

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON**

THEODORE JOSEPH ROBERTS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:20-cv-00054-WOB-CJS
)	
HON. ROBERT NEACE, in his official)	
capacity only as Boone County Attorney,)	
<i>et al.</i> ,)	
)	
Defendants.)	

**GOVERNOR ANDREW BESHEAR’S AND SECRETARY ERIC FRIEDLANDER’S
RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTIONS FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

The Plaintiffs fail to carry their burden to warrant emergency or preliminary relief. The Plaintiffs do not demonstrate a strong likelihood of success on the merits, allege an immediate irreparable injury, or counter the substantial harm and detriment to the public interest that their requested relief may cause. Because of this failure, this Court – like the majority of other courts addressing these issues – should deny Plaintiffs’ motions for temporary and preliminary relief.

BACKGROUND

Kentucky and America face the most serious public health emergency in more than a century. As of this filing, more than 825,000 Americans, including 3,192 Kentuckians, have tested positive for the novel coronavirus (COVID-19). More than 45,000 Americans have died and Kentucky has lost 171 people.

In response to the outbreak of COVID-19 in Kentucky and the threat it poses to public health, Defendant Andrew Beshear, in his official capacity as the Governor of the Commonwealth of Kentucky (“Governor”), and Defendant Eric Friedlander, in his official capacity as Acting Secretary of the Cabinet for Health and Family Services (“Secretary”), issued

a series of orders to implement social distancing guidelines of the CDC, the White House, and public health officials.

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

COVID-19 is a severe, acute respiratory disease caused by the virus SARS-CoV-2.¹ First identified in Wuhan, Hubei Province, China in December 2019, the World Health Organization (“WHO”) declared a Public Health Emergency of International Concern on January 30, 2020.² The next day, the U.S. Department of Health and Human Services declared a public health emergency.³ *See* 42 U.S.C. § 247d. The WHO declared COVID-19 a pandemic on March 11, 2020. *Id.* COVID-19 can be lethal, and older people and people of all ages with chronic medical conditions (such as heart disease, lung disease, and diabetes) have a higher risk of developing serious illness.⁴ *Id.* The Centers for Disease Control and Prevention (“CDC”) summarizes the perils of the pandemic as follows:

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

¹ *Coronavirus Disease 2019 (COVID-19), Situation Summary*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last updated Apr. 19, 2020; last visited Apr. 15, 2020) (“CDC Situation Summary”).

² *WHO Director-General’s Statement On [International Health Regulations] Emergency Committee On Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORGANIZATION, available at [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-(2019-ncov)) (last visited Apr. 15, 2020).

³ *Determination That A Public Health Emergency Exists*, U.S. Department of Health and Human Services, available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Apr. 15, 2020).

⁴ The CDC’s National Center for Health Statistics reports that, as of 2017, Kentucky ranks fifth among the states for deaths per capita due to heart disease, first for chronic lower respiratory disease, and fifth for diabetes. *Stats of the State of Kentucky (2017)*, Centers for Disease Control and Prevention, National Center for Health Statistics, available at <https://www.cdc.gov/nchs/pressroom/states/kentucky/kentucky.htm> (last visited Apr. 15, 2020).

Id. The risk of exposure naturally increases as the outbreak expands. *Id.* “People in places where ongoing community spread of the virus that causes COVID-19 has been reported are at elevated risk of exposure, with the level of risk dependent on the location.” *Id.*

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

Upon the first confirmed positive case in Kentucky, Governor Beshear and the Kentucky Cabinet for Health and Family Services (“CHFS”), with Secretary Friedlander as the Governor’s designee, began exercising their emergency powers under KRS Chapters 39A, 194A and 214 to contain the spread of the virus. On, March 6, 2020, the Governor declared a State of Emergency. (Ky. Exec. Order No. 2020-215).⁵ As the number of confirmed COVID-19 cases increased, the Governor and CHFS, as well as other state officials, federal and state courts, school districts, and local public officials took additional steps to prevent its spread.

On March 16, 2020, CHFS restricted food and beverage sales to carryout, delivery, and drive-thru services, prohibiting onsite consumption. (CHFS Order, Mar. 16, 2020).⁶ On the same day, on the recommendation of the Secretary of State, the Governor postponed the 2020 primary election until June 23, 2020. (Ky. Exec. Order No. 2020-236).⁷ Additionally, on March 17, 2020, CHFS required all public-facing businesses that encourage public congregation or that, by the nature of the service to the public, cannot comply with CDC guidelines concerning social distancing, to cease in-person operations. (CHFS Order, Mar. 17, 2020).⁸

⁵ Available at https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf (last visited on Apr. 17, 2020).

⁶ Available at https://governor.ky.gov/attachments/20200316_Order_Restaurant-Closure.pdf (last visited Apr. 17, 2020).

⁷ Available at https://governor.ky.gov/attachments/20200316_Executive-Order_2020-236_Elections.pdf (last visited on Apr. 17, 2020)).

⁸ Available at https://governor.ky.gov/attachments/20200317_Order_Public-Facing-Businesses.pdf (last visited Apr. 17, 2020).

On March 18, 2020, the Governor issued Executive Order 2020-243 that, among other things, encourages all Kentuckians to take all feasible measures to comply with social distancing guidelines from the CDC and the Kentucky Department for Public Health. (Ky. Exec. Order No. 2020-243).⁹ The next day, 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).¹⁰

On March 22, 2020, the Governor ordered closed all retail businesses to in-person traffic that are not life-sustaining, allowing them to provide curbside or delivery service for online or phone orders only. (Ky. Exec. Order No. 2020-246).¹¹ Three days later, the Governor issued Executive Order 2020-257, encouraging all Kentuckians to remain “healthy at home.” (Ky. Exec. Order No. 2020-257).¹² To facilitate the “healthy at home” initiative, the Executive Order closed all businesses, retail and otherwise, that are not life-sustaining, clearly described life-sustaining businesses, and required life-sustaining businesses that remain open to follow, to the fullest extent practicable, social distancing and hygiene guidance from the CDC and the Kentucky Department for Public Health. (*Id.*) The Executive Order also suspended all in-person state, county, and local government activities that are not necessary to sustain or protect life or support life-sustaining businesses. (*Id.*)

⁹ Available at https://www.klc.org/userfiles/EO_Social_Distancing20200324144503.pdf (last visited Apr. 17, 2020).

¹⁰ Available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf (last visited Apr. 17, 2020).

¹¹ Available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf (last visited Apr. 17, 2020).

¹² Available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited Apr. 17, 2020).

In accordance with recommendations from the White House and the CDC to avoid discretionary travel,¹³ and following logically from his “healthy at home” order, Governor Beshear issued Executive Order 2020-258 on March 30, 2020, prohibiting out-of-state travel. Specifically, the Executive Order prohibits Kentucky residents from traveling to any other state except: when required by employment; to obtain groceries, medicine, or other necessary supplies; to seek or obtain care by a licensed healthcare provider; to provide care for the elderly, minors, dependents, persons with disabilities, or other vulnerable persons; or when required by court order. (Executive Order 2020-258.)¹⁴ It further directs Kentucky residents in another state for any other reason to self-quarantine for fourteen (14) days upon return. (*Id.*) In support of the Executive Order, the Governor cited the need to avoid crowded travel settings and areas experiencing high levels of community spread of COVID-19, especially since other states have not taken as aggressive steps as the Commonwealth to prevent the spread of the virus. (*Id.*) The Governor further cited his broad emergency powers, including his power to order individuals to disperse from the scene of an emergency. (*Id.*)

On April 2, 2020, the Governor expanded these travel restrictions, also prohibiting residents of another state from traveling into Kentucky for other than approved reasons and requiring anyone so traveling into the Commonwealth to self-quarantine for fourteen (14) days. (Executive Order 2020-266.)¹⁵ The order also added an approved reason for travel into or out of Kentucky: rendering care as a healthcare professional or volunteer healthcare worker related to

¹³ See The President’s Coronavirus Guidelines For America (The White House), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited Apr. 19, 2020).

