

No. 21-1153

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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LIGHTHOUSE FELLOWSHIP CHURCH,

Plaintiff–Appellant

v.

RALPH NORTHAM,

in his official capacity as Governor of the Commonwealth of Virginia,

Defendant–Appellee

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On Appeal from the United States District Court  
for the Eastern District of Virginia

In Case No. 2:20-cv-00204 before The Honorable Arenda L. Wright Allen

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**PLAINTIFF–APPELLANT’S OPENING BRIEF**

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**DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1(a), Appellant, Lighthouse Fellowship Church is a subsidiary of Living Hope Ministries of the Eastern Shore, Inc., a non-profit corporation incorporated under the laws of the State of Maryland and hereby states that it does not issue stock and that no publicly held corporation owns 10% or more of its stock.

Dated: April 12, 2021

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## JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 because it is from the district court's order dismissing Plaintiff's Verified Complaint, entered January 27, 2021. (Joint Appendix ("JA") 010.) Plaintiff–Appellant, Lighthouse Fellowship Church ("Lighthouse"), timely filed its Notice of Appeal the on, February 4, 2021. (JA386.) The district court had jurisdiction over the proceedings below pursuant to 28 U.S.C. §§ 1331, 1343, and 1367. (JA016-017.)

## ISSUES PRESENTED FOR REVIEW

Since March 23, 2020 (**385 days ago**), the Governor has imposed, amended, re-imposed, modified, extended, and continued discriminatory restrictions on Lighthouse's religious worship services while exempting myriad nonreligious gatherings or providing them with more favorable restrictions. At the outset of COVID-19, Lighthouse brought its claims challenging the unconstitutional restrictions imposed by the Governor's Orders, which – though ever-changing – have continued unabated for over an entire year. The First Amendment prohibits the discriminatory regime under which the Governor has operated for 385 days. Indeed, **“even in a pandemic, the Constitution cannot be put away and forgotten.”** *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*Catholic Diocese*) (emphasis added).

The Supreme Court’s decisions in *Catholic Diocese, South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021), *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507 (U.S. Apr. 9, 2021), and the decisions of the circuit courts post-*Catholic Diocese*, all compel a single conclusion: **the Governor’s discriminatory restrictions on Lighthouse’s religious worship services violate the First Amendment.** As the Ninth Circuit recently held, *Catholic Diocese* “represented a seismic shift in Free Exercise law, and compels the result in this case.” *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) (emphasis added). And when two Ninth Circuit panels refused to follow *Catholic Diocese*, Justice Gorsuch expressed the Supreme Court’s frustrations: “Today’s orders should have been needless; **the lower courts in these cases should have followed the extensive guidance this Court already gave.**” *South Bay*, 141 S. Ct. at 719 (Gorsuch, J., statement) (emphasis added). Though for some courts, the First Amendment was seemingly placed on “a holiday during this pandemic, **it cannot become a sabbatical.** . . . [C]ourts must resume applying the Free Exercise Clause.” *Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) (emphasis added). Just three days before the filing of this brief, the Supreme Court – yet again – expressed exasperation with the lower courts not following its extensive guidance in COVID-

19 litigation concerning religious worship: **“This is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise . . . It is unsurprising that such litigants are entitled to relief.”** *Tandon v. Newsom*, 2021 WL 1328507, \*2 (emphasis added).

The conclusion here is simple: **discriminatory restrictions imposed on religious services but not on other nonreligious gatherings of like kind are plainly unconstitutional.** *See, e.g., Catholic Diocese*, 141 S. Ct. at 65 (enjoining New York’s discriminatory 10 and 25-person caps on religious worship services); *South Bay*, 141 S. Ct. 716 (enjoining California’s total prohibition on religious worship services); *Harvest Rock*, 2021 WL 406257 at \*1 (same); *Tanden*, 2021 WL 1328507, \*2 (enjoining California’s discriminatory restrictions on religious worship); *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (enjoining Nevada’s 50-person cap on religious worship services); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App’x 317 (9th Cir. 2020) (same); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d. Cir. 2020) (enjoining New York’s discriminatory 10 and 25-person caps on religious worship services); *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814, \*17 (9th Cir. Jan. 22, 2021) (enjoining California’s 100 and 200-person caps on religious worship services); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (enjoining California’s 100 and 200-person caps on religious worship services).

