Nos. 20-5427

UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT

MARYVILLE BAPTIST CHURCH, *et al.*

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
Nos. 3:20-CV-00278

BRIEF OF GOVERNOR ANDY BESHEAR

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STATEMENT CONCERNING ORAL ARGUMENT

This appeal is moot. Therefore, the Governor and the Secretary do not believe this Court should reach the constitutional issues raised by Plaintiffs. For this reason, the Governor and the Secretary do not believe that oral argument is necessary at this time.

STATEMENT OF THE CASE

The position of Plaintiffs Maryville Baptist Church, Inc. and Dr. Jack Roberts in this appeal is unique. They argue the District Court did not have jurisdiction to grant the preliminary injunction, the very relief they ultimately seek at this early stage of the litigation. In short, they are asking this Court to undo the relief the District Court granted them, so that this Court may order the District Court to grant them the same relief.

The underlying facts are not in dispute. Kentucky, like every other state in the country, is in a daily life-and-death battle against COVID-19 – the gravest threat to public health in over a century. COVID-19 is a severe, acute respiratory disease caused by the virus SARS-CoV-2.[1] More than 4.2 million Americans have tested positive for COVID-19 and more than 146,000 Americans have died because of the disease.[2] First identified in Wuhan, Hubei Province, China in December 2019, the World Health Organization ("WHO") declared the spread of

[1] Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/identifying-source-outbreak.html (last visited on July 28, 2020). *See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 451-52.

[2] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Cases, Data & Surveillance, Cases in the U.S., available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fsummary.html (last updated July 27, 2020) (last visited July 27, 2020).

the virus a Public Health Emergency of International Concern on January 30, 2020.[3] The next day, the U.S. Department of Health and Human Services declared a public health emergency, which the Department has twice renewed, most recently on July 25, 2020.[4,5] *See* 42 U.S.C. § 247d. The WHO declared COVID-19 a pandemic on March 11, 2020.[6]

COVID-19 is highly contagious and can be lethal. COVID-19 spreads primarily among people who are in close contact – within about six feet – for a

[3] World Health Organization, *WHO Director-General's Statement On [International Health Regulations] Emergency Committee On Novel Coronavirus (2019-nCoV)*, Jan. 30, 2020, available at https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov) (last visited July 27, 2020).

[4] U.S. Department of Health and Human Services, *Determination That A Public Health Emergency Exists*, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx (last visited July 27, 2020).

[5] U.S. Department of Health and Human Services, *Renewal of Determination That A Public Health Emergency Exists*, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx (last visited July 27, 2020).

[6] World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, Mar. 11, 2020, available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited July 27, 2020).

prolonged period of time.[7] Older people and people of all ages with chronic medical conditions (such as heart disease, lung disease, and diabetes) have a higher risk of developing serious illness.[8]

On March 6, 2020, Kentucky confirmed its first case of COVID-19. The same day, the Governor declared a State of Emergency. (Ky. Exec. Order No. 2020-215).[9] Governor Beshear and the Kentucky Cabinet for Health and Family Services ("CHFS"), through CHFS Secretary Friedlander, then acted decisively to prevent the virus's spread in Kentucky under their emergency powers in KRS Chapters 39A, 194A and 214.

The Governor and CHFS took measured, systematic actions to decrease the number of chances for exposure to the virus by prohibiting certain high-risk

[7] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last updated July 15, 2020) (last visited July 23, 2020).

[8] The CDC's National Center for Health Statistics reports that, as of 2017, Kentucky ranks first among states in deaths for chronic lower respiratory disease, fifth for deaths due to kidney disease, and ninth for heart disease and diabetes. *Stats of the State of Kentucky (2017)*, Centers for Disease Control and Prevention, National Center for Health Statistics, available at https://www.cdc.gov/nchs/pressroom/states/kentucky/kentucky.htm (last visited July 27, 2020).

[9] Available at https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf (last visited on July 27, 2020). *See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 454.

activities.[10] Following Centers for Disease Control and Prevention ("CDC") guidance, on March 19, 2019, CHFS issued an Order (hereinafter "mass gatherings order") prohibiting *all* mass gatherings, defined to include "any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." (CHFS Order, Mar. 19, 2020).[11]

On March 22, Governor Beshear closed businesses that are not life-sustaining during a global pandemic.[12] He ordered closed other businesses for in-person work and placed additional restrictions on life-sustaining businesses that remained open that helped limit the spread of the disease.[13] In large part, these

[10] *See generally* Kentucky's Response to COVID-19, available at https://governor.ky.gov/covid19 (last visited July 27, 2020). *See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 454-55.

[11] Available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf (last visited July 27, 2020). *See also* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 454.

[12] Available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf (last visited July 28, 2020).

[13] Available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited on July 28, 2020).

measures were successful in flattening the initial curve in Kentucky to prevent our hospitals and health resources from being overwhelmed.[14]

Plaintiffs filed the underlying action almost a month later on April 17, 2020. (Complaint, RE 1, Page ID ## 1-53.) Plaintiffs alleged the mass gatherings order violated the First Amendment, equal protection, rights protected under the Kentucky Constitution, the Religious Land Use and Institutionalized Persons Act, and the Kentucky Religious Freedom Restoration Act. (*Id.*, at Page ID ## 27-47.) Plaintiffs sought a temporary restraining order, preliminary injunction, declaratory relief and a permanent injunction against enforcement of the mass gatherings order. (*Id*., at Page ID ## 48-52.)

