Nos. 20-5749

UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT

TONY RAMSEK, *et al.*

Plaintiffs-Appellees,

v.

ANDY BESHEAR, in his official capacity as
GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, *et al.*

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
Nos. 3:20-CV-00036

BRIEF OF GOVERNOR ANDY BESHEAR, SECRETARY ERIC FRIEDLANDER AND COMMISSIONER DR STEVEN STACK

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STATEMENT CONCERNING ORAL ARGUMENT

Defendants-Appellants Governor Beshear, Secretary Friedlander and Dr. Stack request oral argument in this matter. The issues presented in this appeal raise important questions regarding a state's ability to protect its citizens during a public health emergency and the Free Speech Clause of the First Amendment.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) in this appeal from a District Court order granting a preliminary injunction. The order was entered on June 24, 2020. (RE 47.) Defendants-Appellants Governor Andy Beshear, Secretary Eric Friedlander, and Commissioner Dr. Steven Stack ("Defendants") timely filed their notice of appeal on July 2, 2020. (RE 48.). The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

ISSUES PRESENTED FOR REVIEW

Defendants appeal the District Court's issuance of a preliminary injunction enjoining an order of the Defendants that prohibited mass gatherings of more than ten people as it applied to gatherings for the purpose of political speech. Specifically, Defendants appeal the District Court's holding that the order was not narrowly tailored. The Defendants also appeal the District Court's failure to apply the appropriate standard of review that applies to public health orders entered during the COVID-19 emergency.

STATEMENT OF THE CASE

Defendants Governor Andy Beshear, Secretary of the Cabinet for Health and Family Services Eric Friedlander, and Commissioner of the Department for Public Health Dr. Steven Stack appeal the Opinion and Order of the United States District Court for the Eastern District of Kentucky granting a preliminary injunction

enjoining enforcement of an order prohibiting mass gatherings of more than 10 people during the COVID-19 state of emergency as it applied to in-person gatherings for political protest. (RE 47, Page ID#: 762.) The mass gatherings order was implemented to help slow the spread of COVID-19 by limiting the size of gatherings to prevent widespread transmission between individuals. After amending the order to allow gatherings of up to 50 people, Defendants again amended the order to limit gatherings to 10 or fewer people on the recommendation of the White House Coronavirus Task Force because of a surge in positive cases of COVID-19 in the Commonwealth in July.

The underlying facts are not in dispute. Kentucky, like every other state in the country, is in a daily life-and-death battle against COVID-19 – the gravest threat to public health in over a century. COVID-19 is a severe, acute respiratory disease caused by the virus SARS-CoV-2.[1] At the time of this filing, more than 6.2 million Americans have tested positive for COVID-19 and more than 188,500 Americans have died because of the disease.[2] First identified in Wuhan, Hubei

[1] Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/identifying-source-outbreak.html (last visited on Sept. 7, 2020). *See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 451-52.

[2] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Cases, Data & Surveillance, Cases in the U.S., available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%

Province, China in December 2019, the World Health Organization ("WHO") declared the spread of the virus a Public Health Emergency of International Concern on January 30, 2020.[3] The next day, the U.S. Department of Health and Human Services declared a public health emergency, which the Department has twice renewed.[4,5] *See* 42 U.S.C. § 247d. The WHO declared COVID-19 a pandemic on March 11, 2020.[6]

COVID-19 is highly contagious and can be lethal. (Deposition Transcript, RE 43, Page ID ## 456-57, 10:1-3). It spreads primarily among people who are in

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2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fsummary.html (last updated Sept. 8, 2020) (last visited Sept. 8, 2020).

[3] World Health Organization, *WHO Director-General's Statement On [International Health Regulations] Emergency Committee On Novel Coronavirus (2019-nCoV)*, Jan. 30, 2020, available at https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov) (last visited Sept. 7, 2020).

[4] U.S. Department of Health and Human Services, *Determination That A Public Health Emergency Exists*, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx (last visited Sept. 7, 2020).

[5] U.S. Department of Health and Human Services, *Renewal of Determination That A Public Health Emergency Exists*, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx (last visited Sept. 7, 2020).

[6] World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, Mar. 11, 2020, available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited Sept. 7, 2020).

close contact – within about six feet – for a prolonged period of time.[7] (*See id.*, Page ID ## 458-59, 12:24-13:21.) The disease is primarily spread by the projection of droplets from things like sneezing, coughing, speaking, singing, or shouting. (*Id.*, 12:24-13:9.) The droplets could come into contact with another person's eyes, nose, or mouth, or could be inhaled into the respiratory tract. (*Id.*, 13:10-17.) If one person is within six feet of another person, he or she has an increased risk of receiving the droplets. (*Id.*, 13:18-21; Page ID # 460, 14:4-25.)

