UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARYVILLE BAPTIST CHURCH, INC., and DR. JACK ROBERTS,	)	
Plaintiffs,	)	CASE NO. _____
v.	)	
ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky,	)	
Defendant.	)	

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

Plaintiffs, MARYVILLE BAPTIST CHURCH, INC. ("Maryville Baptist Church" or the "Church"), and DR. JACK ROBERTS ("Dr. Roberts"), pursuant to Fed. R. Civ. P. 65 and L.R. 7.1, move the Court for a Temporary Restraining Order (TRO) and Preliminary Injunction (PI) restraining and enjoining Defendant, ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky (the "Commonwealth" or "Kentucky"), from unconstitutionally enforcing and applying the various COVID-19 orders issued by Governor Beshear and other Commonwealth officials (collectively, the "GATHERING ORDERS") purporting to prohibit Plaintiffs, on pain of criminal sanctions and mandatory, household-wide quarantines, from gathering for in-person or even "drive-in" worship services at the Church, regardless of whether Plaintiffs meet or exceed the social distancing and hygiene guidelines pursuant to which the Commonwealth disparately and discriminatorily allows so-called "life-sustaining" commercial and non-religious entities (e.g., beer, wine, and liquor stores, warehouse clubs, and supercenters) to accommodate large gatherings of persons without scrutiny or numerical limit.

Last Saturday, April 11, 2020, this Court issued a TRO restraining and enjoining the Mayor of Louisville from "**enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on drive-in church services at On Fire**." *See On Fire Christian Ctr., Inc. v. Fisher*, No. 3:20-CV-264-JRW, 2020 WL 1820249, *1 (W.D. Ky. Apr. 11, 2020) (emphasis added). The Court issued the TRO because the Mayor threatened the plaintiffs in that action with criminal enforcement of Governor Beshear's COVID-19 orders. The Louisville Mayor had said that he would "use the police to deter and disburse" religious gatherings, had requested that the police "record license plates of all vehicles in attendance," and threatened that individuals would be contacted by public health officials informing them to self-quarantine under the threat of criminal sanction. *Id.* at *4–5. The Court held such threats and actions were unconstitutional because the government "**may not ban its citizens from worshipping**." *Id.* at *8 (emphasis added). And although the Louisville TRO was necessarily limited to the plaintiffs before the Court in the case, the Court admonished, "Louisville ought not to view the limits of this injunction as a green light to violate the religious liberty of non-parties." *Id.* at *1 n.2.

Nevertheless, **what the Mayor of Louisville only threatened to do to On Fire Christian Center, and this Court enjoined as unconstitutional under the First Amendment, Governor Beshear actually did to Plaintiffs**. Governor Beshear dispatched the Kentucky State Police to issue notices to Plaintiffs that their attendance at church was a criminal act, record the license plates of all vehicles in the Church's parking lot, and sent letters to all vehicle owners that they must self-quarantine and engage in certain government-supervised behaviors for 14 days or be subject to further sanction. (V.Compl. ¶¶ 2, 4, 43–55.)

Plaintiffs pray unto this Court to issue a TRO restraining and enjoining the Commonwealth from similarly **enforcing, attempting to enforce, threatening to enforce, or otherwise**

requiring compliance with any prohibition on religious gatherings as against Plaintiffs. Plaintiffs do not seek, at this emergent stage of the proceedings, to undermine the entirety of the Commonwealth's efforts to prevent the spread of COVID-19 in Kentucky. **Plaintiffs merely seek to be free from the unconstitutional application of the GATHERING ORDERS in such a way that they are threatened with criminal sanctions and mandatory, household-wide quarantines, risk loss of their occupations, and suffer criminal penalties for simply going to church.** Absent emergency relief from this Court, Governor Beshear and the State Police will continue to threaten Plaintiffs with criminal sanctions and other penalties, **including this Sunday**, by targeting Plaintiffs' religious gatherings for discriminatory treatment.

As shown in the Verified Complaint filed contemporaneously herewith, **notice and an opportunity to respond to this lawsuit cannot be effectuated, and attempts would be futile, prior to this Sunday's worship activities at the Church**, when the Commonwealth will again interfere with the constitutional liberties of Plaintiffs absent a temporary restraining order from this Court. (V.Compl. ¶¶ 86–88.) Approximately 40 hours before filing this lawsuit, Plaintiffs' counsel wrote to Governor Beshear and other Commonwealth officials by e-mail seeking their assurance that the Commonwealth would cease enforcing its prohibitions of religious gatherings, but received no response, even after attempts at follow up by telephone. (V.Compl. ¶ 86.)