Since the November 25 decision in *Catholic Diocese*, the Supreme Court has vacated **every order** presented to it upholding discriminatory restrictions on places of worship. *See, e.g., Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (granting petition for certiorari, vacating lower court’s denials of injunctive relief, and remanding for consideration in light of *Catholic Diocese*); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same); *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021) (calling the Ninth Circuit’s refusal to follow *South Bay* and *Catholic Diocese* clearly “erroneous”).

Despite the rising tide of this inescapable precedent, the district court entered an order wholly unique to itself, holding – contrary to Supreme Court precedent – that Lighthouse’s claims against the Governor were barred by the Eleventh Amendment. (JA370.) In each of the above-cited cases, the Supreme Court was presented with virtually identical challenges to virtually identical restrictions on religious worship services imposed by – like here – executive orders the Governors of varying States. Yet, neither the Supreme Court nor any lower ever hinted that the Governors could not be sued Eleventh Amendment barred an action for declaratory or injunctive relief against a governor who issued an unconstitutional COVID order.

The issues presented for review are:

(1) Whether the district court erred in holding – contrary to the Supreme Court’s precedent in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), that temporary changes to enduring and constantly evolving COVID-19 restrictions on religious worship services continue to present live and ongoing controversies – that the Governor was immune from suit because there was no ongoing violation of federal law which would permit Lighthouse to bring its federal constitutional claims for prospective relief against the Governor.

(2) Whether the district court erred in holding that the Governor was immune from Lighthouse’s claims because the Governor has no special relationship to the challenged Executive Orders that only he has the authority to issue, only he can modify, alter, or amend, and that the Constitution and statutory laws of Virginia explicitly empower the Governor to enforce.

(3) Whether the district court erred in holding that the Governor was absolutely immune from any claims under the Constitution of Virginia or the Virginia Religious Freedom Restoration Act, for which Lighthouse sought only prospective, noninstitutional relief, despite those claims being brought under the *pendente lite* jurisdiction of the district court and arising out of the same transactions, occurrences, and common nucleus of operative facts as those of Lighthouse’s federal claims.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

#### A. The Governor Has Constitutional And Statutory Authority To Issue, Amend, Alter, And Enforce His Executive Orders.

Under the Constitution of Virginia, “[t]he chief executive power of the Commonwealth shall be vested in a Governor.” Va. Const. Art. V, §1. Under that same provision, the Governor is not only tasked with “faithfully execut[ing] the laws,” and in the very section he purports to exercise his authority to issue the Orders at all, grants him **enforcement** authority over the Orders, **particularly in times of emergency**. See Va. Const. Art. V, §7 (“The Governor . . . shall have the power to . . . **enforce** the execution of the laws.” (emphasis added)).

The Governor also has explicit and unquestioned proximity to and responsibility for his Orders under the Virginia Code. During times of a declared emergency, the Virginia Code makes the Governor the “Director of Emergency Management,” and requires him to “take such action from time to time as is necessary.” Va. Code §44-146.17. In that statutory grant of authority, the Governor is responsible for ensuring that the provisions of the Emergency Operations Plan are enforced and effectuated. *Id.* The Governor is empowered to delegate enforcement authority, to take all measures necessary to aid in the Commonwealth’s response to the declared emergency, and to direct state and local law enforcement and emergency agencies to coordinate the response to the declared emergency with the

Commonwealth's emergency plans, which only he controls as the Director of Emergency Management. Va. Code §44-146.17.

Additionally, the Governor is granted the “exercise of emergency measures” and given the power to “implement emergency mitigation, preparedness, response and recovery actions.” Va. Code §44-146.17. “Emergency measures,” as defined in the preceding section of the same Virginia Code, means “the preparation for **and the carrying out of functions**,” including “firefighting services, **police** services, medical and health services” and many other enforcement mechanisms. Va. Code §44-146.16 (emphasis added).

