UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARYVILLE BAPTIST CHURCH, INC., and DR. JACK ROBERTS,	)	
Plaintiffs,	)	CASE NO. 3:20-cv-00278-DJH
v.	)	
ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND AMENDED MOTION TO DISMISS

Pursuant to L.R. 7.1, Plaintiffs, Maryville Baptist Church, Inc. and Dr. Jack Roberts (collectively "Plaintiffs"), by and through the undersigned counsel, hereby submit this Response in Opposition to the Governor's Motion to Dismiss (Docket No. 33) and Amended Motion to Dismiss. (D.N. 38).[1] For the following reasons, the Governor's motion should be denied.

FACTUAL BACKGROUND

A. The Procedural History Of Plaintiffs' Claims And The Law Of The Case Already Holding That Plaintiffs Are Substantially Likely To Succeed On The Merits Of Their Constitutional And Statutory Claims.

On April 17, 2020, Plaintiffs initiated the instant action, filing a Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages (D.N. 1, "V.Compl."), and moved this Court for a Temporary Restraining Order and

[1] The Governor's Amended Motion to Dismiss essentially incorporates all of the arguments made in his original Motion to Dismiss, with a few other purported defenses added. (*See* D.N. 38-1, Memorandum in Support of Amended Motion to Dismiss.) In accordance with this Court's Order (D.N. 44), Plaintiffs address both motions in this consolidated response.

Preliminary Injunction. (D.N. 3). The next day, April 18, 2020, this Court issued an Order denying Plaintiffs' motion for a temporary restraining order and preliminary injunction. (D.N. 9). On April 24, 2020, Plaintiffs noticed their appeal of this Court's denial to the Sixth Circuit Court of Appeals. (D.N. 16). On May 2, 2020, on an emergency motion for injunction pending appeal, the Sixth Circuit Court of Appeals found that Plaintiffs were "likely to succeed on [their] **state and federal** claims, especially with respect to the ban's application to drive-in services." (D.N. 23, PageID 288 (emphasis added)). On May 8, 2020, after Plaintiffs had submitted a renewed motion for injunction pending appeal, this Court entered an Injunction Pending Appeal likewise finding that "Plaintiffs have **a strong likelihood of success on the merits** of their [state] KRFRA claim" (D.N. 35, PageID 578 (emphasis added)), and that "Plaintiffs are likely to succeed on the merits of their constitutional claims," because the Governor's orders could not survive the required strict scrutiny. (D.N. 35, PageID 578-580).

Interestingly, on the same day this Court issued its Injunction Pending Appeal (but prior to that decision), the Governor moved to dismiss Plaintiffs' Verified Complaint, arguing that Plaintiffs could not state a claim under the First Amendment, that the Religious Land Use and Institutionalized Persons Act did not apply to Plaintiffs' claims, and that the Eleventh Amendment barred determination of Plaintiffs' state law claims. (D.N. 33-1, PageID at 501-505).

B. The Ever-Changing And Temporary Nature Of The Governor's COVID-19 Gathering Restrictions And Orders.

Because the temporal nature of the Governor's gathering restrictions imposed via his COVID-19 orders is relevant to his contentions relating to mootness and this Court's subject-matter jurisdiction, Plaintiffs provide the following chart outlining the timeline of all (pertinent) orders issued by the Governor during the COVID-19 period:

Fig. 1.
Temporary Duration of
Stay-at-Home Restrictions Limiting Worship Services

Order/Action	**Date Issued**	**Limit on religious worship**	**Status**
Executive Order 2020-243 and March 19 Cabinet Order	Mar. 19, 2020	"Any gathering that brings together groups of individuals"	Amended and Extended by Executive Order 2020-257 signed on March 25, 2020
Executive Order 2020-257	Mar. 25, 2020	"Any gathering that brings together groups of individuals"	Extended by Executive Order 2020-275 on April 8, 2020
Executive Order 2020-275	Apr. 8, 2020	"Any gathering that brings together groups of individuals"	Duration clarified by Benchmark Announcement for Reopening Kentucky
Benchmark Announcement	Apr. 16, 2020	"Any gathering that brings together groups of individuals"	Noted that Executive Order 2020-243's gathering restriction would last until 14 days have passed with decreasing cases and updates on vaccine and treatment
Healthy at Work, Phases 1-2	Apr. 21, 2020	"Any gathering that brings together groups of individuals"	Amended by Cabinet for Health and Family Services Order on May 9, 2020
May 9 Order of Cabinet for Health and Family Services; Guidelines for Places of Worship	May 9, 2020	"33% of building occupancy"	Amended by June 10 Order of Cabinet for Health and Family Services

June 10 Order of Cabinet for Health and Family Services; Amended Guidelines for Places of Worship	June 10, 2020	"50% of building occupancy"	Current

LEGAL ARGUMENT

I. THE GOVERNOR'S CHANGE OF POLICY DOES NOT MOOT THIS CASE BECAUSE HE HAS NOT MET AND CANNOT MEET HIS FORMIDABLE BURDEN UNDER THE VOLUNTARY CESSATION DOCTRINE, AND THIS DISPUTE IS CAPABLE OF REPETITION YET EVADING REVIEW.