On April 18, 2020, the District Court denied Plaintiffs' motion for a temporary restraining order (Order, RE 9, Page ID ## 221-227.) Plaintiffs appealed and moved for an emergency injunction pending appeal. (Notice of Appeal, RE 16, Page ID # 252; Emergency Motion for Preliminary Injunction Pending Appeal, RE 17, Page ID # 254.) On April 30, 2020, Plaintiffs moved for an emergency injunction pending appeal in this Court. (Doc. 4-1.) On May 2, this Court granted the motion to the extent the mass gatherings order applied to drive-in services held at a place of worship. *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020). On May 8, 2020, the District Court granted Plaintiffs' motion for an

[14] *See* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 455.

injunction pending appeal as to in-person services and their motion for a preliminary injunction. (Order, RE 35, Page ID # 575.)

On May 9, 2020, the Governor amended the mass gatherings order to allow in-person faith-based services.[15] The order required faith-based organizations to implement and follow the Guidelines for Places of Worship, which stated places of worship should limit attendance for in-person services to 33% building occupancy capacity, which increased to 50% building occupancy capacity on June 10, 2020.[16]

The Governor has since moved the District Court to dissolve the preliminary injunction and injunction pending appeal based upon orders of the United States Supreme Court denying similar relief to churches in California and Illinois. (Motion to Dissolve, RE 46, Page ID # 659.) That motion will be fully briefed on August 3, 2020.

In the meantime, this appeal continues even though the District Court granted Plaintiffs a preliminary injunction.

[15] Available at https://govsite-assets.s3.amazonaws.com/8gdcjsWTRSG2jTuzanK1_May%209,%202020%20-CHFS%20-%205-9-2020%20Order.pdf (last visited July 27, 2020).

[16] Available at https://govsite-assets.s3.amazonaws.com/8gdcjsWTRSG2jTuzanK1_May%209,%202020%20-CHFS%20-%205-9-2020%20Order.pdf (last visited July 27, 2020).

SUMMARY OF THE ARGUMENT

As COVID-19 continues to evolve – and rapidly spread – throughout the United States, the States' responses and the law have also continued to evolve. Importantly, Plaintiffs' claim is now moot because the District Court granted the preliminary injunction, and as of May 9, the Governor has permitted places of worship to hold in-person services. And though the virus is surging, the Governor has not indicated that he will again restrict in-person gatherings at places of worship. In fact, he recently *requested* – but did not mandate – that places of worship pause indoor, in-person services and have virtual services for two weeks to help slow the spread of COVID-19.[17] As a result, the underlying preliminary injunction – *that Plaintiffs were granted* – is no longer necessary.

The law has also responded overwhelmingly in favor of providing the states with significant leeway to craft emergency public health measures to slow the spread of COVID-19. Of particular interest here, the United State Supreme Court – in *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, et al*., 591 U.S. ___ (2020), *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (Mem.) (2020), and *Elim Romanian Pentecostal Church v. Pritzker*, 19A1046 (Order List 590 U.S.) (U.S. May 29, 2020) – has now denied three applications for

[17] *Gov. Beshear asks churches to pause in-person services for two weeks*, WKYT, July 24, 2020, available at https://www.wkyt.com/2020/07/25/gov-beshear-asks-churches-to-pause-in-person-services-for-two-weeks/ (last visited July 27, 2020).

injunctions sought by churches against orders of the governors of Nevada, California and Illinois, orders that are similar to the mass gatherings order. Those decisions, as well as the concurring and dissenting opinions issued in *South Bay*, reveal that the emergency public health orders issued by governors to address the spread of COVID-19 are entitled to the deferential standard of review set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) that allows for judicial intervention only if an emergency order is "beyond all question, a plain, palpable invasion of fundamental rights." *Id*. at 30. Under that standard, the District Court properly denied Plaintiffs' motion for a temporary restraining order.

Moreover, the mass gatherings order does not violate the Free Exercise Clause of the First Amendment because the law is neutral and of general applicability. Nor does it violate free speech or assembly rights because the order – for the same reasons that it is neutral and generally applied - is a narrowly tailored, content-neutral time, place and manner restriction. To be sure, it applied to any event similar to an in-person religious service and only exempted dissimilar activities where social interaction occurs in transit or as necessary for preservation of the public health during a global pandemic. As such, the order is not subject to strict scrutiny, but must be supported only by a rational basis. The mass gatherings order clearly meets this standard of review because it aims to reduce social interaction where the virus is known to spread.

Finally, Plaintiffs' claims under state law are barred under the doctrine of sovereign immunity, and their argument that the May 9 order is vague is not properly before this Court because it was not raised before the District Court.

