No. 20-5427

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARYVILLE BAPTIST CHURCH, INC.; DR. JACK ROBERTS

Plaintiffs–Appellants

v.

ANDY BESHEAR,
in his official capacity as Governor of the Commonwealth of Kentucky

Defendant–Appellee

On Appeal from the United States District Court
for the Western District of Kentucky
In Case No. 3:20-cv-00278 before The Honorable David J. Hale

REPLY BRIEF OF PLAINTIFFS–APPELLANTS

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DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Plaintiffs–Appellants state that neither is a subsidiary or affiliate of a publicly owned corporation, and that no publicly owned corporation, not a party to the appeal, has a financial interest in its outcome.

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A. Under the Voluntary Cessation Doctrine the Governor Faces a Heavy Burden of Making Absolutely Clear That He Cannot Revert Back to His Unconstitutional Policy.

This case is not moot. (Brief of Governor Andy Beshear ("Answer Brief"), Doc. 44, at 10–13.) The sudden, "voluntary" shift from the religious worship ban enshrined in his COVID-19 Orders,[1] which Governor Beshear has vigorously defended in the district court and in this Court, is not enough to moot the case:

> **It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.** Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (emphasis added). As the Supreme Court also explained:

> We have recognized, however, that **a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued**. Otherwise, a defendant

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[1] Capitalized terms herein have the same meanings as in Maryville Appellants' initial Brief (Doc. 39) unless otherwise indicated. Thus, "Orders" refers to the "series of executive orders and pronouncements in the response to COVID-19" issued and amended by "Governor Beshear and his cabinet agencies." (Br. 3.)

> could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that **a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur**.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (emphasis added) (internal quotation marks and citation omitted).

Bench Billboard Co. v. City of Cincinnati (Gov. Br. 10–11) supports only the proposition that "**legislative** repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this requisite case-or-controversy . . . ." 675 F.3d 974, 981 (6th Cir. 2012) (cleaned up) (emphasis added). But, "while a **statutory** change 'is usually enough to render a case moot,' **an executive action that is not governed by any clear or codified procedures cannot moot a claim**." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (emphasis added)). The Governor is not the General Assembly and cannot unilaterally effect legislative change, no matter how broad his emergency powers. The Governor cannot avoid the "formidable burden of showing that it is absolutely clear" his worship ban "could not reasonably be expected to recur." *Already, LLC*, 568 U.S. at 91. The Governor has unfettered discretion to issue the orders and is accountable only to the Constitution and this Court. The Governor cannot and has not carried his burden.

B. The Governor Cannot Carry His Heavy Burden Because His Sudden Change in Policy Is Not Permanent.

Applying this "formidable burden," the Supreme Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that a state governor's "voluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 137 S. Ct. 2012, 2019 n.1 (2017) (modification in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 189 (2000)). Here, Governor Beshear "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his] policy," *id.*, of imposing a discriminatory ban on religious worship services, because his sudden change in policy is neither permanent nor irrevocable. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). The Seventh Circuit rejected the mootness argument of the Illinois Governor in a case challenging his evolving COVID-19 orders. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345 (7th Cir. 2020) ("It follows that the dispute is not moot and that we must address the merits of plaintiffs challenge to Executive Order 2020-32 even though it is no longer in effect.")

Governor Beshear's Orders initially banned drive-in and in-person religious worship, and the Governor did not convert his outright ban to restrictive guidelines until after Maryville Appellants and others commenced litigation and numerous injunctions were entered against the ban. (Br. 10–17.) But neither the Worship

Guidelines 1.1 enacted May 9, nor the *Guidelines for Places of Worship* announced June 10 ("Worship Guidelines 2.0"),[2] satisfies the Governor's burden to show mootness because "by its terms [it] is not permanent" and it has not "'irrevocably eradicated the effects of the alleged violation.'" *Lyons*, 461 U.S. at 101. Neither the plain language nor the regulatory context of the Governor's Orders and Guidelines demonstrate any authority to bind the Governor irrevocably, or any durability against his fiat. *See Lyons*, 461 U.S. at 101; *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007).