¹⁴ Available at https://governor.ky.gov/attachments/20200330_Executive-Order_2020-258_Out-of-State-Travel.pdf (last visited Apr. 17, 2020).

¹⁵ Available at https://governor.ky.gov/attachments/20200402_Executive-Order_2020-266_State-of-Emergency.pdf (last visited Apr. 17, 2020).

the State of Emergency. (*Id.*) The Order is set to remain in effect until the end of the declared State of Emergency. (*Id.*)

Courts in Kentucky have also altered operations in response to the public health emergency. The Kentucky Supreme Court canceled all civil and criminal dockets, except for emergency and time-sensitive matters, unless a judge determines a matter requires prompt attention, and continued its closure of all state court judicial facilities to in-person services until May 31, 2020. (Supreme Court Amended Order 20-122, Apr. 14, 2020).¹⁶ Based on the guidance of The White House and the CDC, the United States District Courts for the Eastern and Western Districts of Kentucky have extended the postponement of trials and conferences, and the limitation of public access to the courthouses, through at least May 17 and May 29, 2020, respectively. (Eastern District of Kentucky General Order No. 20-08, *In re: Court Operations Related to COVID-19* (Apr. 15, 2020); Eastern District of Kentucky General Order 20-03, *In re: Court Operations Related to COVID-19* (Mar. 23, 2020);¹⁷ (Western District of Kentucky General Order No. 20-09, *In Re: Supplemental Order Concerning Court Operations Related to COVID-19* (Apr. 17, 2020)).¹⁸

In addition, local officials have responded to COVID-19. All 120 Kentucky counties have issued emergency declarations. (The Kentucky Association of Counties, COVID-19 Resources for County Leaders).¹⁹ All public schools in Kentucky have ceased in-person educational

¹⁶ Available at https://kycourts.gov/courts/supreme/Rules_Procedures/202022.pdf (last visited Apr. 18, 2020).

¹⁷ Available at http://www.kyed.uscourts.gov/kyed_GOs/gen20-08.pdf (last visited on Apr. 15, 2020); available at http://www.kyed.uscourts.gov/kyed_GOs/gen20-03.pdf (last visited Apr. 15, 2020).

¹⁸ Available at https://www.kywd.uscourts.gov/sites/kywd/files/general-ordes/General_Order_2020-09.pdf (last visited on Apr. 18, 2020).

¹⁹ Available at <https://covid-19.kaco.org/covid-19-newsroom/covid-19-county-emergency-declarations/> (last visited Apr. 16, 2020).

services for the rest of the school year.²⁰ High schools will not be able to have traditional in-person graduation ceremonies, but school districts are looking into having drive-in or virtual ceremonies instead. *Id.*

Kentuckians have answered the call of public officials. Data suggest social distancing is “flattening the curve.”²¹

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

Governor Beshear and Secretary Friedlander have issued orders, including the Order prohibiting mass gatherings, based on the guidance and recommendations of public health officials, including those of the CDC and The White House encouraging social distancing and recommending that people avoid large and small gatherings in private places and public spaces.^{22,23,24} The CDC stresses that limiting face-to-face contact with others is the best way to reduce the spread of COVID-19.²⁵ To practice social or physical distancing, the CDC directs people to stay at least six feet away from each other, not gather in groups, and stay out of crowded places and avoid mass gatherings. *Id.* (See Affidavit of Dr. Steven Stack, Apr. 22, 2019, ¶¶ 15-18 (attached as Exhibit A).)

²⁰ Olivia Krauth, *Kentucky schools closed for remainder of school year due to coronavirus, Beshear says*, The Courier-Journal (Apr. 20, 2020), available at <https://www.courier-journal.com/story/news/2020/04/20/kentucky-schools-closed-remainder-school-year-beshear-says/5114849002/> (last visited Apr. 21, 2020).

²¹ 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 Apr. 18, 2020).

²² 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 Apr. 15, 2020).

²³ Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf (last visited Apr. 16, 2020).

²⁴ The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited Apr. 16, 2020).

²⁵ 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 Apr. 15, 2020).

As the CDC recommends:

In addition to everyday steps to prevent COVID-19, keeping space between you and others is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world. When COVID-19 is spreading in your area, everyone should limit close contact with individuals outside your household in indoor and outdoor spaces. Since people can spread the virus before they know they are sick, it is important to stay away from others when possible, even if you have no symptoms. Social distancing is especially important for people who are at higher risk of getting very sick.

Id. The CDC recommends that people “Avoid large and small gatherings in private places and public spaces, such [as] a friend’s house, parks, restaurants, shops, or any other place. This advice applies to people of any age... .” *Id.*; (Stack Aff., ¶ 21).

On March 29, 2020, the CDC revised its guidance on mass gatherings based on the guidance of The White House. Under the revised guidance, the CDC stated, “During the next 30 days, individuals and organizations should cancel or postpone in-person events that consist of 10 people or more throughout the U.S.”²⁶ The White House recommended avoiding social gatherings in groups of 10 or more people.²⁷

Following CDC guidance, Governor Beshear and Secretary Friedlander issued the March 19, 2020 Order prohibiting mass gatherings to prevent the spread of COVID-19. Under KRS 39A.100(1)(b), the Governor may require state agencies to respond to the emergency or disaster in the manner directed, and KRS 39A.100(1)(f) gives the Governor the power “[t]o exclude all nonessential, unauthorized, disruptive, or otherwise uncooperative personnel from the scene of the emergency, and to command those persons or groups assembled at the scene to

²⁶ Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf (last visited Apr. 16, 2020).

²⁷ The President’s Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited Apr. 16, 2020).

disperse.” Further, “A person who refuses to leave an area in which a written order of evacuation has been issued in accordance with a written declaration of emergency or a disaster may be forcibly removed to a place of safety or shelter, or may, if this is resisted, be arrested by a peace officer. Forcible removal or arrest shall not be exercised as options until all reasonable efforts for voluntary compliance have been exhausted.” KRS 39A.100(1)(f). In addition, pursuant to KRS 214.020, “When the Cabinet for Health and Family Services believes there is a probability that any infectious or contagious disease will invade this state, it shall take such action and adopt and enforce such rules and regulations as it deems efficient in preventing the introduction or spread of such infectious or contagious disease within this state, and to accomplish these objects shall establish and strictly maintain quarantine and isolation at such places as it deems proper.”^{28,29} Governor Beshear designated Secretary Friedlander to deliver directives during the State of Emergency, under which the Secretary issued the Order.³⁰

In Executive Order 2020-257, Governor Beshear closed all except life-sustaining businesses, and specifically declared an emergency exists in places where people do not socially distance. (Ky. Exec. Order No. 2020-257).³¹ As the Executive Order stated: “Where people congregate unnecessarily, or fail to follow adequate social distancing practices, they are

²⁸ Pursuant to 902 KAR 2:050 section 1, “Whenever any private or public property has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the [Cabinet] shall take such measures as are necessary to secure adequate cleaning, disinfection, or other control procedures necessary to insure cessation of transmission.”