ARGUMENT

The District Court granted Plaintiffs' motion for a preliminary injunction against the mass gatherings order as it applied to indoor, in person services of faith-based organizations. As a result, this appeal of the District Court's denial of Plaintiffs' motion for a temporary restraining order is moot.

Regardless, however, the District Court did not abuse its discretion when it denied Plaintiffs' motion for a temporary restraining order, confirmed by subsequent orders of the Supreme Court. As an emergency public health measure targeting the spread of COVID-19, the mass gatherings order was entitled to substantial deference as to its constitutionality, and state actors are granted wide latitude to craft orders responding to an emergency public health crisis.

Indeed, United States Supreme Court precedent requires courts to apply a deferential standard to emergency public health orders issued in response to the COVID-19 pandemic. Under this standard, Plaintiffs did not show a strong likelihood that the mass gatherings order violated the First Amendment or state

law. As a result, this Court should affirm the District Court's order denying the temporary restraining order and dissolve the injunction pending appeal.[18]

I. Plaintiffs' Claims Are Moot Because Places Of Worship May Now Hold Indoor In-Person Services.

The United States Constitution limits the federal judicial power to "cases" and "controversies." U.S. Const., Art. III, § 2. The issue of mootness addresses whether an actual, live controversy exists during the litigation or whether an intervening event will render the Court's final adjudication merely advisory. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). In other words, a court that at one point had jurisdiction may lose that jurisdiction if the case becomes moot because an intervening event has "completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted).

This Court treats "cessation of the allegedly illegal conduct by government officials ... with more solicitude ... than similar action by private parties." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012). Therefore, government "self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Id*. "Legislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this

[18] For the same reasons stated herein, the Court should reject the incorrect analysis of the Attorney General in his amicus brief (R. 41).

requisite case-or-controversy because a statute must be analyzed by the ... court in its present form." *Id*.

This case became moot on May 9, 2020, when Governor Beshear and Secretary Friedlander amended the mass gatherings order. That order – the only order at issue in this matter – no longer applies to in-person services of faith-based organizations. Indeed, this Court already recognized the issue of mootness in its per curiam order in this matter, stating, "The case will become moot just over three Sundays from now, May 20, when the Governor has agreed to permit places of worship to reopen." *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 612 (6th Cir. 2020). This remains true even though the Governor initiated the May 20 reopening plan on May 9. It also remains true even though faith-based services are subject to other orders that encourage capacity to be limited to 50% and require implementation of social distancing, sanitation and hygiene recommendations by the CDC. Plaintiffs did not challenge those guidelines.

Moreover, additional action by the Governor indicates he is unlikely to prohibit in person faith based services as a future response to limiting the spread of COVID-19. As mentioned above, as cases continue to rise in the country and the Commonwealth, the Governor has taken additional steps to limit social interaction. Just this week, he announced the closure of bars and limitation of restaurant capacity to 25% indoors. Yet with the rising cases, he only *requested* churches to

begin holding virtual-only services for a two-week period. This is in spite of evidence showing that places of worship remain a places where the virus can spread.[19]

[19] *Pastor: 40 infected with coronavirus after church event*, Associated Press, July 27, 2020, available at https://apnews.com/0fa0546d160d4d3f1 (last visited July 28, 2020);

See also Allison James, DVM, PhD, et al., CDC Morbitiy 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 27, 2020); 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 27, 2020);

https://dhhr.wv.gov/News/2020/Pages/COVID-19-Outbreak-Confirmed-in-Greenbrier-County-Church.aspx (last visited July 27, 2020); 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 27, 2020).

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 27, 2020); 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 27, 2020).

But Plaintiffs' claims are also moot because the District Court granted the preliminary injunction on May 8. Thus, they have already obtained the relief they now seek from this Court. Plaintiffs' request of this Court to undo what the District Court has already done for the sole purpose of having this Court then order the District Court to grant the same relief is a request for a purely advisory opinion.

A case or controversy no longer exists between Plaintiffs and the Governor regarding the closure of places of worship to indoor, in person services. The relief was granted and the Governor amended the mass gatherings order so that it no longer applies to Plaintiffs. This appeal is moot.

II. The District Court Did Not Abuse Its Discretion By Denying Plaintiffs' Motion for a Temporary Restraining Order.

This Court's review of the District Court's denial of Plaintiffs' motion for a temporary restraining order is limited to whether the lower court abused its discretion. *Beacon Journal Publishing Co., Inc. v. Blackwell*, 389 F.3d 683, 684 (6th Cir. 2004) (citation omitted). A court abuses its discretion if it improperly applies the law or uses an erroneous legal standard. *Id*. at 684-85 (citation omitted).

"There are four factors to be considered in determining whether the grant or denial of a preliminary injunction was an abuse of discretion: (a) the likelihood of success on the merits of the action, (b) the irreparable harm which could result without the relief requested, (c) the impact on the public interest, and (d) the possibility of substantial harm to others." *Christian Schmidt Brewing Co. v. G.*

Heileman Brewing Co., Inc., 753 F.2d 1354, 1356 (6th Cir. 1985) (citations omitted).