All of the Governor's Orders derive their authority from the Governor's extraordinarily broad powers under the Kentucky emergency management statutes, KRS Ch. 39A.[3] These include the power: (1) to "make, amend, and rescind any executive orders as deemed necessary," KRS § 39A.090, as well as the powers (2) "[t]o enforce all laws, and administrative regulations relating to disaster and emergency response and to assume direct operational control of all disaster and emergency response forces and activities in the Commonwealth;" (3) to force local

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[2] *Guidelines for Places of Worship*, Ver. 2.0 (June 10, 2020), https://govsite-assets.s3.amazonaws.com/r00brFxTl2TJkofBUZUh_Healthy%20at%20Work%20Reqs%20-%20Places%20of%20Worship%20-%20Final%20Version%202.0%20Final.pdf. The Court may take judicial notice of information contained on the State's official website as such public information is "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

[3] *See, e.g.*, RE.1-2, PageID#57; RE.1-3, PageID# 60; RE.1-7, PageID# 72.

government authorities to act in any manner he directs; and (4) to "seize, take, or condemn property," and (5) "to perform and exercise other functions, powers, and duties deemed necessary," KRS § 39A.100(1)(a)–(c), (j). Pursuant to these broad and essentially unaccountable powers, the Governor can amend, rescind, supersede, or reissue any of his Orders as he "deem[s] necessary," at any time. To be sure, the Governor's Orders, including the CHFS March 19 Gatherings Order[4] initiating the outright ban on attending worship services (Br. 4), have been amended several times,[5] and in both directions—on July 20[6] the Governor re-limited "mass gatherings" from "50 or fewer people" to "10 or fewer people," and on July 27[7] the Governor re-closed bars and re-reduced allowable restaurant capacity. There is nothing in the Governor's Worship Guidelines that even purports to preclude

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[4] All CHFS COVID-19 orders are expressly issued by the Governor's "designee" under the Governor's Chapter 39A powers and are, therefore, attributable to the Governor. *See, e.g.*, Gatherings Order, RE.1-3, PageID## 60–61 (signed by Acting Secretary of CHFS as "Governor's Designee").

[5] *See, e.g.*, CHFS Order (July 20, 2020), https://governor.ky.gov/attachments/20200720_Order_Mass-Gatherings.pdf (amending Gatherings Order and noting three prior amendments); CHFS Order (July 28, 2020), https://governor.ky.gov/attachments/20200728_CHFS-Order.pdf (amending CHFS "March 16, 2020 Food and Beverage Order" and noting two prior amendments);

[6] *Kentucky's Response to COVID-19*, Ky.gov, https://governor.ky.gov/covid19 (last visited Aug. 27, 2020) (recounting Governor Beshear's announcement of July 20 CHFS Order (*supra* note 5)).

[7] *Gov. Beshear Announces New Actions to Fight COVID-19*, Kentucky.gov (July 27, 2020), https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=283 (announcing CHFS July 28 Order (*supra* note 5)).

reversal or otherwise permanently curb the Governor's power to restrict worship—during this emergency or the next.

The Governor has "neither asserted nor demonstrated that [he] will **never** resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (emphasis added). The Governor only says "he is ***unlikely*** to prohibit in person faith based services as a future response to limiting the spread of COVID-19." (Ans.Br. 11 (emphasis added).) But, as shown above, the Governor has already reversed course several times, and has stated publicly, and unequivocally, that he is willing "to do what's necessary" (in his unchecked discretion) to "deal[] with a surge in the coronavirus."[8] Furthermore, **the Governor has moved the district court to dissolve its IPA preserving Maryville Appellants' right to gather for in-person worship** (Ans.Br. 6), stating,

> In the event the disease returns in force, or some other emergency arises, it is essential that Governor Beshear and other state officials be able to respond promptly and with the latitude afforded to them by our federalist system. State officials must be able to respond to this evolving public health emergency without second-guessing by the federal courts.

(RE.46-1, PageID## 666–667.) Thus, not only has the Governor not disavowed reinstatement of his in-person or drive-in worship ban, he has reserved and pursued

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[8] *Gov. Beshear Announces New Actions to Fight COVID-19*, *supra* note 8.

the right to do so. His obvious hedging precludes his mootness argument. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where intent to reinstate, "the rescission of the policy does not render this case moot").