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.[8] Other than death, contracting COVID-19 could result "in hospitalization, critical care intervention in an intensive care unit, mechanical ventilation, collapse of the respiratory and circulatory system, or a number of other possibilities." (*Id.*, Page ID # 456, 10:4-13.)

On March 6, 2020, Kentucky confirmed its first case of COVID-19. The same day, the Governor declared a State of Emergency. (Ky. Exec. Order No.

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[7] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last updated July 15, 2020) (last visited Sept. 7, 2020).
[8] The CDC's National Center for Health Statistics reports that, as of 2017, Kentucky ranks first among states in deaths for chronic lower respiratory disease, fifth for deaths due to kidney disease, and ninth for heart disease and 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 Sept. 7, 2020).

2020-215).[9] Governor Beshear and the Kentucky Cabinet for Health and Family Services ("CHFS"), through CHFS Secretary Friedlander, then acted decisively to prevent the virus's spread in Kentucky under KRS Chapters 39A.

Specifically, the Governor and CHFS took measured, systematic actions to decrease the number of chances for exposure to the virus by prohibiting certain high-risk activities.[10] The primary objective of the public health measures is to save the lives of Kentuckians. (Deposition Transcript RE 43, Page ID ## 454-55, 8:23-9:2.) The measures are based on science and public health knowledge and principles. (*Id.*, Page ID # 533, 87:2-19.)

Following guidance from the Centers for Disease Control and Prevention ("CDC") and the White House, on March 19, 2019, CHFS issued an Order (hereinafter "mass gatherings 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

[9] Available at https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf (last visited on Sept. 8, 2020). (*See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 454.)

[10] *See generally* Kentucky's Response to COVID-19, available at https://governor.ky.gov/covid19 (last visited Sept. 8, 2020). (*See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 454-55.)

activities." (CHFS Order, Mar. 19, 2020).[11] As Dr. Steven Stack, Commissioner of the Department for Public Health, testified:

> That the evidence in the early days of this epidemic and at present show that when people are brought together in densely confined areas, that the risk of spreading the contagion is elevated. I believe we saw this in Wuhan, China, and Lombardy, Italy, also here domestically in New York City.
>
> And there were publications from the Centers for Disease Control, the World Health Organization, and others that identified that mass gatherings were felt to be particularly high risk. And on the basis of my observed experience – or observing experience in other parts of the world and reading from public health experts in the form of WHO, CDC, and others, it was felt by the public health community and myself that large gatherings of people were particularly high risk for spreading this dangerous infection.

(Deposition Transcript, RE 43, Page ID # 529, 83:1-18.) At the time of this testimony, Dr. Stack stated, "I still believe that mass gatherings are elevated risk for spreading infections." (*Id.*, 83:19-22.)

Respiratory droplets can travel substantially farther than six feet if individuals are shouting or screaming or singing loud, or sneezing with forceful expulsion. (*Id.*, Page ID # 469-70, 23:23-24:10.) Dr. Stack testified, "And any time you increase the number of people who come together, you increase the probability that infected people come in close proximity with uninfected people, spread the

[11] Available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf (last visited Sept. 8, 2020).

disease, and that they subsequently take that back to, to their homes or to their communities, which may be, you know, disparate." (*Id.*, Page ID # 475, 29:12-18.)

Further, according to Dr. Stack:

> … the larger the group, the increased risk that there are more people in that group who may have an infection, expose others. And I've used an analogy early in the course of this response where I described it like buckshot where one individual with infection exposes many others. And when they disperse, they scatter and spread infection, you know, to the places they go. But -- in that context any gathering, again, represents a potential risk.

(*Id.*, Page ID # 519, 73:8-17.) (*See also id.*, Page ID # 531-32, 85:19-86:7.)

Dr. Stack testified regarding the possibility of a protest of about 1,000 people at the Kentucky State Capitol. He explained that, even with people wearing masks and with individuals from different households separated by six feet:

> … any time you bring large numbers of people together during the middle of a pandemic with an easily spread infection for which we have no successful intervention, it is a high-risk activity. There are steps you can take to lower that risk or mitigate the risk. In this instance being outdoors is helpful, the fact that – if you were to be able to keep people six feet apart from each other, it's helpful.
>
> …
>
> But it's also very possible you've contrived a hypothetical that has no bearing on what the likelihood of reality will be. In this case, if you bring together people who are passionate, wildly vocalizing on a topic, and moving around in a free-flowing event, it is highly unlikely they will stay in their six-square-foot box. And so I would say that a mass gathering of any sort remains undesirable in the middle of a pandemic. In this particular case you are describing an activity that is hypothetically possible but realistically difficult, I think, to provide.