Under 902 KAR 2:050 section 2, “Whenever any person has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall employ such measures as are necessary to secure adequate isolation, restriction of employment or other control procedures that may be necessary to insure cessation of transmission of infection.”

²⁹ KRS 194A.025(2) provides that the Cabinet Secretary may delegate any duties of his office to employees in the Cabinet as he deems necessary and appropriate, unless otherwise prohibited by statutes.

³⁰ See Public Health Emergency Order (Mar. 15, 2020), available at <https://chfs.ky.gov/cv19/PubHealthEmergencyOrder.pdf> (last visited Apr. 16, 2020).

³¹ Available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited Apr. 17, 2020).

spreading the disease, creating scenes of an emergency.” *Id.* In Paragraph 8 of the Order, Governor Beshear incorporated by reference the Order prohibiting mass gatherings. *Id.*

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

While most Kentuckians have complied with the Order and social distancing directives to help save Kentuckians’ lives, some have not. In mid-March, a mass gathering in Hopkins County resulted in an outbreak of COVID-19, with more than 50 people becoming infected and, to date, six people dying. (Stack Aff., ¶¶ 40-45.)^{32,33,34} 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 for positive cases.³⁵

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.³⁶ Local public health officials in Pulaski County confirmed that a 59-year-old woman who tested positive for COVID-19 had attended church the prior Sunday, possibly exposing the virus to 40 others who attended the service. *Id.* In Calloway County, University Church of Christ in

³² 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 Apr. 16, 2020).

³³ 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 Apr. 16, 2020).

³⁴ 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 Apr. 16, 2020).

³⁵ 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 Apr. 16, 2020).

³⁶ 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).

Murray advised its congregation of about 150 people to self-quarantine after the county confirmed a case of COVID-19. *Id.*

Mass gatherings in other states have led to clusters of positive cases and deaths. In Washington State, a church choir rehearsal in early March resulted in 45 confirmed cases of COVID-19 and two deaths.³⁷ In Virginia, a church pastor died on April 12 after he defied social distancing and continued having church services.³⁸ In Baton Rouge, Louisiana, a pastor's refusal to comply with mass gathering prohibitions led to the death of a church elder and the hospitalization of a parishioner who is representing the church in a legal challenge against the mass gathering order.³⁹

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

In Kentucky, the vast majority of groups have complied with social distancing measures and the prohibition on mass gatherings. Businesses like restaurants have converted to curbside or delivery service. Nonprofit organizations have adapted by holding scheduled events virtually instead of in-person. For example, the St. Baldrick's Foundation converted some of its shave events to virtual shaves to raise funds to fight childhood cancers.⁴⁰ The Central Kentucky Community Action Council closed its senior centers, but offers drive-thru services at nearly all

³⁷ Richard Read, *A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead*, Los Angeles Times (Mar. 29, 2020), available at <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak> (Apr. 16, 2020).

³⁸ Rebecca Klar, *Va. bishop who defied social distancing recommendation dies of coronavirus complications*, The Hill (Apr. 14, 2020), available at <https://thehill.com/homenews/state-watch/492653-virginia-bishop-who-was-defiant-of-coronavirus-dies-of-covid-19> (last visited Apr. 16, 2020).

³⁹ Rachel Olding, *Parishioner of La. Church That Defied Virus Lockdown Dies From COVID-19, But Pastor Claims It's a Lie*, The Daily Beast (Apr. 17, 2020), available at <https://www.thedailybeast.com/member-of-tony-spells-life-tabernacle-church-in-baton-rouge-dies-from-coronavirus-another-member-in-icu>.

⁴⁰ See, e.g., St. Baldrick's Foundation, UCCOM Shaves Virtual Event, available at <https://www.stbaldricks.org/events/mypage/7653/2020> (last visited Apr. 18, 2020).

of those centers to ensure participants receive meals, and volunteers telecommunicate with senior citizens as part of the senior companion program.⁴¹

On April 9, 2020, the Kentucky Tourism, Arts and Heritage Cabinet closed two State Parks for the month of April to ensure appropriate social distancing and to avoid overcrowding to prevent exposure to and the spread of COVID-19.⁴² Demonstrating the general applicability of the Order prohibiting mass gatherings, on April 10, 2020, the Tourism, Arts and Heritage Cabinet continued its Order closing all Kentucky Performing Arts facilities pursuant to the Order and Executive Orders 2020-243 and 2020-257.⁴³ Stating that compliance with current guidance about mass gatherings and proper social distancing is essential, the Department of Fish and Wildlife suspended all fishing tournaments in Kentucky because of the COVID-19 outbreak.⁴⁴ The Department also canceled all of its summer conservation camps.⁴⁵

In addition to fishing tournaments at Kentucky State Parks, sporting events across the Commonwealth have been canceled during the pandemic. The Kentucky High School Athletic Association suspended the Boys and Girls Sweet Sixteen® basketball tournaments, and indefinitely suspended all spring sports.⁴⁶ Amateur National Motocross events in Kentucky have been postponed indefinitely, including a scheduled event in Webster County, Kentucky.⁴⁷ The bulletin announcing the postponement of those events provided that “MX Sports will comply

⁴¹ Central Kentucky Community Action Counsel Inc. (Mar. 27, 2020), available at <https://ckcac.org/wp-content/uploads/2020/03/CKCAC-Update-COVID-19-3.31.2020.pdf> (last visited Apr. 18, 2020).

⁴² Tourism, Arts and Heritage Cabinet Order (Apr. 9, 2020) (attached as Exhibit B).

⁴³ Tourism, Arts and Heritage Cabinet Order (Apr. 10, 2020) (attached as Exhibit C).

⁴⁴ Available at <https://fw.ky.gov/Fish/Pages/Tournament-Fishing.aspx> (last visited Apr. 19, 2020).

⁴⁵ Available at <https://fw.ky.gov/Education/Pages/Summer-Camps.aspx> (last visited Apr. 19, 2020).

⁴⁶ 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 Apr. 20, 2020).

⁴⁷ 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 Apr. 20, 2020).

with restrictions imposed by federal, state and local authorities, included the [CDC] and the [WHO],” and “MX Sports urges its racing family to use common sense ... 2) avoid shaking hands or coming into close personal contact with others;” *Id.*

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 across Kentucky that had reportedly planned to hold in-person services changed to virtual or drive-in services. For example, churches in Harlan County that planned to hold in-person services opted for drive-in services instead.⁴⁸ 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., ¶ 47.)^{49,50}

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 D).) In the end, only one of the subjects of those complaints refused to comply with the executive

⁴⁸ 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 Apr. 17, 2020).

