VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

LYNCHBURG RANGE & TRAINING, LLC
d/b/a SafeSide Lynchburg,

VIRGINIA CITIZENS DEFENSE LEAGUE,

GUN OWNERS OF AMERICA, INC.,

and

ASSOCIATION OF VIRGINIA GUN RANGES,

Plaintiffs, **Case No. CL20000333-00**

v.

HON. RALPH S. NORTHAM
(In his Official Capacity as
Governor of the Commonwealth of Virginia)

and

GARY T. SETTLE
(In his Official Capacity as
Superintendent of the Virginia State Police)

Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF APPLICATION FOR TEMPORARY INJUNCTION

Plaintiffs file this Supplemental Memorandum to bring to the Court's attention recent decisions of at least two other courts to issue immediate injunctive relief with respect to similar executive orders, and on similar grounds as those presented by the Plaintiffs.

I. ***First Baptist Church v. Kelly*** 2020 U.S. Dist. LEXIS 68267 (D. Kansas, April 18, 2020)

In *Kelly*, the court observed that "[t]he Governor has issued a series of executive orders imposing restrictions on numerous public and private activities in light of the COVID-19 pandemic." *Id.* at *3. The court went on to detail a series of increasingly restrictive orders by the Governor of Kansas, which culminated in an order 5 days before Easter Sunday which restricted religious gatherings to no more than 10 congregants, but included a "long list of activities and facilities that were exempt from the prohibitions in the order" provided that social distancing was maintained. *Id.* at *5. The court in *Kelly* first held that the highest level of scrutiny was applicable, as the executive order clearly treated activity protected by an enumerated right (First Amendment) differently than other activities. So it should be in this case, given that an enumerated right – Article I, §13 of the Virginia Constitution – is infringed, while other purely commercial interests, such as liquor stores and electronics stores, remain open in the Commonwealth.

The court in *Kelly* went on to explain, as Plaintiffs have argued in the present case, that the Kansas governor's executive order cannot, at a minimum, treat similarly situated secular commercial interests (such as restaurants) differently and more favorably than those protected by the enumerated right of free exercise of religion. *Id.* at *22. In the present case, the burden placed on the activity of indoor ranges in the Commonwealth is even more acute – they are completely shuttered, while nearly all merely commercial interests in the Commonwealth remain open to one degree or another. The court called such a distinction "arbitrary," stating that "[t]he legitimate health and safety concerns arising from people attending religious services inside a church would logically be present with respect to most if not all these other essential activities. Defendant has not argued that mass gatherings at churches pose unique health risks that do not

arise in mass gatherings at airports, offices, and production facilities." *Id.* at *23. Indeed, there is no reason whatsoever why an indoor shooting range could not operate with "social distancing," just like any of the businesses that remain open to the public in Virginia.

The court in *Kelly* also acknowledged the unprecedented nature of the COVID-19 pandemic and the general concept that state executives may take significant measures to control the spread, but found significant the fact that "[p]laintiffs have shown, however, that they are willing to abide by protocols that have been determined by the Governor to be adequate to protect the lives of Kansans in the context of other mass gatherings." *Id.* *26. The court in *Kelly* thus found that the public interest was satisfied in issuing injunctive relief, as treating religious gatherings the same as non-religious gatherings would not increase the health risk to the public. This is precisely the relief sought by the Plaintiffs in the present case – to be treated merely the same as other indoor businesses that continue to operate, subject to "social distancing" guidelines.

There are numerous other parallels to *Kelly* in the present case, including the Plaintiffs' fruitless pre-litigation requests to the Governor to amend the executive order. A copy of the *Kelly* opinion is attached as Exhibit A.

II. *On Fire Christian Ctr. v. Fischer*, 2020 U.S. Dist. LEXIS 65924 (W.D. Kentucky, April 11, 2020)

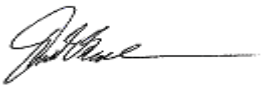
In *Fischer*, the court similarly issued injunctive relief to permit religious services to proceed on Easter Sunday. In that case, the Mayor of Louisville, Kentucky issued an executive order that prohibited religious gatherings even if conducted in a "drive-in" manner wherein congregants would remain in their parked vehicles, separated, during services, yet permitted

liquor stores and "drive-through" restaurants to remain in operation. The court in *Fischer* issued an injunction, and found this mayor's order "stunning" and "beyond all reason, unconstitutional." *Id.* at *3.

As in *Kelly*, the court in *Fischer* acknowledged that society and leaders have the strongest of interests in curbing the spread of COVID-19, but held that officials could not discriminate by permitting secular and merely commercial interests such as restaurants and liquor stores to operate, while completely foreclosing on all religious gatherings. *Id* at *12-13. The court found that the mayor's lists of prohibited activities were "underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that Louisville has permitted on the basis that they are 'essential.' Those 'essential' 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 Easter." *Id.* at *13-14. In the present case, Plaintiffs similarly take no issue with legal alcohol purchases, but it is difficult to comprehend why the Commonwealth's indoor liquor stores must remain open, yet indoor shooting ranges must remain completely shuttered.

Just as in *Kelly*, and in the present case, the plaintiffs in *Fischer* sought relief only sufficient to congregate in accordance with CDC "social distancing" guidelines, which the court also noted as more than reasonable, in granting injunctive relief. Similarly, the court in *Fischer* weighed the public interest in granting in injunction, and reached the same obvious conclusion as in *Kelly* – that people gathering while engaging in social distancing at a church are no different, from a public health standpoint, than those gathering in a socially distant manner anywhere else. A copy of the *Fischer* opinion is attached as Exhibit B.

LYNCHBURG RANGE & TRAINING, LLC
VIRGINIA CITIZENS DEFENSE LEAGUE
GUN OWNERS OF AMERICA, INC.
ASSOCIATION OF VIRGINIA GUN RANGES

BY : 

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 23, 2020, a true and accurate copy of the foregoing Supplemental Memorandum in Support of Application for Temporary Injunction was served upon the following via e-mail, thereby giving notice of the same:

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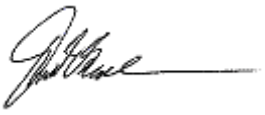

David G. Browne

EXHIBIT A

First Baptist Church v. Kelly

United States District Court for the District of Kansas

April 18, 2020, Filed

No. 20-1102-JWB

Reporter
2020 U.S. Dist. LEXIS 68267 *

FIRST BAPTIST CHURCH; PASTOR STEPHEN ORMORD; CALVARY BAPTIST CHURCH; and PASTOR AARON HARRIS, Plaintiffs, v. GOVERNOR LAURA KELLY, in her official capacity, Defendant.

Core Terms

gatherings, religious, church, exempt, religious activity, distancing, essential function, secular, executive order, facilities, religious services, restrictions, protocols, religious practice, attendees, measures, religion, preliminary injunction, facially neutral, prohibitions, congregants, in-person, movant, injunction, ordinances, attend, target, cases, space, constitutional right

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Judges: JOHN W. BROOMES, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN W. BROOMES

Opinion

MEMORANDUM AND ORDER

This matter is before the court on Plaintiffs' "Motion for Expedited Hearing and Motion for Temporary Restraining Order." (Doc. 7.) The motion was filed in conjunction with Plaintiffs' verified complaint (Doc. 1), which alleges that enforcement of restrictions on religious activity in Defendant Governor Laura Kelly's Executive Order ("EO") 20-18 would violate Plaintiffs' rights, including their First Amendment right **[*2]** to the free exercise of religion. The complaint seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, as well as relief under state law. The court held a telephonic hearing on the motion for temporary restraining order ("TRO") on April 17, 2020, at 4:00 p.m.

Prior to the hearing, Defendant filed a motion to dismiss, arguing the claims are moot because Governor Kelly signed EO 20-25 on April 17, 2020. (Doc. 9.) EO 20-25 alters some of the state-imposed restrictions on public

activities, and it states in part that EO 20-18 "is rescinded and replaced by this order" as of the effective date of April 18, 2020, at 12:01 p.m." (Doc. 9-2 at 5.)

For the reasons stated herein, Defendant's motion to dismiss (Doc. 9) is DENIED and Plaintiffs' motion for a temporary restraining order (Doc. 7) is GRANTED.

