UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND INJUNCTION PENDING APPEAL

Pursuant to W.D. Ky. L.R. 7.1, Plaintiffs, MARYVILLE BAPTIST CHURCH, INC. ("Maryville Baptist" or the "Church") and DR. JACK ROBERTS ("Dr. Roberts"), by and through the undersigned counsel, hereby submit their response in opposition to Defendant's Motion to Dissolve the Preliminary Injunction and Injunction Pending Appeal (D.N. 46, the "Motion") and Memorandum in Support (D.N. 46-1, the "Memorandum"). For the following reasons, this Court should deny the Motion.

INTRODUCTION

Numerous courts have enjoined enforcement of Governor Beshear's overreaching COVID-19 orders, including this Court, and including the Sixth Circuit, *twice,* as applied to Plaintiffs' church. The Sixth Circuit continues to have jurisdiction over the question of whether Plaintiffs are entitled to a preliminary injunction (PI) against enforcement of the Governor's orders, and has entered an injunction pending appeal both in this case and in another case brought by congregants of Plaintiffs' church. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). The Governor now asks this Court to disregard

the Sixth Circuit's jurisdiction over the PI question, and to dissolve an IPA already superseded by the Sixth Circuit's IPA, based on the lone, non-binding concurrence of a single Supreme Court Justice—in another case, concerning another governor's orders, and in a fundamentally different procedural posture. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of extraordinary writ of injunction). The Governor disingenuously and repeatedly cites the Chief Justice's *South Bay* concurrence as if it is the opinion *of the Court*, but there is no *South Bay* majority opinion to bind this Court, and the concurrence does not even provide useful guidance to this Court on the issues it can actually address in the Governor's Motion. This Court cannot give the Governor the relief he wants, and should deny the Motion.[1]

[1] The Governor also asserts the Chief Justice's *South Bay* concurrence as grounds for dismissal of Plaintiffs' claims (Mem. 6–7), as he also did in his reply memorandum in support of his motion to dismiss (D.N. 49, "MTD Reply" at 5–7). Not only does the lone, non-binding concurrence provide no basis for dismissal under Rule 12(b)(6) (especially as against the Sixth Circuit's binding opinions), but the Governor also improperly used his MTD Reply to foul the proceeding with substantial non-record "facts" (MTD Reply 2–4) which cannot be properly considered on a motion to dismiss. *See, e.g., Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, 618 Fed. App'x 246, 255 (6th Cir. 2015) ("In considering a Rule 12(b)(6) motion, a district court cannot consider matters beyond the complaint.") While the Governor's newfound commitment to the Chief Justice's broad federalism observations is commendable (Mem. 6–7), the Governor's arguments are uninformed by principles of jurisprudence, Article III of the Constitution, or the Rules of Civil Procedure.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN DEFENDANT'S MOTION OR GRANT THE REQUESTED RELIEF.

A. This Court Was Divested of Jurisdiction to Consider All Matters Pertaining to Plaintiffs' Entitlement to a Preliminary Injunction When Plaintiffs Noticed Their Appeal from This Court's Denial.

Binding Supreme Court and Sixth Circuit precedent holds this Court was divested of jurisdiction to decide all matters pertaining to Plaintiffs' entitlement to a PI against enforcement of the Governor's orders the moment Plaintiffs' noticed their appeal from this Court's Order (D.N. 9, the "TRO/PI Order") denying Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction (D.N. 3, Plaintiffs' "TRO/PI Motion"). "**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) (emphasis added); *Marrese v. Am. Acad. Of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985) (same); *Taylor v. KeyCorp*, 680 F.3d 609, 616 (6th Cir. 2012) (same); *see also Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017) ("Filing a notice of appeal transfers adjudicatory authority from the district court to the court of appeals.").

The jurisdictional rule has equal application to PI appeals because "an effective notice of appeal divests the district court of jurisdiction over the matter **forming the basis for the appeal**." *N.L.R.B. v. Cinn. Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (emphasis added); *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) (same). While such interlocutory appeals permit a district court to proceed to the merits of an action, *Moltan Co. v. Eagle-Picher Indus., Inc*., 55 F.3d 1171, 1174 (6th Cir. 1995), the jurisdictional retention in 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 the retention is "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).

Here, this Court denied Plaintiffs' TRO/PI Motion on April 18. Though the Court indicated the denial was only of Plaintiffs' requested temporary restraining order (TRO), Plaintiffs appealed the denial on April 24 (D.N. 16) as an effective denial of their requested PI. The Sixth Circuit agreed that this Court's TRO/PI Order effectively denied the PI, and that the appellate court had acquired jurisdiction of the matter on that basis. *Maryville Baptist*, 957 F.3d at 612. Thus, when Plaintiffs noticed their appeal to the Sixth Circuit on April 24, this Court was divested of jurisdiction over all matters pertaining to its TRO/PI Order, including the key issue: whether Plaintiffs are entitled to a PI against enforcement of the Governor's orders.