A. The Voluntary Cessation Of Illegal And Unconstitutional Conduct Does Not Moot Plaintiffs' Claims.

1. The Governor Faces A "Formidable Burden" To Demonstrate That It Is Absolutely Clear He Will Not Resume Old Policies.

This Court should reject the Governor's arguments that this case is moot. His sudden, "voluntary" shift from the discriminatory prohibition on religious gatherings and worship services enshrined in his Executive Order 2020-243 and Healthy at Work Reopening Kentucky plan, which he has vigorously defended in this court, and at the Sixth Circuit, is not enough to remove his conduct from review. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("**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.**" (emphasis added)).

> **a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued**. Otherwise, a defendant 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).

2. The Governor Cannot Carry His Formidable Burden Because, Absent A Permanent Injunction, The Challenged Policies Can Be Reinstituted At Any Time.

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 make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 137 S. Ct. 2012, 2019 n.1 (2017) (cleaned up). Here, the Governor "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his] policy," *id.*, of imposing unique and discriminatory numerical limits and restrictions 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 Healthy At Work plan, and the specific Guidelines for Places of Worship, issued only **after the Governor was temporarily enjoined from enforcing his unconstitutional restrictions against Plaintiffs** "by [their] terms [are] not permanent" and have not "'**irrevocably** eradicated the effects of the alleged violation.'" *Lyons*, 461 U.S. at 101 (emphasis added). Neither the plain language of the May 9 Order of the Cabinet for Health and Family Services, nor the regulatory context of the Guidelines for Places of Worship demonstrates any legally enforceable provision binding the Governor irrevocably or durably against his fiat. *See id.*; *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007). In fact, just the opposite is true. As the May 9 Order demonstrates, "[t]he Cabinet for Health and Family Services will monitor these directives continuously" and continue to "provide updates" throughout the COVID-19 situation. (D.N. 36-1, PageID 585).

Moreover, the Governor's website that is constantly updating the requirements and restrictions on gatherings explicitly states:

> **Reminder: People should be prepared for state and local public health orders to be extended, amended, or changed as needed to protect public health. This means we may move between the different Phases during this pandemic.**

See Healthy at Work: Reopening Kentucky, *available at* https://govstatus.egov.com/ky-healthy-at-work (last visited June 15, 2020) (emphasis original). Thus, not only is the Governor **not** contending that the change (brought about by numerous courts temporarily and preliminarily prohibiting him from enforcing his gathering restrictions) is permanent, but he is **explicitly stating that previous restrictions may need to be reinstated, allegedly based on health metrics**.

No matter, claims the Governor, because the Sixth Circuit has indicated that government is entitled to a presumption that it will not reinstitute a previous order. (D.N. 38-1, PageID 600 (citing *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012)). But, *Bench Billboard* involved the actions of a City Council, acting through the cooperative and deliberative process that is attendant to the ordinary legislative process. 675 F.3d at 982. Moreover, the legislative body in Cincinnati not only officially repealed the challenged ordinance, it also "**imposed an entirely new statutory scheme in place of the repealed ordinance**," *id.* (emphasis added), and, critically, "there was no evidence in the record that the City has announced any intention of, or made any threat to, reenact" the challenged law. *Id.* at 981

None of those things is true here. First, 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). Second, the Governor's directives are issued only at his whim and are not subject to the stringent legislative process that would entitle them to a presumption of permanence. *See McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir.

2015) ("[W]hile 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**." (emphasis added)). To be sure, as quoted and demonstrated above, the Governor ostensibly plans to implement, change or reverse restrictions as health metrics and health criteria change. The Governor has already laid the groundwork for imposing more, not fewer restrictions going forward. Thus, not only has the Governor **not** affirmatively and positively disclaimed any intention to ever reinstate his unconstitutional restriction on religious worship services, but there is evidence he intends to reinstate restrictions within months, under certain circumstances. He cannot demonstrate mootness. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where government intends to reinstate old policy, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . .").

Moreover, the timing of the Governor's policy change—only after he had been temporarily enjoined from enforcing his unconstitutional restrictions—is suspect, calls into question the representation that the Governor's sudden reversal was a "considered decision," and betrays an intent to go back to his old ways if the preliminary injunction is not made permanent. *See Pierce*, 2019 WL 4750138, *5–6 ("The Court is not fooled."); *cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such [post-litigation] maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 871 (2005) (rejecting counties' mere "litigating position" as evidence of actual intent of county policies).

