No. _____

In the Supreme Court of the United States

MARK ANTHONY SPELL, AND
LIFE TABERNACLE CHURCH,

Applicants,

v.

JOHN BEL EDWARDS, in his individual capacity and official capacity as Governor of Louisiana; SID GAUTREAUX, in his individual capacity and official capacity as Sheriff of East Baton Rouge Parish, Louisiana; and ROGER CORCORAN, in his individual capacity and official capacity as Chief of Police for the City of Central, Louisiana,

Respondents.

To the Honorable Samuel Alito, Jr.,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Fifth Circuit

Emergency Application for Writ of Injunction Pending Appellate and Certiorari Review

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QUESTIONS PRESENTED

(1) Do the Religion Clauses of the First Amendment give the Church exclusive jurisdiction over whether to assemble or not?

(2) Is this issue moot when all of the Governor's orders for nearly 8 months forbid the church to fully assemble?

PARTIES AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the present Emergency Application for Writ of Injunction and the proceedings below:

Applicants are MARK ANTHONY SPELL and LIFE TABERNACLE CHURCH. Both are Plaintiffs in the United States District Court for the Middle District of Louisiana and were Appellants in the U.S. Court of Appeals for the Fifth Circuit. Life Tabernacle Church is a nonprofit corporation organized under the laws of the State of Louisiana. It does not have any parent corporation or any stock. Pastor Spell is the pastor of Life Tabernacle Church.

Respondents are JOHN BEL EDWARDS, in his individual capacity and official capacity as Governor of Louisiana; SID GAUTREAUX, in his individual capacity and official capacity as Sheriff of East Baton Rouge Parish, Louisiana; and ROGER CORCORAN, in his individual capacity and official capacity as Chief of Police for the City of Central, Louisiana. All Respondents are Defendants in the U.S. District Court for the Middle District of Louisiana and were Appellees in the U.S. Court of Appeals for the Fifth Circuit.

At the beginning of this lawsuit, Applicants had also sued Baton Rouge Mayor Sharon Weston Broome, City of Central Mayor David Barrow, and Judge Fred Crifasi of the Louisiana 19th Judicial District Court. These defendants were voluntarily dismissed.

DECISIONS BELOW

All of the decisions below are styled *Spell v. Edwards*. The district court denied Applicants' motion for a temporary restraining order and preliminary injunction, and its opinion is attached in the Appendix as Exhibit C. The U.S. Court of Appeals for the Fifth Circuit denied Applicants' motion for an injunction pending appeal and dismissed the appeal as moot, and the opinion is attached in the Appendix as Exhibit A. That opinion has been published as *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020). The Fifth Circuit's order denying Applicants' petition for an *en banc* rehearing is attached in the Appendix as Exhibit B.

One day before Applicants filed this application for injunctive relief, the district court granted Respondents' motion to dismiss. A copy of the district court's opinion is attached in the Appendix as Exhibit H.

JURISDICTION

Applicants will be timely filing a petition for a writ of certiorari. *See* S.Ct. Order Relating to Filing Deadlines (Mar. 19, 2020) (extending the deadline to file a petition for writ of certiorari from 90 days to 150 days). This Court has jurisdiction under 28 U.S.C. § 1651 to grant the injunction requested in this application.

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TO THE HONORABLE SAMUEL ALITO JR., ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT

In Louisiana, one pastor and his church have been fighting since March 2020 for the right that God gives them and the Constitution of the United States secures to them: the right to assemble for church in person. Because of their supposed disobedience to Governor Edwards' orders, the State of Louisiana has brought **nine criminal charges** against Pastor Tony Spell in three phases during the span of this litigation. Not only has Louisiana Governor John Bel Edwards refused to respect the First Amendment rights of Pastor Spell and his church, but he has just refused an order of his own legislature to end the state of emergency that purportedly gives him the power to issue emergency orders.

This case presents a threshold question that other applicants did not present to this Court in prior religious liberty challenges: Whether the First Amendment places the decision of whether to assemble solely within the jurisdiction of the Church and not the State. Based on a historical analysis of the First Amendment and the Court's leading precedents, Applicants herein believe the answer is yes. If it does, then Respondents have no authority to restrict the right of Pastor Spell and his church to meet. Instead of recognizing this right, the State has charged Pastor Spell with six misdemeanor counts of breaking the Governor's orders. Furthermore, they charged him with a felony for allegedly trying to assault a protestor, even though no confrontation ever took place. One of the conditions of his bail after his arrest was that he could not preach to his church as he had been doing. When

Pastor Spell refused, they placed him under house arrest and equipped him with an ankle bracelet to track his whereabouts. After this, they resurrected a 21-year-old speeding ticket against him and a contempt charge for failing to appear in court 21 years ago. All of this happened because he wanted to do one simple thing: attend to his church.

Given that nine criminal charges have already been brought against him in violation of the First Amendment of the United States Constitution and that the Governor is refusing to respect the order of his legislature to terminate the state of emergency, immediate injunctive relief, which was refused by the courts below, is necessary in order to protect the applicants from further unconstitutional abuse.

I. FACTS AND PROCEDURAL HISTORY

A. Background

Pastor Spell is the pastor of Life Tabernacle Church in the City of Central, Louisiana. *Spell v. Edwards*, No. 3:20-cv-00282 (M.D. La.), ECF 58 at 2. Life Tabernacle Church is a large church composed of more than 2,000 people. *Id.* at 9. Pastor Spell and the Church have the sincere religious belief that the Bible requires them to meet in person in their church building. *Id.* at 3-4, 9-11. They also have the sincere religious beliefs that baptisms, communion, the offering, the laying on of hands, and anointing the sick with oil and praying for them must be done in person in a church assembly. *Id.*

During the COVID-19 outbreak, Louisiana Governor John Bel Edwards issued a series of proclamations that severely restricted Pastor Spell and the

Church from meeting together as they had been doing and from performing religious exercise as they were accustomed to doing. *Id.* at 4-7. On March 13, 2020, Governor Edwards issued his first order that addressed churches by implication, prohibiting "all gatherings of 250 people or more," which applied to "gatherings in a single space at the same time where individuals will be in close proximity to one another." La. Exec. Dep't, Proclamation No. 25 JBE 2020 at 2.[1] Three days later, he reduced the number of people permitted to gather to 50. La. Exec. Dep't, Proclamation No. JBE 2020-30 at 1.[2] By the time this litigation commenced, Governor Edwards had prohibited all gatherings of 10 people or more if the people in the gathering would be in a single space at the same time and in close proximity to one another. La. Exec. Dep't, Proclamation No. 33 JBE 2020 at 2.[3] Each of these orders exempted a number of entities such as airports, shopping malls, medical facilities, office buildings, factories, grocery stores, and department stores—but not churches. *See* La. Exec. Dep't, Proclamation Nos. JBE 2020-27 at 2; JBE 2020-30 at 1; 33 JBE 2020 at 2.

Refusing to violate their religious convictions, Pastor Spell and Life Tabernacle Church continued to meet in person. ECF 58 at 11. Not only did refusing to allow them to meet deprive them of their right to assemble but also to

[1] *Available at* https://gov.louisiana.gov/assets/ExecutiveOrders/27-JBE-2020-COVID-19.pdf. All of Governor Edwards' proclamations listed herein may be found online at https://gov.louisiana.gov/index.cfm/newsroom/category/10.
[2] *Available at* https://gov.louisiana.gov/assets/Proclamations/2020/modified/30-JBE-2020-Public-Health-Emergency-COVID-19.pdf
[3] *Available at* https://gov.louisiana.gov/assets/Proclamations/2020/modified/33-JBE-2020-Public-Health-Emergency-COVID.pdf.

carry out all aspects of religious exercise that depend on assembling, such as baptisms, communion, the offering, the laying on of hands, and anointing the sick with oil and praying for them. *Id.* at 10-11. Consequently, Applicants could not submit to the Governors' orders in good conscience, for doing so would violate their sincerely held religious beliefs. *See id.* at 23.

On March 17, 2020, Chief Fire Marshall Butch Browning visited Pastor Spell's house, relaying a message from Governor Edwards to discontinue services. *Id.* at 11. After Pastor Spell declined to discontinue services, Sheriff Gautreaux visited with Pastor Spell, threatening to arrest him if he continued to hold services.[4] *Id.* During this time, two church buses were vandalized, but the police did essentially nothing about it. *Id.* at 11-12.

On March 31, Defendant Corcoran issued Pastor Spell six misdemeanor summonses for violating Governor Edwards's orders, each punishable by a fine of $500 and/or up to 90 days in jail. *Id.* at 14. On April 21, 2020, Defendant Corcoran arrested Pastor Spell on charges for aggravated assault (even though no confrontation, threat, or physical contact occurred) after he attempted to confront a lone protestor outside his church who had been making obscene remarks and vulgar gestures to the Church's women and children. *Id.* at 17-18. The presence of the lone protestor and his actions had been reported to police authorities, but no actions were taken to remove him. *Id.* at 17. Pastor Spell was released on bail but told by Judge Fred Crifasi of the Louisiana 19th Judicial Circuit that as a condition of his

[4] Sheriff Gautreaux disputes this fact. ECF 27 at 3.

bail he could not preach to "such an assembly [more than 10 people] in person…that's prohibited."[5] When Pastor Spell could not assent to these terms, Judge Crifasi placed Pastor Spell under house arrest and had him equipped with an ankle bracelet to track his location. *Spell v. Edwards*, No. 3:20-cv-00282 (M.D. La.), ECF 58 at 19-20. Defendant Corcoran informed Pastor Spell that if he left his home, he would be arrested. *Id.* at 19.

Following his religious conviction that he must obey God rather than man, Pastor Spell went to his church and conducted a service on April 26, 2020. *Id.* at 20. Judge Crifasi threatened to increase his bail by $25,000, but he subsequently recanted after Pastor Spell refused to assent. *Id.* Although Judge Crifasi refused to immediately put Pastor Spell in jail, he said that he would later consider the issue of contempt and revocation of bond, which presumably would put Pastor Spell's liberty in jeopardy once again. *Id.*

B. The Plaintiffs Sue

Having already suffered one felony charge[6] and six misdemeanor charges against Pastor Spell, the Plaintiffs brought the present action in the U.S. District Court for the Middle District of Louisiana on May 7, 2020, along with a motion for a temporary restraining order and preliminary injunction.[7] *Spell v. Edwards*, No.

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[5] *Spell v. Edwards*, No. 20-30358 (5th Cir.), ECF 7 (Motion for Injunction Pending Appeal) Ex. 5 at 13.

[6] This charge was reduced to a misdemeanor after Plaintiffs sued in the present action.

[7] The Complaint also sued the Mayor Sharon Weston Broome of the City of Baton Rouge, Mayor David Barrow of the City of Central, and the Hon. Fred Crifasi, but the Plaintiffs later voluntarily dismissed these defendants.

3:20-cv-00282 (M.D. La.), ECF 1 & 2. On May 14, 2020, Judge Brian Jackson held a hearing over Zoom concerning the Plaintiffs' motion. ECF 60. Shortly after the hearing, Governor Edwards filed a motion to supplement the record with a new proclamation that would go into effect on May 15. ECF 45. The Governor's new proclamation allowed churches to open at 25% capacity to which Pastor Spell vigorously objected, continuing his services as before. ECF 44 & 45.

C. The Appeal and the Fifth Circuit's Decision

On May 15, Judge Jackson issued the order denying the Plaintiffs' motion on the merits. App., Ex. C. Plaintiffs immediately appealed to the United States Court of Appeals for the Fifth Circuit, requesting an emergency injunction pending appeal. *Spell v. Edwards*, No. 20-30358 (5th Cir.), ECF 7 (Motion for Injunction Pending Appeal). Plaintiffs feared that Pastor Spell might be subject to arrest, citation, or other forms of punishment if the Fifth Circuit did not enjoin Defendants from further tramping on Plaintiffs' constitutional rights. As will be shown *infra*, Applicants' fears turned out to be correct: the State brought two more criminal charges against Pastor Spell.

On June 18, 2020, the Fifth Circuit denied Plaintiffs' motion and dismissed the appeal. App., Ex. A. The Fifth Circuit reasoned that the appeal was moot because the Governor's order had expired before the appeal was taken. App., Ex. A at 6. The court also rejected Plaintiffs' argument that the matter was capable of repetition but evading review, reasoning that Louisiana's trend had been to reopen the state instead of closing it back down. *Id.*

Judge Ho reluctantly concurred, agreeing that the appeal was moot but noting problems with the Defendants' actions on the merits. App., Ex. A at 8-12. Specifically, Judge Ho noted, "[O]fficials have not only tolerated protests—they have encouraged them as necessary and important expressions of outrage over abuses of government power." *Id.* at 8. Judge Ho quoted the Governor when he commended the Black Lives Matter protesters engaging in these activities without following social-distancing rules, and he also noted that the Governor said he expected to see the protests continue. *Id.* at 10. Consequently, Judge Ho feared that when the appeal returned to the Fifth Circuit, it would be apparent that Respondents had been picking and choosing to protect some First Amendment rights but deny others. Plaintiffs' timely petition for an *en banc* rehearing was denied on July 15, 2020. App., Ex. B.

D. Subsequent Actions by Defendants

From the time that Plaintiffs appealed to the Fifth Circuit until now, Governor Edwards has issued 9 new proclamations that are relevant to this discussion. On June 4, 2020, Governor Edwards issued Proclamation Number 74 JBE 2020, which was captioned "Phase 2 of Resilient Louisiana."[8] Noting that it may be possible that the State must return to the full restrictions of the stay-at-

[8] *Available at* https://gov.louisiana.gov/assets/Proclamations/2020/74-JBE-2020-State-of-Emergency-COVID-19-Resilient-Louisiana-Phase-2.pdf.

home order,[9] Governor Edwards allowed churches to meet at 50% of their total occupancy as required by the State Fire Marshall.[10]

Governor Edwards issued five more proclamations concerning Phase 2 of the State's reopening, all of which allowed churches to meet at 50% capacity.[11] All five of these proclamations noted that COVID cases were increasing during Phase 2 and that the State might have to return to the full lockdown.[12] These orders also progressively restricted the ability for people to gather, even outdoors, and even imposed a statewide mask requirement.[13]

Governor Edwards moved into Phase 3 of the State's reopening on September 11, 2020, with Proclamation No. 117 JBE 2020, which has been renewed in Proclamations Nos. 134 JBE 2020 and 158 JBE 2020. The Phase 3 orders prohibit churches from gathering at 75% capacity or more.[14] Like the previous

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[9] La. Exec. Dep't, Proclamation No. 74 JBE 2020 at 2.
[10] *Id.* at 4-5.
[11] See La. Exec. Dep't, Proclamations Nos. 83 JBE 2020 (issued June 25, 2020), 89 JBE 2020 (issued July 11, 2020, requiring facial coverings), 96 JBE 2020 (issued July 23, 2020), 101 JBE 2020 (issued Aug. 6, 2020), and 110 JBE 2020 (issued Aug. 26, 2020).
[12] *See* La. Exec. Dep't Proclamation Nos. 83 JBE 2020 at 2, 89 JBE 2020 at 2, 96 JBE 2020 at 2, 101 JBE at 1-2, and 110 JBE at 2.
[13] *See* La. Exec. Dep't, Proclamation Nos. 83 JBE 2020 at 6 ("[S]ocial distancing shall be practiced in any crowd size"); 89 JBE 2020 at 2-3 ("Crowd sizes are limited to no more than 50 people in any single outdoor space where individuals will be in close proximity to one another and unable to maintain strict social distancing of six feet apart from individuals who are not immediate household members."); 96 JBE 2020 at 5-6 (same); 101 JBE 2020 at 6 (same); 110 JBE 2020 at 6 (same).
[14] La. Exec. Dep't, Proclamation Nos. 117 JBE 2020 at 5; 134 JBE 2020 at 5; 158 JBE 2020 at 5.

proclamations, these orders also impose a mask requirement,[15] limit the ability of people to gather outdoors,[16] and note that returning to the stay-at-home order may be necessary.[17]