B. Defendants' Motion Requests That This Court Grant Relief It Has No Jurisdiction to Consider.

The injunction(s) the Governor asks this Court to dissolve (D.N. 35, the "IPA/PI Order"), came only after the Sixth Circuit concluded Plaintiffs' were likely to succeed on their First Amendment and KRFRA claims, granted an IPA as to drive-in worship services, and remanded the case to this Court to determine Plaintiffs' entitlement to an IPA as to in-person worship services based on the balancing of all IPA/PI factors. *Maryville Baptist*, 957 F.3d at 612, 615–16. Based on the scope of the remand and applying the Sixth Circuit's now-binding legal conclusions and reasoning in *Maryville Baptist*, this Court granted the IPA as to in-person worship services, and purported to grant the PI Plaintiffs requested in their original TRO/PI Motion because "the same issues are raised."[2] (IPA/PI Order at 6). Then the Sixth Circuit entered its *Roberts* IPA,

[2] Given that the Sixth Circuit has not relinquished its jurisdiction over Plaintiffs' appeal from this Court's original denial of their TRO/PI Motion, Plaintiffs have taken the position in the Sixth

acknowledging this Court's IPA/PI Order and enjoining enforcement of the Governor's orders as to in-person worship services at Plaintiffs' church. 958 F.3d at 412, 416. After *Roberts*, this Court advised, "To the extent there are differences between this Court's [IPA/PI Order] and the [*Roberts* IPA], the latter would prevail." (Order (May 13, 2020), D.N. 41, at 2). Thus, the Sixth Circuit acquired, exercised, and retains complete jurisdiction over the operative injunctions prohibiting the Governor's enforcement of his orders against worship services at Plaintiffs' church, and this Court has no jurisdiction to dissolve them.

The Court should reject the Governor's argument that the Court retains jurisdiction to dissolve the subject injunctions (Mem. 2.) The Governor cites *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402 (6th Cir. 2012), for the unremarkable proposition that a district court retains jurisdiction to modify or dissolve its injunctions based on changed law or circumstances. (Mem. 2). In *Gooch*, however, the defendants did not ask the district court to dissolve an injunction that was already on appeal. Rather, the defendants appealed the district court's denial of their motion to dissolve, and the Sixth Circuit held it did not have jurisdiction over the appeal because the defendants had not even sought dissolution properly in the district court. 672 F.3d at 414. Thus, *Gooch* is inapposite.

C. This Court Cannot Overrule the Sixth Circuit's Two Binding IPA Decisions Concerning the Governor's Orders.

Even if this Court had jurisdiction over the PI and IPA questions the Governor attempts to raise, the relief the Governor seeks would be of no consequence whatsoever. As the Governor

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Circuit that this Court had no jurisdiction to grant Plaintiffs' TRO/PI Motion on remand, and that this Court's PI ruling in the IPA/PI Order may be given effect only as an "indicative ruling" under Fed. R. Civ. P. 62.1 and Fed. R. App. P. 12, even though Plaintiffs did not request an indicative ruling under those rules. *See United States v. Maldonado-Rios*, 790 F.3d 62, 65 (1st Cir. 2015). In this respect, there is no PI for this court to dissolve.

concedes (Mem. 2), the Sixth Circuit already issued IPAs in *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020), and *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), both enjoining the Governor from enforcing his unconstitutional restrictions on religious worship services at Plaintiffs' church during the pendency of those appeals. Thus, regardless of any action this Court might take with respect to its IPA/PI Order, the Sixth Circuit's IPAs in *Maryville Baptist* and *Roberts* would remain in place.[3]

II. TWO SIXTH CIRCUIT DECISIONS ENJOINING THE GOVERNOR'S ORDERS AT PLAINTIFFS' CHURCH ARE BINDING ON THIS COURT; ONE SUPREME COURT JUSTICE'S CONCURRENCE IN ANOTHER CASE ABOUT ANOTHER CHURCH IS NOT.

A. The Sixth Circuit's Decision in *Maryville Baptist* Is the Law of the Case, and This Court Is Bound by It.

The Court must reject the Governor's specious assertion that *Maryville Baptist* and *Roberts* are "are no longer good law, and therefore Plaintiffs no longer have any likelihood of success on the merits." (Mem. 2.) The Governor is wrong as a matter of law.

The Sixth Circuit held Plaintiffs are likely to succeed on the merits of their First Amendment and KRFRA claims against the Governor's orders in *Maryville Baptist*. 957 F.3d at 612, 615–16. Having been established by the Sixth Circuit, Plaintiffs' likelihood of success is binding on this Court as the law of the case, and this Court is prohibited from revisiting it. "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

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[3] The *Roberts* appeal was consolidated with the *Maryville Baptist* appeal in this case for purposes of the Sixth Circuit's IPA decisions. In the unlikely event the *Roberts* appeal is concluded before the *Maryville Baptist* appeal, then the *Roberts* IPA theoretically would be of no further effect, leaving this Court's IPA/PI Order as the effective IPA for the remaining pendency of Plaintiffs' appeal. Even then, however, the legal conclusions and reasoning of the *Roberts* IPA would still be binding on this Court (*see infra* Part II.B), and this Court could not depart from them to dissolve the IPA/PI Order.