(*Id.*, Page ID ## 511-12, 65:17-66:20.) As Dr. Stack also pointed out, while being outdoors lowers the risk of transmission of the virus, it is harmful to compliance with mask usage because of the heat of standing in the sun and the discomfort associated with wearing a mark in such conditions. (*Id.*, Page ID ## 412-13, 66:24-67:1-4; Page # 502-03, 56:12-57:14.)

Recognizing the fundamental difference between a mass gathering and trip to the grocery store, Dr. Stack stated:

> At least in my experience, I have generally gone to the grocery store, selected the items I desired off the shelf. Seldom do I speak to anybody during that interaction. And then I reach the checkout, which is nowadays often a self checkout, though not always, and so I may not interact with other people in any means except to pass them in a transitory nature, you know, walking down an aisle.

(*Id.*, Page ID # 529-30, 83:23-84:10.) As for the difference between a transitory experience and a communal one, Dr. Stack testified:

> So a transitory experience has individuals who are only briefly or temporarily near each other. They often don't interact with each other personally or directly. … it's a brief interaction. So in – in communal activities, and those could be any shape or form where you're together with a group of people over an extended period of time, you have extended exposure to the same people, which increases the risk if one or more of them have an infection, they may spread it to you.

(*Id.*, Page ID # 530, 84:11-25.) The more contact, the higher risk of infection. (*Id.*, Page ID # 531, 85:1-4.)

On March 22, Governor Beshear closed businesses that are not life-sustaining during a global pandemic.[12] He ordered closed other businesses for in-person work and placed additional restrictions on life-sustaining businesses that remained open to help limit the spread of the disease.[13] In large part, these measures were successful in flattening the initial curve of infection in Kentucky, thereby preventing our hospitals and health resources from being overwhelmed.[14]

Plaintiffs-Appellees ("Plaintiffs") filed the underlying action on May 10, 2020. (Complaint, RE 1, Page ID ## 1-31.) Plaintiffs alleged the mass gatherings order violated their right to free speech, assembly, and petition in violation of the First Amendment, as well as their right to procedural due process in violation of the Fifth and Fourteenth Amendments. (*Id.*, Page ID ## 16-24.) Plaintiffs filed emergency motions for a temporary restraining order and preliminary injunction (Emergency Motions, RE 6, Page ID # 75.) Following a telephonic conference, the District Court denied the emergency motion for a temporary restraining order. (Order, RE 10, Page ID # 112.) Specifically, Plaintiffs sought an order allowing them to hold a political rally at the Kentucky State Capitol hosting between 2,000 to 5,000 people. (Emergency Motions, RE 6, Page ID # 87.)

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[12] Available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf (last visited Sept. 7, 2020).
[13] Available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited on Sept. 7, 2020).
[14] (*See* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 455.)

After briefing and oral argument, on May 21, 2020, the District Court denied the Plaintiffs' motion for a preliminary injunction on the ground that they lacked standing. (Opinion and Order, RE 22, Page ID # 290.) Plaintiffs appealed to this Court and sought an injunction pending appeal. (Notice of Appeal, RE 23, Page ID # 291.) On May 23, 2020, this Court concluded that Plaintiffs had standing and granted an injunction pending appeal as to gatherings for drive-in or drive-through protests. (Order, RE 29, Page ID ## 384-389.) The Court then vacated the District Court's order and remanded the matter to determine whether to enjoin enforcement of the mass gatherings order as to in-person gatherings for political protest. (Order, RE 31, Page ID # 396.) The May 23 protest occurred without interference.

On June 3, 2020, the parties submitted supplemental briefs to the District Court. (RE 35, 36.) Thereafter, Plaintiffs deposed Dr. Stack (Deposition Transcript, RE 43.) Per court order, the parties submitted additional supplemental briefing following the deposition. (RE 44, 45.)

On June 24, 2020, the District Court granted Plaintiffs' motion for a preliminary injunction. (Opinion & Order, RE 47, Page ID ##: 742-765.) The court found the mass gatherings order to be content-neutral but not narrowly tailored because the order did not prohibit citizens from going to retail stores, airports, and churches. (*Id*. at 760-61.) On July 2, 2020, Defendants appealed to this Court. (Notice of Appeal, RE 48, Page ID # 766.)

Thereafter, Defendants moved the District Court to stay the preliminary injunction pending this appeal. (Motion, RE 52, Page ID #: 776.) The Court denied the motion. (Order, RE 58, Page ID ## 877-80.)