E. Black Lives Matter Protests

In the meantime, Judge Ho's observations about Black Lives Matter protests proved to be correct. On July 4, "About 100 people marched down the levee in downtown Baton Rouge ...."[18] The photos of the event show that the protestors were clearly not following social-distancing requirements,[19] despite Governor's order to do so.[20] On July 15, a group of about 100 protestors that again failed to follow social distancing rules marched to the Baton Rouge police headquarters.[21] The police arrested some only after they trespassed onto the police station's property but told them they were free to protest as long as they did not trespass, making no mention of the social distancing rules or Governor Edwards' order.[22] Finally, on August 26,

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[15] La. Exec. Dep't, Proclamation Nos. 117 JBE 2020 at 6-7; 134 JBE 2020 at 7; 158 JBE 2020 at 7-8.
[16] La. Exec. Dep't, Proclamation Nos. 117 JBE 2020 at 6; 134 JBE 2020 at 6-7; 158 JBE 2020 at 7.
[17] La. Exec. Dep't, Proclamation Nos. 117 JBE 2020 at 2; 134 JBE 2020 at 2; 158 JBE 2020 at 2.
[18] Emma Kennedy, *Black Lives Matter Protestors March Along the Levee to Protest Fourth of July Celebrations*, The Advocate (July 4, 2020), https://www.theadvocate.com/baton_rouge/news/article_d18a4966-be58-11ea-a603-a79f057688c1.html.
[19] *Id.*
[20] See La. Exec. Dep't, Proclamation No. 83 JBE 2020, quoted in note 13, *supra*.
[21] Lea Skene, *Watch: Protestors Detained in Baton Rouge for Refusing to Move off of BRPD Property*, The Advocate (July 15, 2020), https://www.theadvocate.com/baton_rouge/news/crime_police/article_c57efdae-c6cf-11ea-803d-e7036706c59c.html.
[22] *Id.*

2020, 75 people, who were not social distancing, gathered outside the federal courthouse in Lafayette to protest the shooting of Trayford Pellerin.[23] The protestors were allowed to continue despite Governor Edwards' limitation of 50 people if social distancing could not be followed.[24]

F. The State Continues to Persecute Pastor Spell

Meanwhile, in an effort to bring down Pastor Spell, the City of Zachary, Louisiana, resurrected 21-year-old criminal charges against him. In 1999, Pastor Spell was issued a speeding ticket in Zachary, Louisiana, which is also in East Baton Rouge Parish. App., Ex. D. When Pastor Spell failed to appear for his court date, a bench warrant was issued for his arrest. App, Ex. E at 69. No action was taken against Pastor Spell for the next 21 years, despite the fact that he became a public figure in the community.[25] *See id.* at 2.

When Pastor Spell was arrested on April 21, 2020, the State brought up his speeding charge and the bench warrant. *Id.* On July 15, 2020, Pastor Spell was arraigned for the speeding ticket and for contempt for failure to appear 21 years ago, **making this the eighth and ninth criminal charges that the State brought against him since this began.** *See id.*

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[23] Katie Gagliano, *In Spite of Hurricane Laura, Protestors Resume Fight for Accountability in Lafayette Police Shooting*, The Advocate (Aug. 26, 2020), https://www.theadvocate.com/acadiana/news/article_049f6f2c-e7ce-11ea-8ea7-43f3882a7f61.html.

[24] *See* La. Exec. Dep't, Proclamation No. 96 JBE 2020, quoted in note 13, *supra*.

[25] If the Respondents argue they could not execute the warrant because they were unable to locate Pastor Spell, then they may also have to prove that Barney Fife was the officer assigned to the case.

Pastor Spell's trial for these charges was held on August 5, 2020. *Id.* at 3. During the trial, the court denied Pastor Spell's motion to quash, in which he argued that prosecuting him 21 years after the event violated the Speedy Trial Clause of the Sixth Amendment. App., Ex. F at 7-18. It also denied his motion to recuse, wherein Pastor Spell argued that the trial judge should have recused himself because he had served as Pastor Spell's lawyer while he was in private practice and had neglected to inform him that a warrant had been issued for his arrest. *Id.* at 5-7. The trial court found him guilty on both counts, charging him a total of $748.50 or seven months in jail. *Id.* at 44-45. Pastor Spell filed a petition for a writ of review in First Circuit of the Louisiana Court of Appeals, which ordered the State to respond in a 2-1 vote. App, Ex. G.

G. The Governor Refuses Legislature's Order to Cease and Desist

Louisiana law provides that the legislature may cease the state of emergency by a majority vote of either house. La. Rev. Stat. § 29:768(B). On October 23, 2020, a majority of the Louisiana House of Representatives voted to end the emergency. As soon as the House voted to end the emergency, Louisiana Attorney General Jeff Landry issued the following statement:

> "The emergency powers act and the emergency health powers act are written to outline what extraordinary powers are granted to the Governor during a declared emergency. A termination clause is included outlining a simple process for pressing the stop button. Immediately upon termination, the emergency powers cease and the Governor's powers revert to the ordinary powers afforded the Governor as outlined by our Constitution and laws. The termination process is effective immediately, unless provided otherwise in the petition, when a petition is signed by a majority of the surviving members within either body of the Legislature, the Senate or the House. The

> termination of emergency powers does not require any additional action other than the signed petition. Upon completion of the signed petition, the Governor is directed to issue a proclamation informing the public of the termination."[26]

Instead of standing down, Governor Edwards took the extraordinary step of **suing the legislature**, claiming, among other things, that the part of the law that authorizes the legislature to end the emergency is unconstitutional.[27] Louisiana Attorney General Jeff Landry filed an answer on behalf of the Speaker of the House, arguing among other things that the Governor does not have discretion to continue the emergency when the House of Representatives orders him to cease and desist.[28]

H. District Court Grants Respondents' Motion to Dismiss

One day before Applicants filed this application for injunctive relief, the district court granted Respondents' motion to dismiss. The district court held that Applicants' claims for injunctive relief were moot, reasoning that the particular orders that Applicants had challenged had expired and Applicants "have not been subject to the same action again," despite the fact that all the Governors' subsequent orders denied them the right to fully assemble as a church. App., Ex. H at 10. The district court also dismissed Applicants' claims for damages, denying

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[26] Statement, *Attorney General Jeff Landry Statement on House Petition to Terminate the Public Health Emergency*, https://www.ag.state.la.us/Article/10799 (last visited Nov. 2, 2020).

[27] Petition for Declaratory and Injunctive Relief at 14, *Governor John Bel Edwards v. Louisiana State Legislature* (La. 19th Jud. Dist. Div. 23 Oct. 26, 2020) (No. C-700923), *available at* https://www.wafb.com/2020/10/26/look-next-steps-petition-temporarily-end-covid-restrictions-la/.

[28] Answer at 17, *Edwards v. Legislature*, *supra* note 27, *available at* https://www.ag.state.la.us/Files/Article/10801/Documents/AnswerandReconventionalDemandbyClaySchexnayder.pdf.

their claims because of this Court's decision in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020), despite the fact that *South Bay* was not a decision on the merits and therefore not binding precedent. App., Ex. H at 8, 11-15.[29] Nowhere in its decision did the district court address Applicants' argument that the Church alone has jurisdiction to decide whether to assemble or not, nor did the district court address Judge Ho's concern that Governor Edwards was favoring some First Amendment rights over others. Applicants plan on filing an appeal to the U.S. Court of Appeals for the Fifth Circuit as soon as this Application is submitted to the Court.

I. Summary

Thus, throughout this litigation, the State has brought **nine criminal charges** against Pastor Spell for doing what Christians have done every week for two millennia: going to church. The Governor, who has issued all of the orders relevant herein, has picked and chosen which First Amendment rights to respect and which First Amendment rights to deny. He has even refused the command of his own legislature to cease and desist from making orders. Applicants' freedoms therefore will not be respected unless this Court intervenes.

REASONS FOR GRANTING THE APPLICATION

A Circuit Justice may issue an affirmative injunction if "there is a 'significant possibility'" that the Court would grant certiorari "and reverse, and if there is a

[29] The district court also noted that Applicants failed to file a timely response to the Respondents' motion to dismiss but declined to rule in Respondents' favor on that ground, choosing instead to rule on the merits. App., Ex. H at 4-7.

likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns v. Gray*, 483 U.S. 1306, 1308 (1987). Typically, "[t]o obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are "indisputably clear."'" *Lux v. Rodrigues*, 561 U.S. 1306, 1306 (2010) (Roberts, C.J.) (quoting *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J.)). The Court itself may issue an injunction "based on all the circumstances of the case" without construing the order "as an expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Col. v. Sebelius*, 571 U.S. 1171 (2014).

I. There Is Even More Than a "Significant Possibility" That This Court Will Grant Certiorari and Reverse

A. This Matter Is Not Moot Because the Undisputed Facts Show That It Is Capable of Repetition But Evading Review, and the Fifth Circuit's Decision to the Contrary Conflicts with the Seventh Circuit's Decision in a Similar Case.

Applicants' request for injunctive relief was not (and is not) moot. Throughout this litigation, Respondents have argued repeatedly that Applicants' claims became moot when Governor Edwards issued new proclamations that superseded the old ones. However, an exception to the mootness doctrine exists for matters that are capable of repetition but evading review. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). This exception applies when two elements are satisfied: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable

expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Applicants have satisfied both elements of this test at every stage of this litigation, including now. The chart below lists the relevant proclamations to which the Applicants have been subject:[30]

Proclamation No.	Forbidding gatherings of:	Effective Date	Date Superseded
JBE 2020-27	250 or more	March 13, 2020	March 16, 2020
JBE 2020-30	50 or more	March 16, 2020	March 22, 2020
33 JBE 2020	10 or more	March 22, 2020	April 2, 2020
41 JBE 2020	10 or more	April 2, 2020	May 1, 2020
52 JBE 2020	10 or more	May 1, 2020	May 15, 2020
58 JBE 2020	25% or more	May 15, 2020	June 5, 2020
74 JBE 2020	50% or more	June 5, 2020	June 26, 2020
83 JBE 2020	50% or more	June 26, 2020	July 24, 2020
96 JBE 2020	50% or more	July 24, 2020	Aug. 7, 2020
101 JBE 2020	50% or more	Aug. 7, 2020	Aug. 28, 2020
110 JBE 2020	50% or more	Aug. 28, 2020	Sep. 11, 2020
117 JBE 2020	75% or more	Sep. 11, 2020	Oct. 8, 2020
134 JBE 2020	75% or more	Oct. 8, 2020	Nov. 6, 2020
158 JBE 2020	75% or more	Nov. 6, 2020	N/A

The average length of each order listed in the chart above was 17 days, which is "too short in its duration to be fully litigated prior to its cessation or

[30] This table does not include orders that made minor changes that are not relevant to this Application.

expiration." *Weinstein*, 423 U.S. at 149.[31] Moreover, of the 14 orders listed above, none of them granted the Applicants the relief they sought, which is the right to assemble fully in person as a church. Since all of the orders, including 158 JBE 2020, have denied the Applicants the relief they sought, there has always been (and continues to be) "a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* There is no evidence at all suggesting that the Governor is ready to let churches meet at 100% capacity in the near future, which is the relief Applicants have sought. Consequently, even though 158 JBE 2020 allows churches to assemble at 75% of their capacity, it does not moot Applicants' claims for equitable relief.

Furthermore, the Seventh Circuit rejected a mootness challenge in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), under similar circumstances. In that case, a church challenged the Illinois Governor's COVID-19 orders that affected the church's right to assemble. When the trial court ruled against the church, the church appealed. Before the case could be argued at the Seventh Circuit, the governor changed his order, permitting the resumption of

[31] If Respondents attempt to argue that Applicants are being too technical by counting orders that simply renewed existing orders, Applicants note that the Fifth Circuit did not care for that distinction. In holding that Applicant's appeal was moot, a material part of the Fifth Circuit's reasoning was that each of these orders was set to expire on a certain date by its very terms. *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (holding that the mootness exception for matters that are capable of repetition but evading review cannot be invoked by an order that will expire by its own terms).

all religious services. The governor thus claimed that the case was moot. The Seventh Circuit disagreed, noting that the Governor had reserved the right to reinstate the original orders if he deemed it necessary. 962 F.3d at 344-45. Because it was not "absolutely clear" that the governor would not reinstate the old orders, the Seventh Circuit held that the claim was not moot. *Id.* at 345 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000)).

In the same way, even though Louisiana has moved to Phase 3 of reopening the State, Governor Edwards has reserved the right to reinstate his original stay-at-home order. In Proclamation No. 158 JBE 2020, Governor Edwards says,

> WHEREAS, should there be an increase in the number of confirmed COVID-19 cases, the percent positivity of testing, or should the number of COVID-19 related hospitalizations threaten the ability of the health care system to respond, it may be necessary to go back to the full restrictions in the Stay at Home Order in Proclamation Number 52 JBE 2020 ....

La. Exec. Dep't, Proclamation No. 158 JBE 2020 at 2.

This is exactly the kind of condition that caused the Seventh Circuit to reject the mootness challenge in *Elim Romanian Pentecostal Church*. In contrast, the Fifth Circuit held to the contrary in *Spell*, thus creating a circuit split that this Court should grant certiorari to resolve. *See* S.Ct. Rule 10(a) (listing a circuit split as a ground for granting certiorari); *see also Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014) (noting that the Court may consider "a traditional ground for certiorari,"

such as a circuit split, in considering whether to grant injunctive relief). When it does, it should find that, in this case, the matter at hand was clearly capable of repetition but evading review.

B. It Is Indisputably Clear that the First Amendment Protects the Rights of Churches to Assemble

1. The First Amendment Places the Decision of Whether to Assemble Solely Within the Jurisdiction of the Church, Not the State

The First Amendment, which applies to the states through the Fourteenth Amendment, prohibits the states from making a law respecting an establishment of religion or prohibiting the free exercise thereof. Both as an original matter and under current Supreme Court precedents, the Defendants'-Appellees' actions violate the Religion Clauses of the First Amendment.

James Madison, the principal author of the First Amendment, viewed freedom of religion as *jurisdictional* in nature, believing that neither civil society nor civil government could abridge duties that man owed to his Creator. *See* James Madison, *Memorial and Remonstrance* (June 20, 1785)[32]; *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1453 (1990) (analyzing Madison's *Memorial and Remonstrance* and concluding that "Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than

[32] The United States Supreme Court attached Madison's *Memorial and Remonstrance* to its landmark opinion in *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1 (1947).

solely on the interests of society."). Citing the Virginia Declaration of Rights, Madison defined "religion" as "the duty which we owe to our Creator and the manner of discharging it." *Id.* Because religion could be directed "only by reason and conviction, not by force or violence," the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." *Id.* Thus, in Madison's view, the right to free exercise of religion should prevail "in every case where it does not trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98, 100 (G. Hunt ed. 1901).

Thomas Jefferson likewise believed that the government had no business dictating religious beliefs or practices. Jefferson famously penned that the First Amendment built "a wall of separation between Church & State." Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802). Sadly, this metaphor has been misconstrued in modern times to prevent the public acknowledgment of God while ignoring that the primary object of Jefferson's metaphor was to protect the church from the state. In his Virginia Statute on Religious Liberty, Jefferson wrote that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty[.] Thomas Jefferson, *Virginia Statute on Religious Liberty* (Jan. 16, 1786). Jefferson acknowledged that the civil government had jurisdiction only "to interfere when

principles break out into overt acts against peace and good order." *Id.* In the first major religious liberty case that the Supreme Court decided, the Court drew on these two sentences from Jefferson's statute and held, "In these two sentences is found the true distinction between what properly belongs to the church and what to the State." *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

In this case, nothing could more fundamentally belong to the church than the decision whether to assemble or not. As Judge Willett of the Fifth Circuit recently noted, "'Ekklesia,' the Greek word for church, means the gathered ones, an assembly of the faithful." *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020) (Willet, J., concurring) (citing *Ekklesia*, The Oxford Dictionary of Byzantium (Alexander P. Kashdan, ed., 1991)); *accord On Fire Christian Center v. Fischer*, No. 3:20-cv-00264, slip op. at 14 (W.D. Ky. Apr. 11, 2020) ("[T]he Greek word translated 'church' in our English versions of the Christian scriptures is the word 'ekklesia,' which literally means 'assembly.'") (citations omitted). Christians have met faithfully for millennia in person, and assembling is "essential" to the religious beliefs of many people "about what it means to be a faithful Christian." *Tabernacle Baptist Church v. Beshear*, No. 3:20-cv-00033, slip op. at 2 (E.D. Ky. May 5, 2020). Consequently, as the U.S. District Court for the District of Columbia held recently, **"It is for the Church, not the District or this Court, to define for itself the meaning of 'not forsaking the assembling of ourselves together.' Hebrews 10:25."** *Capitol Hill Baptist*

Church v. Bowser, No. 20-cv-02710, slip op. at 11-12 (D.D.C. Oct. 9, 2020) (emphasis added).