⁴⁹ See, e.g., Governor Andy Beshear, *Update on COVID-19 in Kentucky – 3.20.2020 PM*, YouTube (Mar. 20, 2020), at 46:45-47:15 (“I believe that this is a creative solution, as long as there is the distancing between those cars We want to see creativity, we want to see ways that they can connect My Commissioner of Public Health says that’s good.”)(available at https://youtu.be/vG_nreWckWw) (last visited Apr. 15, 2020); Governor Andy Beshear, *Update on COVID-19 in Kentucky – 4.11.2020*, YouTube (Apr. 11, 2020), at 52:08-55:27 (“I have been in favor of drive-in services, a chance for people to get together and worship while being apart. . . . We’ve had great buy-in from our faith community around the state. . . . We have had churches working really hard on that and we appreciate it.”)(available at https://youtu.be/X_1NS02f0CI) (last visited Apr. 15, 2020).

⁵⁰ In Mississippi, the United States Department of Justice intervened in a lawsuit filed after a Mayor’s order prohibited drive-in services and attendees of drive-in services received \$500 tickets. The Mayor later stated the City of Greenville would not make people pay the \$500 tickets and that he would allow drive-in services to occur after the Mississippi Governor provided guidance. Associated Press, *Mississippi mayor gives OK for drive-in church with windows up after lawsuit, parishioners fined \$500*, Fox 8 News (Apr. 15, 2020), available at <https://fox8.com/news/coronavirus/mississippi-mayor-gives-ok-for-drive-in-church-with-windows-up-after-lawsuit-parishioners-fined-500/> (last visited Apr. 20, 2020).

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.*

Demonstrating its knowledge of the risk of the spread of the virus through in-person services, Maryville Baptist aired the service via speaker outside of the church so some in their vehicles in the parking lot could attend by drive-in, and made the service available virtually on Facebook. *Id.*



Id. Based on media reports, those who attended the service inside the church were not following CDC social distancing guidelines.⁵¹



⁵¹ 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).

Neither did those entering and exiting the church follow social distancing guidelines or wear personal protective equipment.



Id. The license plates of multiple vehicles in the church parking lot were covered, including the plate of the pastor's vehicle. *Id.*



Id.

Most alarming, and as Plaintiffs' Complaint shows, most attendees of the April 12 service were not Bullitt County residents.⁵² At least two people who attended the in-person service were residents of New Jersey, one of the epicenters of the pandemic in America. *Id.* Those New Jersey residents were photographed shaking the pastor's hand, failing to comply with CDC social distancing guidelines.



⁵² 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 remains second only to New York in the number of confirmed COVID-19 cases, with more than 92,000 confirmed cases, and more than 4,000 deaths.⁵³

The pastor recognized the danger to the health and safety of those attending in-person services at Maryville Baptist Church, 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.’”⁵⁴ Yet

⁵³ New Jersey COVID-19 Dashboard, available at <https://covid19.nj.gov/#live-updates> (last visited Apr. 22, 2020).

⁵⁴ 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->

the pastor still refused to comply with the mass gathering Order and continued to hold in-person services, threatening the health and safety of those in attendance and spreading the virus far beyond his community.

Businesses and groups that have endangered Kentuckians' lives by refusing to comply have faced consequences. Between April 1 and 21, the Department of Workplace Standards within the Kentucky Labor Cabinet received referrals of 170 complaints from the KYSafer non-compliance citizen reporting hotline for investigation and possible enforcement action through closure orders, citations, and fines. (Affidavit of Commissioner Kimberlee C. Perry, Apr. 22, 2020, ¶ 5 (attached as Ex. E).) The Department has 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 Department's 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.⁵⁵ As two examples, the Department cited two Frankfort gyms, Fit4Life and ELITE Fitness, for allegedly continuing to operate despite the prior order to close as public-facing businesses.⁵⁶ The Department had also approved a total of 14 life-sustaining

holds-wednesday-bible-study-against-beshear-recommendation/417-22c63bd4-1875-4055-9a8d-47eb9235c572 (last visited Apr. 17, 2020).

⁵⁵ 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.)

⁵⁶ Chanda Vendo, Updated: *Two Frankfort gyms cited for allegedly violating closure order are identified*, The State Journal (Apr. 5, 2020), available at https://www.state-journal.com/news/coronavirus_pandemic/updated-two-frankfort-gyms-cited-for-allegedly-violating-closure-order-are-identified/article_85d69f8a-77a2-11ea-b0a6-473adc019dee.html (last visited Apr. 17, 2020).

businesses or organizations to reopen after they provided evidence proper implementation of CDC protocols regarding social distancing and hygiene. (*Id.*, ¶ 10.)

From March 19 through April 21, 2020, the Kentucky State Police (“KSP”) received approximately 70 complaints from concerned citizens about non-compliance with the March 19 Order prohibiting all mass gatherings. (Brewer Aff., ¶ 3.) The complaints referenced mass gatherings at various locations, including, but not limited to, hair salons, gas stations, and flea markets, and in neighborhoods and personal residences, and the majority of the groups dispersed prior to Troopers’ arrival. (*Id.*, ¶¶ 4-5.) During the State of Emergency, KSP Police has increased routine patrols, patrolling about 839 retail locations a total of 6,173 times. (*Id.*, ¶¶ 12-13.)

Plaintiffs filed this action on April 15, 2020. Two days later, they sought temporary and preliminary relief from the Governor’s and Secretary’s orders. On April 20, 2020, this Court allowed a response from Defendants and set the matter for hearing.

LEGAL STANDARD

Preliminary injunctive relief “is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.”

Overstreet v. Lexington–Fayette Urban Cty. Gov’t, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). 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.

Id. (citations omitted).⁵⁷

⁵⁷ Upon this Court’s allowance of a response by Defendants, Plaintiffs motion for temporary restraining order is moot. *See* Fed. R. Civ. P. 65(b) (relief by temporary restraining order contemplates a relief prior to opportunity of

ARGUMENT

In light of the public safety threat posed by COVID-19 and the neutral, generally applicable, and limited scope of the Orders, Plaintiffs cannot meet the high burden necessary to obtain preliminary injunctive relief.

I. Plaintiffs Fail To Demonstrate A Strong Likelihood Of Success On The Merits.

The Governor, in times of an emergency, has the authority to prohibit *all* mass gatherings and limit interstate travel. The United States Supreme Court recognizes this authority and now, courts throughout the country are applying that precedent to uphold the necessary actions of Governors to curb the spread of COVID-19. Plaintiffs do not refute the law supporting the orders, but instead inaccurately describe their application.

A. The Governor has Authority to Prohibit Mass Gatherings and Limit Interstate Travel During a Pandemic.

Without question, a state, acting pursuant to its police powers, has the power to quarantine and limit the movement of its residents for the protection of the public health, safety and welfare. *Gibbons v. Ogden*, 22 U.S. 1, 43 (1824) (“Quarantine laws . . . are, in their nature, *health laws*.”). In times of an emergency, in Kentucky the power lies with the Governor.

The statutory authority for the Governor’s Order challenged in this lawsuit is found in KRS Chapter 39A. KRS 39A.100(1)(j) authorizes the Governor “to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population” during a declared state of emergency. More specifically, KRS 39A.100(1)(f) authorizes the Governor “[t]o exclude all nonessential, unauthorized, disruptive, or otherwise uncooperative personnel from the scene of an emergency, and to command those

defendants to be heard). Moreover, Plaintiffs did not argue the motion under the temporary restraining order standard, but only the standard for a preliminary injunction.

groups assembled at the scene to disperse.” “A person who refuses to leave an area in which a written order of evacuation has been issued in accordance with a written declaration of emergency or a disaster may be forcibly removed to a place of safety or shelter, or may, if this is resisted, be arrested by a peace officer.” *Id.* KRS 39A.100(1)(b) allows the Governor to require state agencies to respond to the emergency or disaster in the manner directed.