The timing of the Governor's "voluntary" policy changes further undermines any notion of mootness. The Governor first announced future plans for allowing in-person worship less than a week after Maryville Appellants filed this appeal. (Br. 10.) Then, the Governor published the prospective Worship Requirements 1.0 hours before the district court entered its IPA/PI Order enjoining enforcement of the Governor's Orders against in-person worship at Maryville Appellants' church, the same day the Eastern District of Kentucky entered a statewide TRO allowing in-person worship, and the day before this Court entered its *Roberts* IPA preserving in-person worship at Maryville Appellants' church. (Br. 12–15.) Following the *Roberts* IPA, the Governor immediately accelerated his reopening of churches with the issuance of his Worship Guidelines 1.1. (Br. 15–16.) This litigation-induced timing, combined with the drastic micromanagement of worship imposed by the ambiguously mandatory Guidelines (Br. 55–57), betrays an intent to go back. *Cf. McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 871 (2005) (rejecting counties' mere "litigating position" as evidence of actual intent of county policies). Indeed, "[t]he defendant is free to return to his old ways. This, together with a public interest in

having the legality of the practices settled, militates against a mootness conclusion." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (footnote omitted).

C. The Governor Has Not Changed His Mind About His Worship Ban and Even Now Defends Its Constitutionality.

A case is not moot where, as here, the Governor "did not voluntarily cease the challenged activity because he felt [it] was improper," and "has at all times continued to argue vigorously that his actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985). The vast majority of the Governor's brief to this Court is dedicated to defending his Orders. (Ans.Br. 13–35.) There is nothing in the Governor's filings or the record to demonstrate he has had a change of heart.

The Governor's demonstrated official hostility to would-be worshippers, as compared to his fawning praise for mass protesters (Br. 38–41), is also relevant to the mootness question. The Governor chided would-be worshippers planning to attend Easter Sunday services for purportedly endangering the lives of Kentuckians, without giving them the chance to incorporate distancing and sanitization, but praised and encouraged thousands of protesters who came en masse to see the Governor at the Frankfort Capitol **with no distancing and in blatant violation of his gathering restrictions**. (Br. 39–41.) Such openly disparate treatment undermines any assurance by the Governor that he will not turn against worshippers again.

Indeed, the Governor's public statements in favor of protesters and against worshippers, combined with the timing of his "voluntary" policy changes and his vigorous defense of his Orders, leave little doubt Maryville Appellants are one whim away from being once again subjected to the restrictions they challenge in this case and which the Governor still favors. Both the case and this appeal are far from moot.

D. The Duration and Timing of the Governor's Orders Satisfy the Mootness Exception for Disputes Capable of Repetition, Yet Evading Review.

This case "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* Both circumstances are present.

Given the rapidly changing COVID-19 landscape there is no question that the duration of the Governor's worship ban was always going to be "too short to be fully litigated prior to cessation or expiration." Indeed, as of July 20, the original March 16 Gatherings Order had been amended four times in four months. (*See supra* note 6.) And even if the Governor ends his emergency declaration after one or two years, the duration of his restrictions will have been too short to be fully litigated. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (two years

is too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (two years is too short).

Kingdomware Technologies involved a business's claims against the Department of Veterans Affairs (VA) for failing to follow procurement rules that would have given the business a competitive advantage in bidding for procurement contracts. *See* 136 S. Ct. at 1973. Because the case reached the Court four years after commencement, and the work the business desired to perform for the VA was already complete, the Court found that "no live controversy in the ordinary sense remains because no court is now capable of granting the relief petitioner seeks." *Id.* at 1975–76. The Court concluded, however, that the "capable of repetition, yet evading review" exception to mootness applied because the short-term procurement contracts at issue "were fully performed in less than two years after they were awarded," and that "a period of two years is too short to complete judicial review of the lawfulness of the procurement." *Id.* at 1976 (internal quotation marks omitted) (citing, *inter alia*, *S. Pac. Terminal Co.*, 219 U.S. at 514–516). Thus, the Court held, "we have jurisdiction because the same legal issue in this case is likely to recur in future controversies between the same parties in circumstances where the period of

contract performance is too short to allow full judicial review before performance is complete." *Id.*

In *First National Bank*, two banks wanting to spend money to influence the votes on state referendum proposals were restricted by criminal statutes limiting their expenditures. *See* 435 U.S. at 767–68. In determining whether the banks' claims were moot, because the most recent referendum had already concluded, the Court found that "[u]nder no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment" because in each of the four previous referendum attempts by the state legislature "the period of time between legislative authorization of the proposal and its submission to the voters was approximately 18 months," which "proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Id.* at 774–75. The Court also found that, given the legislature's track record with referenda and the banks' continuing desire to influence votes, there could be no serious doubt that the banks would be subject to the criminal statute's restrictions in the future. *Id.* Thus, the Court held the case was not moot. *Id.* at 775.