Here, the District Court did not abuse its discretion by denying Plaintiffs' motion to temporarily restrain the Governor from enforcing the mass gatherings order as it applied to places of worship. Since the District Court's Order, the Supreme Court has similarly denied preliminary injunctive relief in three cases, and, in doing so, has made clear that Supreme Court precedent requires great deference and wide latitude when reviewing public health measures enacted in response to the COVID-19 emergency. Furthermore, because the order applied to *all* mass gatherings, both secular and non-secular, the order is neutral and of general applicability, a narrowly tailored content-neutral time, place and manner restriction, and not in violation of the First Amendment.

Moreover, Plaintiffs claims under Kentucky state law are barred by the doctrine of sovereign immunity, and their argument regarding vagueness is not properly before this Court. For these reasons, this Court should affirm the District Court's order denying Plaintiffs' motion for a preliminary injunction.

A. The Order Meets the Deferential Standard Applied to Public Health Measures By the United States Supreme Court Because It Targets The Spread of COVID-19 and is Not, Beyond All Question, A Plain, Palpable Violation of Fundamental Rights.

The Supreme Court requires this Court to grant the Governor wide latitude when reviewing emergency public health orders like the mass gathering order,

aimed at limiting the spread of COVID-19. Here, that latitude means this Court should affirm the District Court's denial of Plaintiffs' motion to enjoin the mass gatherings order.

When public officials face the task of protecting the "safety and health of the people . . . in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613-14 (Mem.) (2020) (internal quotation marks and citations omitted). This principle – relying primarily upon *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) – has reemerged during the COVID-19 pandemic to guide federal courts' review of executive orders issued by governors throughout the country intended to slow the spread of the virus. *See League of Ind. Fitness Facilities and Trainers, Inc. v. Whitmer*, --- Fed. Appx. ----, 2020 WL 3468281 (6th Cir. June 24, 2020). *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 922 (6th Cir. 2020). This Court, in *Adams & Boyle, P.C.*, noted that it "is imperative in such circumstances that judges give legislatures and executives—the more responsive branches of government—the flexibility they need to respond quickly and forthrightly to threats to the general welfare, even if that flexibility sometimes comes at the cost of individual liberties." 956 F.3d at 916-17.

In *Jacobson* itself, the Court upheld a mandatory vaccination ordinance enacted by the city of Cambridge Massachusetts intended to slow the slow the spread of the smallpox epidemic. 197 U.S. at 12. The Court recognized that because "a community has the right to protect itself against an epidemic of disease" threatening the public safety and health, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id.* at 27, 29. Facing these great dangers, when a state exercises emergency powers to enact a public health measure, courts are instructed to uphold the measure unless it (1) "has no real or substantial relationship to [the emergency]" or (2) "is, ***beyond all question***, a plain, palpable invasion of rights secured by the fundamental law[.]" *Id*. at 30 (emphasis added).

This standard particularly applies during the preliminary injunction stage of a proceeding and the interlocutory relief sought from the lower court's decision to withhold such preliminary relief. In *South Bay,* Justice Roberts noted the high bar already set for such relief because "an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." 140 S.Ct. at 1613 (quoting *Respect Main PAC v. McKee*, 562 U.S. 996 (2010). The Chief Justice recognized that the "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*. (citation omitted).

At this stage of the proceeding, where Plaintiffs seek interlocutory relief from an order that prohibited all mass gatherings in the early stages of the state response to COVID-19 – an order that has been amended to no longer apply to faith-based services as the state "actively shap[es] [its] response to changing facts on the ground[,]" *id*. at 1614 – Plaintiffs have not met their substantially high burden. Thus, the notion that it could be "indisputably clear" that the mass gatherings order "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law" – in the words of Chief Justice Roberts – "seems quite improbable." This is particularly true given Chief Justice Roberts' concurring opinion as to the Free Exercise Clause claims, the 5-4 decision to deny injunctive relief in *South Bay*, and the dissent only garnering the support of two other Justices, Moreover, the Court denied a similar application on the same day in *Elim Romanian Pentecostal Church v. Pritzker, Gov. of Illinois*, 19A1046 (Order List 590 U.S.) (U.S. May 29, 2020), and again on July 24, 2020, in *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, et al*., 591 U.S. ___ (2020).

In *South Bay*, the Court, in a 5-4 decision, denied an application for injunctive relief to enjoin the Governor of California's Executive Order that limited attendance at public gatherings, including a 25% capacity restriction on

places of worship. 140 S.Ct. at 1613. Plaintiff South Bay initially challenged California's stay at home order on grounds that it prevented any in-person religious services. *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). The District Court and the Ninth Circuit each denied South Bay any preliminary injunctive relief from the stay at home order. *Id*.

The Supreme Court also denied the church any injunctive relief. *South Bay*, 140 S.Ct. at 1613. Chief Justice Roberts and Justice Kavanaugh authored opinions addressing the likelihood of success of the Free Exercise Claim and the split on this issue in the Circuits below. Concurring in the Court's denial, Chief Justice Roberts stated:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently 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. Chief Justice Roberts continued by writing:

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905).When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, Marshall v. United States, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad

> limits are not exceeded, they 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. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

Id. at 1613-14.