When the government forbids people from going to church, it violates the Establishment Clause by coercing people to conform to its idea of which form of assembly is acceptable and which is not. As the Supreme Court held in 1947, the government may not "force [or] influence a person to go to *or remain away from church against his will*." *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 15 (1947) (emphasis added). If there is any risk to the health of the Applicants, then the church, not the government, should be the one to decide whether the risk is worth it.

Forcing people to stay away from church also violates the Free Exercise Clause by prohibiting people from freely exercising their faith. Even in *Employment Division v. Smith*, 494 U.S. 872 (1990), Justice Antonin Scalia and a majority of the Court appeared to view the First Amendment as placing assembling for religious worship *completely* off limits. In *Smith*, the Court said,

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: *assembling with others for a worship service*, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. *It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons*, or only because of the religious belief that they display.

Smith, 494 U.S. at 879 (emphasis added). The Court viewed the State as completely powerless to prohibit "assembling with others for a religious worship service" if it was "engaged in for religious reasons." *Id.*[33]

At that time (in 1990), "no case of [the Court's] had involved the point." *Id.* But that is exactly what is going on in this case. The Governor has banned assembling with others for a worship service when it is engaged in for religious reasons. *Smith* recognized that the State was powerless to issue such a command, and so should this Court.

2. The Governor Lacked the Power to Enact a Law to Prohibit Churches from Assembling.

In addition to examining whether the First Amendment allows churches to decide whether to assemble or not, this Court should also note that the Governor did not have the lawmaking authority to issue the COVID-19 orders to the Applicants. Consequently, the orders are null and void. *Cf. In re Certified Questions*, No. 161492 (Mich. Oct. 2, 2020) (holding that the Governor of Michigan did not have authority to issue executive orders regarding COVID-19); *Wisconsin Legislature v. Palm*, 2020 WI 42 (Wis. May 14, 2020) (holding that Wisconsin Secretary of

[33] Even the justices who did not join the main opinion in *Smith* stated: "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, *freedom of worship and assembly*, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'" *Smith*, 494 U.S. at 903 (O'Conner, J., concurring in judgment, joined by Blackmun, Brennan, and Marshall, JJ.) (emphasis added) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

Health's stay-at-home order was unenforceable because the proper rule-making procedures were not followed).

Article II, Section 2 of the Louisiana Constitution states: "The powers of government of the state are divided into three separate branches: legislative, executive, and judicial," and, "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." Thus, the Louisiana Constitution does not allow the Governor to exercise legislative power, even in emergency situations.

To make this point extra clear, the Louisiana Homeland Security and Emergency Assistance and Disaster Act, which gave the Governor certain emergency powers, forbids the Governor from abridging the "Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution" during times of emergencies. Specifically, La. Rev. Stat. 29:736(D) states:

> Nothing in this Chapter shall be interpreted to diminish the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution. This Chapter shall not violate Article II (Distribution of Powers), Article III (Legislative Branch), or Article V (Judicial Branch) of the Louisiana Constitution.

If the intent of this law was not clear enough from the text, the affidavit of Woody Jenkins, the author of this law, shows that the Louisiana legislature intended to remove "any authority [from the Governor's powers] to infringe any rights guaranteed" by the Louisiana Constitution or the United States Constitution during

times of crisis.[34] The legislature intended for this "to be an absolute prohibition of state infringement upon constitutional rights and not subject to exceptions based on strict scrutiny or other court-based tests."[35]

Nevertheless, Governor Edwards unilaterally issued orders purporting to bind the constitutional rights of religious liberty and freedom of assembly of every person and every church in the state, subject to the penalty of criminal sanctions. This is legislative power, not executive power. Neither the Constitution of Louisiana nor the U.S. Constitution allows their chief executive to exercise such unlimited power. The Louisiana Homeland Security and Emergency Assistance and Disaster Act makes that clear. Furthermore, the LHSEDA expressly provided that nothing in this Chapter would violate the distribution of powers under the Louisiana Constitution.

Making that point even more direct with respect to property rights during a mandatory evacuation under RS 29:730.3(D)(2) it was provided that "A person who refuses to comply with a mandatory evacuation order may remain in his home and not be forcibly removed…" The right to property like the freedom of religion, freedom of speech, and right of assembly enumerated in the Declaration of Rights "are inalienable by the state and shall be preserved inviolate by the state." Article I Declaration of Rights. The intent of the Louisiana legislature in 1993 was to prevent the very abuse of power which the Governor has done in this case.

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[34] *Spell v. Edwards*, No. 20-30358 (5th Cir.), ECF 7 (Motion for Injunction Pending Appeal) Ex. 6.
[35] *Id.*

In the recent COVID-19 controversy across America, many have forgotten the admonition of Justice Jackson in *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943), repeated vigorously by Justice O'Conner in *Smith*, that,

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. at 638.

When governors and elected officials seize upon their own unlawful authority to make law, they will inevitably take valuable rights from the people. The Louisiana legislature knew this and sought to prevent it.

C. This Court's Decision in *Jacobson v. Massachusetts* Does Not Compel the Contrary Result

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Massachusetts legislature passed a statute that allowed city boards of health to require mandatory vaccinations. During a smallpox outbreak, the City of Cambridge, Massachusetts, decided to implement that authority by requiring its people to receive vaccinations. When the case reached the U.S. Supreme Court, the petitioner challenged the Massachusetts statute (rather than the Cambridge Board of Health's order) and argued that the Fourteenth Amendment's guarantee of "liberty" gave him a right to bodily integrity. The Court rejected this argument, holding that the judiciary must defer to the states' judgment in dealing with an emergency health crisis unless the law in question "has no real or substantial relation to those objects, or is, beyond all

question, a plain, palpable invasion of rights secured by the fundamental law[.]" *Jacobson*, 197 U.S. at 31.

In dealing with the COVID-19 outbreak, courts around the country have been relying on *Jacobson* in cases where a state's COVID-19 actions have been challenged. *Jacobson* is distinguishable for several reasons. First, *Jacobson* challenged a law, whereas the Applicants in this case are challenging an executive order, which is not even law. Second, the petitioner in *Jacobson* based his argument on the vague notion that the Fourteenth Amendment protects "liberty," whereas the Applicants are basing their argument on specific rights that are actually enumerated in the Constitution. As Justice Alito noted in his *Calvary Chapel* dissent, "It is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020) (Alito, J., dissenting), slip op. at 10; *see also County of Butler v. Wolf*, No. 2:20-cv-677, slip op. at 11-21 (W.D. Pa. Sep. 14, 2020) (citing Justice Alito's dissent in *Calvary Chapel* and applying ordinary standards of constitutional review instead of the deferential *Jacobson* standard).

However, even if this Court chooses to apply *Jacobson*, this Court can deal with it in two ways. First, unlike any other state of which Applicants are aware, La. Rev. Stat. 29:736(D) explicitly prohibits the Governor's emergency powers from trespassing on constitutional rights. If *Jacobson* instructed the federal courts to respect the states' prerogative to deal with emergencies, then it should realize that

applying that principle here means not deferring to the Governor when the state of Louisiana, by and through its law making branch, explicitly prohibited the Governor from trespassing on Constitutional rights in the use of emergency powers under La. Rev. Stat. 29:736(D).

In addition, *Jacobson* provided an exception where there was "beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.] *Jacobson*, 197 U.S. at 31. As has been argued above, the word "church" literally means "assembly." Therefore, forbidding a church from assembling is a "plain, palpable invasion of rights secured by fundamental law." *Id.* When the State's order prohibits a church from assembling, singing together, hearing the word of God preached, laying hands on the sick, baptizing, taking communion, and the like, then the courts owe the State no deference at all.

D. In the Alternative, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* Prohibits the State from Denying First Amendment Freedoms to Applicants While Allowing Them for Others.

The thrust of the Applicants' argument is not that the Defendants' actions cannot survive strict scrutiny but rather that they are not permissible at all. Unlike many other COVID-19 religious liberty cases around the country, the Applicants are taking the position that, as a jurisdictional matter, the State may not tell the church whether or not they can meet. The Supreme Court has on occasion addressed church-related matters in absolutist terms like this instead of through judicial balancing tests. *See, e.g.*, *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) (recognizing the

distinction between ecclesiastical jurisdiction and civil jurisdiction). Applicants argue that this matter absolutely belongs to the jurisdiction of the church and not the state. *See* Part A, *supra*.

Nevertheless, an injunction is still proper under *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In that case, the Supreme Court held that strict scrutiny review is required if a law burdening religious exercise is not neutral or generally applicable. 508 U.S. at 531-32. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. The problem here is that the Governor's orders are not law. If they were, then the proclamations by their very nature do discriminate against religious practices on their face. Many exceptions exist for other entities that do not apply to churches. A long list of exceptions to a neutral and generally applicable law tends to show that it is neither neutral nor generally applicable. *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020), slip op. at 6-7. In this case, the multitude of exceptions that apply to many other entities but not churches shows that the Governor's "mandatory" orders are not neutral or generally applicable. *Lukumi* also prohibits disparate treatment. Based on the affidavit of Shay Spell, [36] the Defendants did not appear to be interested in enforcing the orders against other businesses that were subject to the same rules. Respondents' actions therefore constitute unconstitutional discrimination against religion in violation of *Lukumi*.

[36] *Spell v. Edwards*, No. 3:20-cv-00282 (M.D. La.), ECF 1 Ex. 5.

E. This Court's Decisions in *South Bay* and *Calvary Chapel* Are Distinguishable.

In two cases earlier this year, this Court denied churches' applications for injunctive relief in 5-4 decisions. *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020). In both of those cases, the applicants argued that the strict scrutiny test applied and that the Governors' COVID orders could not survive that test, either because the government targeted churches or applied its COVID rules in a discriminatory manner.[37] Here Applicants argue the most basic point of the First Amendment, i.e. that the First Amendment creates a jurisdictional bar that allows the Church, not the State, to determine whether to assemble or not.

The different opinions of the Justices in *South Bay* illustrate the difficulties of trying to use judicial tests to resolve the matter instead of adopting a simple black and white rule. If the analysis turns on factual comparisons between churches and other organizations, then one justice might conclude that they are similarly situated while another might disagree. *Compare South Bay*, slip op. at 2 (Roberts, C.J., concurring) (finding churches comparable to lectures, concerts, and movie theaters than grocery stores, banks, or laundromats) *with id.*, slip op. at 5-6 (Kavanaugh, J., dissenting) (finding churches comparable to secular businesses that were exempted from the order); *see also Calvary Chapel*, slip op. at 1 (Alito, J.,

[37] *See* Emergency Application for Writ of Injunction at 14-25, *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020) (No. 19A1044); Emergency Application for an Injunction Pending Appellate Review at 12-13, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020) (No. 19A1070).

dissenting), 12 (Gorsuch, J., dissenting), and 13 (Kavanaugh, J., dissenting) (arguing that being stricter on churches than casinos violates the First Amendment). While Applicants agree that the dissenting justices in *South Bay* and *Calvary Chapel* analyzed the issues correctly *under the questions presented in those cases*, Applicants argue that the churches should be allowed to assemble fully for a far simpler reason: the First Amendment leaves the decision up to the churches, not the State, as to whether to limit their assembly or not.

II. There Is a Likelihood That Irreparable Injury Will Result If Relief Is Not Granted

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Applicants have been denied their right to meet since March, and Pastor Spell has had **nine criminal charges** brought against him for exercising his First Amendment freedoms.[38] Although some church members have come to meet anyway, the looming threats of arrest and criminal prosecution have produced irreparable harm, continue to produce harm, and will continue to produce harm until the threat is abated. The harm to Pastor Spell will continue because the Governor has continually refused to allow Pastor Spell and his church to assemble at their full capacity.

[38] Applicants believe that the charges against him for aggravated assault, speeding, and contempt are in fact pretextual attempts to punish him for standing up for his religious beliefs. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("Although a law targeting religious beliefs as such is never permissible ... if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.").

There are no signs that Governor Edwards is preparing to completely lift his restrictions on churches, and his suit against the Louisiana legislature highlights his desperate attempt to hold onto power **even after** the legislature declared the emergency to be over. Given that all of his orders have failed to give Applicants the relief they requested, and given his determination to run over the doctrine of separation of powers in order to keep his power, irreparable harm will continue to befall Pastor Spell and Life Tabernacle Church if this Court does not intervene.

CONCLUSION

Out of all the religious liberty cases across the country challenging a State's COVID-19 orders, there has never been a more fundamental question presented nor more flagrant unconstitutional punishment of a pastor than here. The State has shown a shocking and unprecedented commitment to criminally prosecuting its strongest dissenter in violation of one of the First Amendment's most precious guarantees: the right of a church, which by definition is an assembly, to decide whether to assemble or not.

The Governor not only refuses to recognize these rights, but he also refuses to assent to his Legislature's command to stand down, picks and chooses which First Amendment rights to support and which to deny, and purports to reserve the right to return to a full lockdown *based on his judgment alone*. Without this Court's immediate intervention, there is no guarantee that the State will not bring a new set of absurd criminal charges against Pastor Spell as it has done now nine times. The Court's intervention is warranted.

WHEREFORE, premises considered, Applicants request that this Court grant Applicants' request for immediate injunctive relief.

Respectfully submitted November 11, 2020,

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CERTIFICATE OF SERVICE

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APPENDIX

APPENDIX TABLE OF CONTENTS

Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-30358

MARK ANTHONY SPELL; LIFE TABERNACLE CHURCH,

Plaintiffs - Appellees

v.

JOHN BEL EDWARDS, in his individual capacity and his official capacity as Governor of the State of Louisiana; ROGER CORCORAN, in his individual capacity and official capacity as Chief of Police of Central City, Louisiana; SID GAUTREAUX, individually and in his official capacity as Sheriff of East Baton Rouge Parish, Louisiana,

Defendants - Appellants

Appeal from the United States District Court
for the Middle District of Louisiana

Before SMITH, COSTA, and HO, Circuit Judges.

GREGG COSTA, Circuit Judge:

COVID-19 has brought another appeal to our court. A Louisiana church and its pastor ask us enjoin stay-at-home orders restricting in-person church services to ten congregants. But there is nothing for us to enjoin. The challenged orders expired more than a month ago. That means this appeal and the related request for an injunction under Federal Rule of Appellate Procedure 8(a)(1)(C) are moot.

I.

A.

In less than six months, COVID-19 has killed more than 115,000 Americans.[1] Parts of Louisiana were early hotspots for the virus.

On March 11, just two days after the first confirmed case in the Pelican State, Governor John Bel Edwards declared the COVID-19 pandemic a public health emergency. La. Exec. Dep't, Proclamation No. 25 JBE 2020, § 1.[2] Less than two weeks later, the Governor issued a proclamation closing certain businesses and ordering "individuals within the state . . . to stay home unless performing an essential activity." La. Exec. Dep't, Proclamation No. 33 JBE 2020, § 3.[3] The order also "postponed or cancelled" "gatherings of 10 people or more." *Id.* § 2. Although some businesses were exempt from that restriction, churches and other religious meeting places were not. *Id.*

The Governor extended the stay-at-home order on April 2 because "the COVID-19 outbreak in Louisiana ha[d] expanded significantly." La. Exec. Dep't, Proclamation No. 41 JBE 2020.[4] He extended the order again on April 30. La. Exec. Dep't, Proclamation No. 52 JBE 2020.[5] The second extension was set to last from May 1 to May 15. *Id.* § 15.