The Governor has issued a series of executive orders imposing restrictions on numerous public and private activities in light of the COVID-19 pandemic. For example, on March 17, 2020, the Governor signed EO 20-04, which among other things prohibited "mass gatherings" in the State of Kansas. The term was defined to include any public or private convening that brings together 50 or more people in a confined or enclosed space. The **[*3]** prohibition was expressly applied to mass gatherings at auditoriums, theaters, stadiums, and a number of other venues. The order contained a substantial list of activities or facilities that were exempt from the prohibition, including "Religious gatherings, as long as attendees can engage in appropriate social distancing." Another order issued the same day (EO 20-07) closed public and private schools in Kansas. On March 24, 2020, the Governor issued EO 20-14, which prohibited mass gatherings of more than 10 people. The exemption for religious gatherings was maintained intact "as long as attendees can engage in appropriate social distancing." Also, on March 24, 2020, the Governor issued EO 20-15 establishing the Kansas Essential Functions Framework ("KEFF"), which identified essential functions that must be exempted from any "stay-at-home" order issued by local authorities. The essential functions identified in the order included a wide array of things, including "Preserve Constitutional Rights."

On March 27, 2020, the Governor signed EO 20-16, which adopted a statewide "stay-at-home" order directing all Kansas citizens to stay at home unless they were performing "an essential activity." (Doc. 1-3 at 3.) The order **[*4]** exempted individuals performing listed essential functions from the prohibitions in the order, although it still required them, to the extent possible without significant disruption to essential functions, to use tele-working or, if meeting in person, to follow appropriate safety protocols, including maintaining a 6-foot distance between individuals. (*Id.* at 5.) The order restated and refined the KEFF essential functions. The essential function of preserving constitutional rights was expanded to include several items, including "Perform or attend religious or faith-based services or activities." (*Id.* at 7.)

On April 7, 2020, five days before Easter, the Governor issued EO 20-18. It found enhanced measures were needed to slow the spread of COVID-19, and it made certain changes to existing prohibitions. In the provision listing venues to which the prohibition on "mass gatherings" applies, the order included for the first time "churches or other religious facilities" among the previously listed auditoriums, theaters, stadiums, and other venues. The order then adopted the following specific restriction on religious activities:

> With regard to churches or other religious services or activities, this order prohibits **[*5]** gatherings of more than ten congregants or parishioner in the same building or confined or enclosed space. However, the number of individuals — such as preachers, lay readers, choir or musical performer, or liturgists — conducting or performing a religious service may exceed ten as long as those individuals follow appropriate safety protocols, including maintaining a six-foot distance between individuals and following other directive regarding social distancing, hygiene, and other efforts to slow the spread of COVID-19.

(Doc. 1-1 at 3.) The order restricted a number of other activities as well, but it also maintained a long list of activities and facilities that were exempt from the prohibitions in the order. The exempted activities and facilities included most governmental operations. The list of exemptions also included, among others: airports; childcare locations; hotels; food pantries and shelters; detoxification centers; shopping malls "and other retails establishments where large numbers of people are present but are generally not within arm's length of one another for more than 10 minutes"; libraries; restaurants, bars, and retail food establishments (including grocery stores), **[*6]** provided social distancing of 6 feet was maintained; office spaces; "manufacturing, processing, distribution, and production facilities"; public transportation; and job centers.

Plaintiffs filed this action on April 16, 2020, after sending a letter to the Governor asking that allowance be made for churches to hold in-person worship services provided the congregants follow rigorous social-distancing and safety protocols applicable to similar secular facilities. (Doc. 1 at 5.) The Governor's counsel responded that the matter was under review and that an order would be issued soon. (*Id.*) On April 17, 2020, the Governor signed EO 20-25, which did not alter the restriction on religious activities, but which removed certain items (such as libraries) from the exempted

functions or facilities, and it placed additional restrictions on some of the exempted activities. Among other things, it limited the exemption for retail establishments where large numbers of people were present to customers and employees that are "performing essential activities or essential functions under Executive Order 20-16." Restaurants and bars were limited to no more than ten customers in the building, who must maintain a six-foot distance, but **[*7]** it allowed the number of persons operating the facility to exceed ten if they maintained safety protocols. Office spaces were still exempt but were limited to those "performing essential activities or functions as described and limited by Executive Order 20-16." (Doc. 9-2.)

I. Jurisdiction

This court has subject matter jurisdiction over Plaintiffs' claims arising under federal law pursuant to 28 U.S.C. § 1331. The court further finds the exercise of this court's jurisdiction over such claims is proper under the rule of *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (plaintiff alleging violation of federal law may seek prospective injunctive relief against responsible state official).[1] As for Defendant's mootness argument, the court finds Plaintiffs' claims are not moot. Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010) (citation omitted.) "Article III's requirement that federal courts adjudicate only cases and controversies necessitates that courts decline to exercise jurisdiction where the award of any requested relief would be moot—i.e. where the controversy is no longer live and ongoing." *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994), *superseded by statute on other grounds*. In this instance, the controversy between **[*8]** the parties is ongoing, as the restrictions on religious activities in newly executed EO 20-25 (Doc. 9-2) are identical to the restrictions on religious activities found in EO 20-18, which formed the basis of the complaint. Plaintiffs have made a sufficient showing that a live controversy exists as to whether the Governor's current restrictions on religious activity — found in both EO 20-18 and EO 20-25 - violate Plaintiffs' First Amendment right to freely exercise their religion. The court thus concludes that it has jurisdiction over the dispute, and that Defendant's motion to dismiss on mootness grounds (Doc. 9) should be denied.

II. Standards for issuance of a TRO

When addressing a motion for temporary restraining order, the court applies the same standard as it applies to a motion for preliminary injunction. Four factors must be shown by the movant to obtain injunctive relief: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction is in the public interest. Because a preliminary injunction is an extraordinary remedy, **[*9]** the movant's right to relief must be clear and unequivocal. *Tickets for Less, LLC v. Cypress Media, LLC*, No. 20-2047-JAR-GEB, 2020 WL 528449, at *2 (D. Kan. Feb. 3, 2020). *See also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Additionally, some preliminary injunctions are disfavored and require a stronger showing by the movant—viz., movants must satisfy a heightened standard. They are '(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.'" *Fish v. Kobach*, 840 F.3d 710, 723-24 (10th Cir. 2016) (citation omitted.) "In seeking such an injunction, the movant must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.* (citation and internal quotation marks omitted.)

III. Analysis

A. Status quo. Defendant argued at the hearing that Plaintiffs' requested TRO should be denied because it would alter the status quo. The "status quo" in this context refers to "the last peaceable uncontested status existing between the parties before the dispute developed." *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *1 (10th Cir. Dec. 20, 2012) (citing *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1071 (10th Cir. 2009)). The last peaceable uncontested status between the parties was just prior to the enactment of EO 20-18, the first order which subjected **[*10]** Plaintiffs to the current restrictions on religious activities. Because the requested TRO would return the parties to that

[1] This order is premised solely on Plaintiffs' federal law claims and does not consider Plaintiffs' claim that enforcement of Executive Order 20-18 violates Kansas law. (Doc. 1 at 14-15.)

uncontested status, it would not alter the status quo and is not a disfavored injunction. *See Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 798 (10th Cir. 2019) (the status quo was the parties' status before the challenged ordinance was adopted.)

B. Likelihood of success on the merits.

To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must show the deprivation of a federal right by a person acting under color of state law. The First Amendment provides in part that "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. Const. amend. I. The First Amendment applies to the States by virtue of the Fourteenth Amendment. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). Plaintiffs claim, among other things, that the restrictions on religious activity imposed by EO 20-18 (and now 20-25) violate Plaintiffs' First Amendment right to freely exercise their religion, including their right to attend worship services in their respective church facilities. For reasons that follow, the court concludes, based on the matters presented so far, that Plaintiffs are likely to prevail on this claim.

i. *Standard of review*. The parties dispute the standard that applies to the court's review of the Governor's executive orders. At the hearing on the TRO, Defendant asserted that **[*11]** these executive orders are not subject to heightened scrutiny because they do not target religious activity, but instead apply broadly to a large swath of both secular and non-secular behavior. The court assumes Defendant is suggesting that this case is controlled by the less rigorous standards for review set forth in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). However, *Smith* was an unemployment case in which the plaintiff was denied unemployment benefits because he was fired for violating a generally applicable statute criminalizing the use of peyote, a hallucinogenic drug. Smith claimed that the government's decision violated his rights under the Free Exercise Clause of the First Amendment. *Id.* at 874.

The statute at issue in *Smith* was a facially neutral law that criminalized the use of certain drugs that was "not specifically directed at [Smith's] religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons." *Id.* at 878. The Supreme Court stated that it has never excused an individual "from compliance with an otherwise valid law *prohibiting conduct that the State is free to regulate*." *Id.* at 879 (emphasis added). But the executive orders at issue in this case expressly restrict religious activity. Indeed, a fair reading of EO 20-18 and EO 20-25 shows that they **[*12]** operate as a wholesale prohibition against assembling for religious services anywhere in the state by more than ten congregants. While it is unclear at this stage of the proceedings exactly how many churches may be impacted by that proscription, it is fair to say that these executive orders will likely impact the majority of churches and religious groups in Kansas. Thus, EO 20-18 and EO 20-25 sweep far beyond the "incidental effect" on religious activity excused in *Smith*. *Id.*; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (noting *Smith's* application to incidental burdening of particular religious practices).