Governor Beshear's continually evolving COVID-19 Orders (*see supra* note 5) give Maryville Appellants approximately a month to obtain final judicial review

of any particular restriction imposed by the Governor. This is unquestionably shorter than either the two years held insufficient by the Supreme Court in *Kingdomware Technologies* or the 18 months held insufficient in *First National Bank*. And given the Governor's established preference for a ban on attending religious worship services, combined with his official hostility towards worshippers as compared to protesters, Maryville Appellants have proved, like the claimants in *Kingdomware Technologies* and *First National Bank*, the likelihood that the Governor's Orders will restrict Maryville Appellants' desired and actual religious exercise in the future—whether this year or as a result of the next health emergency. (*See supra* pts. I.B–C.) Thus, this case satisfies the mootness exception for disputes capable of repetition, yet evading review.

E. The District Court's IPA/PI Order Does Not Moot Maryville Appellants' Appeal Because the District Court Had No Jurisdiction to Enter a Preliminary Injunction While Its Prior Effective Denial of the Preliminary Injunction Is on Appeal to This Court.

The district court had no jurisdiction to enter a preliminary injunction while its effective denial of the preliminary injunction had already been appealed to this Court, and this Court had remanded the case only to resolve the appropriateness of an IPA as to in-person worship services. (Br. 18–20.) Thus, the Court should reject the Governor's argument that the district court mooted this appeal by entering the preliminary injunction Maryville Appellants seek. (Ans.Br. 13.)

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Taylor v. KeyCorp*, 680 F.3d 609, 616 (6th Cir. 2012) (same). The jurisdictional rule applies in an interlocutory appeal from the denial of a preliminary injunction. *See, e.g., Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) ("'[A]n effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal.'"). Thus, the district court was divested of jurisdiction to decide all matters pertaining to Maryville Appellants' entitlement to a preliminary injunction the moment Maryville Appellants noticed their appeal from the district court's TRO/PI Order effectively denying the relief.

While such interlocutory appeals permit a district court to proceed to the merits of an action, *Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1174 (6th Cir. 1995), the jurisdictional retention by the district court is limited to "deciding **other** issues," *Weaver v. City of Cincinnati*, 970 F.2d 1523, 1528–29 (6th Cir. 1992) (emphasis added), and "narrowly defined, and does not include actions that *alter* the case on appeal." *United States v. Carman*, 933 F.3d 614, 617 (6th Cir. 2019) (cleaned up).

The district court denied Plaintiffs' TRO/PI Motion on April 18. (Br. 9.) Though the court indicated the denial was only of Maryville Appellants' requested TRO, they appealed the denial to this Court on April 24 (RE.16) as an effective denial of their requested preliminary injunction (PI). (Br.10.) This Court agreed that the district court's TRO/PI Order effectively denied the PI, and that this Court had acquired jurisdiction of the matter on that basis. *Maryville* IPA, 957 F.3d at 612. Thus, when Maryville Appellants noticed their appeal to this Court on April 24, the district court was divested of jurisdiction over all matters pertaining to its TRO/PI Order, including the key issue: whether Maryville Appellants are entitled to a preliminary injunction against enforcement of the Governor's Orders. Given the district court's lack of jurisdiction to provide Maryville Appellants the relief they seek in this appeal, the district court's IPA/PI order could not have mooted this appeal as a matter of law. (Br. 18–20, n.1)

II. MARYVILLE APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE ORDERS ARE NEITHER NEUTRAL NOR GENERALLY APPLICABLE AND CANNOT SATISFY STRICT SCRUTINY.