SUMMARY OF THE ARGUMENT

The United States Supreme Court restrains the District Court's ability to preliminarily enjoin a public health measure limiting the spread of COVID-19 – like the mass gatherings order – except upon a finding that the measure has no "real or substantial relation to those [state interests], or is, beyond all question, a plain, palpable invasion of fundamental rights." *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905). The District Court did not conform its review to the *Jacobson* standard. Its holding - that the mass gatherings order was not narrowly tailored because it did not permit gatherings for political protest while wearing masks and practicing social distancing - is not supported by any free speech clause precedent. Rather, it is a plain misapplication of the law. Moreover, the Court's holding conflicts with recent Supreme Court orders in *Illinois Republican Party v. Pritzer*, 19A1068 (U.S. July 4, 2020); *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, et al*., 591 U.S. ___ (2020); *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (Mem.) (2020), and *Elim Romanian Pentecostal Church v. Pritzker*, 19A1046 (Order List 590 U.S.) (U.S. May 29,

2020), each denying preliminary injunctive relief based on First Amendment claims.

The record below demonstrates that the mass gatherings order is a content-neutral time, place, and manner restriction enacted to slow the spread of COVID-19. The District Court's order second-guesses the lengths to which the Commonwealth must go to protect the public health from this disease. This Court should reverse the District Court's order.

ARGUMENT

The District Court abused its discretion when it granted Plaintiffs' motion for a preliminary injunction against the mass gatherings order as it applied to in-person gatherings for political protest. Specifically, the District Court misapplied the law in holding that the mass gatherings order was not narrowly tailored because it did not prohibit gatherings at retail stores, airports or churches and did not permit political protests to occur if participants wore masks and remained six feet apart. A public health measure addressing COVID-19 is narrowly tailored so long as without it the state's interest would be achieved less effectively. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989).

The District Court also failed to exercise the judicial restraint mandated by the standard set forth by the United States Supreme Court in *Jacobson*. The mass gatherings order is not "beyond any question, a plain, palpable invasion of

fundamental rights." *Id*. at 30. The mass gatherings order is a content-neutral time, place, and manner restriction intended to slow the spread of COVID-19 at large gatherings of citizens where crowd size, health and sanitation requirements, and proper contact tracing cannot be maintained or monitored.

I. Standard of Review.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotations omitted). A preliminary injunction based on an alleged constitutional violation is reviewed *de novo*. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014) (citations omitted). With a First Amendment claim, Plaintiffs ***must*** demonstrate a likelihood of success on the merits. *Id*. at 690 (citations omitted).

Plaintiffs have a higher burden under current circumstances. To make a *clear showing* of a likelihood of success on the merits, Plaintiffs were required to demonstrate that the mass gatherings order "has no real or substantial relation to [protecting the public health or safety], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" *Jacobson*, 197 U.S. at 31.

Under these standards, this Court should reverse the District Court's order granting a preliminary injunction because it misapplies the law in two ways. First, it misapplies the narrowly tailored standard by failing to recognize that the

Commonwealth's goal of limiting the spread of COVID-19 in large gatherings of people would be less effective absent the mass gatherings order. Second, it fails to apply the judicial restraint standard required by *Jacobson* and, instead, second-guesses the need for the mass gatherings order as applied to protests. These errors were not harmless. Applying the appropriate law and restraining itself to *Jacobson*, the District Court should have denied the preliminary relief by finding that Plaintiffs' were not likely to succeed on their free speech claims.

II. The Mass Gatherings Order is Narrowly Tailored.

The District Court failed to apply the law when it held that the mass gatherings order violated the free speech clause of the First Amendment. Its holding rested on the conclusion that the Governor could have tailored the mass gatherings order to allow protests with appropriate social distancing and face covering requirements because he has permitted retail stores, churches, and airports to operate with similar requirements. (Opinion and Order, RE 47, Page ID # 761-62.) The Constitution, however, does not require a state to take less effective measures to prevent the spread of disease; it only requires that the measures wholly target that goal. There can be no doubt – and neither Plaintiffs nor the District Court seem to disagree – that the mass gatherings order does just that.

Appropriately, the District Court found the mass gatherings order to be content-neutral. (*Id*. at 756-60.) In particular, the Court determined that the order

was enacted prior to Plaintiffs' planned protest to serve a purpose unrelated to the content of Plaintiffs' expression: limiting the spread of COVID-19. (*Id*. at 757, 759.) Thus, it recognized that, "Supreme Court precedent constrains this Court to conclude the Mass Gatherings Order is a content-neutral time, place, and manner restriction on Kentuckian's First Amendment rights." (*Id*. at 760.)