At the TRO hearing, Defendant also relied heavily on *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020), a case recently decided by the Fifth Circuit. In *Abbott*, the Fifth Circuit upheld an executive order issued by the governor of Texas that required healthcare providers to postpone non-essential surgeries and procedures during the COVID-19 pandemic in order to conserve critical medical resources and otherwise curb the spread of coronavirus infection. Plaintiffs in that case claimed that the executive order infringed the constitutional right to abortion. However, unlike the present case, the executive order at issue in *Abbott* made no mention of abortion or other constitutionally **[*13]** protected activity. *Id.* at *3.

Abbott relied heavily on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), a case challenging a Massachusetts law that mandated smallpox vaccinations when the state was battling that disease. *Abbott* quoted *Jacobson* for propositions such as "'[U]nder the pressure of great dangers,' constitutional rights may be reasonably restricted 'as the safety of the general public may demand'" *Abbott* at *1 (quoting *Jacobson* 197 U.S. at 29); "[b]ut '[i]t is no part of the function of a court' to decide which measures are 'likely to be the most effective for the protection of the public against disease'" *Id.* (quoting *Jacobson*, 197 U.S. at 30); and

> [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 *6 (quoting *Jacobson*, 197 U.S. at 29). *Abbott* concluded its analysis, as relevant here, as follows:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and **[*14]** are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." [*Jacobson*, 197 U.S.] at 31, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643. Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. *Id.* at 38, 25 S. Ct. 358. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures. *Id.* at 28, 30, 25 S. Ct. 358.

Id. at *7.

Abbott's reliance on *Jacobson* counsels further analysis of that case. *Jacobson*, like *Abbott*, involved a facially neutral law, which required vaccination for smallpox. The issue in that case did not involve the free exercise of religion, but rather a claim that the law invaded an individual's liberty "to care for his own body and health in such way as to him seems best," as protected by the Fourteenth Amendment. *Jacobson*, 197 U.S. at 26. And although it did not deal with a question of religious liberty, *Jacobson* appears more in line with *Smith* in the sense that law at issue in *Jacobson* did not expressly purport to interfere with rights secured by the Constitution. In concluding that no constitutional violation occurred under the Massachusetts law, *Jacobson* said,

> Smallpox being prevalent and increasing at Cambridge, the court would usurp **[*15]** the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Id. at 28. Importantly, the second sentence of the foregoing quote points out that, even in such extreme cases as a public health crisis, the police power of the state is not without limits, and is subject to appropriate judicial scrutiny. And,

> 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, **[*16]** it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 28.

At the TRO hearing, both sides argued most extensively about the application of the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). In that case, the City of Hialeah passed several facially neutral ordinances aimed at curbing the practice of animal sacrifice that was central to the religious practice of the Santeria religion. The Church of the Lukumi Babalu Aye, Inc., and its congregants practiced the Santeria religion and had recently announced plans to establish a church facility in Hialeah, Florida. Shortly thereafter, Hialeah's city council called an emergency meeting and began enacting a series of ordinances that prohibited animal sacrifices and animal cruelty, and threatened those who violated the ordinances with criminal prosecution. The ordinances purported to extend these prohibitions to the killing of animals for food, but then carved out exemptions for slaughterhouses and other licensed establishments that killed animals for food purposes. *Lukumi*, 508 U.S. at 528. The Supreme Court ultimately concluded that the object of these ordinances was to target the Santeria church members. *Id.* at 535.

The Court began its analysis of the claims **[*17]** in *Lukumi* with the proposition from *Smith* that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531. However, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance

that interest." *Id.* at 533. The neutrality analysis begins with the text of the law, itself, and the law "lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

In this case, EO 20-18 and EO 20-25 expressly purport to restrict in-person religious assembly by more than ten congregants. In that sense, they are not facially neutral. Defendant asserts that despite the express restrictions imposed on religious assembly, the laws are facially neutral because they apply as well to a much broader swath of secular activity in addition to the overt limitations placed on church gatherings. Nevertheless, while these executive orders begin with a broad prohibition **[*18]** against mass gatherings, they proceed to carve out broad exemptions for a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious services. *Lukumi* indicates that a court should evaluate these exemptions in assessing a law's neutrality. *See Lukumi*, 508 U.S. at 535-37.

The court pauses its analysis at this point to circle back to the initial question of what standard is to be applied in evaluating Plaintiffs' claims under the Free Exercise Clause. Unsurprisingly, the parties have failed to identify any controlling authority for evaluating a wholesale prohibition on in-person religious services like that at issue in this case. Under ordinary circumstances, it goes without saying that the government could not lawfully expressly prohibit individuals from meeting together for religious services. Accordingly, the leading cases tend to address facially neutral laws that burden religious beliefs, or restrictions that explicitly or implicitly target particular religious groups or practices. Based on the relatively unique circumstances herein presented, the court concludes that *Smith*, *Abbott*, *Jacobson*, and similar cases do not provide the best framework in which **[*19]** to evaluate the Governor's executive orders because all those cases deal with laws that are facially neutral and generally applicable.

The court concludes that *Lukumi*, though not identical, provides the most appropriate framework to evaluate this case. The ordinances at issue in *Lukumi*, though facially neutral in some respects, contained elements that were clearly targeted at religious practices, such as the prohibitions on ritual sacrifices. And although *Lukumi* dealt with laws that the Court concluded were ultimately aimed at a particular religious group, the court does not think that the Supreme Court would have excused the First Amendment violations in that case if the offending provisions had been part of a broader set of laws that did nothing to diminish the religious animus that was both explicit and implicit in the provisions targeting the church. Based on the foregoing reasoning, the court will evaluate Plaintiffs' claims under the Free Exercise Clause according to the principles set forth in *Lukumi*.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. "A law lacks **[*20]** facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533.

In evaluating neutrality, courts are admonished to "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders,"[2] *Lukumi*, 508 U.S. 534, and, in particular, to consider in that context exceptions or exemptions granted to secular activity that are not extended to religious activity. *See id.*at 535-37. When "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Id.* at 537 (quotation omitted).

In addition to neutrality, the Free Exercise Clause requires that "laws burdening religious practice must be of general applicability." *Lukumi*, 508 U.S. at 542. "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. A law is underinclusive, and thus not generally applicable, when it fails to prohibit secular activity that endangers the same interests to a similar or greater degree than the prohibited religious **[*21]** conduct. *Id.*

A law that fails to satisfy the requirements of neutrality and general applicability is subjected to strict scrutiny. *Id.* at 546. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must

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[2] At the TRO hearing, the court indicated it did not perceive that this was necessarily a religious gerrymandering case. However, upon further analysis, the principles explained in *Lukumi* indicate that the court should consider the effect of the exemptions in these executive orders when evaluating neutrality.

advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal quotations omitted). When "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree," a lack of narrow tailoring invalidates the law. *Id.*

ii. *Application to this Case*.

EO 20-18 and EO 20-25 both state that their prohibitions against mass gatherings apply to "churches or other religious facilities." (EO 20-18 ¶1.b; EO 20-25 ¶1.b). Both orders expressly state in their respective paragraphs 1.c that "[w]ith regard to churches or other religious services or activities, this order prohibits gatherings of more than ten congregants or parishioners in the same building or confined or enclosed space [with exceptions for additional individuals conducting the service]." These provisions show that these executive orders expressly target religious gatherings on a broad **[*22]** scale and are, therefore, not facially neutral.

Given the circumstances, Plaintiffs have made a substantial showing that development of the current restriction on religious activities shows religious activities were specifically targeted for more onerous restrictions than comparable secular activities. The Governor previously designated the attendance of religious services as an "essential function" that was exempt from the general prohibition on mass gatherings. That designation has not been rescinded or modified, yet in EO 20-18 and EO 20-25 churches and religious activities appear to have been singled out among essential functions for stricter treatment. It appears to be the only essential function whose core purpose — association for the purpose of worship — had been basically eliminated.[3] For example, the secular facilities that are still exempt from the mass gathering prohibition or that are given more lenient treatment, despite the apparent likelihood they will involve mass gatherings, include airports, childcare locations, hotels, food pantries and shelters, detoxification centers, retail establishments (subject to the distancing and "essential function" purpose noted above), retail food establishments, **[*23]** public transportation, job centers, office spaces used for essential functions, and the apparently broad category of "manufacturing, processing, distribution, and production facilities." As Plaintiffs point out, the exemption for office spaces is broad enough to include such activities as providing real estate services.