A. This Court Should Follow the Analytical Line of Cases Holding That the Governor's Disparate Worship Restrictions Violate the First Amendment, and Reject the Deferential Line of Cases Relied on by the Governor to Avoid Strict Scrutiny of His Discriminatory Orders.

Maryville Appellants' Brief demonstrates that two distinct lines of reasoning have emerged from the cases involving church challenges to COVID-19 worship

restrictions: the **analytical** line, anchored by this Court's *Roberts* IPA and *Maryville* IPA decisions, which support Maryville Appellants, and the **deferential** line, typified by the Seventh Circuit's decision in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020). (Br. 46–51.) Not surprisingly, the Governor relies heavily on the deferential line of cases, which in turn rely on the century-old *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), as providing a unique, "public health emergency" standard of constitutional analysis. (Gov.Br. 21–45.) This Court should avoid the Governor's error and follow the better-reasoned analytical line.

The Governor misrepresents the extraordinary writs of injunction denied by the Supreme Court in three cases challenging gubernatorial COVID-19 orders to be the same relief Maryville Appellants seek from this Court, and falsely implies that the Supreme Court's denials of the extraordinary writs rely on "the longstanding precedent" of *Jacobson*. (Ans.Br. 21–22.) *See S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020); *Elim Romanian Church v. Pritzker*, 207 L. Ed. 2d 157 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020). The Court should reject the Governor's novelty.

First, the Supreme Court did not say it relied on *Jacobson* in any of the three cases, and rightly so—***Jacobson* predates by decades the development of modern**

strict scrutiny analysis.[9] (Br. 47–48.) Second, no special *Jacobson* standard can be divined from the Chief Justice's lone concurrence in *South Bay* (joined by no other Justice), where he focused primarily on the extremely high bar an applicant must reach to obtain emergency, interlocutory injunctive relief from the Supreme Court, which standard is different from the standard for the preliminary injunctive relief sought by Maryville Appellants. (Br. 49–50.) The Chief Justice only cited *Jacobson* after his brief constitutional "observations," and then only for the general, unremarkable proposition that safety and health are the purview of state officials under the Constitution. 140 S. Ct. at 1613.

Moreover, though equal in precedential value (*i.e.*, none, Br. 50 n.5), the Governor speeds past the sharp and robust dissent of Justice Kavanaugh in *South Bay* (joined by two other Justices), which relies heavily on this Court's *Roberts* IPA decision, and in which Justice Kavanaugh explained convincingly why restrictions such as Governor Beshear's "indisputably discriminate[] against religion, and such discrimination violates the First Amendment." 140 S. Ct. at 1615. (Br. 50–51.) But, like the Chief Justice, Justice Kavanaugh did not cite *Jacobson* as providing a

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[9] *Jacobson* also predates by decades the incorporation of the First Amendment to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating Free Speech Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (incorporating Establishment Clause).

separate constitutional test—Justice Kavanaugh did not cite *Jacobson* at all. (Br. 51.) To be sure, courts reviewing COVID-19 orders are "tasked with identifying precedent in **unprecedented times**," *Tabernacle Baptist Church, Inc. of Nicholasville, Ky. v. Beshear*, 3:20-cv-00033-GFVT, 2020 WL 2305307, at *4 (E.D. Ky. May 8, 2020) (emphasis added), but "'**even under *Jacobson*, constitutional rights still exist**.'" *Id.* (emphasis added) (quoting *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)).

Furthermore, the Governor misrepresents the Supreme Court's stated rationale for its denial of an extraordinary writ of injunction against the Illinois Governor's COVID-19 orders in *Elim Romanian Church*. There, the Court noted that the Illinois Governor removed all worship restrictions on the eve of the Court's review, causing the Court to deny the extraordinary writ of injunction "without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant." 207 L. Ed. 2d 157. Thus, contrary to Governor Beshear's insinuation (Ans.Br. 21–22), the only rationale given by the Supreme Court for its denial was the Illinois Governor's eleventh-hour change of policy, not *Jacobson*.

Finally, in citing Justice Alito's dissent from the writ denial in *Calvary Chapel Dayton Valley* (Ans.Br. 20), the Governor leaves out Justice Alito's critical indictment of the deferential line of reasoning promoted by Governor Beshear: "[A] public health emergency does not give Governors and other public officials *carte*

blanche to disregard the Constitution for as long as the medical problem persists." 2020 WL 4251360, at *2. The Governor's soothsaying notwithstanding, the Supreme Court's writ denials provide no discernable support for the Governor's position.