**B. The Governor's Discriminatory Restrictions on Religious Worship Services and Exemptions for Similar Non-Religious Entities and Activities.**

Governor Northam has issued and amended a series of executive orders and pronouncements in response to COVID-19 (the “Orders”), extensively restricting when, where, and how Virginians may exercise their liberties, including gathering for religious worship according to conscience, while exempting myriad businesses and non-religious activities from gathering restrictions. That discriminatory regime has continued for **385 days**, since March 2020, *inter alia*, the following:

- Executive **Order 51** declares a state of emergency in Virginia in response to COVID-19. (JA062). On May 26 the Governor extended the emergency

declaration indefinitely,<sup>1</sup> and Virginia remains under a continued state of emergency to this day.<sup>2</sup>

- Executive **Order 53 prohibits** “all public and private in person **gatherings of more than 10 individuals** . . . as further clarified in Executive Order 55,” and closes all indoor food and beverage service, and all “recreational and entertainment businesses.” (JA064.) But Order 53 **exempts from closure or any numerical limitations all “Essential retail businesses,”** including “Grocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products,” “department stores with grocery or pharmacy operations,” “Home improvement, hardware, building material, and building supply retailers,” “Beer, wine, and liquor stores,” and “gas stations and convenience stores,” and **also exempts** “business operations offering professional rather than retail services” such as law firms, accounting firms, and other professional services. (JA065-066.) Order

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<sup>1</sup> See *Executive Order Am. No. Fifty-One* (May 26, 2020), [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-51-AMENDED-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-51-AMENDED-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf). The Court may take judicial notice of information contained on the Virginia Governor’s official website as such public information is “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).

<sup>2</sup> See *Fourth Amended Executive Order No. 72* (March 23, 2021), [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-72-FOURTH-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Easing-of-Commonsense-Surge-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-72-FOURTH-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Easing-of-Commonsense-Surge-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).

53 requires that all open businesses “adhere to social distancing recommendations [and] enhanced sanitizing practices,” but only “**to the extent possible.**” (JA066. (emphasis added).)

- Executive **Order 55** is a stay-at-home order that cooperates with Order 53, requiring all individuals to “remain at their place of residence,” except to obtain “food, beverages, goods, or services as permitted in [Order 53],” or for the many other exempt purposes enumerated in Order 55, such as “[t]raveling to and from one’s residence, place of worship, or work.” (JA068.) But Order 55 also makes explicit that the 10-person gathering limit of Order 53 applies to **religious** worship services (“parties, celebrations, **religious**, or other social events” (emphasis added)), and does not apply to “the operation of businesses not required to close to the public under [Order 53].” (JA069.)

Despite exempting at least **14 expansive categories of businesses from the numerical gathering limit**, the Governor issued a Faith Communities Guidance Document (the “Worship Guidance”) reiterating that religious worship services are strictly capped at 10 people. (JA073.) (“Places of worship that conduct in-person **services must limit gatherings to 10 people**, to comply with the statewide 10-person ban.” (emphasis added).) As to “parking lot” or “drive-in” services, the Worship Guidance made clear that every person in attendance must remain in a vehicle. (JA073.)

**C. The Governor’s Discriminatory Restrictions on Lighthouse’s Own Activities in the Same Building.**

Order 55’s list of activities exempted from its travel ban include, *inter alia*, “[s]eeking . . . essential social services,” “[t]raveling to and from one’s residence, place of worship, or work,” and “[v]olunteering with organizations that provide charitable or social services.” (JA068-069.). Thus, Order 55 effectively expands the activities exempt from Order 53’s gathering limits by specifying that religious, charitable, or social organizations providing access to essential social services, such as feeding the hungry, clothing the naked, counseling the afflicted, or housing the homeless, are exempt from the Orders’ 10-person gathering limit. (JA069.).

Lighthouse is a small congregation without the resources or equipment to broadcast its worship services online or conduct parking lot or drive-in services. (JA013.) Many of the members it serves are recovering drug addicts, former prostitutes, and others trying to put their lives together, who likewise do not have the resources to watch worship services over the Internet. (JA013.) As a practical matter, Lighthouse is their only family. (JA013.) Under Orders 53 and 55, Lighthouse’s pastor, its members, and others are permitted to meet together at Lighthouse’s facility as volunteers, in unlimited numbers, to provide the “essential social services” and other “charitable and social services” that Lighthouse provides on a daily basis, such as food, shelter, and counseling, for an unlimited number of persons in need. **So, Lighthouse’s worship services are strictly limited to 10 or fewer people, but**

**Lighthouse can provide non-religious services in the same church building— food, shelter, and other social services (including counseling)—without numerical limitation if the meeting is not a religious gathering or worship.**

Indeed, the Orders expressly exclude such non-religious activities from the Governor's 10-person gathering restriction. (JA069.).