The legitimate health and safety concerns arising from people attending religious services inside a church would logically be present with respect to most if not all these other essential activities. Defendant has not argued that mass gatherings at churches pose unique health risks that do not arise in mass gatherings at airports, offices, and production facilities. Yet the exemption for religious activities has been eliminated while it remains for a multitude of activities that appear comparable in terms of health risks. Based on the record now before the court, the most reasonable inference from this disparate treatment is that the essential function of religious activity was targeted for stricter treatment due to the nature of the activity involved, rather than because such gatherings pose unique health risks that mass gatherings at commercial and other facilities **[*24]** do not, or because the risks at religious gatherings uniquely cannot be adequately mitigated with safety protocols.[4] It is also an arbitrary distinction, in the sense that the disparity has been imposed without any apparent explanation for the differing treatment of religious gatherings. These facts undermine Defendant's contentions and lead the court to conclude that EO 20-18 and EO 20-25 are not neutral laws of general applicability. Instead, they restrict religious practice while failing to "prohibit secular activity that endangers the same interests to a similar or greater degree." As such, the restriction is likely subject to strict scrutiny, and can be sustained only if it is narrowly tailored to further the compelling state interest in slowing or halting the spread of COVID-19.

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[3] As Defendant points out, restaurants and bars were subjected to increased restrictions in EO 20-25, including the prohibition on mass gatherings. The order adopted an exemption that allowed the number of employees operating such facilities to exceed ten, provided they maintained safety protocols. (Doc. 9-2 at 4.) This restriction is arguably comparable to the restriction imposed on religious activity, but it appears to be the only essential function other than religious activities on which such a restriction was imposed. The order allows restaurant and bar facilities to continue takeout and delivery services.

[4] At the TRO hearing, it was represented that a total of 35 COVID-19 clusters have been identified in Kansas, with 5 of those being attributable to churches. It was also represented that 13 of the clusters resulted at private companies, including a recent increase of 9 such clusters. No information was presented as to whether the clusters involving churches arose with or without the use any safety protocols such as social distancing.

On the current record, Plaintiffs are likely to prevail on their assertion that the restriction on religious mass gatherings is not narrowly tailored. Specifically, Plaintiffs point to a number of other secular mass gathering activities or locations that merely require certain safety protocols, including social distancing. Given the similarities of physical proximity between these "essential" secular gathering and Plaintiffs' **[*25]** religious gatherings (which are also deemed essential under EO 20-16), the court finds that Plaintiffs can likely show that the broad prohibition against in-person religious services of more than ten congregants is not narrowly tailored to achieve the stated public health goals where the comparable secular gatherings are subjected to much less restrictive conditions. For that reason, and for the reasons previously stated, Plaintiffs have shown they are likely to succeed on the merits of their claim alleging a violation of their First Amendment right to the free exercise of religion.

C. Irreparable harm. To obtain a TRO, Plaintiffs must show they will suffer irreparable harm in the absence of the order. *Winter*, 555 U.S. at 20. The Supreme Court has recognized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). Plaintiffs have alleged that without a TRO, they will be prevented from gathering for worship at their churches this Sunday, April 19, 2020 and thereafter. The court concludes Plaintiffs have made a sufficient showing of irreparable harm.

D. Balance of the equities. Plaintiffs must also show that the balance of equities tips in their favor. *Winter*, 555 U.S. at 20. Plaintiffs have shown **[*26]** that they will be harmed by a deprivation of the constitutional right to freely exercise their religion, and that they face a threat of criminal penalties if they violate the current restrictions in EO 20-25. The court recognizes that the current pandemic presents an unprecedented health crisis in Kansas, and in this country. The Governor has an immense and sobering responsibility to act quickly to protect the lives of Kansans from a deadly epidemic. The court would not issue any restraint, temporary or otherwise, if the evidence showed such action would substantially interfere with that responsibility. Plaintiffs have shown, however, that they are willing to abide by protocols that have been determined by the Governor to be adequate to protect the lives of Kansans in the context of other mass gatherings. In view of that, and in view of the fact that a preliminary injunction hearing has been promptly scheduled for April 23, 2020, the court concludes that the balance of equities weighs in favor of granting a TRO, pending the preliminary injunction hearing, to permit Plaintiffs to engage in worship services under the conditions stated in this order.

E. Public interest. Lastly, to obtain a TRO, **[*27]** Plaintiffs must show that the granting of a TRO is in the public interest. *Winter*, 555 U.S. at 20. The public interest is furthered by preventing the violation of a party's constitutional rights. *Free the Nipple*, 916 F.3d at 807. Additionally, for the reasons previously mentioned, the record shows that allowing Plaintiffs to gather for worship with the safety protocols similar to those applicable to other essential function mass gatherings is consistent with the interest in protecting public health.

F. Security. After considering the nature of the constitutional claim presented, and the absence of harm to Defendant from a temporary return to the status quo, the court determines that no security should be required for the issuance of the TRO. *Cf*. Fed. R. Civ. P. 65(c).

G. Scope of the TRO. Given the limited record before the court at this stage of the proceedings, and the gravity of the issues involved, the court is somewhat hesitant to simply say that Plaintiffs are free to conduct their religious services using the same social distancing and protective measures specified in the executive orders for similar exempt activities. In particular, Defendant has not had the opportunity to put on evidence that might support stricter safety measures for religious services. **[*28]** At the TRO hearing, Plaintiffs set forth specific plans for social distancing and safety precautions that appear to exceed the general requirements for similar exempt activities under EO 20-25. Until the court has an opportunity to hear evidence on these matters, the terms of the TRO will require Plaintiffs to comply with their proposed measures. Specifically,

First Baptist Church of Dodge City will adhere to the following:

- Prior to and following the in-person service, the facility will be deep-cleaned;
- Invitations will be directed to regular church attendees for this in-person service;
- Individuals will be advised to continue to engage in "stay at home" protocols as directed by EO 20-16 in order to attend the service;
- No church members are known to have had any contact with known COVID-19 confirmed cases;
- Attendees will be advised to perform temperature checks at home on all attendees prior to attending

the service. Individuals that are ill or have fevers will not attend;
• High-risk individuals will be advised not to attend the in-person service;
• Attendees will be advised to bring their own PPE, including masks and gloves;

• Attendees will be advised not to engage in hand shaking or other physical **[*29]** contact;
• Hand sanitizer will be available for use throughout the facility;
• The in-person service will be limited to 50 individuals in a space that has a capacity for 300 individuals (a cross-shaped auditorium 50 feet by 74 feet at the center; 2,950 square feet total, allowing almost 57 square feet available to each attendee at maximum social distancing);
• Co-habitating family units may sit closer together but otherwise the maximum social distancing possible will be used, however, at a minimum, the CDC recommended protocol will be observed with a minimum distance of at least 6 feet;
• A single point of entry and single point of exit on opposite sides of the building will be used, establishing a one-way traffic pattern to ensure social distancing;
• Ventilation will be increased as much as possible, opening windows and doors, as weather permits;
• These procedures will be communicated to church members in advance of the service;
• Church bulletin and offering plates will not be used during the service;
• Attendees will be advised to wash their clothes following the service;

• If Church leadership becomes aware of a clear, immediate, and imminent threat to the safety of the attendees or cannot **[*30]** follow the protocols listed above, the gathering will be immediately disbanded.

Calvary Baptist Church of Junction City will adhere to the following:

• Splitting out pews and marking designated sitting areas to keep non-cohabitating congregants at least six feet apart before, during, and after the worship service;
• Marking multiple entrances to encourage socially distanced foot traffic;
• Propping doors open to prevent the need for congregants to touch doors while entering and exiting the church or sanctuary;
• Suspending passing offering plates and bulletins;
• Actively discouraging handshaking or other social touching;
• Offering hand sanitizer throughout the building;
• Providing face masks to offer to any interested persons.

(*See* Doc. 1 at 8-11.)

IV. Conclusion

Defendant's motion to dismiss the complaint (Doc. 9) is DENIED. Plaintiffs' motion for a temporary restraining order (Doc. 7) is GRANTED. The court will file a separate order containing the terms of the TRO.

A hearing on Plaintiffs' request for a preliminary injunction is scheduled for April 23, 2020, at 9:00 a.m.

/s/ John W. Broomes

JOHN W. BROOMES

UNITED STATES DISTRICT JUDGE

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EXHIBIT B

On Fire Christian Ctr. v. Fischer

United States District Court for the Western District of Kentucky

April 11, 2020, Decided; April 11, 2020, Filed

CIVIL ACTION NO. 3:20-CV-264-JRW

Reporter
2020 U.S. Dist. LEXIS 65924 *

ON FIRE CHRISTIAN CENTER, INC., PLAINTIFF, v. GREG FISCHER, et al., DEFENDANTS.