Justice Kavanaugh authored a dissent, joined by Justices Thomas and Gorsuch. While they agreed that "combating the spread of COVID19 and protecting the health of its citizens" is a compelling interest, principally, they disagreed with Chief Justice Roberts's finding that the order likely complied with the Free Exercise Clause because it applied to comparable secular gatherings, and only treated dissimilar activities differently. *Id*. at 1614-15 (Kavanaugh, J., dissenting) (relying on *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (*per curiam*)).

This disagreement acknowledges and mirrors the split between the circuit courts. This Court, in two decisions granting injunctions pending appeal, aligned with the dissent in *South Bay*. *See Roberts*, 958 F.3d 409; *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020). The Seventh and Ninth Circuits aligned with Chief Justice Roberts's concurrence. *Elim Romanian Pentecostal Church v. Pritzer*, 962 F.3d 341 (7th Cir. 2020); *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). Thus, although it is unclear whether the other four Justices that agreed to deny injunctive relief to

South Bay also agreed with Chief Justice Roberts's opinion, *South Bay* clearly demonstrates that a majority of the Court rejected the analysis applied by Justice Kavanaugh and this Court in *Roberts* and *Maryville*.

The Court again denied injunctive relief to a church on July 24, 2020, under circumstances more favorable to the church than those present in *South Bay*. In *Calvary Chapel*, 591 U.S. _____, the Court, in a 5-4 decision reflecting the same alignment as *South Bay*, denied Calvary Chapel Dayton Valley injunctive relief against the Governor of Nevada from 50-person capacity restrictions that did not apply to casinos, which were subject to 50% capacity restrictions. No concurring opinion was issued, but in dissent, Justice Alito recognized the necessity of the early responses by States to restrict certain personal liberties as opposed to orders issued more recently, like the Nevada order. He stated,

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency – and the opening days of the COVID-19 outbreak plainly qualify – public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.

Id., at *3.

Here, Plaintiffs moved to enjoin a March 19 order – entered in the infancy of the COVID-19 emergency – that prohibited *all* mass gatherings. On May 9, 2020, prior to any other closed establishment, the Governor permitted in-person services at faith-based organizations. Other mass gatherings remain subject to more severe restrictions. In response to rising cases, the Governor ordered gatherings to restrict the number of individuals present to 10 or fewer. Bars are now closed and restaurants are now at 25% indoor capacity until at least August 10.[20] Bars and Restaurants, along with other entities and businesses, were only permitted to reopen after places of worship.[21]

Plaintiffs' arguments request this Court to ignore the Supreme Court's actions in *South Bay*, *Elim Romanian*, and *Calvary Chapel*, and the longstanding precedent they rely upon, and continue as if these three cases do not provide any guidance. This it should not do. One can concede that the opinions in *South Bay* and *Calvary Chapel* do not provide the full scope of what the Supreme Court will

[20] Available at https://govsite-assets.s3.amazonaws.com/5l7HAtkSS4CqDxLf7WIV_7-28-2020%20CHFS%20Order.pdf (last visited July 27, 2020); https://govsite-assets.s3.amazonaws.com/GlXFnrapT8Wp96HaFGBf_2020-7-27%20-%20Healthy%20At%20Work%20Reqs%20-%20Restaurants%20-%20Down%20to%2025-%20capacity%20-%20Final%20Version%204.0.pdf (last visited July 27, 2020).

[21] *See generally* https://govstatus.egov.com/ky-healthy-at-work (last visited July 27, 2020).

decide if and when the underlying merits of these cases reach the Court, but it cannot be ignored that the Court has now on three occasions denied the relief Plaintiffs seek here while recognizing the analysis that splits this Circuit from the Seventh and Ninth Circuits.

This Court should follow the lead of *South Bay*, *Elim Romanian*, and *Calvary Chapel* and affirm the District Court's denial of the temporary restraining order below. These three orders, along with Justice Roberts's concurrence, instruct that at this early stage of the proceeding, when Plaintiffs' burden is already exceptionally high, they cannot demonstrate with indisputable clarity that beyond all question, the mass gatherings order is a plain, palpable violation of the Free Exercise Clause. This is supported by the Court's refusal to adopt Justice Kavanaugh's dissent in *South Bay* that cited this Court's opinion granting the injunction pending appeal in this matter. That analysis – now rejected by the Supreme Court – cannot be the basis for finding Plaintiffs met their burden under *Jacobson*. The District Court's order denying preliminary injunctive relief should be affirmed.

B. The Order Does Not Violate the Free Exercise Clause Because It is a Neutral Law of General Applicability.

In denying Plaintiffs' motion for a temporary restraining order, the District Court noted that the mass gatherings order applied *all* mass gatherings, and Plaintiffs' comparison of liquor stores and grocery stores was not appropriate

because those involve singular and transitory experiences. (Order, RE 9, Page ID # 224.) The Court reached this conclusion even though it did not apply the substantial burden upon Plaintiffs imposed by *Jacobson*. This order also conforms to Chief Justice Roberts's concurring opinion in *South Bay*. 140 S.Ct. at 1613. If this Court does not dismiss the appeal as moot, it should affirm the District Court's Order because it does not violate the First Amendment.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST., amend. I. The free exercise clause embodies a liberty applied to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). However, the clause "does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citation omitted). Nor does the clause "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)).