**D. Enforcement of the Governor's Orders.**

The Governor's Orders were actually enforced against Lighthouse's pastor, Kevin Wilson, and enforcement has been threatened against the church's entire membership. (JA022.). On April 5, 2020, the Town of Chincoteague Police targeted Lighthouse for investigation, entered the church unannounced, prior to any worship service, and demanded compliance with the Governor's 10-person gathering ban. (JA20-022.). After Lighthouse conducted its worship service, with 16 people present in its church building rated for 293, Chincoteague Police officers issued a criminal citation and summons to Pastor Wilson for holding a worship service in violation of the Governor's Orders. (JA021.). The officers informed Lighthouse that holding a religious worship service on the upcoming Easter Sunday with more than 10 people present would result in criminal citations for all persons present. (JA022.). Pastor Wilson was forced to endure criminal prosecution for the exercise of his sincerely held religious beliefs of gathering for religious worship services with his

congregation, but was successful in obtaining a *nolle prosequi* from the Commonwealth Attorney for Accomack County.

For the April 5 worship service that lead to Pastor Wilson's criminal citation, Lighthouse executed stringent social distancing and personal hygiene protocols, including extensive and enhanced sanitizing of common surfaces in Lighthouse's building prior to the service, and requiring attendees to remain at least six feet apart and use hand sanitizer prior to entering and during movement inside Lighthouse's building. (JA022--023.). The 16 people present during the service represented approximately 7% of the church's seating capacity of 225, and only 5% of its overall occupancy limit of 293. (JA023.). Lighthouse's social distancing, personal hygiene, and enhanced sanitizing practices complied with all of the recommended practices for "essential" and "non-essential" businesses that are permitted to operate under Orders 53 and 55 with more than 10 people present, and Lighthouse plans to continue such practices for all worship services held during the COVID-19 period. (JA023.).

## **II. PROCEDURAL HISTORY AND THE DISTRICT COURT'S ORDER.**

Lighthouse commenced this action on April 24, 2020, by filing its Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Damages. (JA010.). Lighthouse also filed a motion for temporary restraining order (TRO) and preliminary injunction, seeking to enjoin the continued enforcement of the Governor's Orders prohibiting religious worship

services. (JA130.). The same day, the district court denied the TRO on the docket and advised a memorandum opinion would follow. (JA004.). Instead, on May 1, the district court entered a written Order denying both the TRO and preliminary injunction. (JA161.). Lighthouse noticed its appeal the same day. (JA194.) This Court subsequently dismissed that appeal as moot, and the Governor moved to dismiss Lighthouse's claims below. (JA321.) On January 27, 2021, the district court granted the Governor's motion to dismiss holding that all of Lighthouse's claims were barred by the Eleventh Amendment. (JA363.) Lighthouse appealed. (JA386.)

### **SUMMARY OF THE ARGUMENT**

The district courts decision is erroneous because the Governor has the requisite special connection to his Executive Orders (that only he can issue, amend, alter, extend, and supplement) and represent an ongoing violation of the First Amendment. The Supreme Court has held numerous times that such executive orders violate the First Amendment and must be enjoined. In not one single COVID-19 litigation against Governors for violating the rights of religious adherent to gather for religious worship services has the any court held that such actions are barred by the Eleventh Amendment. The district court's opinion stands by itself in holding to the contrary and should be reversed.

## STANDARD OF REVIEW

The district court's decision was based solely on Fed. R. Civ. P. 12(b)(1), and "[d]ismissal of an action under Rule 12(b)(1) is a matter of law reviewed *de novo*." *Robb v. United States*, 80 F.3d 884, 887 (4th Cir. 1996). The district court's decision arises under the various doctrines of Eleventh Amendment sovereign immunity, *inter alia Ex Parte Young*, 209 U.S. 123 (1908). (JA363.) "The existence of sovereign immunity is a question of law that we review *de novo*." *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002). Likewise, this Court "review[s] *de novo* a district court's legal determination of whether *Ex Parte Young* relief is available." *Id.* (quoting *CSX Transp., Inc. v. Bd. of Pub. Works of W. Va.*, 138 F.3d 537, 541 (4th Cir. 1998)).

## LEGAL ARGUMENT

### **I. THE ELEVENTH AMENDMENT PROVIDES NO REFUGE OR IMMUNITY FOR THE GOVERNOR AGAINST LIGHTHOUSE'S CLAIMS SEEKING PROSPECTIVE RELIEF AGAINST THE GOVERNOR'S PLAINLY UNCONSTITUTIONAL EXECUTIVE ORDERS DISCRIMINATORILY RESTRICTING RELIGIOUS WORSHIP.**

The district court held that the Eleventh Amendment cloaked the Governor with immunity from Lighthouse's claims because there was no ongoing violation of federal law from which to enjoin him and because he purportedly has no special relationship to Executive Orders that only he can issue, amend, continue, extend, and reissue. (JA371-381, MTD Order at 8-18.) The district court erred at every turn.