1419, 1421 (6th Cir. 1994) (emphasis added). "'[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)). In the context of a PI, the Sixth Circuit's opinion that a plaintiff is likely to prevail on the merits "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 Plaintiffs likely to succeed in their First Amendment challenges to the Governor's orders, this Court is precluded from revisiting the question because *Maryville Baptist* is the law of the case. Thus, this Court is not empowered to revisit, dissolve, modify, or amend an order (currently on appeal) based on a different analysis of the merits of Plaintiffs' claims.

B. The Sixth Circuit's Decision in *Roberts* Is Also Binding on This Court.

Roberts is binding on this Court because this court must follow the rulings of the Sixth Circuit. *See, e.g.*, *United States v. Matos*, No. 3:13CCR-98-S, 2014 WL 1922866, at *3 (W.D. Ky. May 14, 2014) ("A district court is bound to follow the holding of a prior decision of the Court of Appeals for the circuit in which the district court is located until that binding precedent is expressly overruled." (cleaned up)); *Wheeler v. Graves Cnty.*, No. 5:17-cv-38-TBR, 2019 WL 1320506, *7 (W.D. Ky. Mar. 22, 2019) ("District courts are bound by the decisions of their corresponding circuit courts even if decisions from other circuits seem more persuasive or appealing."). This Court cannot disregard *Roberts* (or *Maryville Baptist*, *see supra*) to revisit Plaintiffs' likelihood of success on their challenges to the Governor's orders.

C. The Lone Concurrence of a Single Supreme Court Justice Considering Different Relief in a Different Case Is Neither Binding on This Court nor Helpful to It.

The lone, non-binding concurrence of Chief Justice Roberts in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), provides no support for the Governor's assertion that *Maryville Baptist* and *Roberts* "are no longer good law." (Mem. 2.) In *South Bay* the Court denied a petition for an emergency, interlocutory writ of injunction, which requires a petition to meet a much higher standard than a PI or IPA requires. The Court did not issue an opinion, noting only that four Justices would have granted the injunction. 140 S. Ct. 1613. Such denials of extraordinary writs are never binding on lower courts, and neither are lone concurrences of a single justice. Thus, the *South Bay* decision is neither binding on this Court nor helpful to it.

Chief Justice Roberts' concurrence—joined by no other justices—focused primarily on the extremely high bar an applicant must reach to obtain emergency, interlocutory injunctive relief from the Supreme Court, noting "[t]his power is used where 'the legal rights at issue are indisputably clear' and, even then, 'sparingly and only in the most critical and exigent circumstances.'" *Id.* at 1613. *See also Respect Maine PAC v. McKee*, 562 U.S. 996 (2010); *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers); *Fisherman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). *Communist Party of Indiana v. Whitcomb*, 4099 U.S. 1235 (1972) (Rehnquist, J., in chambers). It was only based on this exceedingly high standard that the Chief Justice (by himself) opined that the requested writ of injunction should be denied. Thus, the Chief Justice's observations are not helpful to this Court, where Plaintiffs' entitlement to injunctive relief requires only a likelihood of success, and that question has already been resolved in Plaintiffs' favor. (*See supra* Part I.)

In any event, the Supreme Court's decision denying an extraordinary writ of injunction is never binding on a lower court. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting) ("Denials of certiorari **never** have precedential value, and the **denial of a stay can have no precedential value either** . . . ." (emphasis added) (citations omitted)); *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (noting writ of injunction pending appeal "demands a significantly higher justification than a request for a stay"); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014) (advising grant of writ of injunction pending appeal "should not be construed as an expression of the Court's views on the merits").

Nor is the lone concurrence of a single justice ever binding. *See Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) ("[T]he former statement was dictum, and the latter was contained in a concurrence, so . . . neither constitutes binding precedent."). The rationale for this rule is simple: concurring opinions are not the opinions of the Court. "Divergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial." *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting); *see also Weber v. Dell*, 630 F. Supp. 255, 260 n.4 (W.D.N.Y. 1986) ("[C]ertainly the opinion of only one Supreme Court Justice on an application for stay is not binding precedent."), *rev'd on other grounds*, *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986).

This Court should not countenance the Governor's disingenuous and repeated citation of the Chief Justice's *South Bay* concurrence as if it is the opinion *of the Court*. (*See, e.g.*, Mem. 1 ("The Supreme Court has issued intervening law . . . ."), 3 ("The Supreme Court upheld the denial of the same injunctive relief Plaintiffs sought here because . . . ."), 4 ("In particular, the Supreme Court held . . . ."), 4 ("[T]he *South Bay United* Opinion explained . . . ."), 5 ("But the Supreme

Court, in a published opinion, has now explicitly spoken to the Sixth Circuit's reasoning . . . ."), 5 ("The majority thus rejected the reasoning of the Sixth Circuit . . . ."), 7 ("This intervening law by the Supreme Court makes clear . . . .").) The Governor's misrepresentation of *South Bay* is stunning and betrays an utter lack of grounds for the relief he seeks.

CONCLUSION

For all of the foregoing reasons, the Governor's Motion must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2020, I caused a true and correct copy of the 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/ Daniel J. Schmid
Daniel J. Schmid