Notably, the Seventh Circuit recently rejected almost identical mootness claims in almost identical circumstances. *See Elim Romanian Pentecostal Church v. Pritzker*, -- F.3d --, No. 20-1811, 2020 WL 3249062, *3 (7th Cir. June 16, 2020) (challenge to Illinois Governor's voluntarily rescinded COVID-19 restrictions on religious services was not moot because "[t]he list of criteria for moving back to [a prior phase] (that is, replacing current rules with older ones) shows that it is not absolutely clear that the [challenged restrictions] will never be restored"). In *Elim*, as here, the case was not moot by the Governor's rescission of the challenged order because the Governor retained the authority to reenact the previous restrictions at any time, and did not make "absolutely clear" that he will not do so. *Id*. ("It follows that the dispute is not moot and that we must address the merits of the plaintiffs' challenge.")[2]

3. The Governor Cannot Carry His Heavy Burden Because He Has Not Changed His Mind About The Legality Of The Gathering Restrictions And Continues To Vigorously Defendant Their 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); *Pierc*e, 2019 WL 4750138, at *5 ("[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case."). In numerous filings in this Court, including the motion currently pending, the Governor continues to assert that his original restrictions were constitutional. (D.N. 38-1, PageID 606 (incorporating all of the Governor's arguments in opposition to Plaintiffs' Renewed Emergency Motion for Injunction Pending

[2] The Seventh Circuit's upholding of the challenged restrictions in *Elim* is of no import here, because the decision was rooted in its express disagreement with the Sixth Circuit's decision and rationale in this case. *Id*. at *5. Of course, the latter not the former controls this case.

Appeal); D.N. 31, PageID 423-434 (arguing that the Governor's orders are constitutional)). Thus, "[t]here is nothing in the parties' submissions or the record to demonstrate the Governor changed his mind about the merits of Plaintiff[s'] claim." *Pierce*, 2019 WL 4750138, at *6. "The Governor did not experience a change of heart that may counsel against a mootness finding." *Id.* Furthermore, "[g]iven the importance of the issues at bar . . . the public interest in having the legality of the Governor's behavior settled weighs against a mootness ruling." *Id.* at *7.[3]

B. This Dispute Is Capable Of Repetition Yet Evading Review, And Not Moot.

This case also "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin 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 conditions are true here. Given the rapidly changing COVID-19 landscape, there is no question that the duration of the Governor's total prohibition on religious gatherings was always going to be "too short to be fully litigated prior to cessation or expiration." *Id*. Indeed, Order 2020-243 was superseded by Order 2020-257 after just 6 days, and the total prohibition first articulated in Order 2020-243 was only fully (as the Governor contends) amended to permit religious gatherings on May 9th, a mere 51 days after it was enacted (*see supra* Figure 1). **It appears that the life span of the Orders runs from 6 days or less to 30 days**. Even under the Governor's

[3] Moreover, Plaintiff Dr. Roberts and other members and/or attendees of Maryville Baptist Church received letters warning that their failure to abide by the Governor's restrictions subjected them to "additional actions by health authorities." (D.N. 1, PageID 17, ¶55 and V.Compl. Ex.K). These letters have never been revoked or rescinded, and thus, without permanent injunctive relief, Plaintiffs still suffer under the Damocles sword of enforcement actions at any time.

recent Guidelines for Places of Worship, the duration of his restrictions will be too short to be fully litigated. *See Kingdomware Tech., 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. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (**18 months** is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (**two years** is too short).

The realities of the Governor's COVID-19 orders give Churches no more than **30 days** to obtain final judicial review of any particular restriction imposed by the Governor. (Figure 1, *supra*). This time horizon is unquestionably shorter, to a significant degree, than either the two years, the 18 months, or even the 12 months held insufficient by the Supreme Court in the foregoing cases. And the Governor himself has forecasted "a reasonable expectation that [Plaintiffs] will be subjected to the same action again," *Wisconsin Right To Life*, 551 U.S. at 462, given the Governor's established preference for a total prohibition on religious worship services, and his explicit prediction that "**People should be prepared for state and local public health orders to be extended, amended, or changed as needed to protect public health. This means we may move between the different Phases during this pandemic**." (*See* page 6, *supra*).