MEMORANDUM OF LAW

To obtain a TRO or PI, Plaintiffs must demonstrate they have a strong likelihood of success on the merits, that they will suffer irreparable injury absent the order, that the balance of the equities favors the order, and that the public interest is served by the Court's issuing the order. *See Workman v. Bredesen*, 486 F.3d 896, 905 (6th Cir. 2007); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575, *1 (W.D. Ky. Mar. 15, 2019) (identifying same four factors for deciding TRO and PI motions).As shown herein, Plaintiffs easily satisfy each

of these elements factually and legally. (Plaintiffs hereby incorporate by reference the allegations of Plaintiffs' Verified Complaint, filed contemporaneously herewith, as their statement of facts in support of their TRO and PI motion.)

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE COMMONWEALTH'S APPLICATION OF THE GATHERING ORDERS IS UNCONSTITUTIONAL AND SHOULD BE RESTRAINED.

A. The Commonwealth's Unconstitutional Application of the GATHERING ORDERS Restricts Plaintiffs' First Amendment Rights to Speech and Assembly and Should Be Restrained.

1. The Commonwealth's unconstitutional application of the GATHERING ORDERS discriminates against Plaintiffs' speech rights and rights to assemble on the basis of content.

"Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (same). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227 (emphasis added). Put simply, the Supreme Court handed down a firm rule: **laws that are content based on their face must satisfy strict scrutiny**. *Id.*

Importantly, this firm rule mandating strict scrutiny of facially content-based restrictions of speech applies regardless of the government's alleged purpose in enacting the law, even if the alleged purpose arises from a time of purported emergency. *See id.* ("On its face, the [law] is a content-based regulation of speech. **We thus have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict**

scrutiny.") In so holding, the Court rejected the lower court's rationale that the alleged purpose behind enacting the content-based law can justify subjecting it to diminished constitutional protection. *Id.* "[T]his analysis skips the crucial first step . . . determining whether the law is content neutral on its face." *Id.* at 2228. The answer to that question, the *Reed* Court said, is dispositive of the level of scrutiny applicable to the regulation of speech. *Id.* "**A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech**." *Id.* (emphasis added). "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229.

Thus, content-based laws must satisfy strict scrutiny, regardless of any purported justification the Commonwealth may assert. *Reed*, 135 S. Ct. at 2229. "Because the [law] imposes content-based restrictions on speech, those provision can stand only if they survive strict scrutiny." *Id.* at 2231. **There are no exceptions to this rule**.[1] Indeed, the notion that a content-based restriction on speech is presumptively unconstitutional is "so engrained in our First Amendment jurisprudence that last term we found it so 'obvious' as to not require explanation." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991). "Regulations that permit the Government to discriminate on the basis of the content of the message

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[1] The concurring Justices confirm the concrete nature of the rule. *See, e.g.*, *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring) (noting that under the majority's rule, a finding of content discrimination is "**as an automatic strict scrutiny trigger**." (emphasis added)); *id.* at 2236 (Kagan, J., concurring in the judgment) ("Says the majority, when laws single out specific subject matter, they are facially content based; and when they are facially content based, they are **automatically subject to strict scrutiny**." (emphasis added)).

cannot be tolerated under the First Amendment." *Id.* at 116. Furthermore, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The burden is on the Commonwealth to prove it can satisfy strict scrutiny, and it cannot meet that burden.

This Court need look no further than the text of the GATHERING ORDERS and their application to determine that they are content-based restrictions on constitutionally protected liberties. The GATHERING ORDERS purport to prohibit "all mass gatherings," meaning any activity "that brings together groups of individuals," except "where large numbers of people are present" for the "normal operations" of many types of businesses and services. (V.Compl. ¶ 24–26, EX. D.) The GATHERING ORDERS then go further, creating **19 expansive categories** of commercial and other non-religious entities that are exempted from any prohibition against large numbers of people, including liquor, warehouse, and supercenter stores. (V.Compl. ¶ 31–33, EX. F.) **Thus, the Commonwealth found 19 categories of businesses for which large numbers of people may gather without restraint, but expressly prohibited the constitutionally protected assemblies or "gatherings" of "faith-based" groups.** The Sixth Circuit has noted that restrictions are "**undeniably content-based**" when the government establishes a system where "some types of [speech] are extensively regulated while others are exempt from regulation." *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3 609, 622 (6th Cir. 2009) (emphasis added) (quoting *Solantic, LLC v. City of Neptune Beach*, 410 F.3 1250, 1263 (11th Cir. 2005)). The GATHERING ORDERS and their application do precisely this. The Commonwealth has targeted "faith-based" gatherings, prohibited Plaintiffs from engaging in such gatherings, and threatened them with criminal sanctions and self-quarantine orders for engaging in such gatherings, but permits gathering at liquor, warehouse, and supercenter stores. That is a textbook content-based restriction

on Plaintiffs' constitutionally protected activities. It must therefore satisfy strict scrutiny, which it plainly cannot do. (*See infra* section I.D.)