This is because the clause "embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell*

v. State of Conn., 310 U.S. 296, 303-04 (1940) (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 144 U.S. 33 (1890)). The holding of "religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Minersville School Dist. Bd. of Ed. v. Gobitis*, 30 U.S. 586, 594-95 (1940). Under the prevailing standard, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing Smith, 494 U.S. 872).

State action is not neutral if the purpose "is to infringe upon or restrict practices because of their religious motivation," or "the purpose . . . is the suppression of religion or religious conduct." *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 591 (6th Cir. 2018) (quoting *Lukumi*, 508 U.S. at 533). "A law is not of general applicability if it 'in a selective manner impose[s] burdens only on conduct motivated by religious belief[.]'" *Michigan Catholic Conference and Catholic Family Serv.'s v .Burwell*, 755 F.3d 372 (6th Cir. 2014) (quoting *Lukumi*, 508 U.S. at 543).

Here, the March 19 order – both on its face and in its application – is neutral and of general applicability. By its plain terms, the Order prohibited "*all* mass

gatherings," not just faith-based gatherings. (*See* Amended Complaint, RE 6-4, Page ID ## 99-100.) The order targets slowing the spread of COVID-19 by limiting social interaction, in particular the social interaction that occurs at mass gatherings, where many individuals from different communities congregate for extended periods of time. Its entire purpose and success hinged upon it applying to all gatherings, not just religious gatherings. Plaintiffs present no evidence the order targeted their mass gathering because of its religious nature. Rather, the order targeted gathering in large groups of any kind. In application, the order forced the closure of businesses and events with no religious affiliation, including movie theaters, concerts, and sporting activities.

State and local officials ordered the closure of businesses for non-compliance with social distancing and hygiene measures, as well as businesses that are not life-sustaining but continued to operate in violation of orders. *See* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 454. Thus, even though the order may "burden" faith-based mass gatherings, it equally burdened all mass gatherings, regardless of their religious nature. Its purpose was to prevent the spread of a disease that is particularly infectious, with no cure, treatment, or vaccine. The order did not discriminate or differentiate among groups, because COVID-19 does not differentiate or discriminate.

Plaintiffs' argument that the order is not generally applied ignores and distorts the facts. The order did not exempt secular mass gatherings; nor was it applied in a manner that would exempt secular mass gatherings. In fact, the order did not provide any exceptions at all. *Cf. Ward v. Polite*, 667 F.3d 727, 738-39 (6th Cir. 2012). Rather, the Order provided examples of what a "mass gathering" is and what it is not; the distinction is that it closes any event the purpose of which is to congregate person-to-person for an extended period to engage in a particular communal activity.

The order prohibiting mass gatherings leaves open locations providing services that are literally necessary to sustain life, and necessary to maintain public health and safety, despite the fact that multiple people may be in transit in the location at the same time. Or, as Chief Justice Roberts noted, the order "exempts or treats more leniently 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." *South Bay,* 140 S.Ct. at 1613. As the Eastern District of Kentucky correctly observed:

> Moreover, there is an undeniable difference between certain activities that are, literally, life sustaining and other that are not. Food, medical care and supplies, certain travel necessary to maintain one's employment and thus income, are, in that sense, essential. Concerts, sports events, and parades clearly are not. And while plaintiffs argue that faith-based gatherings are as important as physical sustenance, as a literal matter, they are not life-sustaining in the physical sense.

Roberts v. Neace, Case No. 2:20-cv-00054, RE 46, Page ID # 832 (E.D.Ky. May 4, 2020). Yet even in some of those instances, the Governor imposed additional restrictions, requiring social distancing and hygiene practices, as well as limiting life-sustaining retail businesses to allowing only one adult per household in at a time. [22]

The Governor's encouragement of drive-in and online broadcast of faith-based services further demonstrates the order's neutrality and general applicability. Through the creativity of Kentucky's faith leaders, Kentuckians could always and still can participate in their faith-based events, without the risk of spreading COVID-19. Similarly, courts have creatively permitted access to the courts via telephonic hearings. Under Plaintiffs' argument, courts would also be required to provide in-person services regardless of the risk posed to judicial staff, parties and witnesses.

Plaintiffs principally argue that the Governor cannot prohibit in-person church services while leaving liquor store or supercenter shopping open. (Doc.37

[22] *See* Ky. Exec. Order 2020-246, Mar. 22, 2020, available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf 9last visited July 27, 2020); Ky. Exec. Order 2020-257, Mar. 25, 2020, available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited July 28, 2020); Ky. Exec. Order 2020-275, Apr. 8, 2020, available at https://governor.ky.gov/attachments/20200408_Executive-Order_2020-275_State-of-Emergency.pdf (last visited July 28, 2020).