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

Similarly, pursuant to his powers under KRS Chapter 39A, the Governor limited interstate travel out of and into the Commonwealth. The purpose is to implement CDC and White House guidelines to reduce unnecessary travel outside of the home. The Order keeps Kentuckians in the state, limiting their exposure to areas of greater community spread and reducing the opportunity for the disease to be brought into the state as a result of exposure elsewhere. The Order also ensures that the effectiveness of the Governor’s other actions, such as prohibiting *all* mass gatherings and closing retail, restaurants, gyms and bars, is not diluted by the ability to engage in these activities outside of the state. The Order provides exceptions for emergencies and those necessary to maintain public health.

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

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

Governor’s Order prohibits *all* mass gatherings in accordance with CDC guidelines, while also specifically allowing and encouraging alternative means to communally worship.

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

This is because the clause “embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” *Cantwell v. State of Conn.*, 310 U.S. 296, 303-04 (1940) (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 Conference and Catholic Family Services v. Burwell*, 755 F.3d 372 (6th Cir. 2014) (quoting *Lukumi*, 508 U.S. at 543).

Here, the Governor’s Order – both on its face and in its application – is neutral and of general applicability. As the United States District Court for the Western District of Kentucky recognized in denying a motion for a temporary restraining order in a lawsuit filed by Maryville Baptist Church and its pastor, by its plain terms the Order prohibits “all mass gatherings,” not just religious gatherings. *Maryville Baptist Church, Inc., et al. v. Andy Beshear*, Civil Action No. 3:20-cv-278-DJH, Order (W.D. Ky. Apr. 18, 2020) (attached as Ex. F).⁵⁸ In fact and practice, its entire purpose and success hinges upon it to applying to all. The Plaintiffs present no evidence the Order targeted Plaintiffs’ 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 Western District of Kentucky recently acknowledged this fact. *Id.* at 5. State and local officials

⁵⁸ Courts in multiple jurisdictions across America have denied motions for temporary restraining orders for reasons similar to those of the Western District of Kentucky and Defendants’ arguments herein. *See, e.g., Legacy Church v. Kunkel*, No. 1:20-cv-327, ECF No. 29 (D.N.M. Apr. 17, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Harris Cty. Apr. 13, 2020); *Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, ECF No. 9 (E.D. Va. Apr. 8, 2020) Case: 2:20-cv-00054-WOB-CJS Doc #: 11-1 Filed: 04/19/20 Page: 9 of 24 - Page ID#: 216 (reaffirming denial of preliminary injunction); *Nigen v. New York*, No. 1:20-cv-1576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020); *Binford v. Sununu*, No. 217-2020-CV-152 (N.H. Super. Ct. Mar. 25, 2020) (denying motion for preliminary injunction); City News Service, *Judge Denies Church’s Attempt to Hold In-Person Easter Sunday Services*, FOX 5 SAN DIEGO (Apr. 10, 2020), <https://bit.ly/3ccPvTG> (San Diego, California, federal judge denied TRO); Matthew Barakat, *Judge rejects lawsuit over order; no religious exemption*, Washington Post (Apr. 9, 2020), <https://wapo.st/2xiqeIE> (Russell County, Virginia, state judge denied TRO).

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.

Plaintiffs’ argument that the Order is not generally applied ignores the facts. 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.⁵⁹ The Western District of Kentucky recognized this distinction in its recent Order, writing that presence at a grocery or liquor store “is a single and transitory experience: individuals enter the store at various times to purchase items; they move around the store individually—subject to strict social-distancing guidelines set out by state and federal health authorities [...]—and they leave when they have achieved their purpose. Plaintiffs’ desired church service, in contrast, is by design a

⁵⁹ There is preliminary evidence suggesting that mass gatherings present a particular risk for the spread of disease, as compared to transitory encounters, which is why the CDC has advised against gatherings where individuals are in close contact for prolonged periods of time. (Stack Affidavit, ¶ 15.) *See also* Jianyun Lu et al., COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020, *Emerging Infectious Diseases*, Vol. 26, No. 7 (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited Apr. 20, 2020) (finding that individuals seated at a mass gathering near an infected person contracted COVID-19, while those having repeated transitory encounters with that person did not); Carl Heneghan et al., SARS-CoV-2 viral load and the severity of COVID-19, *Centre for Evidence-Based Medicine, Nuffield Department of Primary Care Health Sciences, University of Oxford* (Mar. 26, 2020), available at <https://www.cebm.net/covid-19/sars-cov-2-viral-load-and-the-severity-of-covid-19/> (last visited Apr. 20, 2020) (summarizing evidence that length and extent of exposure may affect severity of disease, contributing to increased mortality among healthcare workers).

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.*, Civil Action No. 3:20-cv-278-DJH, Order, at 4 (W.D. Ky. Apr. 18, 2020) (Ex. F). 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.⁶⁰ Through the creativity of our state’s faith leaders, much of the state’s religious community can still participate in their worship services. And these options allow the practice and observation of one’s faith without the risk of mass-spreading COVID-19.

Because the Order is neutral and of general applicability, it is subject to “rational basis review[.]” *Miller v. Davis*, 123 F. Supp. 3d 924, 938 (E.D. Ky. 2015) (citing *Seeger v. Ky. High Sch. Athletic Ass’n*, 453 Fed. Appx. 630, 634 (6th Cir. 2011) (interpreting *Smith*, 494 U.S. 872 and *Lukumi*, 508 U.S. 520)).⁶¹ Under rational basis review, an emergency order will be upheld if it is “rationally related to furthering a legitimate state interest.” *Seeger*, 453 Fed. Appx. 635. An

⁶⁰ Plaintiffs falsely claim that Governor Beshear has prohibited drive-in religious services. (Complaint ¶ 62.) As the United States District Court for the Western District of Kentucky has recognized in a lawsuit brought by Maryville Baptist Church and its pastor, the Governor’s Orders include no such prohibition. *See Maryville Baptist Church, Inc., et al.*, Civil Action No. 3:20-cv-278-DJH, Order (W.D. Ky. Apr. 18, 2020) (Ex. F). Moreover, Governor Beshear has repeatedly so stated in public press conferences. *See* n. 48, *infra*.

⁶¹ This is clear because, in response to *Smith* and *Lukumi*, Congress enacted the Religious Freedom Restoration Act, applying strict scrutiny to government action substantially burdening a person’s exercise of religion even if the action was generally applicable. The Supreme Court ruled the Act could not apply to the states. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). Thus, free exercise challenges to state action remain subject to the standards set forth in *Smith* and *Lukumi*. *See id.* at 939.

emergency order “subject to rational basis review is accorded a strong presumption of validity.”

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

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

C. The Governor’s Order Does Not Violate the Right to Interstate Travel Because the Order Slows the Spread of Disease, is Temporary in Nature, and Provides Necessary Exceptions.

Plaintiff TJ Roberts argues the Governor’s prohibition of unnecessary interstate travel violates the Constitution.⁶² Decisions of the United States Supreme Court directly refute this claim.

In *Zemel v. Rusk*, the Court held that a state may limit interstate travel to prevent the spread of disease, stating:

The right to travel within the United States is of course also constitutionally protected. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.