2. The unconstitutional application of the GATHERING ORDERS represents an unconstitutional prior restraint.

It is axiomatic that prior restraints are highly suspect and disfavored. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Indeed, "**[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity**." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (emphasis added). "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965).

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. **[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition**.

Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 165–66 (2002) (emphasis added); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) ("While this freedom from previous restraint . . . upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the [First Amendment]."); *Carroll v. President & Comm'r Princess Anne, et al.*, 393 U.S. 175, 181 (1968) ("**Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect from abridgment**." (emphasis added)).

The Supreme Court has consistently permitted facial challenges to prior restraints without requiring a plaintiff to show that there are no conceivable set of facts where the application of the particular government regulation might or would be constitutional. *See, e.g., Horton v. City of St.*

Augustine, 272 F.3d 1318, 1331–32 (11th Cir. 2001) ("the Supreme Court itself in *Salerno* acknowledged [that prior restraints are the] exception to the 'unconstitutional-in-every-conceivable-application' rule") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 889 (N.D. Ohio 2009) (noting First Amendment challenges are an exception to the *Salerno* 'unconstitutional in all applications' rule).

Additionally, as numerous federal courts have recognized, total prohibitions on speech represent prior restraints. *See, e.g.*, *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1364 (M.D. Fla. 2000) ("This Court also finds that . . . moratoria are governed by prior restraint analysis in the same manners as permitting schemes."); *D'Ambra v. City of Providence*, 21 F. Supp. 2d 106, 113–14 (D.R.I. 1998) (moratorium on protected expression that includes no indication of ending is a complete prohibition and invalid prior restraint); *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102, 1108 (W.D. Wash. 2005) (total prohibitions on protected expression fail prior restraint analysis). The GATHERING ORDERS are such a prior restraint.

The Sixth Circuit has explicitly noted that it "presume[s] prior restraints are unconstitutional." *Novak v. City of Parma*, 932 F..3d 421, 432 (6th Cir. 2019). One of the most abhorrent systems of prior restraint is "a procedure that places unbridled discretion in the hands of a government official and might result in censorship." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002); *see also East Brooks Books, Inc. v. Shelby Cnty.*, 588 F.3d 360, 369 (6th Cir. 2009) ("Constitutional invalidity of prior restraints may result from . . . the risk of censorship association with the vesting of unbridled discretion in government officials."). There can be no question that the GATHERING ORDERS "forbid protected speech in advance" of Plaintiffs' church services, *Novak*, 932 F.3d at 432, and thus constitute a prior restraint. *Id.* More

problematically, however, is that the GATHERING ORDERS place unbridled discretion in the hands of Commonwealth officials, and are thus unconstitutional.

3. The GATHERING ORDERS unconstitutionally vest unbridled discretion in the hands of Commonwealth officials, which they have used to discriminate against Plaintiffs' religious gatherings.

The danger inherent in the viewpoint discriminatory policies and application here is only increased by the unbridled discretion given to government officials. "When a city allows an official to ban [speech] in his unfettered control, it sanctions a device for suppression of free communication of ideas." *Saia v. People of State of N.Y.*, 334 U.S. 558, 562 (1948). "[E]ven if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, **it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion**." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988) (emphasis added). The danger of viewpoint discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. This is precisely why "**[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official**." *Forsyth Cnty.*, 505 U.S. at 133 (emphasis added).