But, that precedent also constrains the application of the narrowly tailored standard, precedent the District Court wholly ignored in its analysis. (*See generally id*. (citing to one case for its analysis of the narrowly tailored standard)). In particular, the Court failed to apply *Ward*, wherein the Supreme Court set forth the test for determining whether a content-neutral regulation is narrowly tailored:

> [T]he requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. See *Frisby v. Schultz*, 487 U.S., at 485, 108 S.Ct., at 2502 ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil"). So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

491 U.S. 781, 799-800 (1989) (internal citations omitted).

Here, the narrowly tailored standard is easily met: the Governor has a substantial interest to protect Kentuckians from COVID-19 by slowing its spread, and that interest would be achieved less effectively absent the mass gatherings order. Dr. Stack testified to this point. When large groups of people come together, COVID-19 spreads at a higher rate. (Stack Dep., RE 43, Page ID ## 500-503.) When large groups of people come together, social distancing measures are more difficult to maintain. (*Id*.)

The District Court's holding directly conflicts with *Ward*. In particular, the District Court determined, "A blanket ban on large gatherings, including political protests is not the only way to protect public health. Clearly, policymakers have some tools at their disposal which will help mitigate the spread of coronavirus while still allowing Kentuckians to exercise their First Amendment freedoms." (RE 47, Page ID # 761.) *Ward* expressly instructs that a policymaker is not required to choose the less-restrictive means of achieving its goal. What is required is that the blanket ban on large gatherings entirely targets an appropriate evil. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The record below demonstrates that the transmission of COVID-19 is an appropriate evil facing the Commonwealth, and the prohibition of large in-person gatherings directly targets combatting that evil. This District Court wholly ignored this fact.

The District Court's holding rests on its determination that if social distancing measures are utilized when allowing people to enter retail stores, churches, and airports, they must also be used to allow for a constitutionally protected activity – political protest. This is wrong. The fallacy of the determination is apparent when taken to its conclusion. If the narrowly tailored standard required equal measures, it would be satisfied by equal prohibitions on retail stores, churches and airports. By the District Courts' reasoning, a public health measure could be narrowly tailored by prohibiting *broader* access to retail stores, churches and airports. In other words, the order would be constitutional by banning more speech.

Further, as this Court has recognized, states are not required to employ equal measures to all walks of public life. *See League of Ind. Fitness Facilities*, 814 Fed. Appx. at 129 ("Shaping the precise contours of public health measures entails some difficult line-drawing."). In fact, in the one case the District Court cited to for the narrowly tailored standard – *Williams-Yulee v. Florida Bar* – the Court recognized that "[a] state need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." 575 U.S. 433, 449 (2015) (addressing claim that regulation was underinclusive as to regulating speech). In other words, the Constitution permits a state to target the spread of COVID-19 at protests, while neglecting the spread of COVID-19 in churches. *Id*.

(citing *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)). Indeed, legislation can target political speech, i.e., prohibiting picketing in residential neighborhoods, without running afoul of the First Amendment as long as the legislation does not target the viewpoint or content of the political speech, wholly serves a state interest, and allows alternative channels for the political speech to occur. *See Frisby*, 487 U.S. at 481-488. "[T]he Governor's order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19." *Id*. (citing *Heller v. Doe*, 509 U.S. 312, 321 (1993)).

Finally, the District Court's conclusion rests on an incorrect assumption about the public safety measures employed to combat COVID-19. The CDC identifies mass gatherings of individuals as "superspreading" events.[15] In the context of COVID-19, they pose significant and unique risk as opposed to retail stores, churches and airports. Protests, by their nature, present unique risks in the context of mass gatherings. They occur without controls. Individuals, unknown to one another and from different communities, come together to often vocalize their opposition to a position by chanting, singing, or yelling. (RE 43, Page ID # 511-12, 65:17-66:20.) Compliance with the social distancing and hygiene measures

[15] Identifying and Interrupting Superspreading Events—Implications for Control of Severe Acute Respiratory Syndrome Coronavirus 2, Thomas R. Frieden and Christopher T. Lee, EID Journal, Volume 26, Number 6, June 2020, available at https://wwwnc.cdc.gov/eid/article/26/6/20-0495_article (last visited on Sept. 8, 2020).

required of churches or businesses is more challenging, if not impossible, at a large protest. (*Id*.) Moreover, contact tracing remains a crucial tool for public health officials to identify infected individuals and inform individuals they came into contract with of likely exposure. (*Id*. Page ID # 501-03, 55:21-57:14.) But a mass gathering such as a protest make contact tracing difficult because an individual comes into contact with many different unknown individuals without a way to identify and inform each person that may have been exposed.[16]