⁶² Notably, the constitutionality of the Governor’s emergency travel orders are currently at issue in *Alessandro, et al. v. Beshear, et al.*, Civil Action No. 3:20-cv-00023-GFVT (E.D. Ky.). In that case, the Court recently took Plaintiffs’ fully briefed motion for preliminary injunction under advisement.

381 U.S. 1, 15 (1965) (internal citation omitted). Although *Zemel* addressed a limitation on international travel, holding that the Secretary of State could refuse to issue passports for travel to Cuba in the interest of national security, the Court's decision rested on the states' rights to quarantine citizens to preserve public health. *Id.*

Plaintiff's argument fails to account for the state's right to limit interstate travel for the common good. For "[e]ven liberty itself . . . is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." *Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

Zemel rested on long-standing Supreme Court precedent recognizing the deeply rooted power of the States to prevent the spread of an infectious disease. *See, e.g., Bowditch v. City of Boston*, 101 U.S. 16 (1879); *Lawton v. Steele*, 152 U.S. 133 (1894); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *United States v. Caltex*, 349 U.S. 149 (1953).

For instance, in *Jacobson*, the Supreme Court held that a state law requiring vaccination for smallpox did not violate the liberty protected by the Constitution. 197 U.S. at 25-27.

Speaking to that liberty, the Court opined:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and

burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.’

Id. at 26. (citations omitted). In dicta, the Court acknowledged that even a person “apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will . . . until it be ascertained by inspection . . . that the danger of the spread of the disease among the community at large has disappeared.” *Id.* at 29. *See also Compagnie Francaise de Navigation a Vapeur*, 186 U.S. at 393 (upholding state’s right to quarantine healthy passengers on a vessel).

The Supreme Court has continued to recognize the principles established in *Jacobson* when upholding states’ restraint of liberty when the safety of the public may demand it. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (noting that “[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease”); *Caltex*, 344 U.S. 149, 154 (acknowledging that “in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved”). This authority recognized under *Jacobson* has never been limited by the Supreme Court.

Most recently, the Fifth Circuit affirmed the principles of *Jacobson* in *In re Abbott*, -- F.3d --, 2020 WL 1685929 (5th Cir. Apr. 7, 2020), a case addressing a Texas regulation on elective medical procedures during the COVID-19 epidemic. Even though *Abbott* did not apply to restrictions of travel, the Fifth Circuit recognized that *Jacobson* provided the framework governing judicial review of any emergency exercise of state authority during a public health crisis. *Id.*, at *5. Quoting from *Jacobson*, the Court stated:

[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some “real or substantial relation” to the public health crisis and are not

“beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” Courts may ask whether the state’s emergency measures lack basic exceptions for “extreme cases,” and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

Id., at *7 (internal citations omitted). Of note, the dissent also acknowledged that *Jacobson* controlled, but recognized the judicial review standard as whether the “regulation is ‘justified by the necessities of the case’ and does not violate rights secured by the Constitution ‘under the guise of exercising a police power.’” *Id.*, at *19 (Dennis, J., dissenting).

Applying the *Jacobson* framework to an order of the Texas Governor postponing nonessential surgeries and procedures, the Fifth Circuit addressed whether the lower court erred when it temporarily restrained the order as it applied to constitutionally-protected medical procedures. *Id.*, at *6-12. It held the order to be a valid emergency response to the COVID-19 pandemic because it preserved personal protective equipment for health care professionals. *Id.*, at *8. The Court also held the order was not “beyond question, in palpable conflict with the Constitution” because it did not “outright ban” all of the elective medical procedures, but “merely postponed” certain non-essential ones. *Id.*, at *9. The Court reasoned this did not violate the Constitution in the context of an escalating public health crisis. *Id.*

Similarly, the Governor’s travel orders meet the judicial scrutiny set forth in *Jacobson*. The orders have a “real or substantial relation” to protecting the public health in light of the COVID-19 epidemic. The Order implements the White House and the CDC recommendations to cease all non-essential travel. These recommendations intend to limit person-to-person contact and limit interaction in locations of heavy traffic, including airports and gas stations. But the Order also limits travel to the other states, all of which have taken different measures to contain the spread of COVID-19. For instance, some states allowed restaurants and bars to remain open

long after signs of community spread existed and well after other states had closed such businesses. Some states continue to leave these venues open. Some states have allowed beaches to stay open; others allow retail businesses to remain open. More recently, some states have started to reopen venues.⁶³ The facts on the ground evolve by the hour.⁶⁴ And the Governor can only control the restrictions in place in Kentucky. To ensure these restrictions sufficiently protect Kentuckians, the Governor must take action to reduce their exposure in all other states.

The limitation on interstate travel is not “beyond question, in palpable conflict with the Constitution.” *See Zemel*, 381 U.S. at 15 (interstate travel may be limited to prevent spread of disease). *First*, the orders limit travel out of the state except: when required by employment; when rendering care as a healthcare professional or volunteer healthcare worker related to the State of Emergency; to obtain groceries, medicine, or other necessary supplies; to seek or obtain care by a licensed healthcare provider; to provide care for the elderly, minors, dependents, persons with disabilities, or other vulnerable persons; or when required by court order. (Executive Orders 2020-258 and 2020-266). Thus, the orders limit travel out of the state *except* when necessary to protect public health. They do not impose an “outright ban” on interstate travel. *See Abbott*, at *9.

Second, the travel orders only prohibit interstate travel, not intrastate travel. The orders are much less restrictive than measures taken by others states.⁶⁵ And the orders could not be

⁶³ *See* Morgan Hines, *Florida begins reopening beaches amid coronavirus crisis, and people are enthusiastically flocking*, <https://www.usatoday.com/story/travel/news/2020/04/18/coronavirus-florida-beaches-reopen-big-crowds-during-pandemic/5159264002/> (last visited on April 22, 2020).

⁶⁴ On April 20, the Governor of Georgia announced the opening of certain businesses by April 24. *See* Hannah Hagemann and Brakhton Booker, *Georgia Beginning To Reopen Its Economy, Lifting Some Coronavirus-Crisis Limits*, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/839338550/georgia-beginning-to-reopen-its-economy-lifting-some-coronavirus-crisis-limits> (last visited on Apr. 21, 2020).

⁶⁵ 42 states have implemented some form of state-wide shelter in place order. *See* Sarah Mervosh, Denis Lu and Vanessa Swaltes, *See Which States and Cities Have Told Residents to Stay Home*, <https://nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last visited on Apr. 21, 2020).

drawn less restrictive because of the ever-changing conditions and responses by each state. It would be futile to exempt geographical areas of the country because the lack of testing confident reliance on the cases reported by other states. Nor is it practical to issue an ever-changing restriction on interstate travel based on the new measures other states implement to close and reopen venues. As a result of the country's state-by-state approach, the Governor can only be assured in the protective measures being taken within Kentucky. To that end, the travel orders narrowly address a specific issue within the public health response: preventing exposure outside of the state from causing spread within the state.

Third, the travel orders are limited to the duration of the state of emergency and may be rescinded at any point it is deemed safe for Kentuckians to travel out of the state. (Executive Orders 2020-258 and 2020-266.) Thus, the orders only temporarily delay any planned travel outside of the state. *See Abbott*, at *9 (state action delaying exercise of a right does not constitute an outright ban on the right).