The day before the second extension was set to expire, the Governor announced that Louisiana would follow the Trump Administration's three-

[1] *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited June 17, 2020).

[2] Available at https://gov.louisiana.gov/assets/Proclamations/2020/modified/25-JBE-2020-Public-Health-Emergency-COVID-19.pdf.

[3] Available at https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf.

[4] Available at https://gov.louisiana.gov/assets/Proclamations/2020/modified/41-JBE-2020-Public-Health-Emergency.pdf.

[5] Available at https://gov.louisiana.gov/assets/Proclamations/2020/modified/52-JBE-2020-State-of-Emergency-COVID-19-Extension-to-May-15.pdf.

phased reopening approach.[6] La. Exec. Dep't, Proclamation No. 58 JBE 2020.[7] So instead of renewing the stay-at-home order for a third time, the Governor issued a proclamation for Phase 1. It allowed churches to hold gatherings with up to 25 percent of their "total occupancy." *Id.* § 2(G)(4)(a). On June 5, the Governor transitioned the state to Phase 2. La. Exec. Dep't, Proclamation No. 74 JBE 2020.[8] The Phase 2 guidance—still in effect today—allows churches to operate at 50 percent capacity. *Id.* § 2(G)(4)(a).

B.

Pastor Mark Anthony Spell leads Life Tabernacle Church in Baton Rouge. The church has over 2,000 members. They "sincerely believe that the Bible commands them to hold . . . services in person."

When the Governor's first stay-at-home order went into effect, Life Tabernacle remained open. Pastor Spell was subsequently arrested for defying the order. And because he repeatedly held in-person services, police issued him six misdemeanor summons. Pastor Spell was also arrested for an alleged assault and, as a condition of bond, placed on house arrest. Nevertheless, he continued to preach to his congregation. On May 7, he and Tabernacle Life Church filed this lawsuit.

Attacking the stay-at-home orders' ten-person gathering limit, the plaintiffs asserted several federal and state constitutional claims. They asked for permanent injunctive relief and damages, but first sought a preliminary injunction to stop enforcement of the orders.

Working diligently to resolve the motion, the district court heard argument and issued an order denying the requested relief on May 15. *Spell*

[6] *Opening Up America Again*, The White House, https://www.whitehouse.gov/opening america/ (last visited on June 17, 2020).

[7] Available at https://gov.louisiana.gov/assets/Proclamations/2020/58-JBE-2020.pdf.

[8] Available at https://gov.louisiana.gov/assets/Proclamations/2020/74-JBE-2020-State-of-Emergency-COVID-19-Resilient-Louisiana-Phase-2.pdf.

v. Edwards, -- F. Supp. 3d --, 2020 WL 2509078 (M.D. La. 2020). The court denied the motion on the merits, but it also noted the possibility of mootness given that the challenged orders were set to expire that day. *Id.* at *5–6.

The plaintiffs did not immediately appeal the denial of injunctive relief. Instead, two weeks after the court's ruling, they filed an amended complaint acknowledging that the Governor had lifted the ten-person gathering restriction. Not until three weeks after the district court's order did the plaintiffs notice this appeal. They also asked us to grant an injunction pending appeal. FED. R. APP. P. 8(a)(1)(C). They did not first ask the district court for that relief as the rule requires.

II.

This recap of the case's history shows why the current appeal—challenging only the denial of the motion for a preliminary injunction—is moot. Mootness is one of the doctrines that ensures federal courts are only deciding live cases or controversies. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). A matter is moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotations omitted).

It makes sense, then, that a case challenging a statute, executive order, or local ordinance usually becomes moot if the challenged law has expired or been repealed. *See, e.g.*, *Veasey v. Abbott*, 888 F.3d 792, 799 (5th Cir. 2018) ("Ordinarily, a[n] [action] challenging a statute would become moot by the legislature's enactment of a superseding law."). Once the law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (holding that a claim for injunctive relief against a law was moot when the law was amended to give "the precise relief that [the plaintiffs]

requested"); *Amawi v. Paxton*, 956 F.3d 816, 819, 821 (5th Cir. 2020) (dismissing an appeal as moot because a statutory amendment "provided the plaintiffs the very relief their lawsuit sought").

That said, "a defendant cannot automatically moot a case simply by ending its [allegedly] unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 284–86 (5th Cir. 2012) (concluding that a city's repeal of an ordinance the night before oral argument did not moot the plaintiff's challenges to the ordinance). If that is all it took to moot a case, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Nike*, 568 U.S. at 91. To show that such a change of heart is not mere litigation posturing, a defendant asserting mootness must demonstrate "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 425 (5th Cir. 2020); *see also Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018) ("Essentially, the goal is to [decide] whether the defendant's actions are 'litigation posturing' or whether the controversy is actually extinguished.").

But a statute that expires by its own terms does not implicate those concerns. Why? Because its lapse was predetermined and thus not a response to litigation. So unlike a postsuit repeal that might not moot a case, a law's automatic expiration does. *Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017) (dismissing as moot a challenge to an executive order's provisions that had "expired by [their] own terms"); *see also Burke v. Barnes*, 479 U.S. 361, 363–64 (1987) (holding "that any issues concerning whether [a bill] became a law were mooted when [it] expired by its own terms").

Governor Edwards's stay-at-home orders expired by their own terms. The plaintiffs' request that we enjoin them is therefore moot. *Trump*, 138 S. Ct. at 377; *Burke*, 479 U.S. at 363–64.[9]

Plaintiffs contend that another way around mootness—the "capable of repetition, yet evading review" exception—keeps this appeal alive. This exception overcomes the general rule against deciding stale claims only 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 [plaintiffs] [will] be subject to the same action again." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (instructing that this "exception applies only in exceptional situations" (quotation omitted)). The plaintiffs must prove these requirements. *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). Even if the first requirement (duration) is satisfied for the stay-at-home orders, the plaintiffs fail to establish that the Governor might reimpose another gathering restriction on places of worship. The trend in Louisiana has been to reopen the state, not to close it down. To be sure, no one knows what the future of COVID-19 holds. But it is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one. *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010) (requiring more than "merely a theoretical possibility" that the allegedly wrongful conduct would reoccur (quotation omitted)); *see also Cameron*, 2020 WL 2573463, at *2 (concluding that the exception did not apply to a mooted claim challenging expired COVID-19 restrictions in part because "it seem[ed] unlikely that [they] w[ould] be reissued").

[9] *See also Martinko v. Whitmer*, -- F. Supp. 3d --, 2020 WL 3036342, at *3 (E.D. Mich. June 5, 2020) (holding that a claim challenging superseded COVID-19 restrictions was moot); *Ministries v. Newsom*, -- F. Supp. 3d --, 2020 WL 2991467, at *3 (S.D. Cal. June 4, 2020) (same); *Cameron v. Beshear*, 2020 WL 2573463, at *2–3 (E.D. Ky. May 21, 2020) (same); *Krach v. Holcomb*, 2020 WL 2197855, at *2 (N.D. Ind. May 6, 2020) (same).

What is more, the plaintiffs fail to cite any authority applying the "capable of repetition" exception to support a Rule 8 injunction against an order that is no longer in effect. The exception usually applies to keep a case alive, largely out of a fear that the legal questions posed by cases prone to becoming moot will never be answered. *See* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.8 (3d ed. 2020). That is not a concern here. While the expiration of the stay-at-home orders moots plaintiffs' request to enjoin them, their claim for damages remains. *See Opulent Life Church*, 697 F.3d at 286; *see also* EDWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.2 (6th ed. 2012) ("[A] plaintiff seeking both injunctive relief and money damages can continue to pursue the case, even after the request for an equitable remedy is rendered moot."). We express no view on the merits of that claim, which has yet to reach final judgment.

* * *

Because this appeal is moot, the plaintiffs' motion for an injunction is DENIED. For the same reasons, the appeal is DISMISSED. And because the appeal became moot before appellate review, the district court's order denying preliminary relief is VACATED. *Spell*, 2020 WL 2509078. The plaintiff's claim for damages remains in the district court.

JAMES C. HO, Circuit Judge, concurring:

I agree that this appeal is moot due to recent changes to the Governor's order, and that the case will now return to the district court. I write separately to note how other recent events may affect this case going forward.

* * *

At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest.

But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them as necessary and important expressions of outrage over abuses of government power.

For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? The answer is that they can't. Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."

I.

Officials may take appropriate emergency public health measures to combat a pandemic. *See Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905). *See also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). But "[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards." *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) (emphasis omitted).[1]

[1] Judge Collins has criticized our court for reading *Jacobson* too broadly in favor of the government. *See S. Bay*, 959 F.3d at 943 n.2 (criticizing *In re Abbott*, 954 F.3d 772 (5th Cir. 2020)). I would simply observe that, whatever *Jacobson*'s scope, *Abbott* makes clear that

The Governor invokes *Employment Division v. Smith*, 494 U.S. 872 (1990). But *Smith* upheld a "neutral law of general applicability" against challenge under the Free Exercise Clause. *Id.* at 879 (quotations omitted). *Smith* does *not* cover laws that grant exemptions to some, while denying them to people of faith. "Religious liberty deserves better than that—even under *Smith*." *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part).[2]

Instead, laws that burden religion while exempting the non-religious must pass strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The burden on religion "must be justified by a compelling governmental interest," and the law "must be narrowly tailored to advance that interest." *Id.* at 531–32. That is a heavy lift: Such laws "will survive strict scrutiny only in rare cases." *Id.* at 546.

I do not expect this to be one of those "rare cases." *Id.* Pastor Mark Anthony Spell and his parishioners seek to worship as their faith directs. They cannot do so, however, due to a series of orders by Governor John Bel Edwards that forbid citizens from assembling in public—including inside churches.

The Governor no doubt issued those orders out of sincere public health concerns. To survive First Amendment scrutiny, however, those concerns must

pandemic regulations must govern "evenhandedly"—precisely the problem here. *In re Abbott*, 954 F.3d at 792.

[2] *Smith* has been derided by "[c]ivil rights leaders and scholars . . . as 'the *Dred Scott* of First Amendment law,'" criticized by "[a]t least ten members of the Supreme Court," and "widely panned as contrary to the Free Exercise Clause and our Founders' belief in religion as a cornerstone of civil society." *Horvath*, 946 F.3d at 794–95 (Ho, J., concurring in the judgment in part and dissenting in part) (quoting other sources). *Smith* is troubling because it is of "little solace to the person of faith that a non-believer might be equally inconvenienced." *Id.* at 796. "For it is the person of faith whose faith is uniquely burdened—the non-believer, by definition, suffers no such crisis of conscience. This recalls Anatole France's mordant remark about 'the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.'" *Id.* (quoting ANATOLE FRANCE, THE RED LILY 87 (1910)).

be applied consistently, not selectively. And it is hard to see how that rule is met here if the record is developed to take account of the recent protests.

It is common knowledge, and easily proved, that protestors do not comply with social distancing requirements.[3] But instead of enforcing the Governor's orders, officials are encouraging the protests—out of an admirable, if belated, respect for First Amendment rights. The Governor himself commended citizens for "appropriately expressing their concerns and exercising their First Amendment Rights."[4] And he predicted that "we will continue to see peaceful, nonviolent demonstrations and protests where people properly exercise their First Amendment rights."[5]

If protests are exempt from social distancing requirements, then worship must be too. As the United States recently observed, "California's political leaders have expressed support for such peaceful protests and, from all appearances, have not required them to adhere to the now operative 100-person limit. . . . [I]t could raise First Amendment concerns if California were to hold other protests . . . to a different standard." Brief for the United States as Amicus Curiae at 24, *Givens v. Newsom*, No. 20-15949 (9th Cir. June 10, 2020). The same principle should apply to people of faith. *See*, *e.g.*, *Lukumi*, 508 U.S. at 537 ("[Where] individualized exemptions from a general requirement are available, the government may not refuse to extend that

[3] *See*, *e.g.*, *George Floyd protest in Baton Rouge: See photos, videos of peaceful march*, THE ADVOCATE (May 31, 2020), https://www.theadvocate.com/baton_rouge/multimedia/photos/collection_fc447130-a374-11ea-ba75-13e315745881.html#3.

[4] David Gray, *Gov. Edwards commends Louisiana's 'peaceful' protests after 'egregious' death of George Floyd*, THE LIVINGSTON PARISH NEWS (June 2, 2020), https://www.livingstonparishnews.com/breaking_news/gov-edwards-commends-louisiana-s-peaceful-protests-after-egregious-death-of-george-floyd/article_8c81f514-a506-11ea-b00a-cffba12e8440.html.

[5] Melinda Deslatte, *Louisiana governor praises state's peaceful Floyd protests*, AP NEWS (June 3, 2020), https://apnews.com/51fd29f1cd6bd7e6d2bea8799117fec8.

system to cases of religious hardship without compelling reason.") (quotations omitted).

II.

The Governor may respond that his order forbids *only* indoor worship but still allows people of faith to worship outdoors. But whether health experts would endorse that dichotomy—and whether the First Amendment permits it—is far from obvious.[6]

Underinclusive rules fail strict scrutiny just as overinclusive ones do. A "law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). To survive strict scrutiny, then, the Governor must show that a rule restricting indoor worship, while exempting outdoor worship, is narrowly tailored to further a compelling interest.

That may not be easy. Plaintiffs can presumably find health experts who say outdoor protests present serious health concerns.[7] They might also find health experts who support and encourage the protests, not because they pose no health risk, but because their social value outweighs any risk.[8]

Such support for the protests reflects a commendable commitment to equality. But public officials cannot devalue people of faith while elevating certain protestors. That would offend the First Amendment—not to mention the principle of equality for which the protests stand.

[6] Under his logic, the Governor would allow tens of thousands of LSU fans to assemble this fall under the open sky at Tiger Stadium, while forbidding countless others from cheering on the Saints under the Superdome.

[7] *See, e.g.*, Morgan Winsor, *Dr. Fauci voices concerns about coronavirus spreading amid nationwide protests*, ABC NEWS (June 10, 2020), https://abcnews.go.com/US/dr-fauci-voices-concerns-coronavirus-spreading-amid-nationwide/story?id=71171103.

[8] *See, e.g.*, Jamie Ducharme, *"Protest Is a Profound Public Health Intervention." Why So Many Doctors Are Supporting Protests in the Middle of the Covid-19 Pandemic*, TIME (June 10, 2020), https://time.com/5848212/doctors-supporting-protests/.

* * *

None of this is to say that Pastor Spell and his parishioners *should* ignore the advice of health experts. But the same is true for the protestors. No doubt many other Louisianans would have protested too, but for the advice of health experts. The point here is that state and local officials gave them the choice. Those officials took no action when protestors chose to ignore health experts and violate social distancing rules. And that forbearance has consequences.

The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution.

I concur in the dismissal of this appeal as moot, but in anticipation that a future appeal may turn out very differently.

Exhibit B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-30358

MARK ANTHONY SPELL; LIFE TABERNACLE CHURCH,

Plaintiffs - Appellants

v.

JOHN BEL EDWARDS, In his individual capacity and his official capacity as Governor of the State of Louisiana; ROGER CORCORAN, In his individual capacity and official capacity as Chief of Police of Central City, Louisiana; SID GAUTREAUX, Individually and in his official capacity as Sheriff of East Baton Rouge Parish, Louisiana,

Defendants - Appellees

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING EN BANC

Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:

(✓) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of

the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COUURT:

UNITED STATES CIRCUIT JUDGE

Exhibit C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MARK ANTHONY SPELL, ET AL **CIVIL ACTION**

VERSUS

JOHN BEL EDWARDS, ET AL **NO: 20-00282-BAJ-EWD**

RULING ORDER

Before the Court is Plaintiffs' **Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2)**. The Motion is opposed. *See* (Doc. 21, 22, 27 & 37). For the reasons stated herein, Plaintiffs' Motion is **DENIED**.