Core Terms

religious, gathering, church, religion, worship, temporary restraining order, religious belief, celebration, sincerely, Pilgrims, drive-in, drive-throughs, believers, public health, parking lot, non-religious, ban, strong likelihood, church service, distancing, lives, irreparable injury, liquor store, burdening

Counsel: **[*1]** For On Fire Christian Center, Inc., Plaintiff: Andrew Miller, Hyun-Soo Lim, Kevin Gallagher, LEAD ATTORNEYS, Wilmer Cutler Pickering Hale and Dorr LLp, Washington, DC; Hiram A. Sasser, III, Roger Byron, LEAD ATTORNEYS, First Liberty Institute, Plano, TX; J. Brooken Smith, LEAD ATTORNEY, Swansburg & Smith PLLC, Louisville, KY; Matthew T. Martens, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr, New York, NY; Michael G. Swansburg, Jr, LEAD ATTORNEY, Swansburg & Smith PLLC, Louisville, KY; Amicus, Human Dignity Project, Inc., LEAD ATTORNEY; Vincent F. Heuser, Jr., LEAD ATTORNEY, Louisville, KY.

For Human Dignity Project, Inc., Amicus: Vincent F. Heuser, Jr., LEAD ATTORNEY, Louisville, KY.

Judges: Justin R. Walker, United States District Judge.

Opinion by: Justin R. Walker

Opinion

TEMPORARY RESTRAINING ORDER

1. The Court **GRANTS** the motion for a temporary restraining order filed by On Fire Christian Center, Inc. ("On Fire") against Mayor Greg Fischer and the City of Louisville (together, "Louisville").

2. The Court **ENTERS** this Temporary Restraining Order on Saturday, April 11, 2020 at 2:00 P.M.[1]

3. The Court **ENJOINS** Louisville from enforcing; attempting to enforce; threatening to enforce; or otherwise requiring compliance **[*2]** with any prohibition on drive-in church services at On Fire.[2]

4. Unless the Court enters this Temporary Restraining Order, the members of On Fire will suffer irreparable harm.[3] The government plans to substantially burden their religious practice on one of the most important holidays of the Christian calendar, Easter Sunday.[4]

5. Notice to Louisville before entering this Temporary Restraining Order isn't necessary.[5] The facts in On Fire's affidavit "clearly show that immediate and irreparable injury, loss, or damage will result to [On Fire] before [Louisville] may be heard in opposition."[6] J. Brooken Smith, On Fire's lawyer, certified that he sent Louisville a letter yesterday detailing their potential claims but didn't hear anything back.[7]

6. The Court issued this Temporary Restraining Order without notice because Easter Sunday is less than one day away.[8] Providing notice to Louisville before entering this Temporary Restraining Order would be impractical in such a short period of time.

7. On Fire does not need to post a security because enjoining Louisville from prohibiting drive-in church services at On Fire doesn't interfere with Louisville's rights.[9]

8. The Court **GRANTS** On Fire's request **[*3]** for Oral Argument. The Court will hold a telephonic hearing on the preliminary injunction motion on **April 14, 2020** at **11:00 A.M.** Counsel shall email Ms. Megan Jackson at Megan_Jackson@kywd.uscourts.gov for the hearing's call-in number and access code. Members of the public interested in listening to the hearing may also email Ms. Jackson.

9. The Court **ORDERS** On Fire's lawyers to serve a copy of this Temporary Restraining Order and Opinion on Mike O'Connell, Jefferson County Attorney.

/s/ Justin R. Walker

Justin R. Walker, District Judge

United States District Court

4/11/2020

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[1] *Fed. R. Civ. P. 65(b)(2)*.

[2] As a general rule, a court's injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. But Louisville ought not to view the limits of this injunction as a green light to violate the religious liberty of non-parties. *Cf.* *42 U.S.C. § 1983*.

[3] *Id.*

[4] DN 1 ¶ 13.

[5] *Fed. R. Civ. P. 65(b)(1)*.

[6] *Fed. R. Civ. P. 65(b)(1)(A)*.

[7] *Fed. R. Civ. P. 65(b)(1)(B)*; DN 3-1 #43.

[8] *Fed. R. Civ. P. 65(b)(2)*.

[9] *Fed. R. Civ. P. 65(c)*.

MEMORANDUM OPINION

On Holy Thursday, an American mayor criminalized the communal celebration of Easter. That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of *The Onion*. But two days ago, citing the need for social distancing during the current pandemic, Louisville's Mayor Greg Fischer ordered Christians not to attend Sunday services, even if they remained *in their cars* to worship — and even though it's *Easter*.

The Mayor's decision is stunning.

And it is, "beyond all reason," unconstitutional.[10]

* * *

According to St. Paul, the first pilgrim was Abel. With **[*4]** Enoch, Noah, Abraham, Isaac, Jacob, and Sara, they "died in faith, not having received the promises" of God's promised kingdom.[11] But they saw "them afar off, and were persuaded of them, and embraced them, and confessed that they were strangers and pilgrims on the earth."[12]

The Plymouth Colony's second Governor, William Bradford, alluded to St. Paul's pilgrims when he recalled, years later, his fellow colonists' departure from England. The land they were leaving was comfortable and familiar. The ocean before them was, for them, unknown and dangerous. So too was the New World, where half would not survive the first winter.[13] There were "mutual embraces and many tears," as they said farewell to sons, daughters, mothers, and fathers, too young or old or fearful or frail to leave the Old World.[14]

But they sailed west because west was where they would find what they wanted most, what they needed most: the liberty to worship God according to their conscience. "They knew they were pilgrims," wrote Bradford, "and looked not much on those things" left behind, "but lifted their eyes to heaven, their dearest country and quieted their spirits."[15]

The Pilgrims were heirs **[*5]** to a long line of persecuted Christians, including some punished with prison or worse for the crime of celebrating Easter[16] - and an even longer line of persecuted peoples of more ancient faiths.[17] And although their notions of tolerance left more than a little to be desired,[18] the Pilgrims understood at least this much:

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[10] *Cf.* *Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905)*.

[11] Hebrews 11:13.

[12] *Id.*

[13] Patricia Deetz and James Deetz, *Mayflower Passenger Deaths, 1620-1621*, THE PLYMOUTH COLONY ARCHIVE PROJECT (Dec. 14, 2007), http://www.histarch.illinois.edu/plymouth/Maydeaths.html.

[14] WILLIAM BRADFORD, HISTORY OF PLYMOUTH COLONY 60 (Charles Deane, 1948) https://www.google.com/books/edition/History_of_Plymouth_Plantation/tYecOAN1cwwC?hl=en&gbpv=1&dq=inauthor:%22WILLIAM+BRADFORD%22&printsec=frontcover.

[15] *Id. at 59* (modernized).

[16] Tacitus' *Annals* 15:44, *available at* http://www.perseus.tufts.edu/hopper/text?doc=Tac.+Ann.+15.44&redirect=true.

[17] *See, e.g.*, *Exodus* 1:11-18.

[18] Nathaniel Philbrick, *Mayflower* 177 (2006) ("It was the Puritans who led the way in persecuting the Quakers, but the Pilgrims were more than willing to follow along. As a Quaker sympathizer acidly wrote, the 'Plymouth-saddle is on the Bay horse,' and in

No place, not even the unknown, is worse than *any* place whose state forbids the exercise of your sincerely held religious beliefs.

The Pilgrims' history of fleeing religious persecution was just one of the many "historical instances of religious persecution and intolerance that gave concern to those who drafted the *Free Exercise Clause*" of our *Constitution's First Amendment*."[19] It provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[20]

At the time of that Amendment's ratification, religious liberty was among the American experiment's most audacious guarantees. For millennia, soldiers had fought and killed to impose their religious doctrine on their neighbors. A century before America's founding, in Germany alone, religious conflict took the lives of one out of every five men, women, and children.[21] But not **[*6]** so in America. "Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion."[22]

Of course, pockets of society have not always lived up to our nation's ideals. Slave owners flogged slaves for attending prayer meetings.[23] Murderous mobs drove the Latter Day Saints into Utah.[24] Bigotry toward Roman Catholics motivated a majority of states to enact Blaine Amendments.[25] Harvard University created a quota system to admit fewer Jewish students.[26] Five decades ago, a former member of the racist, anti-Semitic, and anti-Catholic Ku Klux Klan sat on the Supreme Court.[27] And just over three decades ago, another ex-Klansman was the Majority Leader of the United States Senate.[28]

Some of that bigotry was not state-sponsored. But in recent years, an expanding government has made the *Free Exercise Clause* more important than ever. It was not long ago, for example, **[*7]** that the government told the Supreme Court it can prohibit a church from choosing its own minister;[29] force religious business owners to buy pharmaceuticals they consider abortion-inducing;[30] and conscript nuns to provide birth control.[31] Even after the Supreme Court vacated lower court decisions — by 9-0, 5-4, and 8-0 margins — the *Free Exercise Clause* remains

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1660 Isaac Robinson, son of the late pastor John Robinson, was dis-enfranchised for advocating a policy of moderation to the Quakers.").