B. The Governor's Inapposite, Anecdotal Accounts of Church Gatherings Do Not Advance His Burden to Justify His Worship Restrictions.

It is the Governor's burden to prove the constitutionality of his worship restrictions under strict scrutiny. (Br. 42–43.) But the Governor's factually deficient, anecdotal accounts of far-flung church gatherings (Ans.Br. 12, n.19) do not satisfy the constitutional standard. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (alleged harm cannot be "mere speculation or conjecture").

The Governor apparently expects the Court to take judicial notice of numerous news reports of COVID-19 transmission purportedly connected to churches (Ans.Br. 12 n.19[10]), without even attempting to show when (*i.e.*, early or recently in the pandemic), or what distancing and sanitization protocols were observed (if any). But

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[10] "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

the examples cited by the Governor which were actually studied by the CDC illustrate the deficiency of the Governor's evidence. The oft-cited Seattle church choir met on **March 17**—still ancient history on the COVID-19 timeline—for 2 1/2 hours of singing practice, which included "members sitting close to one another, sharing snacks, and stacking chairs at the end of practice."[11] Indeed, [m]embers had an **intense and prolonged exposure, singing while sitting 6–10 inches from one another**."[12] Moreover, one attendee "**was known to be symptomatic**."[13] At the time of the practice, "[t]here were no closures of schools, restaurants, churches, bowling alleys, banks, libraries, theaters, or any other businesses," and "[t]he advice from the State of Washington was to limit gatherings to 250 people."[14] And, with respect to singing, the CDC concluded only that "[t]he act of singing, itself, **might** have

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[11] Lea Hamner, MPH, et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69(19) MMWR 606, 606 (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf.

[12] *Id.* at 609 (emphasis added).

[13] *Id.* at 606 (emphasis added).

[14] Skagit Valley Chorale, *Statement re: COVID-19*, skagitvalleychorale.org (Mar. 23, 2019), https://9b3c1cdb-8ac7-42d9-bccf-4c2d13847f41.filesusr.com/ugd/3e7440635a114fead240e1a02bc2c872a852de.pdf.

contributed to transmission."[15] The Arkansas example occurred even earlier, **over the course of three days**, March 6-8, which was eight days prior to the CDC's issuing social distancing guidelines, and included two people who were **symptomatic** and likely responsible for the subsequent spread.[16]

A repeat of such events this far into the pandemic is highly unlikely, especially where churches like Maryville Appellants' are observing sanitization and distancing. (Br. 7.) Moreover, it is disingenuous even to suggest that the earliest COVID-19 cases involving churches—before any standardized or widespread social distancing

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[15] Hamner, *supra* note 4, at 606 (emphasis added). *Cf.* Christian J. Kähler & Rainer Hain, *Singing in choirs and making music with wind instruments – Is that safe during the SARS-CoV-2 pandemic?*, Inst. Fluid Mechanics and Aerodynamics, U. Bundeswehr Munich (June 2020), DOI: 10.13140/RG.2.2.36405.29926, at 2 ("The experiments clearly show that air is only set in motion in the immediate vicinity of the mouth when singing. In the case of the professional singer, the experiments showed that at a distance of around 0.5 m, almost no air movement can be detected, regardless of how loud the sound was and what pitch was sung. It is therefore unlikely that the virus could spread beyond this limit via the air flow created during singing."), 7 ("Our quantitative measurement results show that the dispersion of droplets when singing and making music with wind instruments is in general relatively small."), 8 ("If the findings and recommendations derived from our quantitative measurements are taken into account, then making music in a community should be relatively safe.").

[16] *See* Allison James, DVM, PhD, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69(20) MMWR 632 (May 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf.

and sanitization protocols had taken effect—have any bearing on worship services today, attended by the same people expected to observe these protocols literally everywhere else they are allowed to go.

C. The Governor's Constitutionally Forbidden Value Judgments on Maryville Appellants' Religious Exercise Pursuant to Their Sincerely Held Beliefs Cannot Justify His Disparate Treatment of Worship Services.