I. BACKGROUND

The President of the United States declared a nationwide state of emergency in response to the COVID-19 pandemic.[1] Like many other states, the Governor of the State of Louisiana, Defendant John Bel Edwards, similarly declared a statewide public health emergency. (Doc. 1–3, at p. 15). During this time of crisis, the Governor's office has systematically issued proclamations outlining the State's evolving response to the pandemic.[2] As both the infection rate and the death toll grew in Louisiana, and under guidance issued to all states by the Centers for Disease Control and

[1] See, Proc. No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020).

[2] Under the Louisiana Homeland Security and Emergency Assistance and Disaster Act, the Governor may issue executive orders, proclamations, and regulations that carry the force and effect of law. *See* La. Stat. Ann. § 29:724.

Prevention, the Governor's proclamations, *inter alia*, imposed tighter restrictions upon the ability of persons to gather and congregate. (Doc. 21, at p. 5). At the time the Complaint and Motion were filed, the most recent Proclamation, No. 52 JBE 2020, included a provision restricting the gathering of more than ten people in a single space at a single time. (Doc. 1–2, at p. 2). The Proclamation was issued to promote efforts to limit the rapid spread of COVID-19.

Plaintiff Mark Anthony Spell is the pastor of Plaintiff Life Tabernacle Church, located in the Baton Rouge area. (Doc. 1, at ¶¶ 3–4). Plaintiff Spell alleges that the restrictions contained in the Governor's proclamation violate his constitutional rights.[3] Specifically, Plaintiffs' nine claims allege that the Governor's orders violate: the Free Exercise, Establishment, Freedom of Assembly, and Free Speech clauses of the First Amendment of the United States Constitution; the Equal Protection clause under the Fourteenth Amendment of the United States Constitution; the Free Exercise, Freedom of Assembly and Freedom of Speech clauses of the Louisiana Constitution; and the provisions of the Louisiana Homeland Security and Emergency Assistance Act by using emergency powers to abridge constitutional rights. *Id*. at ¶¶ 44, 66, 70, 75, 82, 86, 92, 98, 111. Plaintiffs seek an injunction preventing these orders from being enforced against them and seek compensation for the alleged

[3] Plaintiffs' Motion also challenged an order issued by the Nineteenth Judicial District Court placing Plaintiff Spell under house arrest following his arrest for aggravated assault, which allegedly prevented him from preaching or assembling his congregation. However, Plaintiffs subsequently dismissed Judge Fred T. Crifasi, who issued the bond order requiring house arrest, as an original Defendant in the case, as well as Mayor Sharon Weston Broome and Mayor David Barrow, who were among the named Defendants. *See* (Docs. 23, 24). In doing so, Plaintiffs have abandoned any challenges to the state court's order that was initially challenged in the Motion. Counsel for Plaintiffs expressly dismissed all such challenges to the state court's ruling in Plaintiff Spell's criminal case during the hearing held on this Motion on May 14, 2020.

deprivation of their constitutional rights. (Doc. 1 at ¶ 2). Plaintiffs also ask the Court to prohibit the enforcement of the Governor's Executive Order by Defendants Central City Police Chief Roger Corcoran and East Baton Rouge Parish Sheriff Sid Gautreaux.

At the core of their argument, Plaintiffs submit that their congregation "is a large assembly of more than 2,000 individuals" whose religious beliefs require them to assemble for church in person. (Doc. 1 at ¶ 17). Additionally, Plaintiff Spell avers that he is imbued with a "duty to lay hands on the sick and pray for them so that they may become well," which, along with holy communion and the love offering, would lose meaning absent a public gathering. *Id*. at ¶¶ 20–21. Plaintiffs allege that, in an effort to enforce the orders, Defendant Gautreaux personally threatened Plaintiff Spell with arrest if he continued holding church assemblies. *Id*. at ¶ 24. Defendant Gautreaux denies that he has ever threatened Plaintiff Spell with arrest. (Doc. 27–1 at ¶ 8). When Plaintiff Spell continued to hold services, six misdemeanor summonses were issued to him by Defendant Corcoran *(*Doc. 1 at ¶ 28), yet he was not arrested or placed in police custody for conducting religious services.

On May 12, 2020, Defendants duly filed oppositions to the Motion. *See* (Docs. 21, 22, 27). Thereafter, Plaintiffs voluntarily dismissed three Defendants, as discussed *supra*.[4] Remaining Defendants filed motions to dismiss. *See* (Docs. 25, 26). On May 14, 2020, the Court held a hearing on the merits of the instant Motion.

[4] The three original Defendants who were voluntarily dismissed by Plaintiffs include Baton Rouge Mayor Sharon Weston Broome, Central City Mayor David Barrow, and Judge Fred T. Crifasi.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 65(b), to obtain injunctive relief by way of a Temporary Restraining Order, Plaintiffs must establish: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) that the injunction will not disserve the public interest. See *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 734 (5th Cir. 2008). These elements also apply to Plaintiffs' request for a preliminary injunction, which is "an extraordinary and drastic remedy" that is "never to be awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal citations and quotations omitted). See also *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989).

At all times, the burden of persuasion remains with Plaintiffs as to each of the four elements. If Plaintiffs fail to meet the burden regarding any of the required elements, the Court need not address the other elements necessary for granting a preliminary injunction. *See Roho, Inc. v. Marquis*, 902 F.2d 356, 261 (5th Cir. 1990) (declining to address the remaining elements necessary to obtain a preliminary injunction after finding that the plaintiff failed to show a substantial likelihood of success on the merits).

III. DISCUSSION

The first factor Plaintiffs must meet for entitlement to injunctive relief is the likelihood of success on the merits. Plaintiffs allege that the Governor's orders have been "discriminatorily and disparately applied" against them while allowing "local and similarly situated non-religious businesses" to remain open, accommodating "gatherings, crowds of more than ten (10) people…without the enforcement of any 'social distancing,' or other measures supposedly required by the Emergency Orders." (Doc. 2, at p. 3). This prohibition as applied to churches, Plaintiffs argue, is therefore an arbitrary and discriminatory distinction. (Doc. 1, at ¶ 57). Additionally, Plaintiffs argue that the requirements of the Governor's orders prohibit religious practices such as baptisms and the laying on of hands, which violates the Establishment Clause by dictating what Plaintiffs can and cannot include in their service. (Doc. 2–2 at p. 7).

Plaintiffs seek recognition of their constitutional rights in a vacuum, curiously paying no heed to the pandemic that has spread across the entire nation in a matter of mere weeks. The Complaint and instant Motion heavily reference the importance of individual freedoms, which neither the Court nor the Defendants dispute. However, Plaintiffs ignore controlling law under these perilous circumstances.

In determining "the framework governing emergency public health measures," the United States Court of Appeals for the Fifth Circuit has looked to the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *See In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020). Indeed, the Supreme Court has

long recognized that "liberty secured by the Constitution" is not absolute in the face of an epidemic, but rather that a community "has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson* 11 U.S. at 29.

The Supreme Court has also recognized that "[T]he right to practice religion freely does not include liberty to expose the community…to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). According to the Fifth Circuit, *Jacobson* stands for the following principle: "'[U]nder the pressure of great dangers,' constitutional rights may be reasonably restricted 'as the safety of the general public may demand.'" *Abbott*, 954 F.3d at 778 (quoting *Jacobson*, 11 U.S. at 29). In fact, the "settled rule allows the state to," for example, "restrict . . . one's right to peace[fully] assemble, *to publicly worship*, to travel, and even to leave one's home." *In re Abbott*, 954 F.3d at 778 (emphasis added). Where a law that burdens religious freedom is neutral and generally applicable to all citizens and institutions, it is not subject to a heightened scrutiny above the standard rational-basis review. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Plaintiffs argue that the orders are discriminatory and disparately applied because they permit other "similarly situated non-religious businesses" such as "big box retailers, groceries and hardware stores" to remain open to crowds larger than 10 people. (Doc. 2, at p. 3). Indeed, a law "lacks neutrality where it refers to a religious

practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533.

At the hearing on the instant Motion, Defendants argued that the transient, in-and-out nature of consumer interaction with businesses, like those identified by the Plaintiff, are markedly different from the extended, more densely packed environments of churches, or from nonessential businesses that *have* been fully closed, including aquariums, museums, arcades, theaters, bars, gymnasiums, and more. (Doc. 1–2, at p. 2). In fact, multiple versions of the proclamations thus far, including the version challenged by Plaintiffs, have even classified "travel to and from places of worship" as an essential activity, thereby implying that it is permissible under the order to visit churches, and by extension, that churches may continue to conduct worship services. (*Id.*, at 2, 20; Doc. 1–3 at p. 8). The text of the Governor's orders therefore supports Defendants' contentions that the orders neither target religion nor lack a neutral, secular meaning—specifically, the promotion and protection of public health.

As clarified by a recent ruling by the Fifth Circuit, constitutional rights, including the right to peaceably assemble and publicly worship, may be reasonably restricted by the state "as the safety of the general public may demand" under the pressure of great dangers like COVID-19. *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020). The court in *Abbott* described the "bottom line" for such restrictions:

> "[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain,

palpable invasion of rights secured by the fundamental law.'"

Id. at 784, citing *Jacobson*, 197 U.S. at 31. The court specifically instructed that "*all* constitutional rights may be reasonably restricted to combat a public health emergency." *Id*. at 786 (emphasis in original).

The Court finds that there is a substantial relationship between the occupancy limitations in the Governor's orders and the current severe public health crisis. Such restrictions are directly intended to limit the contact-based spread of COVID-19.[5] Additionally, like the law at issue in *Jacobson*, Proclamation No. 52 JBE 2020 is not a complete ban on Plaintiffs' rights as alleged by Plaintiffs. Under the terms of the order, Plaintiffs have been free to hold outdoor services with as many congregants as they would like and nothing in the orders proscribes, inhibits or regulates the content of their religious speech. Plaintiffs have always been free to fully exercise their rights to assembly, although for smaller numbers of congregants. *Id*. at 789.

Plaintiffs' Establishment Clause claim is equally unlikely to succeed, as imposing harms on third parties by exempting religious exercise from requirements of the law may impermissibly favor the benefited religion over non-beneficiaries. *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 709–10 (1985). The Supreme Court held in *Estate of Thornton* that a Connecticut statute violated the Establishment Clause by providing Sabbath observers with an absolute right not to work on their

[5] *See* The President's Coronavirus Guidelines for America, 30 Days to Slow the Spread (March 31, 2020), https://www.whitehouse.gov/briefings-statements/coronavirus-guidelines-america (last visited May 15, 2020) (recommending, among other hygienic and distancing measures, that gatherings in groups of more than 10 people be avoided in order to slow the spread of COVID-19).

chosen sabbath. *Id.* at 703. A statute (or order) must not have a primary effect of advancing or inhibiting religion. *Id.* Shielding Plaintiffs' congregation of 2,000 from the Governor's orders based solely upon their preference to assemble larger groups for their services may amount to a carveout that is not available to other non-religious businesses, in violation of the Establishment Clause.

Next, Plaintiffs fail to adequately demonstrate that the balance of equities supports their position. As Plaintiffs would have it, the equities tip decidedly in their favor because "even minimal infringements upon [Plaintiffs'] First Amendment values constitutes irreparable injury" and that the State of Louisiana is "in no way harmed" by issuance of an injunction of the Governor's orders. (Doc. 2–2 at p. 14). Plaintiffs proceed to argue that "there can be no comparison between the irreparable and unconscionable loss of First Amendment freedoms suffered by Plaintiffs absent injunctive relief and the ***non-existent interest*** the State has in enforcing unconstitutional Governor's Agency Orders." *Id.* (emphasis added).

Plaintiffs make no mention of Proclamation No. 25 JBE 2020, which provides in § 1 that "a statewide public health emergency is declared…as a result of the imminent threat posed to Louisiana citizens by COVID-19" (Doc. 1 – 3, at p. 15). Yet, the Fifth Circuit has acknowledged that "a community," or in this case, the State of Louisiana, "has the right to protect itself against an epidemic of disease which threatens the safety of its members." *See In re Abbott*, 954 F.3d at 783. Indeed, "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency," and including the right of the public to freely

exercise religion in the manner of its choosing in light of COVID-19. *In re Abbott*, 954 F.3d at 786 (emphasis in original). Plaintiff's conclusory statement fails to demonstrate that their rights, which are not absolute, outweigh the lives and health of Louisiana's population.

With respect to the final factor, Plaintiffs simply argue that upholding constitutional rights generally serves the public interest, and therefore protection *ipso facto* is in the interest of the public. (Doc. 2–2, at p. 14–15). Again, Plaintiffs are silent on the counterbalancing considerations of public health that the Court is obligated to consider when evaluating the public interest. "[A] court must at the very least weigh the potential injury to the public health when it considers enjoining state officers from enforcing emergency public health laws." *Abbott*, 954 at 791–92. Once again, Plaintiffs have failed to demonstrate that the public interest, the health and lives of the people of Louisiana, is best served by exempting them from the neutral, orders of the Governor.

To be sure, the Court recognizes that the Governor's order in this case, like in all cases, is "presumed to be constitutional, and the burden of showing [it] to be unconstitutional is on the challenging party, not on the party defending the [Governor's order]." *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 (1988). Therefore, and to that end, the Court *must* uphold a Governor's order implementing reasonable restrictions on the public's constitutional rights in the midst of a national pandemic, especially when, as here, the Plaintiffs fail to show that the Governor's order bears no "real or substantial relation to the public health

crisis." *See In re Abbott*, 954 F.3d at 786 (internal quotations omitted) Plaintiffs' also fail to demonstrate that the Governor's order is "beyond all question, a plain, palpable invasion of the [Plainiff's constitutional] right[s]." *See In re Abbott*, 954 F.3d at 786 (internal quotations omitted). Plaintiffs have not (and cannot) make such a showing. A plain reading of the Governor's order demonstrates that it is neutral with respect to religion; that is, the Governor's order restricts religious and non-religious gatherings to the *exact* same extent and degree. See, *Employment Division v. Smith*, 494 U.S. 872, 883 (1990).

Additionally, as noted during the hearing on this Motion, the Court finds that Plaintiffs fail to establish a likelihood of success on the merits as to any claims asserted against Defendants Chief Corcoran and Sheriff Gautreaux. Plaintiffs' allegations against Defendant Corcoran are simply that he issued six misdemeanor summonses to Plaintiff Spell for violation of the Governor's orders, which Plaintiffs deficiently argue are not law. (Doc. 1, ¶ 24; Doc. 2–2 at p. 5). Plaintiffs' claim that Plaintiff Spell's rights were violated through "threat of or actual arrest" by Defendant Gautreaux for the exercise of his religious freedoms also lacks merit. (Doc. 1, at ¶ 24). No evidence has been offered by Plaintiff to show that, despite Plaintiff Spell's repeated defiance of the Order (when he conducted numerous worship services after the issuance of the order yet was not arrested), that a real and imminent threat was presented by Defendant Gautreaux in arresting him. Indeed, Plaintiffs' counsel conceded at the hearing that Plaintiff Spell's only actual arrest was the result of the assault charges indirectly related to this proceeding.

Lastly, the Court notes that Defendants have argued extensively that Plaintiffs' claims are rendered moot by the Governor's latest Order, Proclamation No. 58 JBE 2020, which is effective as of today, May 15, 2020. Under § 2(G)(4)(a)-(b) of the latest Proclamation, churches and other faith-based organizations are permitted to hold indoor services with up to 25% capacity of total occupancy as determined by the State Fire Marshal. In addition, Plaintiffs remain free to conduct outdoor services, to which they have always been entitled, for as many congregants as they wish to host. Because the 10-person indoor limit that forms the basis of Plaintiffs' Complaint and Motion is no longer in effect, Defendants argue that the Motion, and even the entire case, is moot. (Doc. 25, at p. 1).

The Court finds merit in the argument, given that the complained of restriction is no longer imposed on the Plaintiffs. Defendants have filed separate motions to dismiss in which they fully articulate these arguments. (Docs. 25, 26). Plaintiffs nonetheless insist that they are entitled to monetary damages and attorneys' fees for the alleged violation of their rights. The Court will take up such matters at a later stage in these proceedings.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that Plaintiffs' **Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2)** against all Defendants is **DENIED**.