Page: 44.) But this argument amounts to a policy disagreement, without recognizing the public health concerns driving that policy. And is precisely what Courts describe as the "difficult line-drawing" public health officials must undertake in crafting a response to a public health emergency. *See League of Ind. Fitness Facilities*, 2020 WL 3468281, at *3. Shutting down hospitals, transportation, grocery stores, and even liquor stores could undermine the public health during a global pandemic. The same cannot be said of in-person church services. And, though these lines may admittedly be imperfectly drawn, it is also why this Court and the Supreme Court recognize that the Constitution leaves this "difficult line-drawing" to officials directly accountable to the people. *Id*. (citing *South Bay*, 140 S.Ct. at 1613-14).

Because the Order is neutral and of general applicability, it is subject to "rational basis review[.]" *Miller v. Davis*, 123 F. Supp. 3d 924, 938 (E.D. Ky. 2015) (citing *Seger v. Ky. High Sch. Athletic Ass'n*, 453 Fed. Appx. 630, 634 (6th Cir. 2011) (interpreting *Smith*, 494 U.S. 872 and *Lukumi*, 508 U.S. 520)). Under rational basis review, an emergency order will be upheld if it is "rationally related to furthering a legitimate state interest." *Seger*, 453 Fed. Appx. 635. An emergency order "subject to rational basis review is accorded a strong presumption of validity." *Id*. It should be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach*

Commc'ns, Inc., 508 U.S. 307, 313 (1993). Plaintiffs carry the burden to negate "every conceivable basis which support it[.]" *Id*. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The mass gatherings order meets rational basis review. As Justice Alito's dissent in *Calvary Cathedral* acknowledges: the threat of the spread of COVID-19 in the early days of the virus was an emergency that required public officials to respond quickly and decisively. 591 US ____, at *3. (Alito, J. dissent). The Governor and the Secretary did just that when they issued the March 19 mass gatherings order. The order bears a reasonable relationship to curbing the spread of COVID-19 by limiting social interactions for prolonged periods between large groups of people from different households. (*See* Dr. Steven Stack Affidavit, RE 31-2, Page ID # 452-56.) Because the prohibition on mass gatherings reasonably relates to the legitimate state interest in stopping the spread of disease, Plaintiffs' free exercise claim was not substantially likely to prevail in the District Court.

C. Plaintiffs' State Law Claims are barred by Sovereign Immunity.

The Plaintiffs cannot show a strong likelihood of success on a state claim that is barred by sovereign immunity in federal court. The Governor expressly asserted his immunity in the Motion to Dismiss filed before the District Court. (Motion to Dismiss, RE 33-1, Page ID ## 502-503.) As a result, the claim under

the KRFRA and the claims under the Kentucky Constitution do not support a reversal of the District Court's order denying the temporary restraining order.

The Eleventh Amendment to the United States Constitution bars suits against the state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97-98 (1984). State officials sued in their official capacities are "arms of the state" entitled to assert the State's sovereign immunity on their own behalf. *See Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005). The Supreme Court acknowledges three exceptions: suits against state officials for injunctive relief challenging the constitutionality of the official's action, *see Ex parte Young*, 209 U.S. 123 (1908), suits to which states consent, *see Pennhurst*, 465 at 98, and suits invoking Congressional statutes pursuant to the Fourteenth Amendment, *see Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001).

These exceptions are not applicable to Plaintiffs' state law claims asserted in the Complaint. As to the state law claims, "because the purposes of *Ex parte Young* do not apply to a lawsuit designed to bring a State into compliance with state law, the States' constitutional immunity from suit prohibits all state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in nature." *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005) (citing *Pennhurst*, 465 U.S. at 106). Nor has the Commonwealth consented to suit in federal court on the state law claims. The Kentucky Constitution provides that the Commonwealth

cannot waive immunity except by express legislative action. KY. CONST. § 231. *See also Edelman v. Jordan*, 415 U.S. 651, 673 (1977) (a state must specify "by the most express language" its intent to waive Eleventh Amendment immunity and subject itself to suit in federal court). The Commonwealth has not done so.

Plaintiffs' claims also cannot survive as requests for declaratory judgment. *See Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667, 671 (1950) (holding that the Declaratory Judgment Act does not extend the jurisdiction of federal courts.)[23]

Accordingly, sovereign immunity bars Plaintiffs' claims against the Governor in his official capacity for declaratory relief under the KRFRA and Kentucky Constitution. As a result, those claims cannot support a reversal of the District Court's order refusing to temporarily restrain the Governor.

D. The Mass Gatherings Order Does Not Violate Plaintiffs' Free Speech or Assembly Rights Because the Order is A Narrowly Tailored Content-Neutral Time, Place and Manner Restriction.

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). This includes

[23] As to the RLUIPA claim, which is not addressed on appeal, that Act does not expressly abrogate a state's sovereign immunity. *See Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1025-26 (D.C. Cir. 2006). Thus, the state's sovereign immunity would bar this claim as well.

public forums, such as state capitols and their grounds, where "the government may impose reasonable restrictions on the time, place, or manner of protected speech[.]" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). To pass constitutional muster, a time, place, or manner restriction must be: (1) content-neutral, (2) "narrowly tailored to serve a significant government interest" and (3) "leave open ample alternative channels for communication of the information." *Id*. (citation omitted).