The Governor attempts to justify his disparate treatment of religious worship services on the grounds that they are not "literally necessary to sustain life." (Ans.Br. 26–28.) The Court should reject the Governor's value judgments about religious exercise as precisely what the Free Exercise Clause forbids.

As shown in Maryville Appellants' Brief (Br. 47), the Seventh Circuit made an obvious error in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), placing the decision in direct conflict with the Supreme Court's binding decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Lukumi* holds that a law restricting religious conduct "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree**" than the prohibited religious conduct. 508 U.S. at 543. (Br. 36.) The Seventh Circuit, however, expressly acknowledged "that warehouse workers and people who assist the poor or elderly"—essential and always exempted from numerical gathering restrictions under

Governor Beshear' Orders (Br. 4–5)—"may be at much the same risk as people who gather for large, in-person religious worship." 962 F.3d at 347. Under *Lukumi*, this acknowledgement required the Seventh Circuit to find that the worship restrictions at issue were not generally applicable, and to hold them unconstitutional unless they could satisfy strict scrutiny.

Compounding its error, the Seventh Circuit further violated the strict scrutiny principles of *Lukumi* by imposing its own value judgments on the importance of worship to the plaintiffs. As shown above, the court agreed that the Illinois numerical limitations exempted some "Essential Activities" meeting material needs, but involving similar risks of COVID-19 spread as worship services, but the court nonetheless approved the disparate treatment because it assigned a lower value to spiritual needs met by in-person worship. *See* 962 F.3d at 347 ("Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways."). (*Cf.* Ans.Br. 26–28.) But such line drawing based on the court's view of the value of a religious activity, rather than the risk of the activity to the claimed governmental interest, is precisely what the Free Exercise Clause forbids under *Lukumi*.

Governor Beshear makes the same error as the Seventh Circuit in deciding supercenters, warehouses, media, laundry, and liquor are "literally necessary to sustain life" while discounting the importance of "soul-sustaining group services of

faith organizations, even if the groups adhere to all the public health guidelines required of essential services . . . .” *Maryville* IPA, 957 F.3d at 614. But, as Justice Alito admonished in his *Calvary Chapel Dayton Valley* dissent, “As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.” 2020 WL 4251360, at *2 (Alito, J., dissenting). Thus, no discussion of what is “literally life sustaining” can be complete without consideration of the harm to life and health caused by lockdowns like Governor Beshear’s, which the CDC has undertaken with predictable results. *See, e.g.*, Mark É. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24–30, 2020*, 69(32) MMWR 1049 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf.

Indeed, the CDC study confirms what is intuitively known by most, perhaps especially by religious adherents prohibited from worshipping according to conscience: “The coronavirus disease 2019 (COVID-19) pandemic has been associated with mental health challenges related to . . . mitigation activities, **including the impact of physical distancing and stay-at-home orders**.” Czeisler, *supra*, at 1049 (emphasis added). The study found that, “[o]verall, 40.9% [of respondents] reported an adverse mental or behavioral health condition, including . . . those who reported having started or increased substance use to cope with stress

or emotions related to COVID-19 . . . and those who reported having seriously considered suicide . . . .” *Id.* at 1051. “At least one adverse mental or behavioral health symptom was reported by more than one half of respondents who were aged 18–24 years (74.9%) and 25–44 years (51.9%) . . . as well as those who were **essential workers** (54.0%) . . . and who reported treatment for diagnosed anxiety (72.7%), depression (68.8%), or PTSD (88.0%) at the time of the survey.” *Id.* (emphasis added). “[A]pproximately one in 10 reported that they started or increased substance use because of COVID-19. **Suicidal ideation was also elevated; approximately twice as many respondents reported serious consideration of suicide** in the previous 30 days than did adults in the United States in 2018, referring to the previous 12 months . . . .” *Id.* at 1053 (emphasis added).

Thus, the study concluded, “Markedly elevated prevalences of reported adverse mental and behavioral health conditions associated with the COVID-19 pandemic highlight the broad impact of the pandemic and the need to prevent and treat these conditions. . . . Community-level intervention and prevention efforts should include . . . **promoting social connectedness, and supporting persons at risk for suicide** . . . .” *Id.* at 1054–55 (emphasis added).