[19] *Church of the Lukumi Balalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993)* (quoting *Bowen v. Roy, 476 U.S. 693, 703, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986))*.

[20] *U.S. Const. amend. I*; *see also*, *U.S. Const. amend. XIV* ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[21] Jason Daley, *Researchers Catalogue the Grisly Deaths of Soldiers in the Thirty Years' War*, SMITHSONIANMAG.COM (Jun. 6, 2017), https://www.smithsonianmag.com/smart-news/researchers-catalogue-grisly-deaths-soldiers-thirty-years-war-180963531/.

[22] *Burwell v. Hobby Lobby, 573 U.S. 682, 739, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014)* (Kennedy, J., concurring).

[23] Albert J. Raboteau, *The Secret Religion of the Slaves: They often risked floggings to worship God*, CHRISTIANITY TODAY https://www.christianitytoday.com/history/issues/issue-33/secret-religion-of-slaves.html (last accessed Apr. 11, 2020).

[24] *See Mormon Pioneers*, PIONEERS, https://www.bbc.co.uk/religion/religions/mormon/history/pioneers_1.shtml. (last accessed Apr. 11, 2020).

[25] *See* Jane G. Rainey, *Blaine Amendments*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1036/blaine-amendments (last accessed Apr. 11, 2020).

[26] *Anti-Semitism in the U.S.: Harvard's Jewish Problem*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/harvard-s-jewish-problem (last accessed Apr. 11, 2020).

a too-often-tested bulwark against discrimination toward people of faith, from religious cakemakers to religious preschoolers.[32]

This state of affairs has severe implications for religious Americans, because "freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law."[33] But its importance extends beyond the liberty to worship. It threatens liberty of all kinds. That's because, as de Tocqueville wrote, "religion, which among the Americans never directly takes part in the government of society, must be considered as the first of their political institutions; for if it does not give them the taste for liberty, it singularly facilitates use of it."[34]

* * *

That brings us to this case. "As we are all painfully aware, our nation faces a public health emergency caused by the exponential spread **[*8]** of COVID-19, the respiratory disease caused by the novel coronavirus SARS-CoV-2."[35] Four days ago, defendant Mayor of Louisville Greg Fischer said it was "with a heavy heart" that he was banning religious services, even if congregants remain in their cars during the service.[36] He asserted, "It's not really practical or safe to accommodate drive-up services taking place in our community."[37] Drive-through restaurants and liquor stores are still open.[38]

Two days ago, on Holy Thursday, the Mayor threatened church members and pastors if they hold a drive-in Easter service:

- "We are not allowing churches to gather either in person or in any kind of drive-through capacity."[39]
- "Ok so, if you are a church or you are a churchgoing member and you do that, you're in violation of the mandate from the governor, you're in violation of the request from my office and city government to not do that."[40]
- "We're saying no church worshiping, no drive-throughs."[41]

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[27] Kat Eschner, *This Supreme Court Justice Was a KKK Member*, SMITHSONIAN MAG., Feb. 27, 2017 https://www.smithsonianmag.com/smart-news/supreme-court-justice-was-kkk-member-180962254/ (last accessed Apr. 11, 2020).

[28] *Robert C. Byrd, United States Senator*, https://www.britannica.com/biography/Robert-C-Byrd (last accessed Apr. 11, 2020).

[29] *See* *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 185, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)*.

[30] *See* *Hobby Lobby, 573 U.S. at 691*.

[31] *See* *Zubic v. Burwell, 136 S.Ct. 1557 (2016)*.

[32] *See* *Masterpiece Cakeshop Ltd. v. Colorado Human Rights Comm'n, 138 S.Ct. 1719, 201 L. Ed. 2d 35 (2018)*; *Trinity Lutheran Church v. Comer, 137 S.Ct. 2012, 198 L. Ed. 2d 551 (2017)*.

[33] *573 U.S. at 736* (Kennedy, J., concurring).

[34] Alexis De Tocqueville, *Democracy in America I* at 475, Eduardo Nolla (ed.) & James T. Schleifer (tr.) (2012); *cf.*, NORTHWEST ORDINANCE 1787 (those elected by our country's founding generation believed "religion" to be "necessary to ... the happiness of mankind") available at https://www.visitthecapitol.gov/exhibitions/artifact/northwest-ordinance-1787 (last accessed Apr. 11, 2020).

[35] *In re Abbott*, 2020 WL 1685929 *2 (5th Cir. Apr. 7, 2020).

[36] DN 3-4 (Savannah Fadens & Ben Tobin, *Church vs. State: Can Kentucky Governments Block Religious Gatherings Amid COVID-19*?, LOUISVILLE COURIER J. (Apr. 9, 2020) https://www.courier-journal.com/story/news/2020/04/09/coronavirus-kentucky-can-beshear-block-religious-gatherings/2972356001/ (last accessed April 9, 2020)).

The same day, the Mayor's spokesperson said he would use the police to deter and disburse drive-in religious **[*9]** gatherings: "Louisville Metro Police have been proactive about reaching out to those we've heard about, and discouraging organizers from proceeding."[42] She added, perhaps in an effort to be less threatening, "This is not a law enforcement matter, it's a community matter."[43] But the Louisville Metro Police are not Peace Corps volunteers or community organizers; their job *is* law enforcement. And the Mayor's spokesperson backed up the Mayor's threat to use the police with a request for "anyone who sees violations from our social distancing guidance to reach out to 311" to inform on their family, friends, and neighbors.[44]

Yesterday, on Good Friday, the Mayor's threats continued:

- "In order to save lives, we must not gather in churches, drive-through services, family gatherings, social gatherings this weekend."[45]
- "If there are gatherings on Sunday, Louisville Metro Police Department will be there on Sunday handing out information detailing the health risks involved, and I have asked LMPD to record license plates of all vehicles in attendance."[46]
- "We will share that information with our public health department, **[*10]** so they can follow up with the individuals that are out in church and gathering in groups, which is clearly a very, very unsafe practice."[47]

Today is Holy Saturday. Tomorrow is Easter Sunday. This is for Christians, as Mayor Fischer has said, "the holiest week of the year."[48]

On Sunday, tomorrow, Plaintiff On Fire Christian Center wishes to hold an Easter service, as Christians have done for two thousand years. On Fire has planned a drive-in church service in accordance with the Center for Disease Control's social distancing guidelines.[49] Yesterday, near the close of business, On Fire filed this suit, including a request for a Temporary Restraining Order. It has asked the Court to stop defendants Mayor Greg Fischer and

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[37] *Id.*

[38] Kentucky Attorney General Daniel Cameron has said, "As long as Kentuckians are permitted to drive through liquor stores, restaurants, and other businesses during the COVID-19 pandemic, the law requires that they must also be allowed to participate in drive-in church services, consistent with existing policies to stop the spread of COVID-19." Otts, Chris. FISCHER: POLICE WILL COLLECT LICENSE PLATES OF EASTER CHURCHGOERS, WDRB.com, https://www.wdrb.com/in-depth/fischer-police-will-collect-license-plates-of-easter-churchgoers/article_795c708a-7b6d-11ea-8e48-d7138b31add7.html (last accessed Apr. 10, 2020).

[39] DN 1 ¶ 27 (quoting Greg Fischer, *Daily COVID-19 Briefing By Louisville Mayor Greg Fischer* (Apr. 9, 2020), https://www.wave3.com/2020/04/09/fischer-confirms-new-cases-more-deaths/ (embedded video)).

[40] *Id.*

[41] *Id.*

[42] DN 3-4 (Savannah Fadens & Ben Tobin, *Church vs. State: Can Kentucky Governments Block Religious Gatherings Amid COVID-19*?, LOUISVILLE COURIER J. (Apr. 9, 2020) https://www.courier-journal.com/story/news/2020/04/09/coronavirus-kentucky-can-beshear-block-religious-gatherings/2972356001/ (last accessed April 9, 2020)).

[43] *Id.*

[44] *Id.; cf.* George Orwell, 1984.

[45] COVID-19 Daily Briefing, 04-10-2020, https://www.facebook.com/MayorGregFischer/videos/514408469234775/.

[46] Otts, Chris. FISCHER: POLICE WILL COLLECT LICENSE PLATES OF EASTER CHURCHGOERS, WDRB.com, https://www.wdrb.com/in-depth/fischer-police-will-collect-license-plates-of-easter-churchgoers/article_795c708a-7b6d-11ea-8e48-d7138b31add7.html (last accessed Apr. 10, 2020).