C. The Governor's Voluntary Cessation Does Not Moot Plaintiffs' Equitable Claims.

"Along with its power to hear a case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (193). Indeed, for this Court to still grant equitable relief in the form of a declaratory judgment or permanent injunctive relief, Plaintiffs need only show that "there exists come cognizable danger of recurring violation." *Id.*; *Smith v. S.E.C.*, 129 F.3d 356, (6th Cir. 1997) (same). The Sixth Circuit has held that injunctive and declaratory relief are available where – as here – "[t]here *is* a reasonable expectation that the alleged wrongful and unconstitutional deprivation may be

repeated." *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 699 (6th Cir. 1985) (emphasis original). As demonstrated *supra*, there is a possibility here – **explicitly stated by the Governor as an expectation** – that a return to prior orders and restrictions may be necessary during the COVID-19 pandemic. Thus, this Court retains the authority to declare the legal rights of the Plaintiffs and enjoin the Governor's unconstitutional restrictions on religious gatherings.

D. The Governor's Voluntary Cessation Does Not Moot Plaintiffs' Damages Claims.

Finally, even if Plaintiffs' claims for injunctive relief were moot, which they are not, Plaintiffs have pleaded a claim for damages. (V.Compl., D.N. 1, PageID 51). Under binding law in the Sixth Circuit, a claim for damages – even nominal damages – is sufficient to keep a case justiciable. *See, e.g.*, *Lynch v. Leis*, 382 F.3d 642, n.2 (6th Cir. 2004) (noting that the Sixth Circuit "'squarely hold[s] that a claim for nominal damages is sufficient to render a case justiciable'" (quoting *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1268 (10th Cir. 2004) (McConnell, J., concurring)); *Ermold v. Davis*, 855 F.3d 715, 719 (6th Cir. 2017) ("Even 'a claim for nominal damages is normally sufficient to establish standing and defeat mootness'" (quoting *Lynch*, 382 F.3d at 646 n.2)); *Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (finding district court erred by failing to consider claims for nominal damages, even though the claims for injunctive relief were moot).

In sum, the Governor's attempt to avoid judicial accountability for his unconstitutional dictates fails. This case is not moot. The Court should deny the motion to dismiss.

II. PLAINTIFFS' WELL-PLEAD ALLEGATIONS STATE CLAIMS FOR RELIEF.

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). "[A] complaint attacked by a Rule 12(b)(6) motion

to dismiss does not need detailed factual allegations," but a plaintiff must meet his "obligation to show the grounds of his entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Supreme Court does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face" and enough facts to "nudge[] [plaintiffs'] claims across the line from conceivable to plausible." *Id.* at 570; *see also Ashcroft*, 556 U.S. at 679 ("a complaint that states a plausible claim to relief survives a motion to dismiss"). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990).

A district court cannot dismiss a complaint under Rule 12(b)(6) "unless **after accepting all well-pleaded allegations in the plaintiff's complaint as true** and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears **certain** that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir. 2005) (emphasis added). It is axiomatic that motions to dismiss under Rule 12(b)(6) are **highly disfavored**. *See, e.g. Nuchols v. Berrong*, 141 F. App'x 451, 453 (6th Cir. 2005). Indeed, such motions "are **rarely granted**." *Id.* (emphasis added). *See also Damnjanovic v. U.S. Dep't of Air Force*, 135 F. Supp. 3d 601, 605 (E.D. Mich. Sept. 22, 2015) (same).

The Governor cannot overcome his extraordinarily high burden to prevail on his motion to dismiss, especially since **both this Court and the Sixth Circuit have already concluded that Plaintiffs are likely to succeed on both their state and federal claims**. Plaintiffs' well-plead allegations unquestionably cross the minimum threshold, and the Governor's Motion must be denied.

A. Binding Sixth Circuit Precedent, And The Law Of The Case, Demonstrate That Plaintiffs Have Stated A Claim For Relief Under The First Amendment (And Are Likely To Succeed).

The Governor continues to argue that his restrictions on religious gatherings challenged in the instant action are perfectly permissible under the First Amendment because of the emergent nature of the COVID-19 situation. (D.N. 38-1, PageID 606). This contention must fail as a matter of law. The fatal problem for the Governor's motion is that he asks this Court to address (and reverse) that which has already been decided: that his total prohibitions on religious gatherings – even during the COVID-19 situation – are unconstitutional under the First Amendment. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) (Governor's COVID-19 gathering restrictions are unconstitutional as to drive-in services, and likely also unconstitutional as to in-person worship services); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (Governor's COVID-19 gathering restrictions are unconstitutional as to in-person and drive-in services); *Maryville Baptist Church, Inc. v. Beshear*, D.N. 35, Order Granting Injunction Pending Appeal and Preliminary Injunction as to restrictions on in-person worship services).