Binding precedent from the Sixth Circuit also mandates that prior restraints not impermissibly vest County officials with unbridled discretion. *See, e.g., United Food & Comm. Workers Union, Local 1099 v. Sw. Ohio Reg. Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) ("a statute or ordinance offends the First Amendment when it grants a public official unbridled discretion such that the official's decision to limit speech is not constrained by objective criteria

but may rest on ambiguous and subjective reasons"); *id.* ("We will not presume that the public official responsible for administering a [prior restraint] will act in good faith and respect a speaker's First Amendment rights"); *East Brooks Books*, 588 F.3d at 369 (holding a prior restraint would not pass constitutional muster when it lacks "explicit and objective criteria"); *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 893 (6th Cir. 2012) ("[O]rdinances must contain precise and objective criteria on which [officials] must make their decisions; an ordinance that gives too much discretion to public officials is invalid"); *Polaris Amphitheater Concerts v. City of Westerville*, 267 F.3d 503, 509 (6th Cir. 2001) ("in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, the law invites opportunities for the unconstitutional suppression of speech" (internal quotation marks and citations omitted)).

Here, the GATHERING ORDERS lack specific and definite checks on the discretion of government authorities. "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty.*, 505 U.S. at 133 n.10. Here, the GATHERING ORDERS' vesting of unbridled discretion is not only unconstitutional because there are no checks on the Commonwealth, but is even worse because the Commonwealth has **actually exercised** its unchecked discretion to prohibit religious gatherings while not prohibiting similar non-religious gatherings. Nothing in the GATHERING ORDERS limits the authority of Commonwealth officials to target church services or religious gatherings that are abiding by social distancing and personal hygiene practices while not equally targeting non-religious gatherings doing the same. In fact, that is precisely what the GATHERING ORDERS demand of Commonwealth officials. The

entire scheme established by the GATHERING ORDERS enshrines the type of "ambiguous and subjective reasons" the doctrine of unbridled discretion was intended to prevent. *United Food & Comm. Workers*, 163 F.3d at 359. Indeed, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). The GATHERING ORDERS have instituted a total prohibition on "faith-based" gatherings throughout the entire forum of the Commonwealth without any standards or objective criteria for why Plaintiffs' religious gatherings should be treated differently than the gathering of large numbers of people occurring daily at liquor, warehouse, and supercenter stores. The First Amendment demands more, and so should this Court.

B. The Commonwealth's Unconstitutional Application of the GATHERING ORDERS Violates Plaintiffs' First Amendment Rights to Free Exercise of Religion and Should Be Restrained.

Though the Commonwealth might not view church attendance as fundamental to the religious beliefs of Plaintiffs, its opinion is irrelevant to the protections afforded to Plaintiffs' sincerely held religious beliefs. Plaintiffs' "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merits First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). Indeed, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or **regulates or prohibits conduct because it is undertaken for religious reasons**." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. As this Court just noted, prohibiting Plaintiffs from attending church services where other non-religious gatherings

are permitted under similar circumstances "**violat[es] the Free Exercise Clause beyond all question**." *On Fire Christian Ctr.*, 2020 WL 1820249, at *6 (emphasis added). Even in a time of crisis or disease, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the First Amendment does not evaporate. Indeed, "even under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose." *On Fire Christian Ctr.*, 2020 WL 1820249, at *8; *see also Terminiello v. City of Chicago*, 337 U.S. 1, 27, 31, 38 (1949).

1. Burdens on sincerely held religious beliefs are subject to strict scrutiny if neither neutral nor generally applicable.

As a matter of black letter law, "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. But, as here, "[a] law failing these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 532. The GATHERING ORDERS are neither neutral nor generally applicable and therefore must satisfy strict scrutiny.

2. The Commonwealth's application of the GATHERING ORDERS is neither neutral nor generally applicable.

a. The GATHERING ORDERS are not neutral.

"Although a law targeting religious beliefs as such is never permissible . . . if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. To determine neutrality, courts look to the text of the law "for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* But, "[f]acial neutrality is not determinative. The Free Exercise Clause extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 534. This is so because, as here, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with facial neutrality." *Id.* For the First Amendment prohibits hostility that is "masked,

as well as overt." *Id.* The GATHERING ORDERS are not facially neutral, and even if they were, they represent subtle departures from neutrality by treating Plaintiffs' religious or "faith-based" gatherings differently than similar non-religious gatherings.

The GATHERING ORDERS fail even cursory facial examination. They expressly target "faith-based" gatherings for disparate treatment. (V.Compl. ¶ 24, EX. D.) Yet, in the very same text of the GATHERING ORDERS, businesses such as liquor, warehouse, and supercenter stores exempted from the broad prohibitions. (V.Compl. ¶¶ 32–33, EX. F.) As this Court just noted, when the government "has targeted religious worship" for disparate treatment – such as parking in a parking lot of Maryville Baptist Church – while "not prohibit[ing] parking in parking lots more broadly – including, again, the parking lots of liquor stores," it simply fails the test of neutrality. *On Fire Christian Ctr.*, 2020 WL 1820249, at *6. Gov. Beshear expressly targets churches and churchgoers, threatening criminal prosecution, sending State Police, and issuing notices of quarantine to people parked in a church parking lot for Sunday service, including drive-in only. At the same time, no similar action is directed to people who park in liquor store lots, gather in Walmart, or freely move about in a long list of secular businesses.

b. The GATHERING ORDERS are not generally applicable.

In determining general applicability, the courts focus on disparate treatment of similar conduct. *Lukumi*, 508 U.S. at 542. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* The textbook operation of a law that is not generally applicable is one where "inequality results" from the government "decid[ing] that the governmental interests it seeks to advance are worthy of being pursued **only against conduct with religious motivation**." *Id.* at 543 (emphasis added). In *Lukumi*, the Supreme Court held that a law "fall[s] well below the minimum standard necessary to

protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

This is precisely the effect of the GATHERING ORDERS. First, they purport to prohibit "all mass gatherings," but define "mass gatherings" to exclude large gatherings of people at numerous businesses and other non-religious entities. (V.Compl. ¶ 24–26, EX. D.) Their text makes it plain that "faith-based" gatherings are prohibited, large numbers of people may gather at liquor, warehouse, and supercenter stores, as but a few examples. (V.Compl. ¶¶ 31–33, EX. F.) Non-religious **large gatherings at an expansively defined 19 categories of businesses are permitted** if social distancing and personal hygiene guidelines are followed—"when possible" and to the extent "practicable." (V.Compl. ¶¶ 28–33, EXS. E, F.) But "faith-based" gatherings are still prohibited, even if social distancing and personal hygiene guidelines are followed religiously. If large gatherings at liquor, warehouse, and supercenter stores are not prohibited, even though endangering citizens (or not) to an equal degree, then it is obvious "faith-based" gatherings have been targeted for discriminatory treatment. Such a blatant discriminatory application of the GATHERING ORDERS "falls well below the minimum standard" the First Amendment demands. *Lukumi*, 508 U.S. at 543; *see also On Fire Christian Ctr.*, 2020 WL 1820249, at *6 (holding that government regulation is not generally applicable when it targets religious gatherings with "orders and threats" but does not apply the same orders and threats to similar non-religious conduct). The GATHERING ORDERS are not generally applicable.

C. The GATHERING ORDERS Violate the Kentucky Religious Freedom Restoration Act and Their Enforcement Should Be Restrained.

The Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350 [hereinafter KRFRA], prohibits the government from substantially burdening a person's exercise of religion.

If the government does burden religious exercise, it must demonstrate "by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest." *Id.*

1. The exercise of Plaintiffs' religion requires them not to forsake the assembling of themselves together.

KRFRA notes that its protection of the "freedom of religion" permits Plaintiffs "[t]he right to act or refuse to act in a manner motivated by a sincerely held religious belief." Plaintiffs have adequately demonstrated they have sincerely held religious beliefs, rooted in Scripture's commands (e.g., Hebrews 10:25), that followers of Jesus Christ are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. (V.Compl. ¶¶ 123, 199, 226, 238.) And, as this Court has recognized, "many Christians take comfort and draw strength from Christ's promise that 'where two or three are gathered together in My name, there am I in the midst of them.'" *On Fire Christian Ctr.*, 2020 WL 1820249, at *8 (quoting *Matthew* 18:20). Indeed, the Court explained, "the Greek work translated church . . . literally means **assembly**." *Id.*

2. The GATHERING ORDERS substantially burden Plaintiffs' exercise of religion.

The GATHERING ORDERS place a substantial burden on Plaintiffs' right to religious freedom and the exercise of their sincerely held religious beliefs. KRFRA defines a "burden" as "indirect burdens such as withholding benefits, **assessing penalties**, or an exclusion from programs or access to facilities." (Emphasis added.) There can be no question that the GATHERING ORDERS, on their face and as applied by the Commonwealth, impose direct penalties on Plaintiffs for the act of attending church in conformance with their sincerely held religious beliefs. On Easter Sunday, in accordance with the Governor's directives under the GATHERING ORDERS, the Kentucky State Police stationed themselves outside of Maryville