The mass gatherings order is a content neutral time, place, and manner restriction to slow the spread of COVID-19. The order does not apply to any particular speech because of its topic or the idea or message expressed. *Cf. Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 169 (2015). It limits the amount of individuals that can gather in a park for a birthday to the same degree it limits the amount of people that can gather for a political protest. As long as the mass gatherings order does not target the content or viewpoint of Plaintiffs' speech and is directly aimed at preventing the spread of COVID-19, it is constitutional. Thus, even if allowing large gatherings to occur with appropriate social distancing measures protects the public health, the Governor may go further, provided the

[16] Why tracing coronavirus cases from the Black Lives Matter protests could be nearly impossible, Shira Feder and Hilary Brueck, Insider, June 9, 2020, available at https://www.insider.com/contact-tracing-coronavirus-cases-after-protests-will-be-difficult-2020-6 (last visited September 8, 2020). (*See also id*.)

mass gatherings order still entirely targets limiting the spread of COVID-19. It cannot be questioned that it does. It therefore meets the narrowly tailored standard set forth by the United States Supreme Court.

III. The District Court Failed To Exercise The Judicial Restraint That *Jacobson* Requires.

"Our Constitution principally entrusts '[t]he safety and health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38) (brackets in original). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id*. (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Because actions taken within these "broad limits" should not be "second-guess[ed] by an 'unelected federal judiciary,'" *id*. (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)), the United States Supreme Court mandates a deferential standard of review. *See Jacobson*, 197 U.S. at 31. This Court and others have applied that standard in reviewing executive actions protecting the public health and safety during the COVID-19 pandemic. *See, e.g., League of Indep. Fitness Facilities & Trainers, Inc.*, 814 Fed. Appx. at 127-28 (citing *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020); *In re Rutledge*, 956 F.3d 1018, 1031–32 (8th Cir. 2020); *In re Abbott*, 956 F.3d 696, 704–05 (5th Cir. 2020); *Geller v. de Blasio*, – F. Supp.

3d – , 2020 WL 2520711, at *3 (S.D.N.Y. May 18, 2020); *McGhee v. City of Flagstaff*, No. 2020 WL 2308479, at *3 (D. Ariz. May 8, 2020); *Givens v. Newsom*, – F. Supp. 3d –, 2020 WL 2307224, at *3 (E.D. Cal. May 8, 2020)).

The standard is one of significant judicial restraint. In *Jacobson*, the Supreme Court upheld a state law that required vaccination during the smallpox epidemic. 197 U.S. at 27. The Court stated:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29. This includes the "the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. The "mode or manner in which those results are to be accomplished is within the discretion of the state[.]" *Id*. at 25. Subject to challenge, courts are instructed "only" to interfere:

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, ***beyond all question, a plain, palpable invasion of rights secured by the fundamental law***[.]

Id. at 31 (emphasis added).

A violation of the Constitution is not enough to warrant judicial intervention. The violation must be both palpable, i.e., easily perceptible, and beyond all question of a doubt. *Id*. In *Jacobson*, this meant that the law was not exercised "so arbitrary and oppressive in particular cases[] as to justify the interference of the

courts to prevent wrong and oppression." *Id*. at 38. As a hypothetical, the Court implied it would interfere in "[e]xtreme cases[,]" where for instance vaccination of an adult "in a particular condition of his health or body would be cruel and inhumane[.]" *Id*. This is not an extreme case and the mass gatherings order is neither arbitrary nor oppressive under the circumstances.

The District Court's misapplication of *Jacobson* is evident. It reserves its analysis for the final three pages of its 24-page opinion. And the analysis of *Jacobson* is limited to the court's defense of its decision, stating:

> There is a difference between second-guessing the efficacy of instituting a Mass Gatherings Order in the first instance – which the Court does not do – and requiring the Governor to use his discretion to craft an Order that does not completely eliminate Kentuckians' ability to gather for in-person exercise of the First Amendment rights.

(RE 47 at 765.)The District Court was correct in one sense: it is not the place of courts to second-guess the difficult policy decisions made by governors to slow the spread of COVID-19. *See S. Bay*., 140 S.Ct. at 1613. But *Jacobson* requires more.

Absent from the 24-page opinion is application of the deferential standard of judicial restraint that the Supreme Court requires. The District Court failed to make a finding that the mass gatherings order had no real or substantial relation to slowing the spread of COVID-19 or was beyond all question, a plain, palpable invasion of rights secured by the fundamental law in order to authorize its issuance of the preliminary injunction. Quite the opposite, the court held the mass

gatherings order was not narrowly tailored because it permits citizens to gather in retail stores, airports, parking lots, and churches. (RE 47 at 761.) Even if this were true, such a violation is neither palpable nor beyond any question, but an original application of the narrowly tailored standard unsupported by free speech jurisprudence. (See Argument II.) More importantly, such a conclusion cannot meet the standard *Jacobson* requires because it is at direct odds with developing Supreme Court precedent declining requests to enjoin state action subject to First Amendment challenges by the same argument.