It is beyond cavil that the Governor cannot succeed on his motion to dismiss Plaintiffs' constitutional claims, because these matters, decided by both the Sixth Circuit and by this Court in this matter, are now the law of the case. In fact, this Court is prohibited from revisiting the precise issue the Governor seeks here. "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)); *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (same). Indeed, "[t]he doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided.'" *Musacchio*, 136 S. Ct. at 716 (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). *See also Caldwell v. City*

of Louisville, 200 F. App'x 430, 433 (6th Cir. 2006) ("The law-of-the-case doctrine precludes reconsideration of issues decided at an earlier stage of the case.").

Put simply, "**the law of the case doctrine and the mandate rule generally preclude a lower court from reconsidering an issue expressly or impliedly decided by a superior court**." *United States v. Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994) (emphasis added). Even in the context of a preliminary injunction, when the Sixth Circuit issues a decision on an important issue of law in the case, "then that opinion becomes the law of the case." *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015). Thus, because the Sixth Circuit has already held that the Governor's orders likely violate the First Amendment and the Kentucky RFRA, this Court is precluded from revisiting those question of law, and certainly precluded from concluding that Plaintiffs are not only unlikely to prevail but have not even stated cognizable claims.

B. The Sixth Circuit's Decision Also Demonstrates That Plaintiffs' Other First Amendment Claims State Cognizable Claims For Relief.

Though the Sixth Circuit's decision in *Maryville Baptist* focused on the Free Exercise component of Plaintiffs' Complaint, its analysis is equally binding on Plaintiffs' Free Speech and Free Assembly claims. Plaintiffs have plainly alleged that the Governor's orders impose a content- and viewpoint-based restriction on Plaintiffs' free speech rights, and that the orders impose a prior restraint on their speech. (D.N. 1, V.Compl. ¶¶92-94). Content-based restrictions on speech must survive strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Thus, because Plaintiffs have alleged a content and viewpoint-based restriction on their speech, the Sixth Circuit's determination that the Governor's Orders cannot withstand strict scrutiny because they are not narrowly tailored or the least restrictive means, 957 F.3d at 614, applies equally to Plaintiffs' free speech and free assembly claims.

C. Plaintiffs' Well-Plead Allegations Demonstrate That They Have Stated A Claim For Relief Under RLUIPA.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") states that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." 42 U.S.C. § 2000cc(a)(1). If the government does impose such a restriction, it must satisfy strict scrutiny, *i.e.*, demonstrate that such a burden on the religious assembly is supported by a compelling interest and is the least restrictive means to further that alleged interest. *Id.* RLUIPA has several key provisions, including *inter alia* an "[e]qual terms" provision, a "[n]ondiscrimination" provision, and a total exclusion provision. 42 U.S.C. §§2000cc(b)(1)-(3).[4] Plaintiffs' well-plead allegations state a claim under all three RLUIPA provisions.

1. Plaintiffs' RLUIPA Claims Are Not Barred By Sovereign Immunity.

The Governor contends that the Eleventh Amendment bars Plaintiffs' RLUIPA claims. (D.N. 38-1, PageID 603-04 (citing *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022 (D.C. Cir. 2006)).[5] This is incorrect. RLUIPA has been expressly held to authorize injunctive relief claims

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[4] The equal terms provision mandates that no government "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). The nondiscrimination provision mandates that no government "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion." 42 U.S.C. § 2000cc(b)(2). The total exclusion provision mandates that the government not "impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction." 42 U.S.C. §2000cc(b)(3)(A).

[5] The Governor's reliance on *Webman* is misplaced. First, *Webman* involved RFRA, not RLUIPA. 441 F.3d at 1025. Second, *Webman* dealt with whether the **federal** government had waived sovereign immunity under RFRA. *Id.* Third, *Webman*'s only holding was that **RFRA** did not waive the **federal** government's sovereign immunity as to **monetary damages**, but recognized it **did** waive sovereign immunity as to injunctive relief, which Plaintiffs seek here. *Id.*

against states, which is what Plaintiffs seek here. *See, e.g.*, *Sossamon v. Texas*, 536 U.S. 277, 285 (2011) (RLUIPA authorizes injunctive relief, but does not waive state's sovereign immunity from suit for **monetary** damages); *Cardinal v.* Metrish, 564 F.3d 794 (6th Cir. 2009) (sovereign immunity only bars plaintiffs RLUIPA claims for **monetary** damages); *Luther v. White*, No. 5:17CV-P138-TBR, 2017 WL 6507655, *2 (W.D. Ky. Dec. 19, 2017) (citing *Sossamon* for the proposition that "RLUIPA generally authorizes only injunctive relief and does not waive a state's sovereign immunity from suit for **money** damages" (emphasis added)); *Robinson v. Parker*, No. 5:12CV-P45-R, 2012 WL 3989925, *5 (W.D. Ky. Sept. 11, 2012) (holding that RLUIPA permits claims for injunctive relief against the states).