Plaintiff's argument in response amounts to one sentence stating the Order is not narrowly tailored to meet a compelling interest. (Doc. 7-1, Page ID# 145.) But *Jacobson* informs that this is not the standard. *See infra*, at pp. 29-30. And Plaintiff can only cite to precedent generally recognizing the right to travel, but doesn't cite to any precedent limiting a Governor's power to issue quarantines in furtherance of protecting the public health. In every Supreme Court case cited before this Court by the parties, the Court has permitted temporary burdens to individuals' movement when necessary to protect the public health. Therefore, Supreme Court precedent precludes Plaintiff from demonstrating a *strong* likelihood of success on his claim of a violation of the right to interstate travel. The Governor's actions protect the public health and provide necessary exceptions and limitations to accommodate that goal.

D. Plaintiffs Cannot Prevail on Their Procedural Due Process Claim.

Plaintiffs raise a claim of procedural due process. (Doc. 6, Page ID##: 86-87.) Under the Fourteenth Amendment to the United States Constitution, no state shall “deprive any person of life, liberty, or property, without due process of law” “Procedural due process rules are meant to protect persons not from deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

Plaintiffs specifically allege that “[b]y issuing and enforcing the Travel Bans and other orders, without any process to appeal a determination or an order to quarantine, Governor Beshear and the other Defendants herein are depriving and will continue to deprive Plaintiffs and other similarly situated Kentuckians of the right to procedural due process secured by the Fifth and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983, thereby causing harm.” (Doc. 6, Page ID#: 87, ¶ 79.) Plaintiffs cannot prevail on this claim. First, it is not ripe for review and, therefore, the Court is without jurisdiction to hear it. Second, even if the claim were ripe and the Court had jurisdiction, any person ordered to quarantine involuntarily by the Commonwealth is provided all the process due by the Constitution.

1. Plaintiffs’ due process claim is not ripe.

Before addressing a claim’s merits, a court “must be convinced that the claim in question is ripe for review” *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992). Under Article III of the federal Constitution, the jurisdiction of federal courts is limited to consideration of actual cases and controversies. *See id.* (citing *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 627 (6th Cir. 1987)). Thus, “[r]ipeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.” *Id.* (citation and internal

quotation marks omitted). A procedural claim is not ripe if it presents “no more than speculation that the process, if it were permitted to proceed, might be infirm.” *Brown v. City of Royal Oak, Mich.*, 202 Fed. Appx. 62, 67 (6th Cir. 2006).

Here, Plaintiffs do not allege that they have been forced to self-quarantine or otherwise deprived of their liberty without due process of law. Instead, they merely speculate that *if* the travel ban and other executive orders issued during the state of the COVID-19 emergency are enforced against them, the process that might be used will be infirm in violation of the due process clause. This claim is not ripe. Thus, the Court lacks jurisdiction to hear it and should dismiss it.

2. Even if Plaintiffs’ due process claim was ripe, it still fails.

Even assuming, *arguendo*, that Plaintiffs’ procedural due process claim was ripe, however, they cannot succeed as a matter of law on the claim. The due process clause generally requires that “deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). However, post-deprivation notice and opportunity for a hearing may satisfy procedural due process in some circumstances, such as where quick action by the state is necessary. *See Zinermon v. Burch*, 494 U.S. 113, 128 (1990) (citing cases).

To date, Governor Beshear and Secretary Friedlander, through the Kentucky Department for Public Health, are aware of fifteen (15) cases where individuals in the Commonwealth have been ordered to quarantine involuntarily, and those cases have involved diagnoses of and/or definite exposure to COVID-19. (Stack Aff., ¶ 50.)⁶⁶ The quarantine orders have come from state courts, with the affected individuals afforded post-deprivation notice and an opportunity to be

⁶⁶ In the vast majority of cases, individuals have been asked and have agreed voluntarily to self-quarantine.

heard pursuant to KRS 209.130.⁶⁷ Here, there can be no doubt that where preventing the spread of COVID-19 is at issue, quick action by the Commonwealth is necessary, and therefore post-deprivation notice and hearing satisfy the requirements of due process.

Notably, violation of an emergency executive order also constitutes a Class A misdemeanor under Kentucky law. KRS 39A.990. Of course, any person charged with a Class A misdemeanor is afforded all the process due under the Constitution, just like any other criminal defendant in the Commonwealth. *See, e.g.*, U.S. CONST., amends. V, VI.

Accordingly, Plaintiffs' procedural due process claim is not ripe for review, and even if it was ripe, Plaintiffs cannot prevail as a matter of law on that claim.

II. Plaintiffs Fail To Allege An Irreparable Injury.

Generally, courts presume irreparable injury when a Plaintiff alleges a violation of a constitutional right. *Overstreet*, 305 F.3d at 578 (citation omitted). Plaintiffs rest their argument on this presumption. However, when Supreme Court precedent rebuts the allegation, the presumption gives way to the alleged facts. *Id.* Plaintiffs concede as much here, noting the presumption only remains "[t]o the extent that the moving party can establish a likelihood of success on the merits of its constitutional claims[.]" (Doc. 7-1, Page ID#: 147 (citing *Connection Dist. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).) For the reasons stated above, Plaintiffs cannot demonstrate a strong likelihood of success on the merits. As a result, they are not entitled to the presumption of irreparable injury.

⁶⁷ Generally, these court records are filed under seal. However, at least some have been documented by media reports. *See* Andrew Wolfson, "Can the government force you to quarantine if you're infected with coronavirus?", Louisville Courier Journal, March 16, 2020, available at courier-journal.com/story/news/2020/03/16/coronavirus-kentucky-state-law-allows-involuntary-quarantine/5060657002/ (last visited Apr. 19, 2020) (noting that the Nelson County Attorney obtained a confidential court order to require a resident to involuntarily quarantine); Andrew Wolfson, "Louisville man with coronavirus ordered to isolate himself or risk arrest and charges," Louisville Courier Journal, March 23, 2020, available at courier-journal.com/story/news/2020/03/22/Louisville-man-ordered-quarantinedlouisville-man-ordered-quarantined/2895866001/ (last visited Apr. 19, 2020) (noting that the order to quarantine was signed by the Jefferson Circuit Court Chief Judge).

Having solely relied on that presumption, Plaintiffs fail to set forth factual allegations to demonstrate an irreparable injury. For instance, they do not allege they are currently under a forced quarantine. Nor do they allege they will miss a specific event due to the Governor's Orders. Instead, Plaintiffs focus on the *prior* actions of KSP notifying them of the requirement to self-quarantine after violating the prohibition on all mass gatherings. They do not allege a specific and *forthcoming* irreparable injury. And, as to the travel restrictions, Plaintiff Roberts alleges he frequently travels to Ohio to volunteer and socialize. But all of the travel restrictions are temporary as to the state of emergency. Thus, the Orders delay Plaintiff Roberts intentions; they do not prevent them from ever occurring. *See Abbott*, at *9 (state action delaying exercise of a right does not constitute an outright ban on the right). As such, and in light of the serious public health threat posed by Plaintiffs' desire to worship communally and socialize and volunteer in other states,⁶⁸ they fail to allege an irreparable injury to warrant preliminary injunctive relief.

