governor, the

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<sup>28</sup> Further, there is no need for an expedited briefing schedule in this appeal. As of May 20, 2020, in-person faith-based services will again be permitted in the Commonwealth. *See* Governor Beshear Outlines Road Ahead for Gradual Reopening of Businesses (Apr. 30, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=148> (last visited Apr. 30, 2020).

Cabinet, and local officials have enforced the order uniformly, without discrimination.

Appellants fail in their claim that the Governor’s prohibition of mass gatherings to curb the spread of COVID-19 violates their right to practice their religion, because the order prohibits all mass gatherings in accordance with CDC guidelines, while also allowing alternative means to communally worship that the Governor and officials have encouraged.

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

The clause “embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct

remains subject to regulation for the protection of society.” *Cantwell* 310 U.S. at 303-04 (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 144 U.S. 33 (1890)). The holding of “religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” *Minersville School Dist. Bd. of Ed. v. Gobitis*, 30 U.S. 586, 594-95 (1940). Under the prevailing standard, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

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

The Governor’s Order – both on its face and in its application – is neutral and of general applicability. As the lower court correctly recognized, by its plain

terms the Order prohibits “all mass gatherings,” not just religious gatherings. *Maryville Baptist Church, Inc.*, Civil Action No. 3:20-cv-278-DJH, Order (W.D. Ky. Apr. 18, 2020) (Doc 4-1.) In fact and practice, its entire purpose and success hinges upon it to applying to all. Appellants present no evidence the Order targeted their mass gathering because of its religious nature. Rather, the Order targets any intent to gather in large groups. In its application, the Order has forced the closure of events with no religious affiliation, including movie theaters, concerts, and sporting events. The District Court recently acknowledged this fact. *Id.* at 5. State and local officials have ordered the closure of businesses for non-compliance with social distancing and hygiene measures, as well as businesses that are not life-sustaining but continued to operate in violation of orders. Thus, even though the Order may “burden” faith-based mass gatherings, it equally burdens all mass gatherings, regardless of the religious nature. Its purpose is to prevent the spread of a disease that is particularly infectious, with no cure or treatment. The Order does not discriminate or differentiate among groups, because COVID-19 does not differentiate or discriminate.

The Order does not exempt secular mass gatherings; nor is it applied in a manner that would exempt secular mass gatherings. In fact, the Order does not provide any exceptions at all. *Cf. Ward v. Polite*, 667 F.3d 727, 738-39 (6th Cir. 2012). Rather, the Order provides examples of what a “mass gathering” is and

what it is not; the distinction is that it closes any event the purpose of which is to congregate person-to-person for an extended period to engage in a particular activity. The District Court recognized this distinction, writing that presence at a grocery or liquor store “is a single and transitory experience: individuals enter the store at various times to purchase items; they move around the store individually—subject to strict social-distancing guidelines set out by state and federal health authorities [...]—and they leave when they have achieved their purpose. Plaintiffs’ desired church service, in contrast, is by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose.” *Maryville Baptist Church, Inc., et al.*, Order at 4. The Order prohibiting mass gatherings leaves open locations providing services necessary to maintain public health and safety, despite the fact that people are in transit in the location at the same time. However, even in some of those instances, the Governor has required social distancing and hygiene practices and imposed additional restrictions, such as limiting life-sustaining retail businesses to allow one adult per household in at a time.

The Governor’s encouragement of drive-in and online broadcast of faith-based services further demonstrates the Order’s neutrality and general applicability. These options allow the practice and observation of one’s faith without the risk of mass-spreading COVID-19.