2. The Governor's Orders Regulate How Plaintiffs Can Use Their Land And Emanate From His Authority To Regulate Land Use.

Next, the Governor contends that Plaintiffs' RLUIPA claims fail to state a claim because the Governor's Orders did not arise out of a zoning or land use scheme. (D.N. 38-1, PageID 605-606). This contention fails too, because it ignores the very authority upon which the Governor purports to make his challenged orders.[6]

Under K.R.S. §39A-100(1), the Governor is given extraordinarily broad powers, including: (1) the enforcement, regulation, and authority to proscribe how all regulations in the Commonwealth may be interpreted, applied, or enforced, K.R.S. §39A-100(1)(a); (2) to force local

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[6] The Governor's Orders repeatedly state that they are rooted in, and emanate from, K.R.S. §39A. (*See, e.g.*, D.N. 1-2, PageID 57 (noting that the Governor declared his state of emergency "by virtue of the authority vested in me by Chapter 39A of the Kentucky Revised Statutes"); D.N. 1-3, PageID 60 (noting that the gathering restrictions were issued "[p]ursuant to the authority of KRS Chapter 39A"); D.N. 1-5, PageID 66 (noting that the order was issued under "KRS Chapter 39A"); D.N. 1-6, PageID 69 (Executive Order 2020-246 issued "by virtue of authority vested in me pursuant to the Constitution of Kentucky and KRS Chapter 39A," and ordering the closure of all business and entities that are not "life-sustaining" to close); D.N. 1-7, PageID 72 ("Kentucky revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary . . . including the power to suspend state statutes and regulations")).

government authorities to act in any manner he directs, *id.* 39A-100(1)(b); and (3) to "**seize, take, or condemn property**" as he deems necessary. *Id.* §39A-100(1)(c) (emphasis added). Such extraordinarily broad powers certainly include – explicitly – the power to regulate the use of land, such as Plaintiffs' churches. The power to seize, condemn, and take property is unquestionably an exercise of land use authority, and thus subjects the Governor to a right of action under RLUIPA.

In fact, RLUIPA specifically encompasses not only zoning and land use regulations, but "the application of such law[s], that limit or restrict a claimant's use or development of land." 42 U.S.C. §2000cc-5(5). Here, the Governor has applied his broad land use authority granted in K.R.S. §39A-100 to enact his challenged COVID-19 orders, which limit and restrict Plaintiffs' ability to use their facilities and land for worship services. The Governor cannot purport to exercise authority under K.R.S. §39A-100, which gives him authority over land use, and then claim that his orders are not explicitly land use or zoning restrictions.

3. Plaintiffs' Well-Pleaded Allegations State Claims Under RLUIPA's Equal Terms, Nondiscrimination And Total Exclusion Provisions.

"The equal-terms section [of RLUIPA] is violated whenever religious land uses are treated worse than comparable non-religious ones, whether or not the discrimination imposes a substantial burden on the religious uses." *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir 2007); *see also Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006) (same). The Sixth Circuit has explicitly adopted this test as its own. *See Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 368-69 (6th Cir. 2018) ("[W]e adopt the Third, Seventh, and Ninth Circuit cases." (citing *Vision Church*, 468 F.3d 975)). Plaintiffs' Verified Complaint plainly states a claim under the equal terms provision. (D.N. 1, V.Compl. ¶45 (alleging that the Governor's orders facially differentiate between religious and nonreligious

assemblies)); (*id.* ¶238 (alleging that the Governor's orders place a burden solely on religious assemblies while exempting similar non-religious assemblies or gatherings)).

Under the nondiscrimination provision of RLUIPA, Plaintiffs need only demonstrate that the government had treated them less favorably than other nonreligious entities and that "a discriminatory impact was foreseeable," and "less restrictive alternatives were available." *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historical Dist Comm'n*, 768 F.3d 183, 199 (2d Cir. 2014). The Sixth Circuit has suggested that Plaintiffs need also demonstrate a "similar comparator" in order to state a claim. *Tree of Life*, 905 F.3d at 370. Here, there is no question that a discriminatory impact was foreseeable, as the Governor's orders imposed a blanket restriction on Plaintiffs' religious gatherings (D.N. 1, V.Compl. ¶¶230), and numerous less restrictive alternatives were available. (D.N. 1, V.Compl. ¶¶69-79). Moreover, as the law of the case from the Sixth Circuit's decision in *Maryville Baptist* demonstrates beyond cavil, Plaintiffs have demonstrated a suitable comparator. *Maryville Baptist*, 957 F.3d at 613 ("The way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches.").