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

Plaintiffs' requested relief would cause substantial harm to the public health and safety. With respect to faith-based mass gatherings, the CDC and the White House have recommended avoiding social gatherings of ten or more people. *See supra*, p. 7. Epidemiological evidence demonstrates that mass gatherings in defiance of these recommendations, and in defiance of the Governor and the Secretary's Order, have resulted in the spread of COVID-19. Of particular relevance to Plaintiffs' motion, faith-based mass gatherings have resulted in the spread of COVID-19.

⁶⁸ Plaintiffs' failure to recognize the public health threat posed by their intended actions and insistence that they can adhere to social distancing while engaging in these activities reflects a policy disagreement with the Governor, as well as every public health official. Such a disagreement bears no relationship to the legal standards under which the Orders are reviewed. *See Jacobson*, 197 U.S. at 28 (a court should not second-guess a state's policy choices in crafting emergency public health measures).

Again, for example, a revival in Hopkins County in mid-March has been linked to more than 50 confirmed cases of the novel coronavirus and, to date, six deaths. *See supra*, p. 10. And in the state of Washington, a church choir rehearsal in early March resulted in 45 confirmed cases and two deaths. (*See supra*, p. 11.)

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. (Stack Aff., ¶ 15.)

With respect to interstate travel, the Governor's orders are in line with guidance from the CDC and the White House recommending the avoidance of all discretionary travel. Travel outside of Kentucky presents an increased risk of exposure, which then could allow the virus to be brought back into the state. This is true because not all states acted as swiftly or as decisively as Kentucky to prevent the spread of COVID-19. Neighboring states that were slower to take steps to mitigate the spread of the virus have faced increased incidence of it. Tennessee, for example, saw a rapid acceleration of the spread of confirmed positive cases. On March 17, Tennessee had confirmed 73 cases.⁶⁹ This doubled over the next two days to 154 cases.⁷⁰ By March 23, the number quadrupled to 615.⁷¹ Over the next week it tripled to 1,834 total cases on

⁶⁹ *COVID-19 Bulletin #1 – March 17, 2020*, Tennessee Office of the Governor, <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/3/17/covid-19-bulletin--1---march-17--2020.html>. (last visited Apr. 21, 2020).

⁷⁰ *COVID-19 Bulletin #3 – March 19, 2020*, Tennessee Office of the Governor, <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/3/19/covid-19-bulletin-3---march-19--2020.html>. (last visited Apr. 21, 2020).

⁷¹ *COVID-19 Bulletin #4 – March 23, 2020*, Tennessee Office of the Governor, <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/3/23/covid-19-bulletin--4---march-23--2020.html>. (last visited Apr. 21, 2020).

March 30,⁷² and then more than doubled over the next week to 3,802 cases on April 6.⁷³ As of this April 20, 2020, Tennessee had 7,238 cases of COVID-19.⁷⁴

Allowing faith-based mass gatherings and interstate travel 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. We are already seeing this in other areas of the country, and limited supplies of personal protective equipment require those health care workers to face increased threat of exposure.⁷⁵ As more health care workers become exposed, hospitals have less capacity hospitals to treat the sick.⁷⁶ The Commonwealth's orders represent efforts to prevent this spike in cases because if its health care systems become overwhelmed, all of the problems of COVID-19 compound.

Additionally, the efforts and sacrifices Kentuckians have made to engage in social distancing and limit their exposure to one another would be sacrificed, if citizens could participate in a mass gathering within the Commonwealth's borders or merely travel across the border to engage in the social activities currently banned in Kentucky. The progress made to flatten the curve could be reversed out if Kentuckians become exposed at a mass gathering or in another state and return home infected.

⁷² *COVID-19 Bulletin #8 – March 30, 2020*, Tennessee Office of the Governor, <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/3/30/covid-19-bulletin--8.html>. (last visited Apr. 21, 2020).

⁷³ *COVID-19 Bulletin #13 – April 6, 2020*, Tennessee Office of the Governor, <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/4/6/covid-19-bulletin--13---april-6--2020.html>

⁷⁴ See <https://www.tn.gov/health/cedep/ncov.html> (last visited Apr. 21, 2020).

⁷⁵ See Bernared Condon, Jim Mustian, and Jennifer Peltz, *Coronavirus News: Video Shows New York City Emergency Room Overflowing With Patients as City on Frontlines of Coronavirus Outbreak*, (Associated Press, March 28, 2020), available at <https://abc7ny.com/jamaica-hospital-queens-new-york-city-nyc-coronavirus/6058195/> (last visited on April 22, 2020).

⁷⁶ Andrew Jacobs, Matt Richtel and Mike Baker, *'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire*, (New York Times, March 19, 2020), available at <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> (last visited on April 22, 2020).

Plaintiffs do not have an adequate argument in response. Instead, they argue that there are secular exceptions, as well as a lack of enforcement against anyone other than those attending Easter Sunday in-person religious services. But this 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. As a result of the substantial harm currently posed by mass gatherings and interstate travel, Plaintiffs cannot meet their burden.

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

Citing *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665 (E.D. Mich. 2010), Plaintiffs argue that “the public interest always strongly favors the vindication of constitutional rights and the invalidation of any state action which infringes on those rights or chills their confident and unfettered exercise.” (Doc. 7-1, Page ID #: 148.) However, while, “[g]enerally speaking, ‘the public interest is served by preventing the violation of constitutional rights[,]’ . . . enjoining officials from pursuing their chosen policies is not without costs.” *League of Women Voters v. Hargett*, 400 F.Supp.3d 706, 733-34 (M.D.Tenn. Sept. 12, 2019) (quoting *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004)). Courts, then, are directed to weigh the Plaintiffs’ interests against that of the public. *Id.*

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

ability to take these measures is significant, as the purpose is to prevent the spread of COVID-19 and save the lives of Kentuckians. Certainly, that overrides the public's interest in the right to travel, which is burdened only temporarily by the Governor's orders, and which contain exceptions for travel pursuant to court order or for purposes of public health. It also overrides the public's interest in attending in-person faith-based mass gatherings, especially since there are multiple other ways citizens may worship during this time, including virtual and drive-in services, and religious services are not singled out or burdened differently from other mass gatherings in the March 19, 2020 Order.

CONCLUSION

For the foregoing reasons, Defendants Governor Beshear and Secretary Friedlander respectfully ask the Court to deny Plaintiffs' Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction.

Respectfully submitted,

/s/ S. Travis Mayo
La Tasha Buckner
General Counsel
S. Travis Mayo
Chief Deputy General Counsel
Taylor Payne
Deputy General Counsel
Laura Tipton
Deputy General Counsel
Marc Farris
Deputy General Counsel
Office of the Governor
700 Capitol Avenue, Suite 106
Frankfort, KY 40601
(502) 564-2611
LaTasha.Buckner@ky.gov
travis.mayo@ky.gov
taylor.payne@ky.gov
laurac.tipton@ky.gov
marc.farris@ky.gov

Counsel for Governor Andrew Beshear

/s/ Wesley Duke (with permission)
Wesley W. Duke
Executive Director
Office of Legal Services
David T. Lovely
Deputy General Counsel
Cabinet for Health and Family Services
275 East Main Street 5W-A
Frankfort, KY 40621
(502) 564-7042
WesleyW.Duke@ky.gov
davidt.lovely@ky.gov

Counsel for Acting Secretary Eric Friedlander

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing Response to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction via the Court's CM/ECF system, causing counsel of record to be served.

/s/ S. Travis Mayo
S. Travis Mayo