Those cases begin with *South Bay*, where the Court, in a 5-4 decision, denied an application by South Bay United Pentecostal Church to enjoin enforcement of a public health measure restricting capacity in places of worship. Chief Justice Roberts concurred with the Court's denial, finding that the restrictions on places of worship "appear consistent with the Free Exercise Clause of the First Amendment[]." *Id.* Addressing the argument of disparate treatment between industries that has dominated the Circuits, the Court stated:

> Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

Id. On the same day, the Court also denied an application by two churches in Chicago to enjoin Illinois' stay-at-home order. *Elim Romanian Church, et al. v. Pritzker, Gov. of Illinois*, 19A1046 (Order List 590 U.S.) (U.S. May 29, 2020).

Following *South Bay* and *Elim*, on July 24, 2020, the Court again denied a church's application for injunction in a 5-4 decision. *Calvary Chapel Dayton Valley v. Sisolak*, --- S.Ct. ---, 2020 WL 4251360 (Mem) (2020). The church alleged that a Nevada order limiting indoor worship services to fifty persons while allowing secular activities such as casinos to operate at 50% capacity violated the Constitution. *Id*., at *1. Notably, in a dissenting opinion, Justice Alito, with whom Justices Thomas and Kavanaugh joined, recognized the deference paid to orders entered in the early stages of the COVID-19 pandemic as distinguishable from more recently issued orders. He wrote:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency – and the opening days of the COVID-19 outbreak plainly qualify – public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules.

Id., at *2.

The Supreme Court's instruction has not been limited to cases involving primarily free exercise claims. On July 4, 2020, Supreme Court Justice Brett Kavanaugh denied an application by the Illinois Republican Party and others to enjoin the Governor of Illinois from enforcing an Executive Order that prohibited gatherings of more than 50 people. *See Illinois Republican Party v. Pritzer*, 19A1068 (U.S. July 4, 2020). The order began as a prohibition on groups of more than 10 people and was later amended to prohibit groups of more than 50. *See* Opinion and Order, *Illinois Republican Party v. Pritzker*, 2020 WL 3604106, at *1 (N.D. Ill. July 2, 2020). Plaintiffs challenged the Executive Order as a violation of the free speech and free association clauses of the First Amendment, arguing in part that the order was content-based because it exempted religious services from the capacity limitation. *Id*.

While Justice Kavanaugh alone denied the application, his denial is revealing. It indicates broader support on the Court for denying preliminary injunctive relief to free speech challenges against orders such as the mass gatherings order. Along with the decisions of Justices Roberts, Sotomayor, Kagan, Ginsburg and Breyer to deny applications for injunctions in *South Bay*, *Elim*, and *Calvary Chapel*, it indicates that the United States Supreme Court concludes that blanket bans on mass gatherings do not plainly and palpably violate the free speech clause for purposes of granting preliminary relief during a global pandemic.

Thus, the District Court's decision here was both novel and in conflict with Supreme Court Orders. By definition, the alleged constitutional violation here was neither palpable nor beyond all question. At this preliminary stage of the proceeding, the District Court's failure to restrain its review to the *Jacobson* standard was a violation of the law. That failure led it to grant a preliminary injunction against an emergency public health measure enacted in the early stages of the COVID-19 outbreak. The Governor and other public health officials must retain the wide discretion afforded to them to address emergencies, especially in the early days of the virus. *See Calvary Chapel*, 2020 WL 4251360, at *2.

IV. The District Court's Errors Are Not Harmless.

As detailed above, the District Court misapplied the law governing content-neutral time, place and manner restrictions and failed to restrain its review to that required by *Jacobson*. Its misapplication of the law led it to an erroneous result: preliminarily enjoining a constitutionally valid public health measure limiting the spread of COVID-19.

A. The mass gatherings order is content-neutral, narrowly tailored and leaves open alternative channels for communication.

The mass gatherings order is a permissible time, place, and manner restriction. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). This

includes public forums, such as state capitols and their grounds, where "the government may impose reasonable restrictions on the time, place, or manner of protected speech[.]" *Ward*, 491 U.S. at 791. To pass constitutional muster, a time, place, or manner restriction must be: (1) content-neutral, (2) "narrowly tailored to serve a significant government interest" and (3) "leave open ample alternative channels for communication of the information." *Id*. (citation omitted). As explained above, the mass gatherings order is narrowly tailored. But, it is also content-neutral and leaves open alternative channels for Plaintiffs to communicate their opinions.