Metro Louisville from carrying out their plan to enforce their interpretation of the Governor's social distancing order.[50]

* * *

In reviewing a TRO motion, the Court considers whether:

1) On Fire has a strong likelihood of success on the merits;
2) On Fire would suffer irreparable injury without a TRO;
3) The "balance of the equities" tips in On Fire's favor; and

4) "[A]n injunction is in the public interest."[51]

On Fire can satisfy all four parts, and it is entitled to a **[*11]** Temporary Restraining Order. The threats against On Fire by the Mayor and Louisville Metro violate the *First Amendment* and Kentucky law.

I. On Fire has demonstrated a strong likelihood of success on the merits on its two Free Exercise claims and its Kentucky statutory claims.

A. On Fire has demonstrated a strong likelihood of success on its federal and state Free Exercise claims.

There is no doubt that society has the strongest of interests in curbing the growth of a deadly disease, which is the interest Mayor Fischer and Metro Louisville (together, "Louisville") has asserted when ordering churches and churchgoers to stay home on Easter. "When faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or

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[47] Otts, Chris. FISCHER: POLICE WILL COLLECT LICENSE PLATES OF EASTER CHURCHGOERS, WDRB.com, https://www.wdrb.com/in-depth/fischer-police-will-collect-license-plates-of-easter-churchgoers/article_795c708a-7b6d-11ea-8e48-d7138b31add7.html (last accessed Apr. 10, 2020); *cf*. Wheatley, Kevin. PARTICIPANTS IN WEEKEND GATHERINGS MUST SELF-QUARANTINE FOR 2 WEEKS, GOV. BESHEAR SAYS, WDRB.COM, https://www.wdrb.com/news/participants-in-weekend-gatherings-must-self-quarantine-for-2-weeks-gov-beshear-says/article_01fa77c6-7b72-11ea-90c7-7747ea013459.html (last accessed Apr. 10, 2020) ("License plate information will be collected from cars in parking lots by Kentucky State Police and forwarded to local health departments, who will then present an order to self-quarantine for 14 days at the owners' homes.").

[48] COVID-19 Daily Briefing, 04-10-2020, https://www.facebook.com/MayorGregFischer/videos/514408469234775/

[49] Centers for Disease Control & Prevention, SOCIAL DISTANCING, QUARANTINE, & ISOLATION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last accessed Apr. 11, 2020).

[50] There is doubt about the meaning of the Governor's social distancing order. Kentucky Attorney General Daniel Cameron has said, "As long as Kentuckians are permitted to drive through liquor stores, restaurants, and other businesses during the COVID-19 pandemic, the law requires that they must also be allowed to participate in drive-in church services, consistent with existing policies to stop the spread of COVID-19." Otts, Chris. FISCHER: POLICE WILL COLLECT LICENSE PLATES OF EASTER CHURCHGOERS, WDRB.com, https://www.wdrb.com/in-depth/fischer-police-will-collect-license-plates-of-easter-churchgoers/article_795c708a-7b6d-11ea-8e48-d7138b31add7.html (last accessed Apr. 10, 2020). But what matters for this case is not what the Governor has purported to authorize the Mayor and the Louisville Metro Police Department to do; what matters is what the Mayor and the Police *are doing* and what state action is imminent. *See* *Clapper v. ACLU, 568 U.S. 398, 401 (2013)*.

[51] *Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008)*; *see also*, *Ohio Republican Party v. Brunner, 543 F.3d 357, 361 (6th Cir. 2008)* (the Court considers the same factors in considering whether to grant a TRO or a preliminary injunction).

substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"[52]

In this case, Louisville is violating the *Free Exercise Clause* "beyond all question."[53]

To begin, Louisville is substantially burdening On Fire's sincerely held religious beliefs in a manner that is not "neutral" between religious **[*12]** and non-religious conduct, with orders and threats that are not "generally applicable" to both religious and non-religious conduct.[54] "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*."[55] In *Lukumi Babalu*, the City of Hialeah's ban on animal sacrifice was not "neutral" or "generally applicable" because it banned the Church of Lukumi Babalu's ritualistic animal sacrifices while at the same time it did not ban most other kinds of animal killing, including kosher slaughtering and killing animals for non-religious reasons.[56]

Here, Louisville has targeted religious worship by prohibiting drive-in church services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs — including, for example, drive-through liquor stores. Moreover, Louisville has not prohibited parking in parking lots more broadly — including, again, the parking lots of liquor stores. When Louisville prohibits religious activity while permitting non-religious activities, its choice "must undergo the most rigorous of scrutiny."[57] That **[*13]** scrutiny requires Louisville to prove its interest is "compelling" and its regulation is "narrowly tailored to advance that interest."[58]

Louisville will be (highly) unlikely to make the second of those two showings. To be sure, Louisville is pursuing a compelling interest of the highest order through its efforts to contain the current pandemic. But its actions violate the *Free Exercise Clause* "beyond all question"[59] because they are not even close to being "narrowly tailored to advance that interest."[60] As in *Lukumi Babalu*, the government's "proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."[61]

In other words, Louisville's actions are "underinclusive" *and* "overbroad."[62] They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that Louisville has permitted on the basis that they are "essential." Those "essential" activities include driving through a liquor store's pick-up window, parking

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[52] *In re Abbott*, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (quoting *Jacobson, 197 U.S. at 31*).

[53] *Id.; see also, In re Abbott*, No. 20-50296, slip op. at 2-3 (5th Cir. Apr. 10, 2020).

[54] *Church of the Lukumi Balalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1990)*.

[55] *Id. at 543*.

[56] *Id. at 536*.

[57] *Id.; see also, id.* ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

[58] *Id. at 531-32*.

[59] *In re Abbott*, 2020 WL 1685929, at *7 (quoting *Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905)*); *see also In re Abbott*, No. 20-50296, slip op. at 2-3 (Apr. 10, 2020 5th Cir.).

[60] 494 U.S. at 531-32

[61] *Id.* at 546.

[62] *Id.*

in a liquor store's parking lot, or walking into a liquor store where other customers are shopping. **[*14]** 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 Easter.

Louisville's actions are also overbroad because, at least in this early stage of the litigation, it appears likely that Louisville's interest in preventing churchgoers from spreading COVID-19 would be achieved by allowing churchgoers to congregate in their cars as On Fire proposes. On Fire has committed to practicing social distancing in accordance with CDC guidelines. "Cars will park six feet apart and all congregants will remain in their cars with windows no more than half open for the entirety of the service."[63] Its pastor and a videographer will be the only people outside cars, and they will be at a distance from the cars.[64]

Louisville might suggest that On Fire members could participate in an online service and thus satisfy their longing for communal celebration. But some members may not have access to online resources. And even if they all did, the *Free Exercise Clause* protects their right to worship as their conscience commands them. It is not the role of a court to tell religious believers what is and isn't important **[*15]** to their religion, so long as their belief in the religious importance is sincere. The *Free Exercise clause* protects sincerely held religious beliefs that are at times not "acceptable, logical, consistent, or comprehensible to others."[65]

The Court does not doubt that Mayor Fischer can satisfy his sincerely held religious beliefs by watching a service on the Internet. Millions of Americans will do that this Easter, and the Court does not doubt that they will be true to their own faiths. Nothing in this Opinion should be read to impugn the Mayor's motives or his faith. Indeed, it is obvious he is trying to save lives. But when considering the rights guaranteed by the *Free Exercise Clause*, it doesn't matter that the government burdening the religious practices of others "consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens."[66]

At the same time, the Court does not for a moment doubt that for some believers Easter means gathering together, if not hand in hand or shoulder to shoulder, then at least car fender to car fender. Religion is not "some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most **[*16]** believers, it is *not* that, and has never been."[67] Instead, just as many religions reinforce their faith and their bonds with the faithful through religious assemblies, 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."[68] Indeed, as On Fire points out, "the Greek word translated 'church' in our English versions of the Christian scriptures is the word 'ekklesia,' which literally means 'assembly.'"[69]

It is true that On Fire's church members could *believe* in everything Easter teaches them from their homes on Sunday. Soo too could the Pilgrims before they left Europe. But the Pilgrims demanded more than that. And so too does the *Free Exercise Clause*. It "guarantees the free *exercise* of religion, not just the right to inward belief."[70] That

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[63] DN 3-2 ¶ 6.

[64] *Id.*

[65] *508 U.S. at 531* (quoting *Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981))*.

[66] *508 U.S. at 559* (Scalia, J., concurring).

[67] *Lee v. Weisman, 505 U.S. 577, 645, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992)* (Scalia, J., dissenting).