Baton Rouge, Louisiana, this 15th day of May, 2020

JUDGE BRIAN A. JACKSON
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Exhibit D

Louisiana Official Driving Record

Louisiana Department of Public Safety and Corrections
Office of Motor Vehicles
P.O. Box 64886
Baton Rouge, Louisiana 70896

OFFICIAL CERTIFICATION OF DRIVING RECORD

Accident involvement indicated does NOT mean the individual was at fault or given a citation.

Official Driving Records are periodically updated. For the next 30 days, the most current version of this Official Driving Record may be viewed and/or printed at no additional charge.

To view and/or print the most current version visit the Office of Motor Vehicle's website at www.expresslane.org, Official Driving Records Online.

This Official Online Driving Record was issued:
Date: 8/4/2020 Time:4:30 PM

```
DATE     DOB      SX LIC NO   CLS ISS DATE EXP DATE RESTRICTIONS
08042020 04121978 M   6709298  B  04222019 04122025 63,00,00,00,00,00

PER STATUS: VALID                                  CDL STATUS: VALID

NAME/ADDRESS
SPELL MARK ANTHONY                                      ENDR: P,S
9323 HOOPER RD       BATON ROUGE     70818 DIS 3

AMOUNT CHARGED $16.00                                   DRC: 10061994
12-09-15 DEPARTMENTAL ACTION              07-18-15
PRIVATE VEHICLE
0000 DAYS SUSPENDED 04-20-16 TO 07-13-16 REINSTATED 07-13-16

SELF CERT: NONEXCEPTED INTERSTATE  MED CERT STATUS: CERTIFIED
MED CERT EFF DATE: 12192019   MED CERT EXP DATE: 12192021
MED CERT REST:  NO MED RESTR          MED LIC: LA 306987
(225)262-8337  ME NATL REG: 3438810891          MED SPEC CODE: PA
VARIANCE EFF DATE:    VARIANCE EXP DATE:
```

EXHIBIT

PENGAD 800-631-6989

LOUISIANA UNIFORM TRAFFIC TICKET & COMPLAINT

STATE OF LOUISIANA ☐ Sheriff ☐ Municipal ☐ Other

PARISH OF EBR
CITY/TOWN/VILLAGE
OF Zachary } S.S.

NO. MN 5023974

COMPLAINT-AFFIDAVIT

In the Zachary (JUD. DIST. / MUNICIPAL) Court 99-00672

The undersigned being duly sworn upon his oath deposes and says

On the 23 day of May, 199 9 at 6 22P Hrs.

NAME

Name Mark Spell

Address 4115 Nelso

City Zachary State La Zip 70791

DOB 4/12/78 Age 21 Race W Sex M Ht. 6' Eyes Brn

OLN 6709298 State La Class E

☐ Carrying Haz. Mat. ☐ Comm. Veh. ☐ CDL ☐ Ins. Child. ☐ D/L Picked up for Bond ☐ Prop. Acc. ☐ Inj. Acc. ☐ Fatal Acc.

(Last)

Unlawfully Operated Year 99 Make Dodg Type Pk Color Brn

Veh. Lic. 6748864 State La Year 99

VIN 3B7HC13Y0XG197517

Location Old Baker S/B @ Kirkwood

MP# _____

And did commit the following offense(s) in violation of Louisiana Revised Statute

Multi ☐ Single ☐

Speeding 54 M.P.H. in a 30 Zone Radar/ Laser

(First)

	Title / Section	(Describe)
1	32:63	Speeding
2	Title / Section	(Describe)
3	Title / Section	(Describe)

The undersigned authority further states that he has just and reasonable grounds to believe and does believe that the above committed the offense(s) herein set forth contrary to law of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

Lt. B. Chrisson 2-4
RANK AND SIGNATURE DATA #

Sworn to before me this 23 day of May, 199 9

K. Scott
NOTARY OR EX OFFICIO NOTARY

(M.I.)

Court Appearance ☐ Juv. ☐ Upon Notice ☐ Booked ☐ No Court Date Issued Contact Agency Below

Date 6-16-99 Time 9:00 AM M. Phone (654 0044

At Zachary Court City Zachary, LA

I understand the terms and conditions of the summons and promise to appear at the time and place shown above. Failure to appear will be cause for the suspension of my driving privileges and the imposition of additional fines and/or fees by the Louisiana Department of Public Safety and Corrections.

Signature [signature]

SIGNATURE IS NOT AN ADMISSION OF GUILT

MN 5023974

PENGAD 800-631-6989

EXHIBIT

_____

RECEIVED
MAY 24 1999
BY: _____

Hsel wf & child
late for Church
Stating old Baker, Tree
No other vehicles

Exhibit E

No. 99-00672

ZACHARY CITY COURT

PARISH OF EAST BATON ROUGE

State of Louisiana

Mark Anthony Spell

54/30

DATE FILED

06-16-99- arraign FTA-B/W
7-15-20- arraign/Contempt Hearing
8-5-20 Trial
12-9-20 Pay

Spell, M.

No. 99-00672

Mark A. Spell

No. 99-00672

Mark A. Spell

CITY COURT OF ZACHARY
CASE CHRONOLOGY

Run: 9/01/20
1:41PM

Page: 1

DEFENDANT: SPELL, MARK ANTHONY
9323 HOOPER RD
BATON ROUGE, LA 70818
TELEPHONE: Not Listed

Date of Birth: 4/12/1978
Driver's License: 6709298 LA

Charge References for Case: 99-00672 Citation Reference: **T5023974**

5/23/1999 32:64B - GENERAL SPEED LAW 21 - 25

6/16/1999	Court date of 6/16/1999 at 9:00AM was set for division A for ARRAIGNMENT
	Defendant failed to appear. Bench Warrant ordered
4/21/2020	TRANSFERRED FROM PTS SYSTEM
4/21/2020	BOOKED
4/21/2020	BONDED
5/20/2020	Court date of 7/15/2020 at 9:00AM was set for division A for ARRAIGNMENT
5/20/2020	Notification of Event
	A summons was issued for the defendant SPELL, MARK ANTHONY for the event ARRAIGNMENT scheduled for 7/15/2020 at 9:00 AM.
5/20/2020	Court date of 7/15/2020 at 9:00AM was set for division A for CONTEMPT HEARING
7/15/2020	Defendant was present in Court and represented by attorney of record, (To be Assigned). Attorney was present in Court.
7/15/2020	Attorney of record, JEFFREY WITTENBRINK represented the defendant.
7/15/2020	**Defendant PLED NOT GUILTY to the charge of 32:64B GENERAL SPEED LAW 21 - 25**
7/15/2020	**Defendant PLED NOT GUILTY for FTA 6/16/1999**
7/15/2020	Court date of 8/05/2020 at 1:30PM was set for division A for TRIAL
7/15/2020	Notification of Event - PERSONAL SERVICE
	A notice was issued for the attorney WITTENBRINK, JEFFREY for the event TRIAL scheduled for 8/05/2020 at 1:30 PM.
7/20/2020	Notification of Event
	A subpoena was issued for the witness CHAISSON, BRUCE for the event TRIAL scheduled for 8/05/2020 at 1:30 PM.
7/20/2020	Notification of Event
	A subpoena was issued for the witness CHARLET, CONNIE for the event TRIAL scheduled for 8/05/2020 at 1:30 PM.
7/20/2020	Notification of Event
	A subpoena was issued for the witness SPELL, SHAYE for the event TRIAL scheduled for 8/05/2020 at 1:30 PM.

DEFENDANT: SPELL, MARK ANTHONY
9323 HOOPER RD
BATON ROUGE, LA 70818
TELEPHONE: Not Listed

Date of Birth: 4/12/1978
Driver's License: 6709298 LA

Charge References for Case: 99-00672 Citation Reference: **T5023974**

7/20/2020	SUBPOENA DECUS TECUM REQUESTED ON BEHALF OF THE PROSECUTOR FOR ALL DOCUMENTS CONTAINED IN: CASE NUMBER 01-01675.
	01-0675 FILE WAS SUBMITTED ON RECORDS RETENTION SCHEDULE SIGNED BY JUDGE LONNY A. MYLES 11/07/13. APPROVED BY CARRIE FAGER AT SECRETARY OF STATE 11/13/13.
7/27/2020	07/27/20 FACSIMILE FILED BY DEFENDANT'S ATTORNEY JEFFREY S. WITTENBRINK MOTION TO QUASH , MEMORANDUM IN SUPPORT OF MOTION TO QUASH
	ORIGINAL MOTION FILED 07/27/20 BY DEFENDANT'S ATTORNEY JEFFREY S. WITTENBRINK
7/30/2020	Service Return Posted For CONNIE CHARLET
	CONNIE CHARLET was served Personal on 7/30/2020 by the ZACHARY City Marshal.
8/ 4/2020	Service Return Posted For BRUCE CHAISSON
	BRUCE CHAISSON was served By Department on 7/29/2020 by the Sheriff of ZACHARY Parish.
8/ 5/2020	Service Return Posted For SHAYE SPELL
	SHAYE SPELL was served Domiciliary on 8/04/2020 by the ZACHARY City Marshal. SUBPOENA WAS RECEIVED BY HUSBAND MARK SPELL
8/ 5/2020	Defendant was NOT present in Court and represented by attorney of record, JEFFREY WITTENBRINK. Attorney was present in Court.
8/ 5/2020	**Contempt in the amount of 500.00 was imposed FOR FTA 6/16/1999.**
8/ 5/2020	To the charge of 32:64B GENERAL SPEED LAW 21 - 25 a disposition of FOUND GUILTY was entered.
8/ 5/2020	**SENTENCING AND DISPOSITION FOR 32:64B GENERAL SPEED LAW 21 - 25**
	To the charge of 32:64B GENERAL SPEED LAW 21 - 25 the defendant was sentenced on 8/05/2020. THE DEFENDANT WAS ASSESSED FINE AND COST IN THE AMOUNT OF 248.50 OR SERVE 30 DAYS IN JAIL IN DEFAULT.
8/ 5/2020	Court date of 12/09/2020 at 9:00AM was set for division A for PAYMENT DUE
8/ 5/2020	Notification of Event - PERSONAL SERVICE
	A notice was issued for the attorney WITTENBRINK, JEFFREY for the event PAYMENT DUE scheduled for 12/09/2020 at 9:00 AM.
8/12/2020	NOTICE OF INTENTION TO FILE FOR WRIT OF REVIEW
	ORDER SIGNED BY JUDGE MYLES AUGUST 18, 2020

3

DEFENDANT: SPELL, MARK ANTHONY
9323 HOOPER RD
BATON ROUGE, LA 70818
TELEPHONE: Not Listed

Date of Birth: 4/12/1978

Driver's License: 6709298 LA

Charge References for Case: 99-00672

Citation Reference: **T5023974**

8/31/2020	CORRESPONDENCE RECEIVED FROM WITTENBRINK INDICATING THAT THE PAYMENT OF $350.00 WAS SUBMITTED TO THE COURT FOR TRANSCRIPT SERVICE AND ZACHARY CITY COURT COST FOR A COPY OF THE RECORD.

CERTIFIED
TRUE COPY

SEP 01 2020

BY Amanda Jackson
CLERK/DEPUTY CLERK
#146934

BENCH WARRANT
STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

Entered 6:23.99 DBC

ZACHARY CITY COURT

Cleared 04/21/99 XY

CITY OF ZACHARY

VS NO. 99-00672 OFFENSE: SPEEDING

MARK ANTHONY SPELL

TO ANY DULY QUALIFIED OFFICER, GREETINGS:

YOU ARE HEREBY COMMANDED, to arrest the body of SPELL, MARK ANTHONY last known to reside at 4115 NELSON STREET, ZACHARY, LA 70791-0000 described as,

DOB: 04/12/78 SEX: M RACE: W SS NO: OPERATORS #: 6709298

HEIGHT: 0.00 WEIGHT: 145 VEHICLE: 99 DODGE PU VEHICLE LICENSE 6748864 ,so that you have him/her before said Court instanta then and there to answer to any charge that may be brought against him/her for:

FAILURE TO APPEAR FOR ARRAIGNMENT
on 06/16/99.

And how you shall have executed this warrant you make due return unto our said Court as the law directs.

Witness the Honorable Judge , LONNY A. MYLES, of said Court
this 21ST day of JUNE A.D. 1999.

Eppie Parker
Judge / Deputy Clerk

BOND SET AT: $ 150.00 PLUS 25.00 TOTALING 175.00.

Exhibit F

PARISH OF EAST BATON ROUGE

ZACHARY CITY COURT

STATE OF LOUISIANA

* * * * * * * * * * * * * * * * * *

HONORABLE JUDGE LONNY A. MYLES

WEDNESDAY, AUGUST 5, 2020

DOCKET NO. 99-0672 – SPEEDING (05/23/99)

* * * * * * * * * * * * * * * * * *

CITY OF ZACHARY

VERSUS

MARK ANTHONY SPELL

* * * * * * * * * * * * * * * * * *

Zachary City Court

Zachary, Louisiana

She is not coming in.

MR. WITTENBRINK:

So, I want to make that an objection.

THE COURT:

You can make that objection, that's fine.

MR. WITTENBRINK:

Are we on the record? Is this recorded on the record? Do you-all keep a record?

THE COURT:

Yes, we are on the record.

MR. WITTENBRINK:

Okay.

MR. DUPRE:

Have we started yet?

-- OFF THE RECORD --

-- BACK ON THE RECORD --

THE COURT:

All right. Now, you had -- I think, you had something else you wanted to argue, Mr. Wittenbrink?

MR. WITTENBRINK:

Yes, Your Honor. Preliminary, if Ms. Shaye Spell were in here, we would ask the Court -- have a motion for the Court to recuse himself.

Both Mr. Spell and Mrs. Spell appear that you have represented them on many occasions in the last 20 years. And that Mr. Spell has appeared before you personally to sign documents, have documents notarized, and transactions

completed by you.

And he believes it is improper for you to preside over this proceeding because all during that time, apparently, there was a bench warrant that you would have been in position to know about more than him, and that you didn't notify him.

So, he has formally asking for you to recuse yourself and I am as well, and that would be our motion to recuse. We think it is improper to move forward with you as the trier of facts, and that you should recuse yourself.

THE COURT:

Well, I'm not going recuse myself, because number one, I would have to have -- normally, when you recuse yourself, I have to have information that is against your client. And I don't have any information that I know against your client.

It was 21 years ago, Mr. Wittenbrink. I knew just about everybody in Zachary. If I would have spent my life back then calling everybody that missed court, I would have spent most of my calling people.

Now, have I called a couple of people in that time, yes. I'm not going to lie to you, I have. But do I call everybody, heck, no. I didn't call -- first of all, I don't remember -- I did a lot of work for

Reverend Bervick Spell. Now, Mark came in and did some stuff for Reverend Bervick Spell, but I don't really remember offhand doing stuff for them.

But I am not going to recuse myself. If I recuse myself on every case in Zachary City Court that I knew the people, I wouldn't have -- especially, 21 years ago, I wouldn't have heard many things. So, I don't recuse myself.

Secondly, do you have that motion to quash again, that you are going to put up?

MR. WITTENBRINK:

Yes, Your Honor. In regard to the Motion to Quash, trying to prosecute a misdemeanor within a year of the action, under 578, no trial should be commenced or a bail obligation be enforced on a misdemeanor case after a year from the date of institution of the prosecution.

579(A)3 says that prosecution is interrupted. The period of limitation is interrupted, if he fails to appear at any proceeding pursuant to actual notice. It says proof of which appears in the record. So, that burden would be on the prosecutor.

But that the Court is seeking to prosecute Mark Spell after a lapse of 21 years of time. And we would suggest to the Court -- you know, I followed the whole history of this statute and speedy trial.

A speedy trial, is something that is not just a statutory right, Judge, but it is a right that is protected by the Constitution of the United States and protected by the Constitution of the State of Louisiana. And I looked at the whole history of a speedy trial in Louisiana, and there was originally a split in the circuits.