To be sure, here the challenged order does not target or restrict any speech; any effect on speech is incidental. *See Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) ("a regulation of places where speech may occur," rather than a regulation of the speech itself is content-neutral) (citing *Hill v. Colorado*, 530 U.S. 703, 719 (2000)). Moreover, the effect applies neutrally: the order prohibits all mass gatherings. That the order distinguishes gatherings of people for work or faith-based services "is inapposite." *Givens*, No. 2:20-cv-852 (Doc. 18, at 12). The distinction is not one of content, viewpoint or the type of speech, but as a matter of public health. The spread of COVID-19 makes any mass gathering dangerous to the public health regardless of the social distancing and hygiene measures employed. (Deposition Transcript, RE 43 at 501-03, 55:18 -57:14.) But restricting

social encounters in a way that stops people from working, obtaining food, washing their clothes, or reporting on this crisis would undermine the public health goals. The same cannot be said of an in-person gathering for political protest.

Plaintiffs have ample alternative channels of communication. They may voice their complaints through the Governor's Office of Constituent Services. The mass gatherings order does not preclude drive-in protests where individuals remain in their cars. And, the order permits groups to organize in smaller groups, not exceeding – at this time – ten people. These channels allow Plaintiffs to reach their intended audience, as the Sixth Circuit requires. *See Contributor v. City of Brentwood, Tenn.*, 726 F.3d 861, 865 (6th Cir. 2013).

B. Plaintiffs' other claims do not warrant preliminary injunctive relief.

Plaintiffs' claims below under the right to assemble and petition take them no further. Both rights are still subject to restrictions "as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29; *see also Givens*, No. 2:20-cv-852 (Doc. 18, p. 16-19) (denying right to assemble and petition claims for same reasons the court denied right to free speech claim). Nor do Plaintiffs raise any concerns under these claims that are not subsumed by the concerns raised under the free speech claim. *See Int'l Soc. for Krishna Consciousness, Inc. v .Evans*, 440 F.Supp. 414, 421 (S.D. Oh. Aug. 25, 1977) (analyzing free assembly claims under free speech analysis when intent of assembly is to communicate ideas). *See also*

Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 388 (2011) (analysis of petition clause must be guided by the objectives underlying the right). Here, Plaintiffs' claims under the right to assemble and petition are inextricably intertwined with their free speech claim. For the reasons set forth above, neither would be successful.

C. The balance of equities weighs heavily against issuing a preliminary injunction.

Plaintiffs failed to show they would suffer irreparable harm in the absence of a preliminary injunction. Most importantly, Plaintiffs did not allege, let alone prove, they were unable to attend or organize any rally. Rather, they alleged a speculative injury – a fear of prosecution for violating the mass gatherings order. A hypothetical fear of prosecution, however, is not an irreparable injury. *See D.T. v. Sumner Cty. Schools*, 942 F.3d 324, 327 (6th Cir. 2019) (the hypothetical threat of prosecution is not an irreparable injury warranting a preliminary injunction) (citations omitted). Defendants confirmed before the District Court that neither the Plaintiffs nor others will be prosecuted solely for attending any political rally. Indeed, the May 23 rally occurred without interference from Defendants.

Additionally, the preliminary injunction has caused substantial harm to the Commonwealth's authority to respond to a global pandemic. Without a comprehensive and aggressive response, the spread of COVID-19 will continue to increase. Dr. Stack stated, based on his experience and knowledge, protests of the

magnitude originally proposed by Plaintiffs on the Capitol grounds "will be very difficult for organizers to control and conduct safely." (RE 43, Page ID # 501-03, 55:18 -57:14.) Further, although social distancing and use of face coverings may help reduce the risk, and is a part of any response, significant risk remains any time large groups of individuals gather. (*Id.* at 475-76, 29:24 -30:22.) Complicating the matter, the chanting and yelling a protest typically involves will spread the respiratory droplets that transmit COVID-19 from infected persons more widely. (*Id*. at 531-32, 85:19 -86:7.) Protestors could then take the virus back to their communities, increasing the spread of COVID-19 throughout Kentucky, not just among protest attendees. (*Id.* at 474-75, 28:24-29:19.) By limiting the Governor's response, the District Court has harmed the state's goal to enact a comprehensive public health response.

Finally, the public interest was not served by granting a preliminary injunction. 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 the public's. *Id*. Not just the Governor, but the other constitutional officers, Kentucky

courts, schools, 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 gathering in-person to protest at the Capitol, which is burdened only temporarily by the Governor's Orders. This is especially true considering the alternative channels for Plaintiffs to protest.

CONCLUSION

For the reasons set forth herein, this Court should reverse the District Court's order granting Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32 and the type-volume limitation because it contains 7,560 words and uses proportionally spaced typeface of Times New Roman in 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

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ADDENDUM

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