For all Kentuckians whose mental health is supported by the religious exercise of assembling for worship with their church families, according to their sincerely held beliefs, including essential workers who serve all Kentuckians, the Governor’s

answer is that assembled worship is "literally" not necessary to sustain them. (Ans.Br. 26–28.) But the Governor's position, in addition to not being religiously neutral (Br. 35–36), is undermined by his own Executive Order 2020-257, expressly incorporating by reference the "CISA List" (RE.1-7, PageID#73, ¶ 1.a), which as of March 28, 2020 referred to the U.S. Department of Homeland Security Cybersecurity and Infrastructure Agency updated guidance document, *Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience In COVID-19 Response*, Ver. 2.0 (Mar. 28, 2020) (RE.1-8, PageID## 79–91), which significantly expands the categories of essential businesses and workers exempted from the Governor's Gatherings Order, and expressly specifies "Clergy for essential support" as "essential critical infrastructure workers" who are "needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response," and whose ability "to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions." (RE.1-8, PageID## 79, 88.).

In light of the foregoing, the Governor's ban on gathered worship effectively sidelined "Clergy for essential support" who are deemed critical to public health under the Governor's own Orders, and disparately deprived all Kentuckians who depend on assembled worship for spiritual sustenance, including essential workers,

of the spiritual connectedness necessary for maintaining their mental health. Thus, the Governor's position is "literally" harmful, and "literally" does not make sense.

"[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). "Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law." *United States v. Ballard*, 322 U.S. 78, 86–87 (1944). "Man's relation to his God was made no concern of the state [by the Constitution]. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *Id.* at 87. The value of religious worship is enshrined in the First Amendment, and even in the Governor's "essential" designations. Thus, the Constitution prohibits Governor Beshear from second-guessing the value of worship to Maryville Appellants and other Kentuckians, and *Lukumi* requires the Court to invalidate the Governor's disparate treatment of religious worship as compared to other permitted activities of similar risk.

III. MARYVILLE APPELLANTS' VAGUENESS ARGUMENTS ARE PROPERLY BEFORE THIS COURT.

Maryville Appellants' vagueness challenge to the Governor's ambiguously mandatory Worship Guidelines 1.1 (Br. 55–57) is neither moot nor waived, as suggested by the Governor. (Ans.Br. 36.) The May 9 enactment of the Governor's

Worship Guidelines 1.1 and the June 10 announcement of the Worship Guidelines 2.0 both occurred after Maryville Appellants appealed to this Court on April 24. (RE.16, PageID# 252.) Thus, Maryville Appellants could not have addressed the Guidelines in their vagueness challenge in the district court (RE.1, PageID## 28, 38) prior to coming to this Court, making waiver a non-issue. *See Scottsdale Ins. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) ("These rules generally provide that an argument not raised before the district court is waived on appeal to this Court.").

Rather, the vagueness challenge to the Governor's later enactments presents the "particular circumstances," *see Scottsdale Ins.*, 513 F.3d at 552, where this Court should take up a new but purely legal question, the resolution of which is clear beyond doubt: The Worship Guidelines 1.1, which the Governor issued to ameliorate his unconstitutional worship ban, are themselves unconstitutional because their juxtaposition of mandatory and permissive language renders them hopelessly vague. (Br. 55–57.) And the announcement of the Worship Guidelines 2.0 does not moot the vagueness of the Guidelines 1.1 because the Guidelines 2.0 suffer from the identical problem. (*Compare, e.g.*, Worship Guidelines 2.0, *supra* note 2, at 1 ("In addition, **places of worship should follow the guidelines** in order to reopen and remain open . . . ."), *with* Worship Guidelines 1.1, RE.36-1, PageID# 586 (same).) It would be a denial of substantial justice to Maryville Appellants, *see Scottsdale Ins.*, 513 F.3d at 552, to allow the Governor to run out the clock on this appeal

through the serial enactment of vague guidelines to avoid accountability for his unconstitutional worship ban.

CONCLUSION

For all the foregoing reasons, and those in Maryville Appellants initial Brief, the district court's denial of preliminary injunctive relief should be reversed.

Respectfully submitted:

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DATED this August 28, 2020.

/s/ Roger K. Gannam
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I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

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/s/ Roger K. Gannam
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