Baptist Church, intimidated worshippers, and assessed direct penalties on the owners of cars in the parking lot. (V.Compl. ¶¶ 43–51, EXS. I, J.) Plaintiffs received the Commonwealth's NOTICE on their vehicles that threatened them with criminal sanctions for simply parking in the parking lot of Maryville Baptist Church. (*Id.*) The NOTICE informed Plaintiff Dr. Roberts and other recipients that they were subject to criminal penalties, further enforcement actions by the health officials, and mandated self-quarantine for the act of going to church. (*Id.*)

In addition to the NOTICE provided by the State Police, Plaintiff Dr. Roberts and others received letters from the Commonwealth informing them that they were required to self-quarantine, to take their temperatures daily and report to the health department, that they were required to sign a document "outlining" their responsibilities to the Commonwealth, and that failure to do so would be grounds for further criminal or civil action. (V.Compl. ¶¶ 52–55, EX. K.) If these government-issued dictates do not constitute a substantial burden, then the term has no meaning. Criminal sanctions, self-quarantine, and government-issued invitations to self-criticize before the politburo for the mere act of going to church are quintessential burdens on religious freedom, and why laws like KRFRA are enacted.

D. The Commonwealth's Application of the GATHERING ORDERS Cannot Withstand Strict Scrutiny and Should Be Restrained.

Because the GATHERING ORDERS and the targeting of churches are a content-based restriction on Plaintiffs' speech and assembly rights, are neither neutral nor generally applicable, and substantially burden Plaintiffs' sincerely held religious beliefs (*see supra* sections I.A–C), there is no question they must survive strict scrutiny. The Commonwealth is therefore subject to "the most demanding test known to constitutional law." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). In fact, "**it is the rare case in which a . . . restriction withstands strict scrutiny**." *Reed v. Town of*

Gilbert, 135 S. Ct. 2218, 2236 (Kagan, J., concurring) (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015)) (emphasis added). *See also Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("we readily acknowledge that a law rarely survives such scrutiny"). Indeed, "**strict-scrutiny review is strict in theory but usually fatal in fact**." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (emphasis added); *see also Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 366 (2009) (Breyer, J., concurring) ("strict scrutiny" is "a categorization that almost always proves fatal to the law in question"). This is not that rare case, and the mandatory application of strict scrutiny here condemns the GATHERING ORDERS to their constitutional grave.

1. The Commonwealth's unconstitutional application of the GATHERING ORDERS and discriminatory treatment of "faith-based" gatherings is not supported by a compelling interest.

When "[a] speech-restrictive law with widespread impact" is at issue, "**the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights**." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Here, because the GATHERING ORDERS infringe upon Plaintiffs' free speech rights, the government "must do more than simply posit the existence of the disease sought to be cured. **It must demonstrate that the recited harms are real, not merely conjectural**." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (regulation of speech must still demonstrate that the alleged harm is not "mere speculation or conjecture"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (same). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire Christian Ctr.*, 2020 WL 1820249, at *7. Plaintiffs do not doubt the sincerity of the Commonwealth's assertion of such an interest. But where the Commonwealth permits regular large gatherings of persons for commercial purposes, while expressly prohibiting Plaintiffs' "faith-based" gatherings, the government's assertions of a compelling interest are substantially diminished. Indeed, the GATHERING ORDERS "cannot be regarded as protecting an interest of the highest order . . . **when it leaves appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added). *See also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (same). Indeed, where the government creates a large system of exceptions, such as the Commonwealth's system of exempted businesses where people can gather without limit (VC ¶30), the Supreme Court has recognized that such exceptions "can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011)). The GATHERING ORDERS thus "have every appearance of a prohibition that society is prepared to impose upon [Plaintiffs' religious gatherings] but not on itself." *The Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring). In fact, the GATHERING ORDERS suggest that the Commonwealth is prepared to accept the risk of gatherings at liquor, warehouse, and supercenter stores, but cannot stomach Plaintiffs' assembly for a church service, even with the social distancing that is good enough for others. The Commonwealth cannot permit broad swaths of gatherings that carry the same (if not greater) risk than those posed by Plaintiffs' church services and claim constitutional protection. "Such a prohibition does not protect an interest of the highest order." *Id.*

2. The Commonwealth cannot satisfy its burden of proving narrow tailoring because the GATHERING ORDERS are not the least restrictive means.