Finally, a violation of the total exclusion provision of RLUIPA may be found where – as here – the Governor's Orders have "the effect of depriving [Churches] and other religious institutions and assemblies of reasonable opportunities to practice their religion, including the **use** and construction of structures." *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1238 (10th Cir. 2010). Plaintiffs' well-plead allegations demonstrate that the Governor's Orders have unquestionably deprived Plaintiffs of the ability to use their facilities to host worship services along similar lines as non-religious gatherings are permitted. (D.N. 1,

V.Compl. ¶¶64-68 (alleging the disparate treatment afforded to non-religious gatherings while the blanket prohibition was imposed on Plaintiffs' religious worship services)).

In sum, the Governor's motion to dismiss Plaintiff's RLUIPA claims should be denied.

D. Plaintiffs' Well-Pleaded Allegations Under KRFRA State Cognizable Claims And Are Not Barred By The Eleventh Amendment.

Like Plaintiffs' First Amendment claims, the law of the case precludes revisiting Plaintiffs' KRFRA Claims.

For the first time in this matter, the Governor now contends that the Eleventh Amendment bars this Court's consideration of Plaintiffs' claims under the Kentucky Religious Freedom Restoration Act (KRFRA). (D.N. 38-1, PageID 603-604). But, fatally for the Governor, here again he seeks revisiting that which has already been decided by both the Sixth Circuit and this Court, and is thus the law of the case. *See Maryville Baptist Church, Inc.*, 957 F.3d at 613-614 (holding the Governor's COVID-19 gathering restrictions violate KRFRA and "**plainly** so" (emphasis added)); *Maryville Baptist Church, Inc.*, D.N. 35 ("the Court is compelled to find that Plaintiffs have a **strong** likelihood of success on the merits of their KRFRA claim" (emphasis added)).

Moreover, numerous federal courts have routinely permitted claims under state RFRA statutes, including this very District in this very scenario, without any concerns as to the purported 11th Amendment bar the Governor purports to raise here, and even expressly rejecting sovereign immunity claims for **injunctive** relief under such statutes (which is what Plaintiffs seek here). *See, e.g., On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249, *9 (W.D. Ky. Apr. 11, 2020) (holding that the Governor's orders challenged here violate KRFRA); *Youngblood v. Florida*, No. 3:01-CV-1449-J-16MCR, 2005 WL 8159645, *10 (M.D. Fla. Mar. 17, 2005) (rejecting sovereign immunity as grounds for dismissing Florida RFRA claims for injunctive and declaratory relief against the state, and upholding sovereign immunity **only as to a claim for damages**) ("[A]n

agency of the State of Florida[] cannot be sued **for civil monetary damages** in this case due to the principle of sovereign immunity. However . . . **Plaintiffs can seek prospective relief in the form of an injunction and declaratory judgment, as immunity is not a bar to equitable relief**." (emphasis added)); *Muhammad v. Crews*, No. 4:14CV379-MW/GRJ, 2016 WL 3360501, *7 (N.D. Fla. June 15, 2016) (sovereign immunity shields state officials from Florida RFRA claims **for damages but not declaratory relief**) ("FRFRA was passed by the Florida Legislature after the Supreme Court held that RFRA did not apply against the states, and it was intended to ensure that RFRA-like protections would be in place for actions taken by state governmental entities."); *Fiedor v. Florida Dep't of Fin. Services*, --- F. Supp. 3d ---, No. 4:18CV191-RH-CAS, 2020 WL 881998, *4, *7 (N.D. Fla. Feb. 24, 2020) (reaching plaintiff's Florida RFRA claim on the merits, noting that "[t]he count sought an injunction, not damages, apparently recognizing that the Act does not create an action for damages.").

In sum, the Governor's motion to dismiss Plaintiffs' KRFRA claims should be denied.

III. THE GOVERNOR'S UNCLEAN HANDS DEFENSE IS OFFENSIVE TO PLAINTIFFS' WORSHIP SERVICES, IRRELEVANT AS A MATTER OF BINDING FIRST AMENDMENT LAW, AND IMPROPER AT THE MOTION TO DISMISS STAGE.

Remarkably, the Governor contends that Plaintiffs cannot seek prospective relief in this matter because they refused to bend to the Governor's orders, even though they infringed protected First Amendment rights. (D.N. 28-1, at 7-8). However, "**[t]he Constitution can hardly be thought to deny one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands**." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (emphasis added). *See also Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one."); *N.H. Right to Life Pol. Action*

Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) ("it is not necessary that a person expose herself to arrest or prosecution under a statute in order to challenge that statute in federal court" because the "threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement").

The Governor contends that *GEFT Outdoors, LLC v. City of Westfield*, 933 F.3d 357 (7th Cir. 2019) closes the doors for equitable relief. (D.N. 38-1, PageID 602-603). However, *GEFT Outdoors* did not involve a First Amendment claim, but rather a due process claim. 933 F.3d at 364 (the "preliminary injunction motion focuses solely on its due process claim").[7] As *Shuttlesworth* and *Dombrowski* make evident, the First Amendment provides an entirely different calculus. Thus, the notion that Plaintiffs must yield to the Governor's demands prior to challenging his unconstitutional restrictions on worship services is incorrect.