The mass gatherings order is content-neutral. To be sure, the order does not target or restrict any speech; any effect on speech is incidental. *See Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) ("a regulation of places where speech may occur," rather than a regulation of the speech itself is content-neutral) (citing *Hill v. Colorado*, 530 U.S. 703, 719 (2000)). Moreover, the effect applies neutrally: the order prohibits *all* mass gatherings. That the order distinguishes gatherings of people for work or faith-based services "is inapposite." *Givens, v. Newsom*, --- F.Supp.3d ----, 2020 W 2307224 (E.D.Cal. May 8, 2020). The distinction is not one of content of speech, but as a matter of public health. The spread of COVID-19 makes any gathering dangerous to the public health regardless of the social distancing and hygiene measures employed. To restrict social encounters in a way that stops people from working, obtaining food,

washing their clothes, or reporting on this crisis would undermine the public health goals.

The mass gatherings order is narrowly tailored to serve a significant government interest. A regulation of speech "need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 798-99 (citations omitted). This is easily met here where absent the prohibition on mass gatherings, COVID-19 would spread in crowds. Likewise, "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the lease restrictive or least intrusive means of serving the [state's] goal." *Hill*, 530 U.S. at 726. Here, the order permits other means of speech: it permitted virtual and drive-in faith-based services. And in fact, the order did not even intend to limit speech. Finally, even a "complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). While this is not a complete ban on speech, the entirety of the order seeks to limit social interaction to slow the rate of COVID-19 transmission. Under any view, the order satisfies the narrow tailoring standard.

Finally, the *temporary* prohibition on in person mass gatherings does not foreclose alternative channels of communication. While the mass gatherings order prohibited in person services, Plaintiffs were able to express their views and worship through virtual and drive-in services, where individuals remain in their cars. These channels allowed Plaintiffs to reach their intended audience, as the Sixth Circuit requires. *See Contributor v. City of Brentwood, Tenn.*, 726 F.3d 861, 865 (6th Cir. 2013).

Moreover, as in *South Bay*, *Elim Pentecostal*, and *Calvary Chapel*, the Supreme Court has similarly declined to preliminarily enjoin a mass gatherings order challenged as a violation of free speech and assembly rights. On July 4, Justice Kavanaugh denied an application by the Illinois Republican Party and others to enjoin the Governor of Illinois from enforcing an Executive Order that prohibited gatherings of more than fifty people. *See Illinois Republican Party v. Pritzer*, 19A1068 (U.S. July 4, 2020). The order, remarkably similar to the mass gatherings order at issue here – began as a prohibition on groups of more than ten and was amended to prohibit groups of more than 50. *See* Opinion and Order, *Illinois Republic Party v. Pritzker*, No 20 C 3489, Doc. 16 (N.D.Ill July 2, 2020). Plaintiffs challenged the Executive Order as a violation of the free speech and free association clauses of the First Amendment in that it did not allow larger political gatherings. *See id*. While Justice Kavanaugh alone denied the application, his

denial, along with the decisions of Justices Roberts, Sotomayor, Kagan, Ginsburg and Breyer to deny the application for injunction in *South Bay*, *Elim Pentecostal*, and *Calvary Chapel*, indicates that free speech claims against mass gatherings orders do not warrant preliminary injunctive relief during a global pandemic.

Plaintiffs' claim under the right to assemble takes them no further. Both rights are still subject to restrictions "as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29; *see also Givens*, --- F.Supp.3d ----, 2020 W 2307224 (denying right to assemble and petition claims for same reasons the court denied right to free speech claim). And Plaintiffs do not raise any concerns under these claims that are not subsumed by the concerns raised under the free speech claim. *See Int'l Soc. for Krishna Consciousness, Inc. v. Evans*, 440 F.Supp. 414, 421 (S.D.Oh. August 25, 1977) (analyzing free assembly claims under free speech analysis when intent of assembly is to communicate ideas). *See also Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011) (analysis of petition clause must be guided by the objectives underlying the right). Here, Plaintiffs' claims under the right to assemble and petition are inextricably intertwined with the free speech claim. Neither would be successful.

E. Plaintiff's Vagueness Claim is not Properly Before this Court.

Plaintiffs raise a vagueness claim against the new guidelines issued by the Governor that permit churches to reopen safely during a global pandemic. (Doc.

37, Page: 67.) But the May 9 order is no longer in effect; it was superseded by an order on June 10 permitting churches to operate at 50% with guidelines for social distancing. Neither the May 9 order nor the June 10 order were challenged before the District Court, and Plaintiffs have not amended their Complaint to raise these claims. This Court should not consider Plaintiffs' vagueness claim against an order no longer in place and not challenged below for the first time on appeal. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008).

CONCLUSION

For the reasons set forth herein, this Court should affirm the District Court's denial of Plaintiffs' Motion for a Temporary Restraining Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32 and the type-volume limitation because it contains 8,292 words and uses proportionally spaced typeface of Times New Roman in 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2020, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ S. Travis Mayo
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ADDENDUM