The First Circuit, and another circuit, it came down on the side that, if you didn't appear in court, the process was interrupted, period. And the Second and Third Circuit came down and said, no, if you didn't appear in court, simply stop the time for a period of time, basically, another year.

And the court -- excuse me, the prosecution of the state and the city, whoever is prosecuting, has the burden then to come back and make a reasonable effort to find the defendant and bring them to trial.

Now, that view of those two circuits, in my opinion, is consistent with the case from the United States Supreme Court and is still the law; and that is *Barker versus Wingo*.

The United States Supreme Court said it is a balancing test, that you can't make a single rule for all cases and speedy trial because speedy trial is slippery. The defendant may not want a

speedy trial.

The process of a speedy trial may be in favor of the prosecution. So -- so, the Court has to weigh and balance the length of time and the circumstances, to say whether or not it's reasonable for a person to come to trial.

And so, I would submit to you, Your Honor, under *Barker versus Wingo*, and even though it may have been -- and I think they have to prove -- it may have been Mr. Spell's fault, if he did not come to a court appearance back in 1999.

But I would submit to you, Your Honor, that Mr. Spell has now been a public figure for quite some time. He wasn't back then. He has now been a public figure for quite some time.

And I have to submit -- I'm going to show this to the prosecutor here.

MR. WITTENBRINK:

Mr. Dupre, this is an Official Driving Record from the Department of Public Safety; do you want to take a look at that?

MR. DUPRE:

(Viewing document.)

MR. WITTENBRINK:

So, I don't have a witness here, Judge. But I do have an official certification of the driving record for Pastor -- for Mark Anthony Spell,

addressed 9323 Hooper Road. And they have one infraction on his record, and that is certified as of 8/4/2020.

And he had a suspension of his driver's license from April 20, 2016, to July 13, 2016. And if Mr. Spell were here, he would tell the Court that that infraction was because he gave away a vehicle and didn't get the plate and turn the plate in.

Anyway, that is the only thing he has on his driving record, period. And that, if this bench warrant is still outstanding, it should have at least appeared. He has had his driver's license renewed seven times.

So, there is no reasonable notice to Pastor Spell, other than the original ticket, if indeed he got the original ticket. And so, in connection with this motion to quash, I would like to file this into evidence.

MR. DUPRE:

All right.

THE COURT:

Well, now, I will let -- for the weight of it, I will --

MR. WITTENBRINK:

Sure.

(The exhibit is marked as Exhibit Defense No. 1 for identification and attached hereto.)

THE COURT:

I don't know how much weight I'm going to give that. I don't think that is really applicable myself.

MR. WITTENBRINK:

Well, just in conclusion, Judge, I do think it is the state of the law under United States Supreme Court principles at least, would be that some time -- and I can't tell you what time -- but the Court has to -- would have to decide that.

But within some reasonable time, after Mr. Spell got his ticket, if he got a ticket, and some reasonable time after he failed to appear, there would have to be some showing of some effort to contact Mr. Spell telling him; that he had an outstanding warrant and put it on his driver's license, so that he would get that flag and that he would pay it.

If Pastor Spell were here without a mask, he would say he pays all of his obligations. He has a perfect driving record, as far as he knows, and he doesn't recall anything about this ticket because it's 21 years ago. And it is hardly fair to make him come and appear to try to defend it.

So, with that I rest my motion to quash.

THE COURT:

Okay.

MR. DUPRE:

Your Honor, can I close the door?

THE COURT:

Yes.

BY MR. DUPRE:

Your Honor, the City of Zachary submits that the Code of Criminal Procedure Articles 578 and 579 are clear, and when applied to the facts of the case at bar, Louisiana law, specifically, the Code of Criminal Procedure Article 579 requires that Mr. Spell's failure to attend Court on June 16, 1999, after being duly noticed of that date, resulted in the Article 578 one year time limitation being interrupted.

The Code of Articles are clear and unambiguous. Defense Counsel argues only that the law as written is not fair, and application of the law to the facts of our case somehow deprives the defendant of a speedy -- right to a speedy trial.

The only jurisprudence cited by Mr. Wittenbrink is *State versus Romar*, which is a 2008 Louisiana Supreme Court case and *Barker versus Wingo*, which is a 1972 US Supreme Court case.

In *Romar*, the defendant pleaded not guilty to DUI. He failed to appear for a trial. A bench warrant was issued, and he was absent for more than eight years, until

he was arrested on another charge.

Defense Counsel in *Romar* did exactly what defense council in the case at bar did, namely, they filed a motion to quash, they argued that the defendant was not hiding, and that the *State* took no steps to locate the defendant.

The Louisiana Supreme Court in *Romar* held that there is no burden on the prosecution to search for a defendant who fails to appear after receiving notice.

I attempt to rest there, Judge. But just to address his constitutional argument, I will go forward.

The other case cited by Defense Counsel is *Barker versus Wingo*. In *Barker versus Wingo*, the defendant was arrested and sat in jail for ten months, before he was able to bond out. In our case, Mr. Spell has not spent a single night in jail.

In *Barker* all the delays and continuances were caused and requested by the prosecution. In our case, the 21-year delay was caused solely by Mr. Spell failing to come to court after receiving notice to do so.

The *Barker* Courts, this is the US Supreme Court, the *Barker* Courts balancing test that Mr. Wittenbrink would like us to apply, would like the Court to

apply, is designed to determine whether the State's delay in the prosecution is a violation of a right to speedy trial. But in our case, the only person who can be held responsible for not receiving a speedy trial is Mr. Spell himself.

Defense Counsel in the case at bar is correct in that the right to a speedy trial is a fundamental right, it is a constitutional fundamental right to due process. But the *Barker* Court, ultimately held that the Sixth Amendment does not require a fixed time period.

It is different from what he said. It doesn't say that a fixed time period is unconstitutional. It says that the State is not required to fix itself to a time period.

That is important because *Barker* was decided in 1972. And the Constitution doesn't require a strict time limitation to try cases. Despite that whole thing, Louisiana did exactly what the Constitution didn't require. It gave defendants more than the Constitution requires. By enacting 578 in 2006, the State imposed on itself a strict time limitation to try cases.

Again, 578 gives defendants more time -- I'm sorry, a more definite time than the US Constitution requires as held by the

Supreme Court. Article 578 deals with the State's responsibility in the speedy trial arena, and Article 579 deals with the exceptions to the hard and fast time limitations.

In other words, 579 addresses what the *Barker* Court calls the defendant's responsibility in the area -- in the arena of a speedy trial.

In fact, parts of 579 at issue here between speedy -- the interplay between speedy trial rights and delays that are caused by a defendant's actions. They are stated by the US Supreme Court as being so obvious as to almost not warrant mention when the Court stated, quote, we hardly need to add that if the delay is attributable to defendant, then his waiver -- referring to his waiver to a speedy trial -- quote, may be given effect.

In other words, 578 does not only comport with *Barker*, they are in legislative codification of *Barker*. Both the statutes and the *Barker* Court are clear, trial delays caused solely by the defendant are equal to a defendant's waiver of their right to a speedy trial.

Mr. Wittenbrink does not argue that there is an ambiguity in the law to which his client is entitled to the benefit of the doubt, he does not present any controlling jurisprudence that holds the

prosecutor responsible for searching for a defendant, who voluntarily stops his prosecution because he can't.

In fact, all the controlling jurisdiction states that there is a burden on the prosecutor to search for a defendant who fails to appear after receiving notice, that is the holding of *Romar*, which he cited, that is the holding of *State versus Stuart*, which is a 2017 Louisiana Supreme Court Case.

In fact, the *Romar* Court also said in Louisiana an arrest warrant does not become stale with the passage of time, citing Louisiana Code of Criminal Procedure Article 205. So, the warrant never dies.

The law is clear and the law is constitutional. The only person responsible for Mark Anthony Spell not receiving a speedy trial is Mark Anthony Spell. The City of Zachary respectively submits that this instant motion be denied.

THE COURT:

Anything else, Mr. Wittenbrink?

MR. WITTENBRINK:

Just briefly, Judge, *Barker versus Wingo*, did say that there is a balancing test. The balancing test requires that the State consider the length of time that has passed; and also, that there is nothing, there's no presumption that can be made,

even in the statute where the defendant is required to take an affirmative act and that that failure to take that affirmative act acts as a presumption of waiver.

And that is exactly what the statute does. The statute says he's got to come back to court. His failure to come back to court means the period of time is interrupted forever. So, the holding in *Barker* is there's got to be a balancing test.

We submit that a period of 21 years without even a notation on Mr. Spell's driving record, just the simplest of clerical acts could have prevented all of this, this ticket would been paid long ago. If it was, indeed given, anything that -- even the simplest of clerical acts to apprise Mr. Spell of the ticket, his right to trial, or further the prosecution has not been done.

And that, therefore, under the United States Supreme Court, this is an unfair prosecution.

THE COURT:

Well, I started out as a public defender in 1974. and *Wingo* was very much a big item back in those days. I don't agree with you about what *Wingo* says.

Wingo says, as far as I'm concerned,

I've got somebody that is in jail, that is what it originally started about. Should he have a speedy trial so we can get him out of jail, and that's what that started about. Should have, yes, he should have a speedy trial to get him out of jail.

Your client wasn't in jail. To me, the law is clear in Louisiana. If you miss a trial -- a court date, it is suspended until you show back up, and then, it starts back up again. So, your motion to quash is denied.

All right. Are we ready to go to trial?

MR. DUPRE:

Yes, sir.

THE COURT:

All right. Call your first witness.

MR. DUPRE:

I call Bruce Chaisson.

THE COURT:

Come around, Mr. Chaisson, you will be sworn in.

MS. QUWANDA JACKSON:

(Swears in witness.)

MR. BRUCE CHAISSON:

I do.

MS. QUWANDA JACKSON:

Thank you.

THE COURT:

And for the record, Mr. Wittenbrink,

THE COURT:

May 23?

MR. DUPRE:

Yes. The ticket was issued on that date.

MS. QUWANDA JACKSON:

That is the ticket issued on that date.

THE COURT:

Oh.

MR. DUPRE:

That is the ticket.

MS. QUWANDA JACKSON:

That is the form when he signed for that citation.

THE COURT:

All right. Okay.

MR. DUPRE:

Your Honor, prosecution rests.

THE COURT:

All right. Mr. Wittenbrink, do you got any witnesses?

MR. WITTENBRINK:

Your Honor, I just -- I have the witnesses here, and they are objecting to having to appear with the masks on. I would just enter that objection in the record.

THE COURT:

So ordered. All right.

Court is going to find him guilty of speeding. The fine is going to be 30 days

in jail, suspended on payment of the fine. The fine is $125 dollars plus costs on the contempt. It is going to be six months in jail, consecutive to that. The fine is going to be $500 dollars.

I will give him two months to pay it. You can appeal it.

Exhibit G

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

CITY OF ZACHARY — NO. 2020 KW 0867

VERSUS — ZACHARY CITY COURT

MARK ANTHONY SPELL — PARISH OF EAST BATON ROUGE

CITY CT. NO. 99-0672

OCTOBER 28, 2020

BEFORE: WHIPPLE, C.J., CHUTZ AND WOLFE, JJ.

INTERIM ORDER

The above numbered and entitled matter being presently before this court,

IT IS ORDERED that the City of Zachary, through Jewell E. "Trae" Welch, City Prosecutor, or his designated assistant, file a response on or before November 23, 2020, addressing the merits of relator's claims urged in his writ application filed with this court. The Honorable Lonny A. Myles, Judge, Zachary City Court, is invited to file a *per curiam* in response to this application, if he so elects.

VGW
WRC

Wolfe, J., dissents and would deny the writ application.

COURT OF APPEAL, FIRST CIRCUIT

Peggy J. Landry

DEPUTY CLERK OF COURT
FOR THE COURT

Exhibit H

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MARK ANTHONY SPELL, ET AL. CIVIL ACTION

VERSUS

JOHN BEL EDWARDS, ET AL. NO. 20-00282-BAJ-EWD

RULING AND ORDER

Before the Court is Plaintiffs, Mark Anthony Spell and Life Tabernacle Church's **Motion for Leave to Oppose Defendants' Motions to Dismiss (Doc. 87).** Plaintiffs ask for leave because they did not timely file a Motion to Oppose Defendants' Motions to Dismiss (Docs. 74, 78, 80). In light of this fact, Defendant John Bel Edwards filed a Motion for Entry of Judgment on Unopposed Motion to Dismiss Under Federal Rule of Civil Procedure 12 (Doc. 85). For the reasons stated herein, Plaintiffs' Motion is **DENIED**, Defendant Edwards's Motion for Entry of Judgment is **DENIED**, Defendants' Motions to Dismiss are **GRANTED**, and Plaintiffs' claims against Defendant are **DISMISSED WITH PREJUDICE**.

I. RELEVANT BACKGROUND

A. Relevant Facts

Like all states[1] the State of Louisiana, governed by Defendant John Bel

[1] "All states have taken coronavirus-related actions, but restrictions vary, and so does the length of time the measures are in place." Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP (Nov. 9, 2020), https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html.

Edwards (the "Governor"), declared a statewide public health emergency in the face of the COVID-19 pandemic (Doc. 1-3 at p. 15). During this time of crisis, the Governor's office issued proclamations outlining restrictions on certain activities in light of the State's evolving response to the pandemic.[2] At the beginning of the crisis the Governor's proclamations, under guidance issued to all states by the Centers for Disease Control and Prevention, imposed tight restrictions upon the ability of all persons to gather and congregate in a variety of contexts, including worship. (Doc. 21 at p. 5). These proclamations were issued to promote efforts to limit the rapid spread of COVID-19 and have changed as guidance related to transmission of the virus has changed. To date there is no vaccine, no known cure, and no effective treatment for the virus, and restrictions remain in place in various ways throughout the country.

Plaintiff Mark Anthony Spell is the pastor of Plaintiff Life Tabernacle Church, located in the Baton Rouge area. (Doc. 58 at ¶¶ 3–4). Plaintiffs allege that the restrictions contained in the Governor's proclamations violate their constitutional rights under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and applicable state statutory and constitutional provisions. (Doc. 58). Plaintiffs sued Defendants—the Governor, Roger Corcoran (the "Chief of Police"), and Sid Gautreaux (the "Sheriff")—to have the restrictions against them imposed on May 29, 2020 enjoined as unconstitutional. (Doc. 58 at ¶ 2). Plaintiff Spell

[2] Under the Louisiana Homeland Security and Emergency Assistance and Disaster Act, the Governor may issue executive orders, proclamations, and regulations that carry the force and effect of law. *See* La. Stat. Ann. § 29:724.

additionally seeks to be compensated for the deprivation of his constitutionally protected rights.

B. Procedural History

On May 7, 2020, Plaintiffs filed a Complaint against Defendants, along with a Motion for Temporary Restraining Order, in an attempt to prevent the enforcement of one of the Governor's proclamations, which restricted the gathering of more than ten people in a single space indoors at a single time. On May 15, 2020, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2) was denied by this Court. (Doc. 46). The Plaintiffs subsequently filed an Amended Complaint on May 29, 2020. (Doc. 58). Plaintiffs also immediately appealed the denial of the temporary restraining order to the United States Court of Appeals for the Fifth Circuit. The appeal was dismissed as moot on June 18, 2020. *See Spell v. Edwards*, 962 F.3d 175, (5th Cir. 2020).

On June 16, 2020, the Governor filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) & (6). (Doc. 74). The Sheriff and the Chief of Police filed Rule 12(b)(6) Motions to Dismiss on June 26, 2020 (Doc. 78) and July 6, 2020 (Doc. 80). Local Rule 7(f) provides "Each respondent opposing a motion shall file a response, including opposing affidavits, memorandum, and such supporting documents as are then available, within twenty-one days after service of the motion."

Plaintiffs were therefore required to file an opposition to these motions by, at the latest, July 27, 2020, but failed to do so. Therefore, the September 2, 2020 Motion for Leave to Oppose Defendants' Motions to Dismiss is at best a month overdue. As

such, it is within the Court's discretion to treat the Motions to Dismiss as unopposed. *See, e.g. Nelson v. Star Enterprise*, 220 F.2d 587 (5th Cir. 2000).