Because the Order is neutral and of general applicability, it is subject to “rational basis review[.]” *Miller v. Davis*, 123 F. Supp. 3d 924, 938 (E.D. Ky. 2015) (citing *Seger v. Ky. High Sch. Athletic Ass’n*, 453 Fed. Appx. 630, 634 (6th Cir. 2011) (interpreting *Smith*, 494 U.S. 872 and *Lukumi*, 508 U.S. 520)). Under rational basis review, an emergency order will be upheld if it is “rationally related to furthering a legitimate state interest.” *Seger*, 453 Fed. Appx. 635. An emergency order “subject to rational basis review is accorded a strong presumption of validity.” *Id.* It should be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). Plaintiffs carry the burden to negate “every conceivable basis which might support it[.]” *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The facts weighing against Appellants’ arguments are insurmountable. The White House and the CDC have recommended the closure of any establishment or event allowing for a mass gathering. National, state, and local public health officials describe the particular risks of spreading COVID-19 “among people who are in close contact with each other for a prolonged period.” (Stack Affidavit, ¶ 15.) Because the prohibition on mass gatherings is rationally related to the legitimate state interest in stopping the spread of disease, Appellants’ free exercise claim fails.

## **II. Appellants Fail To Allege An Irreparable Injury.**

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

Having solely relied on that presumption, Appellantss fail to set forth factual allegations to demonstrate an irreparable injury. They do not allege they are currently under a forced quarantine, or that they will miss a specific event due to the Order. They can attend virtual or drive-in church services provide by their own church. They do not allege a specific and forthcoming irreparable injury. As such, they fail to allege an irreparable injury to warrant preliminary injunctive relief.

## **III. Issuance Of The Requested Injunction Would Cause Substantial Harm.**

Appellants’ requested relief would cause substantial harm to the public health and safety. As to faith-based mass gatherings, the CDC and the White House have recommended avoiding social gatherings of 10n or more people. *See infra*. Epidemiological evidence demonstrates that mass gatherings have resulted in the spread of COVID-19. Importantly, those attending a mass gathering, such as in-person faith-based services, not only risk exposure to COVID-19 themselves,



they also risk exposing anyone they later come into contact with. These risks are exacerbated by the fact that COVID-19 appears to have a long incubation period, and an infected person may spread the virus even if asymptomatic. Allowing in-person faith-based mass gatherings as Plaintiffs request could result in more illness, more deaths, and a higher spike in cases at any given time, resulting in our health care centers becoming overwhelmed.

Additionally, the efforts and sacrifices Kentuckians have made to engage in social distancing and limit their exposure to one another would be sacrificed, and the progress to flatten the curve could be reversed. Appellants do not have an adequate argument in response. Instead, they argue that there are secular exceptions, which is not the case. There are no exceptions to the mass gatherings order, and activities currently permitted by other orders – shopping for life-sustaining good such as groceries, going through a restaurant drive-thru – are materially different in terms of risk of exposure.. Appellants cannot meet their burden.

#### **IV. Issuance Of The Requested Injunction Would Not Serve The Public Interest.**

While, “[g]enerally speaking, ‘the public interest is served by preventing the violation of constitutional rights[,]’ . . . enjoining officials from pursuing their chosen policies is not without costs.” *League of Women Voters v. Hargett*, 400 F.Supp.3d 706, 733-34 (M.D.Tenn. Sept. 12, 2019) (quoting *Chabad of S. Ohio &*

*Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004)).

Courts, then, are directed to weigh the plaintiffs’ interests against that of the public. *Id.*

As knowledge of COVID-19 and its spread is constantly evolving, and as cases of the virus continue to increase in the Commonwealth, state and local officials must be able to take rapid, decisive action. Here, the Governor, other constitutional officers, state officials, public health officials, state and federal courts, school districts, local officials, and citizens have all taken action to prevent the spread of COVID-19 – the type of collective action public health officials state is needed to protect public health and safety. The public interest in state officials’ ability to take these measures is significant and overrides the public’s interest in attending in-person faith-based mass gatherings – especially since other ways to worship – and religious services are not singled out or burdened differently from other mass gatherings in the March 19, 2020 Order.<sup>29</sup>

## CONCLUSION

Defendant-Appellee Governor Beshear respectfully asks the Court to deny Plaintiffs-Appellants’ Emergency Motion for Injunction Pending Appeal and to Expedite Appeal.

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<sup>29</sup> For the same reasons stated herein, the Court should reject the arguments the Attorney General raises in his amicus brief (Doc 6).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2020, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ S. Travis Mayo  
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