Plaintiffs "**must be deemed likely to prevail unless the government has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than enforcing the act**." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added). Indeed, to prove narrow tailoring, the Commonwealth is required to demonstrate that there are no less restrictive means capable of achieving its desired result. *See, e.g., Boos v. Berry*, 485 U.S. 312, 329 (1988) (when content-based restrictions on speech are analyzed under strict scrutiny, an ordinance "is not narrowly tailored [where] a less restrictive alternative is readily available"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (noting that under "the most exacting scrutiny" applicable to content-based restrictions on speech, the government must employ the least restrictive alternative to pass narrow tailoring). The Commonwealth cannot do so. The Commonwealth bears the burden of demonstrating narrow tailoring as a matter of law, a burden it cannot satisfy here. Further, the Commonwealth has not and cannot demonstrate that it seriously undertook to consider other less-restrictive alternatives and ruled them out for good reason. Indeed, as the orders from other states plainly demonstrate, faith-based and religious gatherings can be—and have been—exempted from such draconian prohibitions or at least treated on an equal basis with other businesses and gatherings that may continue to operate. As such, the Commonwealth utterly fails to demonstrate narrow tailoring.

a. The Commonwealth bears the burden of demonstrating narrow tailoring.

Even on a motion for TRO or PI, the Commonwealth unquestionably bears the burden of demonstrating that the GATHERING ORDERS are narrowly tailored. As the Supreme Court has held: "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O*

Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006). As such, on a preliminary injunction motion, **the government—**not the movant—bears the burden of proof on narrow tailoring, because **the government** bears that burden at trial. *Ashcroft*, 542 U.S. at 665 (on preliminary injunction motion, "**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute." (emphasis added)).

The Commonwealth indisputably bears the burden of proving narrow tailoring at trial. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *id.* at 2540 ("To meet the requirement of narrow tailoring, **the government must demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier" (emphasis added)). Thus, the Commonwealth also bears—and falls woefully short of meeting—the burden of proving narrow tailoring here. *Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 665.

b. The Commonwealth has not demonstrated that it seriously considered less speech restrictive alternatives and ruled them out for good reason.

The Commonwealth also flunks the narrow tailoring strict scrutiny test for yet another, even more compelling reason. In connection with its narrow tailoring burden, the Commonwealth must show that it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. Thus, the Commonwealth "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives**

were closely examined and ruled out for good reason." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added).

The Commonwealth utterly fails this test. The Commonwealth tried nothing else. It considered nothing else but a complete prohibition. The Commonwealth jumped straight to a purported ban on "all mass gatherings," and proclaimed that "faith-based" gatherings were included among the prohibition. (V.Compl. ¶¶ 24–26, EX. D.) But the Commonwealth drove a Mack Truck through its prohibition by expansively exempting numerous businesses and non-religious entities, such as liquor, warehouse, and supercenter stores. (V.Compl. ¶¶ 26–33, EXS. D–F.) The Commonwealth has not and cannot state why or how gathering with a large number of persons at a warehouse or supercenter store is any less "dangerous" to public health than attending a worship service, yet it exempted the non-religious gatherings and prohibited Plaintiffs' church services. Quite simply, it appears the Commonwealth "burn[ed] the house to roast the pig" by imposing draconian prohibitions "not reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The Commonwealth tried nothing else, and for that reason alone, fails the narrow tailoring analysis required under *McCullen*.

c. The numerous other COVID-19 orders specifically exempting religious gatherings or treating them equally to non-religious gatherings demonstrates less restrictive and non-discriminatory alternatives exist.

Even if the Commonwealth could substantiate compelling interests for the GATHERING ORDERS' discriminatory application to "faith-based" or religious gatherings, which it cannot, the Commonwealth could not meet its burden of showing that the GATHERING ORDERS are narrowly tailored. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). There must be a 'fit between the . . . ends and the means chosen to accomplish

those ends.'" *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity, government may regulate the area of First Amendment freedoms only with narrow specificity." *Ward*, 491 U.S. at 794.

The Supreme Court has clearly established that "[t][he government may not regulate a ['mode of speech'] based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). The GATHERING ORDERS impose discriminatory and disparate treatment on "faith-based" gatherings that are not applied to similar or larger non-religious gatherings. Where other, content-neutral alternatives exist, such as here, government cannot fulfill its narrow tailoring burden by ignoring those alternatives. *See id.* at 395 ("The existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a statute, casting considerable doubt on the government's protestations that the 'asserted justification is in fact an accurate description of the purpose and effect of the law.'" (citations omitted)).