[68] Matthew 18:20.

[69] DN 1 ¶ 14 (quoting A.T. Robertson, A GRAMMAR OF THE GREEK NEW TESTAMENT IN LIGHT OF HISTORICAL RESEARCH (3d ed. 1919)).

[70] *Trinity Lutheran, 137 S.Ct. at 2026* (Gorsuch, J., concurring).

promise is as important for the minister as for those ministered to, as vital to the shepherd as to the sheep. And it is as necessary now as when the *Mayflower* met Plymouth Rock.

Finally, nothing in this legal analysis should be read to imply that the rules of the road in constitutional law remain rigidly fixed in the time of a national emergency. We know that from *Jacobson* ***[*17]*** *v. Massachusetts*.[71] The COVID-19 pandemic has upended every aspect of our lives: how we work, how we live, how we celebrate, and how we mourn. We worry about our loved ones and our nation. We have made tremendous sacrifices. And the Constitution is not "a suicide pact."[72]

But even under *Jacobson*, constitutional rights still exist.[73] Among them is the freedom to worship as we choose. The brief history at the outset of this opinion does not even scratch the surface of religious liberty's importance to our nation's story, identity, and Constitution. But mindful of that importance, the Court believes there is a strong likelihood On Fire will prevail on the merits of its claim that Louisville may not ban its citizens from worshiping — or, in the relative safety of their cars, from worshiping together.[74]

B. On Fire has also demonstrated a strong likelihood of success on its Kentucky statutory claim.

Kentucky's Religious Freedom Restoration **[*18]** Act prohibits Louisville from "substantially burden[ing] a person's freedom of religion."[75] Louisville must prove "by clear and convincing evidence that [they have] a compelling interest in infringing the specific act [and have] used the least restrictive means to further that interest."[76] As was true for non-neutral laws targeting religion, "judges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief."[77] And as with the strict scrutiny analysis in the constitutional context, to survive under RFRA the government must "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting

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[71] *197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905)*; *see also In re Abbott*, 2020 WL 1685929 at *7 ("*Jacobson* remains good law.").

[72] *Terminiello v. City of Chicago, 337 U.S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)* (Jackson, J., dissenting).

[73] *Id. at 31* (emergency does not permit "beyond all question, a plain, palpable invasion of rights secured by the fundamental law"); *cf*. at 27 (... "an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an *arbitrary, unreasonable manner*, or might go so far beyond what was reasonably required for the safety of the public, *as to authorize or compel the courts to interfere for the protection of such persons*.") (emphasis added); *id. at 38* ("...the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or *by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression*.") (emphasis added).

[74] Since the Kentucky Supreme Court has held that the right to worship in its state Constitution is "in line with United States Supreme Court precedent" on the federal *Free Exercise Clause*, Louisville's ban is unconstitutional under state law, too. *Gingerich v. Commonwealth, 382 S.W.3d 835, 844 (Ky. 2012)*.

[75] *Ky. Rev. Stat. § 446.350*.

[76] *Id.*

[77] *Priests for Life v. HHS, 808 F.3d 1, 17, 420 U.S. App. D.C. 229 (D.C. Cir. 2015)* (Kavanaugh, J., dissenting from denial of reh'g *en banc*) (citing *Hobby Lobby*, 134 S.Ct. at 2774 n.28, 2777-79; *Thomas, 450 U.S. at 714-16*), vac'd by *Zubik v. Burwell, 136 S.Ct. 1557, 194 L. Ed. 2d 696 (2016)*; *see also Hobby Lobby, 573 U.S. at 725* ("it is not for us to say that their religious

parties in these cases."[78] And as above, banning drive-in church services isn't the least restrictive means to advance Louisville's interest in preventing the spread of coronavirus. Moreover, if sitting in cars did pose a significant danger of spreading the virus, Louisville would close all drive-throughs and parking lots that are not related to maintaining public health, which they haven't done.[79]

Given the strong likelihood On **[*19]** Fire will succeed on its religious liberty claims, there is no need to address whether it will also succeed on its freedom-of-assembly claim.

II. On Fire would suffer irreparable injury without a TRO.

"Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."[80] Here, that is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today. "The loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[81]

For Christians, there is nothing minimal about celebrating Easter, the holiest day in the Christian calendar. And for the reasons explained above, the Court does not doubt that for them, an online substitute for an in-person, in-the-car celebration is no substitute at all. On Fire "and its members have a sincerely held religious belief that physical corporate gathering of believers each Sunday, especially on Easter Sunday, is a central element of religious worship commanded by the Lord."[82] Having to skip Easter Sunday would substantially burden On Fire's members' religious practice.[83]

III. [*20] The balance of the equities tips in On Fire's favor.

If the Court did not immediately intervene and stop Louisville's enforcement plan, churchgoers at On Fire would face an impossible choice: skip Easter Sunday service, in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs. Unless a government action is far more narrowly tailored to a compelling government interest than is Louisville's, that is a choice no one in our nation should ever have to face. Conversely, because Louisville allows other, non-religious and no-more-essential parking and drive-throughs, there is not yet any evidence in the record that stopping Louisville from enforcing its unconstitutional order will do it any harm.

IV. A TRO is in the public interest.

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beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction' ....") (quoting *Thomas, 450 U.S. at 716*).

[78] *Hobby Lobby, 573 U.S. at 727*.

[79] In the interest of moving on from the Court's example of liquor stores that are open, the Court takes judicial notice that ice cream shops (and their parking lots) are still open — to the relief of every sweet tooth in the city.

[80] *Winter*, 555 U.S. at 375.

[81] *Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)*; *see also Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989)* ("The Supreme Court has unequivocally admonished that even minimal infringement upon *First Amendment* values constitutes irreparable injury sufficient to justify injunctive relief.").

[82] DN 3-2 ¶ 7.

[83] DN 3-2 ¶ 11.

In considering whether a TRO is in the public interest, "a court must at the very least weigh the potential injury to the public health when it considers enjoining state officers from enforcing emergency public health laws."[84] The Court has considered that question above. With the limited record before the Court, it is unclear how a gathering of cars in a parking **[*21]** lot is a danger to public health. Admittedly, the record as it stands is sparse and one-sided. But in that limited record, there isn't any evidence that On Fire's parking lot will prove more dangerous than the countless other parking lots that remain open. Nor is there any evidence that churches are less essential than every other business that is currently allowed to be open — liquor stores among them.

Moreover, whereas the public may have no interest in Louisville's overbroad ban on drive-in church services, the public has a profound interest in men and women of faith worshiping together this Easter in a manner consistent with their conscience. You do not have to share On Fire's faith to believe that celebrating that faith — while gathered together in praise of the One they believe healed the sick and conquered death — will bring hope to many in need of hope this Holy Week.

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There is no instruction book for a pandemic. The threat evolves. Experts reevaluate. And government officials make the best calls they can, based on the best information they have.

Sometimes those government officials will disagree. The Mayor of Louisville, in this case, wants to save lives. The state Attorney **[*22]** General, to pick one example of an official who disagrees with the Mayor, surely shares the Mayor's concern for the public's health. Neither has faced this situation before. We all hope that we will never have to face anything like this again. And neither leader, the Court feels confident, is acting with malice toward the physical or spiritual health of On Fire's congregation.

Some who read this Court's opinion will disagree with the Mayor. Others will disagree with the Court. And each camp will include some readers who share On Fire's faith, others whose conscience calls them to a different faith, and still others who profess no faith at all. Each of them, believers and non-believers, deserves at least this from the Court: To know why I decided as I did. You may not agree with my reasons, but my role as a judge is to explain, to teach, and perhaps, at least on occasion, to persuade.

The Christians of On Fire, however, owe no one an explanation for why they will gather together this Easter Sunday to celebrate what they believe to be a miracle and a mystery. True, they can attempt to explain it. True, they can try to teach. But to the nonbeliever, the Passion of Jesus — the betrayals, **[*23]** the torture, the state-sponsored murder of God's only Son, and the empty tomb on the third day — makes no sense at all. And even to the believer, or at least to some of them, it can be incomprehensible as well.

But for the men and women of On Fire, Christ's sacrifice isn't about the logic of this world. Nor is their Easter Sunday celebration. The reason they will be there for each other and their Lord is the reason they believe He was and is there for us. For them, for all believers, "it isn't a matter of reason; finally, it's a matter of love."[858686]

/s/ Justin R. Walker

Justin R. Walker, District Judge

United States District Court

4/11/2020

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[84] *In re Abbott*, 2020 WL 1685929 *12 (5th Cir. Apr. 7, 2020).

[85] Robert Bolt, *A Man for All Seasons* 141.

[86] JRW, SDR, & PBB.

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