II. Motion for Leave

Prior to addressing the merits of Plaintiffs' claims, the Court must determine whether to grant Plaintiffs Motion for leave to respond to Defendants' Motions to Dismiss. As is discussed below, the Court will not grant leave to oppose Defendants' Motions to Dismiss. However, the Governor's request that we grant his motion to dismiss solely because Plaintiffs failed to timely file their opposition is too harsh a sanction, and as such will be denied. [3]

A. Standard

Plaintiffs' Motion for Leave seeks relief from requirements and deadlines imposed by the Court's Local Rules. Federal Rule 83(a)(1) permits the Court to establish local rules. A valid local rule has the force of law. *Weil v. Neary*, 278 U.S. 160, 169 (1929); *Jetton v. McDonnell Douglas Corp.*, 121 F.3d 423, 426 (8th Cir. 1997). Litigants "are charged with knowledge of the district court's rules the same as with knowledge of the Federal Rules and all federal law." *Jetton*, 121 F.3d at 426. The Court's local rules require that each respondent opposing a motion file a

[3] The Governor's "Motion for Entry of Judgment" does not rely on a Federal Rule of Civil Procedure, nor any case law, to support his proposition that an unopposed motion to dismiss results in an entry of judgment as a matter of course. Judgments are governed by Federal Rule of Civil Procedure 58, which merely addresses the manner in which Judgments are entered upon disposition of a proceeding. Motions to dismiss, governed by Rule 12, instead address the disposition of proceedings prior to judgment. As such, the Court interprets the Governor's Motion for Entry of Judgment as a request to grant the Motion to Dismiss due to Plaintiffs' failure to timely file an opposition.

response to the motion within twenty-one days after service, unless upon a party's written motion, the Court finds good cause to shorten or extend the deadline. LR 7.4.

Generally, "[c]ourts have broad discretion in interpreting and applying their own local rules," *Matter of Adams*, 734 F.2d 1094, 1102 (5th Cir. 1984), and a party that "fails to comply with the Local Rules does so at his own peril." *Broussard v. Oryx Energy Co.*, 110 F. Supp. 2d 532, 537 (E.D. Tex. 2000). Absent a specific standard required by a Local Rule, this Court measures Plaintiffs' Motion for Leave for "good cause." *E.g.*, *Chevron TCI, Inc. v. Capitol House Hotel Manager, LLC*, No. 18-cv-776, 2020 WL 1164835, at *1 n.1 (M.D. La. Mar. 11, 2020).

However, "the Fifth Circuit has not approved the automatic grant of motions that are dispositive on litigation on the ground that the nonmoving party failed to comply with local rules that require a party to file a response to an opposed motion." *Darville v. Turner Industries Group, LLC.*, 503 F.R.D. 91, 94 (M.D. La. 2015) (citing *John v. Louisiana (Bd. of Trs. for State Colls. & Univs.)*, 757 F.2d 698, 709 (5th Cir. 1985)). The Court views "the automatic grant of a dispositive motion, such as a dismissal with prejudice based solely on a litigant's failure to comply with a local rule, with considerable aversion." *Webb v. Morella*, 457 Fed. Appx. 448, 452 (5th Cir. 2012).

To dismiss a claim with prejudice based on a litigant's conduct, the Court must find "egregious and continued refusal to abide by the court's deadlines." *Id.* Where courts have affirmed a dismissal with prejudice based on failure to prosecute, courts has usually found "at least one of three aggravating factors: '(1) delay caused by [the]

plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct.' " *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d, 1188, 1191 (5th Cir. 1992) (quoting *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986)). The Court considers the dismissal of a claim with prejudice due solely to failing to abide by a Local Rule to be a "severe sanction that should be used only in extreme circumstances." *Webb*, 457 Fed. Appx. at 452. (quoting *Boazman v. Econ. Lab, Inc.*, 537 F2d. 210, 212 (5th Cir. 1976).

B. Discussion

Plaintiffs argue that because they were "actively pursuing the matter before the Court of Appeal" and are "presently preparing a petition for a writ of certiorari to the U.S. Supreme Court" the court should grant leave. (Doc. 87-1). Plaintiffs also note that one of their local counsel contracted and recovered from COVID-19 during the time that the responses to Defendants' motions were due. Plaintiffs argued that the attorney also physically relocated into new office space, thus accounting for the delay in the response.

While the court is sympathetic to the illness suffered by one of Plaintiffs' counsel, it is worth noting that two attorneys are enrolled as counsel of record in this matter, therefore this reason alone is not enough to establish good cause. Plaintiffs would like the Court to believe that while Plaintiffs were able to file their appeal to the Fifth Circuit on July 2, 2020, they had good cause to not file an opposition to the Governor's Motion to Dismiss a mere five days' later. Even if filing pleadings in the Fifth Circuit was so time consuming as to constitute "good cause", Plaintiffs' appeal

was denied as moot on July 22, 2020, again, five days' before the deadline to file an opposition to the final Defendant's Motion to Dismiss. Plaintiffs' explanation and excuse strain credulity.

However, dismissing the action on the merits would deny Plaintiffs the opportunity to be heard, and a one-month unexcused delay does not warrant the "severe sanction" which dismissal on the merits would otherwise require.

III. MOTION TO DISMISS

The Court will now analyze the merits of Plaintiffs' arguments, based on the facts set forth in Plaintiffs' Amended Complaint.

A. Standard

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint against the legal standard set forth in Rule 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*,

550 U.S. at 556). Hence, the complaint need not set out "detailed factual allegations," but something "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" is required. *Twombly*, 550 U.S. at 555. When conducting its inquiry, the Court must "accept[] all well-pleaded facts as true and view[] those facts in the light most favorable to the plaintiff." *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010) (quotation marks omitted).

B. Discussion

Plaintiffs assert two claims: one for injunctive relief, and one for damages based on violations of a variety of Federal and State constitutional rights.[4] Given that the Proclamation Plaintiffs allege caused them harm has long since expired, their claim for injunctive relief is denied as moot. Further, Plaintiffs' claim for damages is denied in light of *South Bay United Pentecostal Church v. Newsom*, 207 L. Ed. 2d 154 (2020), as there has been no violation of federal law and therefore no damages.

i. Plaintiffs' claims for injunctive relief are moot.

The Governor has issued six proclamations that restrict gatherings in, among other places, houses of worship over the past six months:

Proclamation No.	Forbidding gatherings of:	Effective Date	Date Superseded
27 JBE 2020	250 or more	March 13, 2020	March 16, 2020
30 JBE 2020	50 or more	March 16, 2020	March 22, 2020
33 JBE 2020	10 or more	March 22, 2020	May 15, 2020
58 JBE 2020	25% or more	May 15, 2020	June 5, 2020

[4] Plaintiffs allege violations under: the First Amendment's Free Exercise, Establishment, Freedom of Assembly, and Free Speech clauses; the Equal Protection Clause of the Fourteenth Amendment; as well as the Freedom of Assembly and Freedom of Speech clauses of the Louisiana Constitution; and the Louisiana Homeland Security and Emergency Assistance and Disaster Act.

74 JBE 2020	50% or more	June 5, 2020	Sep. 11, 2020
117 JBE 2020	75% or more	Sep. 11, 2020	N/A

The proclamations that formed the basis of the original suit, 30 JBE 2020 and 33 JBE 2020, have expired. The Governor has issued at least three superseding Proclamations, all of which have imposed fewer and fewer restrictions on religious gatherings, following the natural expiration of the previous proclamations.

It is true that "a defendant cannot automatically moot a case simply by ending its [allegedly] unlawful conduct once sued," *Already, LLC v. Nike Inc.*, 568 U.S. 85, 91 (2013). Nevertheless, where executive orders and statutes expire on their own terms the court is not concerned about "mere litigation posturing" where a defendant engages in unlawful conduct, stops once sued, and repeats the unlawful conduct once litigation is terminated. *Spell v. Edwards*, 962 F.3d at 179. (citing *Trump v. Hawaii*, ___ U.S. ___, 138 S. Ct. 2392). Plaintiffs have failed to offer evidence that the Governor is attempting to evade litigation, as the proclamations have all expired on their own terms. Therefore, Plaintiffs' request for injunctive relief is moot.

Plaintiffs allege that their injuries fall under an exception to mootness, as the harm is capable of repetition, yet evading review. This exception to the mootness doctrine applies only in exceptional situations in which (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. *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011).

By Plaintiffs' count, the average length of each order is thirty-three days.

Thus, the first requirement for this exception is satisfied. (Doc. 92 at p. 3). However, Plaintiffs have not been subject to the same action again, and there is no evidence that they will be subject to such restrictions in the future. The trend in the Governor's proclamations has been to *reduce* restrictions on gatherings, rather than to increase them.

Further, the Fifth Circuit has noted that this exception exists to "keep a case alive, largely out of a fear that the legal questions posed by cases prone to becoming moot will never be answered." *Spell*, 962 F.3d at 180. Even if there were a reasonable expectation that Plaintiffs would be subject to the same action again, the legal questions in this case have been answered by the United States Supreme Court in *South Bay United Pentecostal Church*. There is no concern that the conduct, should it be repeated, will be found unlawful.

As such, this exemption does not apply, and Plaintiffs claims are moot.

ii. Plaintiffs cannot recover damages, as there has been no violation of federal law.

Plaintiffs correctly note that their claim for damages under the expired Proclamations do not become moot merely because the condition that created the harm no longer exists. *See, e.g.*, *Campbell v. Lamar Inst. Of Tech.*, 842 F.3d 375, 379 (5th Cir. 2016). Thus, they are still entitled to pursue their claim for damages. However, the Governor's Proclamations do not violate federal law. Therefore, Plaintiffs are not entitled to a recovery of damages.

The Supreme Court has always recognized that religious freedom does not act as an absolute shield against generally applicable laws. *See, e.g.*, *Reynolds v. United*

States, 98 U.S. 145 (1879) (holding that Congress could outlaw the practice of polygamy, though it could not outlaw the belief). Traditionally, under the Free Exercise Clause, "neutral generally applicable laws" are subject to rational basis review, even where they are applied to religious practice. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014) (citing *City of Boerne* v. *Flores*, 521 U. S. 507, 514 (1997)). Facial neutrality, however, is not determinative. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Conversely, a law burdening religious practice that is not neutral or not of general application must undergo strict scrutiny. *Id.* at 546.

Expressive association is treated similarly. Despite the importance of the right to association, restriction of the right of expressive association during a public health emergency such as a global pandemic is weighed under the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). There, the Court held that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members" and can restrict individual liberties. Such restrictions may only be overturned if the measure "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. 11, 27, 31 (1905) (citation omitted) (*reaff'd, S. Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020)).

Where similar limitations are placed on secular organizations, numerical limits on religious gatherings during the COVID-19 pandemic were upheld by the Supreme Court in *South Bay United Pentecostal Church*. There, the Court denied an

application by a church to enjoin California Governor Gavin Newsom's proclamation, which limited attendance at places of worship to "25% of building capacity or a maximum of 100 attendees" in an effort to limit the spread of COVID-19, under the Free Exercise Clause. *Id.* at 1613 (Roberts, J., concurring).

Chief Justice Roberts, concurring in the denial of application for injunctive relief, concluded that these guidelines appeared to be consistent with the Free Exercise Clause of the First Amendment, as "similar or more severe restrictions appli[ed] to comparable secular gatherings." *Id.* The Chief Justice highlighted the fact that the California Order only exempts or treats more leniently "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 1613. This is consistent with the growing consensus of courts across the country who have held that where laws or proclamations issued during the pandemic are neutrally applied, or where religious gatherings are given favored treatment, there is no First Amendment Violation.[5]

Governor Edwards's Proclamations have always treated comparable secular

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[5] *See, e.g. Elim Romanian Pentecostal Church v. Prtizker*, 962 F.3d 341, (7th Cir. 2020) (citing *Jacobson* in upholding an executive order that limited the size of public assemblies, including religious services, against a free exercise challenge and explaining that courts do not evaluate orders issued in response to public-health emergences by the usual standard); *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 U.S. Dist. LEXIS 80289, at *25 (E.D. Va. May 1, 2020) (denying a TRO on the grounds that the Virginia's governor's order banning all gatherings of more than ten individuals was facially neutral); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 U.S. Dist. LEXIS 81962, at *20 (D. Me. May 9, 2020) ("[I]n this free exercise analysis, the question is not whether any secular entity faces fewer restrictions than any religious one" but whether *comparable* secular entities do.).

institutions similarly to comparable religious institutions. In the earliest days of the pandemic, the only businesses or individuals who were treated more leniently than religious organizations were essential workers and businesses, such as healthcare workers and grocery stores. With every restriction on places of worship, identical or more stringent restrictions have been placed on similarly situated secular businesses. Indeed, religious organizations have often been privileged over similar secular businesses. This is demonstrated most recently under Proclamation No. 117 JBE 2020, which places most jurisdictions in Louisiana in Phase 3 of "Resilient Louisiana."[6] Section 2(D)(4) entitled "Churches and other faith-based organizations" states that, so long as an establishment does not exceed 75% of its total occupancy and adheres to social distancing between households, services may be held indoors. Further, churches are explicitly excluded from Proclamation No. 117 JBE 2020's Section 2(E), which limits crowd sizes to a maximum of 250 people. Multiple versions of the Proclamations which restrict social gatherings thus far, including the versions challenged by Plaintiffs, have classified "travel to and from places of worship" as an essential activity, thereby implying that it is permissible under the order to visit churches, and by extension, that churches may continue to conduct worship services, albeit not at full capacity, while other businesses were required to remain closed.

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[6] Resilient Louisiana is a state commission charged with examining Louisiana's economy amid the COVID-19 pandemic and making recommendations for more resilient business-related activities and commerce in the coming months. *See Resilient Louisiana Commission*, LA. ECON. DEV., https://guides.libraries.uc.edu/c.php?g=222561&p=1472886 (last visited Nov. 4, 2020). It is used as shorthand for economic recovery from COVID-19. *See, e.g.* La. Exec. Dep't, Proclamation No. 117 JBE 2020 (Sept. 11, 2020).

(Doc. 1-3 at p. 8).

To the extent that Plaintiffs argue that *any* restrictions on their right to gather violate the U.S. Constitution, they are clearly incorrect. *See, Jacobson*, 197 U.S. at 29 (1905). Even the dissent in *South Bay United Pentecostal Church* highlighted the fact that the plaintiffs were "willing to abide by the State's rules that apply to comparable secular business, including the rules regarding social distancing and hygiene" favorably. *Id.* at 1614 (Kavanaugh, J., dissenting). As an alternative to the discrimination between secular and religious organizations that the Dissent believed existed, Justice Kavanaugh argued that "the State could insist that the congregants adhere to social-distancing and other health requirements." *Id.* It is important to note that Justice Kavanaugh did not opine on whether the state should permit the church to worship in person with no restrictions at all.

As such, no federal statute or constitutional provision requires that this Court order the state of Louisiana to permit Plaintiffs to hold services at 100% capacity—the relief Plaintiffs request (Doc. 92 at p. 3)—in the middle of an evolving pandemic that has killed well over a 1,000,000 people world-wide, including 233,000 in the United States to date. *See, Covid World Map: Tracking the Global Outbreak*, N.Y. TIMES, (Nov. 4, 2020). The overwhelming consensus of courts throughout the United States reveals that reasonable restrictions on religious gatherings comply with Constitutional standards.

Because there has been no violation of federal law, Plaintiffs harms under the Proclamations survive constitutional review. Thus, Plaintiffs' claim for damages are

dismissed.

C. State Law Claims

As there is no federal question jurisdiction, this Court declines to exercise supplemental jurisdiction over any State law claims, and thus dismisses this case.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that Leave to Oppose Defendants' Motions to Dismiss is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motions to Dismiss are **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's claims against Defendants John Bel Edwards, Roger Corcoran, and Sid Gautreaux are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over any state law claims.

A separate judgment will be issued.

Baton Rouge, Louisiana, this 10th day of November, 2020

JUDGE BRIAN A. JACKSON
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA