

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE**

MARYVILLE BAPTIST CHURCH, INC., )  
*et al.*, )

Plaintiffs, )

v. )

Civil Action No. 3:20-cv-00278-DJH

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

Defendant. )

**GOVERNOR BESHEAR’S REPLY IN SUPPORT OF MOTION TO DISMISS**

Significant developments have occurred since the filing of the First Amended Motion to Dismiss on May 12, 2020. *First*, cases of COVID-19 are increases at a record pace across the country. On July 8, 2020, the United States surpassed 3,000,000 cases of COVID-19 and reported a one-day record of 60,021 new cases on July 7.<sup>1</sup> More than 132,000 Americans have died from COVID-19.<sup>2</sup> *Second*, the Supreme Court has denied requests for the same relief Plaintiffs seek here. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020). The Sixth Circuit has adopted the reasoning of *South Bay*. *Third*, the challenged order is no longer in effect. As the Governor moves to reopen services, places of worship may now operate at 50% capacity. Plaintiffs do not challenge the capacity limitations in this action. For these additional reasons, the First Amended Motion to Dismiss should be granted.

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<sup>1</sup> John Bacon, et al. *Coronavirus updates; US hits daily record; New Jersey to require masks outdoors; United Airlines announces major layoffs*, USA Today, July 8, 2020, available at <https://www.usatoday.com/story/news/health/2020/07/08/covid-19-us-3-million-cases-florida-new-jersey/5391309002/> (last visited July 9, 2020).

<sup>2</sup> *Id.*

## **I. COVID-19 Cases Are Increasing Across The United States.**

Recent spikes of COVID-19 cases across the country show that the disease is more dangerous than ever, and public health officials in those states have imposed new restrictions in attempting to slow the spread of the virus. Kentucky has yet to experience such a spike, but if it does, the Governor and public health officials must have the flexibility and discretion to address it appropriately.

In late June, as cases began to rise throughout Texas, its Governor halted its reopening, closing its bars, reducing restaurant capacity, and prohibiting gatherings of over 100 people.<sup>3</sup> The city of Houston announced on July 3 that beds in the intensive care units of its hospital system had nearly reached capacity.<sup>4</sup> While Houston has not yet implemented crisis standards, there can be no doubt that when hospital beds reach capacity some form of rationing will be required unless more beds are made available, quickly. Over the Fourth of July weekend, hospitals in at least two counties in Texas reached capacity, prompting Judges in those counties to issue shelter-in-place orders.<sup>5</sup>

Starting over the Fourth of July weekend, South Carolina has set records for new cases and reported 2,239 new cases on July 11 and 1,952 new cases on July 12.<sup>6</sup> South Carolina's Governor has lifted many restrictions on businesses, and he has warned citizens that college and

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<sup>3</sup> Gov. Greg Abbott orders Texas bars to close again and restaurants to reduce to 50% occupancy as coronavirus spreads, Texas Tribune, June 26, 2020, available at <https://www.texastribune.org/2020/06/26/texas-bars-restaurants-coronavirus-greg-abbott/> (last visited July 8, 2020).

<sup>4</sup> Joshua Nelson, Houston doctor reports 'ICU beds are just about at capacity' due to surge of coronavirus cases, Fox News, July 4, 2020, available at <https://www.foxnews.com/media/houston-doctor-bill-fisher-coronavirus-icu-capacity> (last visited July 6, 2020).

<sup>5</sup> Alta Spells and Susannah Cullinane, 2 Texas counties urge residents to shelter in place as hospitals reach capacity, CNN, July 4, 2020, available at <https://www.cnn.com/2020/07/04/us/texas-hospitals-coronavirus/index.html> (last visited July 4, 2020).

<sup>6</sup> See Lou Bezjak and Noah Felt, *Cases of COVID-19 complication deadly to kids found in SC, with 1,952 new positive tests*, The State, July 12, 2020, available at <https://www.thestate.com/news/coronavirus/article244173052.html> (last visited July 13, 2020).

high school football are unlikely to resume in the fall.<sup>7</sup> California has also seen a resurgence of COVID-19 cases after early success in battling the disease, with daily diagnoses of over 4,000 positive cases. In the southern California counties where the disease is spreading most rapidly, Governor Newsom has closed indoor operations at all restaurants, wineries, movie theaters, family entertainment centers, zoos, museums and cardrooms.<sup>8</sup>

And in Florida, which reopened quicker than most states, the state reported nearly 15,300 new cases on July 12 and 12,624 new cases on July 13.<sup>9</sup> Florida now has 282,435 cases of COVID-19.<sup>10</sup> The test positivity rate reached 19.6-percent (19.6%) there on Sunday.<sup>11</sup> Florida's governor shut down bars on June 26, 2020.<sup>12</sup> The Florida Supreme Court agreed when it ruled that a "pandemic was a 'natural emergency' under Florida's emergency management law, and DeSantis was within his rights when he closed restaurants and bars earlier this year."<sup>13,14</sup>

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<sup>7</sup> Lou Bezjak and Noah Feit, SC health officials report more than 1,400 new COVID-19 cases, eight deaths, The State, July 5, 2020, available at <https://www.thestate.com/news/coronavirus/article244012572.html> (last visited July 5, 2020).

<sup>8</sup> Stephanie Sierra and Alix Martichoux, Gov. Newsom warns Californians to follow new health orders ahead of Fourth of July, ABC 7 News, July 5, 2020, available at <https://abc7news.com/california-coronavirus-what-did-gavin-newsom-say-today-are-parks-open-in-counties-closed/6292195/> (last visited July 5, 2020).

<sup>9</sup> Michelle Marchante, *Florida sees more than 12,600 new coronavirus cases as Miami-Dade total hits 67,713*, Miami Herald, July 13, 2020, available at <https://www.miamiherald.com/news/coronavirus/article244183227.html> (last visited July 13, 2020).

<sup>10</sup> *Id.*

<sup>11</sup> Christina Maxouris and Holly Yan, *Florida shatters US record for new single-day Covid-19 cases*, CNN Health, July 12, 2020, available at <https://www.cnn.com/2020/07/12/health/us-coronavirus-sunday/index.html> (last visited July 12, 2020).

<sup>12</sup> NBC Miami, *Florida Shuts Down Consumption of Alcohol at Bars Statewide*, available at <https://www.msn.com/en-us/finance/smallbusiness/florida-shuts-down-consumption-of-alcohol-at-bars-statewide/ar-BB160rZr> (last visited July 5, 2020).

<sup>13</sup> Lauren Johnson, *Florida Supreme Court affirms governor's emergency powers during pandemic*, The Times (Apalachicola), June 26, 2020, available at <https://www.apalachtimes.com/news/20200626/florida-supreme-court-affirms-governor-s-emergency-powers-during-pandemic> (last visited July 3, 2020).

<sup>14</sup> As Defendants have argued, COVID-19 has reached all areas and places, including in-person services of faith-based organizations. In a rural county of 25,000 people, 35 people developed COVID-19, causing the deaths of three people, all linked to attendees of an Arkansas church with less than 100 attendees. Allison James, DVM, PhD, et al., *CDC Morbidity and Mortality Weekly Report (MMWR), High COVID-19 Attack Rate Among Attendees at Events at a Church – Arkansas, March 2020*, May 22, 2020, available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm> (last visited July 12, 2020).

On May 12, 2020, the Centers for Disease Control and Prevention (CDC) published a Morbidity and Mortality Weekly Report titled *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice – Skagit*

Kentucky has 19,121 reported cases of COVID-19 and 622 Kentuckians have died from COVID-19.<sup>15</sup> With 453 new cases on July 11 and 426 new cases on July 10 – the second- and third-highest daily number of new cases since the emergency began – Kentucky is no longer in a plateau.<sup>16</sup> Kentucky had 277 new cases on July 12, 333 new cases on July 9 and 402 new cases on July 8, 2020.<sup>17</sup> Comparing cases reported from June 29 to July 5 with cases reported from July 6 to July 12, Kentucky has had a 48.7% increase in positive cases.<sup>18</sup>

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*County, Washington, March 2020*, regarding the investigation and findings related to a March 10, 2020 choir practice that resulted in an outbreak of COVID-19 with a high secondary attack rate. Leigh Hamner, MPH, et al., CDC Morbidity and Mortality Weekly Report (MMWR), *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice – Skagit County, Washington, March, 2020* (Early Release/Vol. 69, May 12, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm> (last visited July 12, 2020).

West Virginia has reported at least five outbreaks of COVID-19 that are traced to church services, including 17 cases tied to the Greenbrier County church. See <https://dhhr.wv.gov/News/2020/Pages/COVID-19-Outbreak-Confirmed-in-Greenbrier-County-Church.aspx> (last visited July 12, 2020). At least 51 cases and three deaths have been tied to a church immediately after in-person service resumed at Graystone Baptist Church in Ronceverte, West Virginia. Kate Conger, *Churches emerge as Major Source of Coronavirus Cases*, New York Times, July 12, 2020, available at <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html> (last visited July 12, 2020). A rural county in Oregon with only six cases early in the pandemic now has over 356 cases, many of which were traced to church resumed services at Lighthouse United Pentecostal Church. *Id.*

In Kentucky, an outbreak of 18 cases of COVID-19 occurred at a central Kentucky church that began holding in-person services on May 13, 2020, prompting the church to halt in-person services. Billy Kolbin, *Kentucky pastor spars with Beshear after 18 church members test positive*, The Courier-Journal, June 9, 2020, available at <https://www.courier-journal.com/story/news/local/2020/06/09/coronavirus-kentucky-17-clays-mill-baptist-church-members-infected/3164299001/> (last visited July 12, 2020);<sup>14</sup> Alex Acquisto, *This Central Kentucky church reopened on May 10 and became a Covid-19 hot spot*, Lexington Herald-Leader, June 5, 2020 (last visited July 12, 2020).

<sup>15</sup> KY COVID-19 Daily Summary 7/11/2020, Kentucky Department for Public Health, available at <https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf> (last visited July 11, 2020). See *Gov. Beshear Provides Update on COVID-19*, July 11, 2020, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=256> (last visited July 11, 2020).

<sup>16</sup> See *Gov. Beshear Provides Update on COVID-19*, July 11, 2020, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=256> (last visited July 11, 2020); *Gov. Beshear: Face Coverings Protect Our Families, Economy*, July 10, 2020, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=254> (last visited July 10, 2020).

<sup>17</sup> *Gov. Beshear Provides Updates on COVID-19*, July 12, 2020, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=257> (last visited July 12, 2020); *Gov. Beshear Provides Updates on COVID-19*, July 8, 2020, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=249> (last visited July 10, 2020); *Gov. Beshear: Increasing Cases Requires Kentuckians to Wear Face Masks*, July 9, 2020, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=251> (last visited July 10, 2020).

<sup>18</sup> *Id.*

## II. The Supreme Court Denied Similar Relief.

Since the Governor filed his Motion, the Supreme Court has weighed in. On May 29, 2020, the United States Supreme Court refused to enjoin mass gatherings orders – similar to the one here – issued by the Governors in California and Illinois that initially closed church services and were later amended to allow the services to resume at reduced capacity. *South Bay*, 140 S.Ct. 1613; *Elim Romanian Church, et al. v. Pritzker, Gov. of Illinois*, 19A1046, 2020 WL 2781671 (Order List 590 U.S.) (U.S. May 29, 2020). In *South Bay*, Chief Justice Roberts, in a concurring opinion, opined that the mass gatherings order “appear[ed]” to pass First Amendment review because it applied similar restrictions to “lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time,” while treating differently “only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.” *Id.*, at \*2. He further addressed the deference owed to public officials, stating “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *South Bay*, 140 S.Ct. at 1613 (quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905).) He further cautioned, that when making these decisions, state officials “should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” *Id.* at 1613-14 (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985)).

Plaintiffs’ reliance on the Sixth Circuit’s rulings in *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) and *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) is now misplaced Chief Justice Roberts’ Opinion directly rejects the reasoning in *Maryville Baptist*

*Church v. Beshear* and *Roberts v. Neace*, Consolidated Appeal Nos. 20-5465 and 20-5427, that led the Sixth Circuit to find a likelihood of success with respect to First Amendment challenges to the Mass Gatherings Order. Indeed, both the Petitioners and dissenters in *South Bay United* cited to these Sixth Circuit Opinions, which the Supreme Court majority has now rejected. In *Maryville Baptist*, the Sixth Circuit reasoned that the mass gatherings prohibition discriminated against churches because it excepted “life-sustaining” operations such as “law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes and landscaping.” 957 F.3d at 614. But Chief Justice Roberts specifically opined that excluding these services did not run afoul of the First Amendment, because “grocery stores, banks, and laundromats” are “dissimilar activities . . . in which people neither congregate in large groups nor remain in close proximity for extended periods.” *South Bay*, 140 S.Ct. at 1613.

Since its issuance, the Sixth Circuit has now relied on Justice Roberts’ concurrence to grant an emergency stay of a preliminary injunction issued against the Governor of Michigan’s orders closing fitness centers. *League of Ind. Fitness Facilities and Trainers, Inc. v. Whitmer*, --- F.Supp.3d ----, 2020 WL 3468281 (6th Cir. June 24, 2020). There, the Sixth Circuit recognized that “All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts. *Id.* (citing *Jacobson*, 197 U.S. at 29).<sup>19</sup> With this guidance from the Supreme Court and the Sixth Circuit’s adoption of

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<sup>19</sup> Since its issuance, courts continue to rely on *South Bay United* to uphold or deny enjoining state action in response to COVID-19. See e.g., *Texas Democratic Party v. Abbott*, --- F.3d ---, 2020 WL 2982937 (5th Cir. June 4, 2020); *Talleywhacker, Inc. v. Cooper*, --- F.Supp.3d ---, 2020 WL 3051207 (E.D.N.C. June 8, 2020); *Elkhorn Baptist Church v. Brown*, --- P.3d ---, 2020 WL 3116543 (Or. 2020); *Christian Cathedral v. Pan*, 2020 WL 3078072 (N.D.Cal. June 10, 2020); *Professional Beauty Fed. of California v. Newsom*, 2020 WL 3056126 (C.D.Cal. June 8, 2020); *Altman v. County of Santa Clara*, --- F.Supp.3d ----, 2020 WL 2850291 (N.D.Cal. June 2, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, --- F.Supp.3d ----, 2020 WL 3108716 (D.Nev. June 11, 2020) (appeal filed, June 30, 2020, 9th Cir. No. 20-16274); *High Plains Harvest Church v. Polis*, 2020 WL 3263902 (D.Colo. June 16, 2020). On July 4, 2020, Justice Kavanaugh entered an order declining to enjoin Illinois Governor Pritzker’s ban on political events of 50 or more people, further confirming that *South Bay United* is the settled law of the land. Order, *Illinois Republican Party v. Pritzker*, 19A1068 (July 4, 2020).

that reasoning, this Court should also apply *South Bay* and the reasoning set forth in the majority of circuits to find Plaintiffs have not stated a claim upon which this Court may grant relief. *See Elim Romanian Pentecostal Church v. Pritzker*, --- F.Supp.3d ----, 2020 WL 2468194, at \*4 (N.D. Ill. May 13, 2020) (finding Plaintiffs had less than a negligible likelihood of success on the free exercise claims because the mass gatherings order was neutral and of general applicability); *See Elim Romanian Pentecostal Church v. Pritzker*, --- F. Supp. ----, 2020 WL 3249062 (7th Cir. 2020); *Calvary Chapel Lone Mountain v. Sisolak*, --- F.Supp.3d ----, 2020 WL 3108716 (D.Nev. June 11, 2020).

### **III. Plaintiffs’ Claims Are Moot.**

At the time of filing the First Amended Complaint, the Governor had just begun issuing Healthy at Work guidance that allowed for the reopening of services throughout the state. On May 9, 2020, places of worship were allowed to hold in-person services, but were advised that they should limit attendance to 33% capacity in order to allow for effective social distancing. On June 10, 2020, that capacity increased to 50%.<sup>20</sup> Because the challenged order no longer applies to places of worship, Plaintiffs’ claims are moot.

Plaintiffs’ argument regarding voluntary cessation and capable of repetition exceptions to mootness do not apply. This is because, “a governmental entity—consisting of public servants instead of self-interested private parties—has a less laborious undertaking in pursuit of mootness. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). “[A] governmental entity that voluntary ceases allegedly illegal conduct is entitled to a good-faith presumption that the conduct is “unlikely to recur,” *Id.* at 767–68. Applying this reasoning, Plaintiffs’ argument has already

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<sup>20</sup> Available at [https://govsite-assets.s3.amazonaws.com/r00brFxTl2TJkofBUZUh\\_Healthy %20at%20Work%-20Reqs%20-%20Places%20of%20Worship%20-%20Final%20Version%202.0%20Final.pdf](https://govsite-assets.s3.amazonaws.com/r00brFxTl2TJkofBUZUh_Healthy%20at%20Work%-20Reqs%20-%20Places%20of%20Worship%20-%20Final%20Version%202.0%20Final.pdf) (last visited July 12, 2020).



been rejected by a Kentucky District Court on similar issues. In *WO v. Beshear*, No. 3:20-cv-00023, Doc. 43 (E.D.Ky May 21, 2020), the District Court denied the Attorney General’s motion to intervene on grounds that claims against the Governor’s restrictions on interstate travel were mooted by the Governor’s amendment to those restrictions. The Court held that while the Governor’s orders were subject to numerous constitutional challenges and the Governor amended those orders to address the constitutional challenges, it was not likely that the conduct was to reoccur. *Id.* at 4.

For similar reasons, the District Court also held that the executive orders were also not capable of repetition, yet evading review. *Id.* The exception applies if “(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.” *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). For the reasons set forth above, there is no reasonable expectation that Plaintiffs will be subject to the same action again. But even if similar restrictions were imposed, Plaintiffs could challenge those orders in the same manner they did here.

#### **IV. Plaintiffs’ Unclean Hands Bar Injunctive Relief.**

As set forth in the Motion, Plaintiffs have unclean hands, because they have not only violated the mass gatherings order and guidelines while their motions for temporary relief were pending; they have also violated this Court’s Orders, which require social distancing. Those facts are indisputable, as the video posted by Maryville Baptist Church shows.

In their response, Plaintiffs raise questions about that argument, all of which are beside the point. The video speaks for itself; Plaintiff Maryville Baptist Church posted the video, and Plaintiffs do not challenge its authenticity. Plaintiffs cannot refute that it shows instances of violations of the social distancing requirements. Plaintiffs’ unclean hands bar injunctive relief.



### **Conclusion**

For these additional reasons, Plaintiffs' claims should be dismissed.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2020, I electronically filed the foregoing Reply via the Court's CM/ECF system, causing counsel of record to be served.

/s/ Taylor Payne  
Taylor Payne