The Governor also attempts to rely on a purported video of one religious service at Maryville Baptist Church, in a misguided effort to show that the Church has "unclean hands." (D.N. 38-1, PageID 602). This effort fails for multiple reasons. First, the Governor's attempt to bring in "evidence" outside of the pleadings is improper. On a motion to dismiss, the Governor is limited to the allegations of the Complaint and any exhibits thereto. *See, e.g.*, *Passa v.. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005) ("a court generally may not consider any facts outside the complaint and exhibits attached thereto").

Second, even if this Court could consider the Governor's suggested "evidence" outside of the pleadings, and even if this "evidence" were relevant to anything, neither of which is conceded,

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[7] The Governor also references *Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publ'g Co.*, 839 F.2d 1147 (6th Cir. 1988) (D.N. 38-1 at 7). But, that matter involved a sex discrimination claim in the employment context, not the First Amendment. 839 F.2d at 1149. It is thus wholly irrelevant to Plaintiffs' claims.

it is premature and perilous to afford such untested evidence any weight. The Governor does not offer, nor could he, any evidence as to the relationship of the individuals purportedly standing closer than six feet apart (*i.e.*, whether they are from the same household), nor any evidence that the video actually shows people closer than six feet apart. Indeed, the Governor does not even offer any evidence or testimony to authenticate the purported video. More importantly, discovery may well reveal that the Church has appropriately spaced the choir seats to account for social distancing, **including by removing every other seat** (as is readily apparent in the video). Discovery may well reveal that the individuals in the choir are actually much farther apart than would appear on the video, which is obviously distorted because of how disproportionately "thin" the people in it look. Indeed, discovery may reveal that the video is filmed with a telephoto lens from a great distance away in the back of the church, and therefore suffers from perspective distortions including "foreshortening" – "an effect caused by visual compression of an image [] most often … noticed with a telephoto lens … [whereby] intra distances of items in the frame look compressed." (https://www.quora.com/What-is-Foreshortening-in-photography-and-how-to-improve, last visited June 17, 2020).

Third, the Governor's "unclean hands" argument, and his monitoring of the church's worship services, demonstrate his continuing hostility towards Plaintiffs' religious gatherings. Does the Governor go around inquiring as to whether every individual in Walmart, Target, Lowe's or Home Depot maintains strict 6-foot separation at all times in the store? Are his enforcers present at these locations with measuring sticks to ensure no one violates a six-foot distancing requirement? Did the Governor go to strictly enforce his 6-foot distancing requirement on any of the thousands of protestors, rioters, or looters that have recently taken to the streets in Kentucky? Of course not. The Governor persists in attempting to impose stringent enforcement protocols only

upon Plaintiffs' Church, while trusting non-religious gatherings and turning a blind eye to numerous social distancing "violations" that most assuredly take place there. If the Governor wishes to open up a new front in this litigation based upon his uneven enforcement of his restrictions, Plaintiffs should be given the opportunity to confirm all of these discriminatory tactics through discovery.

IV. SHOULD THIS COURT GRANT DEFENDANT'S MOTION, PLAINTIFFS SHOULD BE GIVEN LIBERAL LEAVE TO AMEND.

Should this Court grant the Governor's motion in any respect, which it should not do, the Court must permit Plaintiffs to amend their Complaint to cure any perceived deficiencies. Civil Rule 15 explicitly states that "[t]he court should freely grant leave to amend." Fed. R. Civ. P. 15(a)(2). *See also Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that Rule 15 imposes a mandate that courts liberally grant leave to amend, and "this mandate is to be heeded"); *Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997) ("courts should liberally grant plaintiffs leave to amend their complaints").

Here, as the Sixth Circuit has already recognized, Plaintiffs' claims not only clear the low hurdle of Rule 8, but also the high bar of proving a substantial likelihood of success on the merits, as was necessary to obtain preliminary injunctive relief. That the Governor has issued revised guidance does not alter this calculus. Indeed, the Governor's Guidelines for Places of Worship (*see supra* Fig. 1), **still** purport to impose more stringent restrictions on religious gatherings than those required of similarly situated non-religious gatherings. The Governor is maintaining his unconstitutional regime, under a different name, and Plaintiffs can state a claim to challenge this disparate treatment. Moreover, under *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005), the unconstitutional taint of the Governor's orders continues.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims are not moot and plainly state cognizable claims for relief. The Governor's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2020, I caused a true and correct copy of t he foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Horatio G. Mihet
Horatio G. Mihet