As shown in the Verified Complaint, the Commonwealth has ignored numerous other, less restrictive means of achieving its purported interest. One option tried successfully in other jurisdictions is to exempt religious gatherings from gathering prohibitions altogether. The States of Florida and Indiana have declared religious gatherings essential activities which may continue. (V.Compl. ¶¶ 70-71, EXS. L, M.) The Commonwealth has refused to consider or attempt it. Another less restrictive alternative would be to allow churches to continue in-person services provided they agree to maintain adequate social distancing and personal hygiene practices. Arizona, Arkansas, Alabama, and Connecticut have all permitted such an exception for religious gatherings. (V.Compl. ¶¶ 72–75, EXS. N–Q.) Plaintiffs have demonstrated they already engage in

the recommended social distancing and personal hygiene practices recognized by the Commonwealth as sufficient for non-religious gatherings (V.Compl. ¶¶ 56–63.) There is no justification for depriving Plaintiffs of the same benefit.

Indeed, as this Court has already exquisitely stated, the Commonwealth is unlikely to be able to demonstrate that it deployed the least restrictive means because the GATHERING ORDERS and their application

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

On Fire Christian Ctr., 2020 WL 1820249, at *7 (emphasis added) (footnote omitted).

Put simply, the Commonwealth's failure to try other available alternatives that have worked and are working in other jurisdictions across the country demonstrates that it has not and cannot satisfy its burden to demonstrate that its actions are narrowly tailored. It thus fails strict scrutiny, and the TRO and PI are warranted.

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

Governments are not empowered to create "First Amendment Free Zones" within their borders, like the Commonwealth has done here. *See, e.g.*, *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (striking local government's attempt to prohibit protected expression within a "First Amendment Free Zone."); *United States v. Stevens*, 559 U.S. 460, 470 (2010) (government in not empowered to create First Amendment free zones with respect to certain categories of speech). Saying that Plaintiffs may avoid irreparable injury by simply "watching church services online" while foregoing established constitutional rights is simply insufficient

under the First Amendment. Indeed, "violations of First Amendment rights constitute per se irreparable injury," *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 10799 (6th Cir. 1994), and it does not matter that such an injury could be—in the Commonwealth's opinion—reduced by not following the dictates of Plaintiffs' conscience and sincerely held religious beliefs because "even minimal infringements upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009).

Not only is the Commonwealth's invitation for Plaintiffs to "stay home and watch church online" itself offensive and baseless as a matter of settled law, it also betrays the Commonwealth's failure to understand that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, First Amendment violations are **presumed** to impose irreparable injury. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012); *see also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that **no further showing of irreparable injury is necessary**." (emphasis added)).Thus, demonstrating irreparable injury in this matter "**is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today**." *On Fire Christian Ctr.*, 2020 WL 1820249, at *9 (emphasis added).

III. THE BALANCE OF THE EQUITIES WARRANTS A TRO AND PI.

An injunction in this matter will protect the very rights the Supreme Court has characterized as "lying at the foundation of a free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The granting of a TRO and PI enjoining enforcement of the GATHERING ORDERS on Plaintiffs' church services will impose no harm on the Commonwealth. "[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004).

"[I]t is well established that the public has no interest in the enforcement of an unconstitutional law." *EMW Women's Surgical Ctr. v. Meier*, 373 F. Supp. 3d 807, 826(W.D. Ky. 2019). But for Plaintiffs, as noted above, "even minimal infringements upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Jones*, 569 F.3d at 277. As such, there can be no comparison between the irreparable and unconscionable loss of First Amendment freedoms suffered by Plaintiffs absent injunctive relief and the non-existent interest the Commonwealth has in enforcing unconstitutional GATHERING ORDERS. Indeed, as this Court noted, absent a TRO, Plaintiffs "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On Fire Christian Ctr.*, 2020 WL 1820249, at *9. The balance of the equities tips decidedly in Plaintiffs' favor, and the TRO and PI should issue.

IV. A TRO AND PI ARE IN THE PUBLIC INTEREST.

"Injunctions protecting First Amendment freedoms are **always in the public interest**." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added); *see also Elrod*, 427 U.S. at 373. This protection is *ipso facto* in the interest of the general public because "First Amendment rights are not private rights [but] rights of the general public [for] the benefits of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288–90 (5th Cir. 1969) (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). There is no "evidence that churches are less essential than every other business that is currently allowed to be open," *On Fire Christian Ctr.*, 2020 WL 1820249, at *9, and "**the public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *Id.* (emphasis added).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court issue the TRO and PI as set forth in the Prayer for Relief in Plaintiffs' Verified Complaint (V.Compl. at 48.)

Respectfully submitted,

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