In fact, there are five independent reasons the district court's Eleventh Amendment analysis is plainly in error: (1) *Ex Parte Young*, 209 U.S. 123 (1908) completely removes the cloak of immunity from the Governor when he acts in contravention to federal law; (2) Lighthouse's Verified Complaint sought prospective relief against the Governor's ongoing violations of federal law, plainly satisfying the *Ex Parte Young*'s straightforward inquiry; (3) the Governor's unconstitutional regime is ongoing to this day; (4) the Governor has a special relationship to his own executive orders; and (5) the Supreme Court has long since laid to rest any claim that governors are immune from actions challenging the unconstitutional and discriminatory restrictions placed on religious worship services during COVID-19. The district court's decision must be reversed.

**A. *Ex Parte Young* Plainly Establishes That The Governor's Fictional Cloak Of Immunity Is Removed When He Acts In Contravention To Federal Law.**

Over a century ago, the Supreme Court recognized that suits against State officials in their official capacities are not barred by the Eleventh Amendment when the relief sought is entirely prospective. *Ex Parte Young*, 209 U.S. 123, 159 (1908). The rationale for this conclusion is simple: when a State official acts in contravention of the United States Constitution or federal law, he is stripped of his cloak of immunity. *Id.* Were it otherwise, the Supremacy Clause would be a dead letter. Such was not the case in 1908, and it is not the case over a century later. Indeed,

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, **the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.** It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. **If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.**

*Id.* at 159-60 (emphasis added). *See also Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (same); *Sch. Bd. City of Charlottesville v. Allen*, 240 F.2d 59, 63 (4th Cir. 1956) (same).

In fact, Eleventh Amendment immunity is inapplicable where there is ““action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves **or the manner in which they are exercised are constitutionally void.**” *Little v. Morton*, 445 F.3d 1207, 1213 (4th Cir. 1971) (quoting *Dugan v. Rank*, 372 U.S. 609, 620-21 (1963)) (emphasis added). The Supreme Court’s “cases make it clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is

unconstitutional.” *Fl. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982). “Specifically, a state official ceases to represent the state when it attempts to use state power in violation of the Constitution’ Such officials thus ‘may be enjoined from such unconstitutional action—sued and stopped.” *Wright v. North Carolina*, 787 F.3d 256, 261 (4th Cir. 2015) (cleaned up). **Simply put, “[a] State officer acting in violation of federal law thus loses ‘the cloak of State immunity.’”** *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (quoting *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 292 (4th Cir. 2001)) (emphasis added).

Lighthouse’s Verified Complaint was based primarily upon the Governor’s flagrant violation of the United States Constitution and his overt hostility towards religious worship services. (JA032-040, V. Compl. ¶¶84-146.) And, the relief Lighthouse sought below requested the district court to do nothing more than require the Governor to comply with the demands of the First Amendment. (JA133, dkt. 3, Motion for Temporary Restraining Order and Preliminary Injunction, at 4.) Because the Governor’s COVID-19 regime of discriminatory restrictions on religious worship services plainly violates the First Amendment (*see infra* Section I.D), *Ex Parte Young* plainly removes the cloak of immunity from the Governor, and the district court’s conclusion to the contrary is plainly in error. Indeed, *Ex Parte Young*’s entire holding is contingent upon “permit[ing] federal courts to vindicate federal rights.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105

(1984). The district court’s decision below failed to recognize that “**when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes.**” *Stewart*, 563 U.S. at 255 (emphasis added). Its failure to recognize this plain truth was erroneous.

**B. Lighthouse’s Verified Complaint Seeks Prospective Relief Against The Governor’s Ongoing Violations Of Federal Law, And Thus Satisfies *Ex Parte Young*’s Straightforward Inquiry.**

The district court held that Lighthouse’s claims were barred by the Eleventh Amendment because it was not seeking prospective relief against any ongoing violation of federal law. (JA370-373, MTD Order at 8-11.) This is plainly in error. The familiar *Ex parte Young* exception to Eleventh Amendment sovereign immunity “allows suits against state officers for **prospective** equitable relief from ongoing violations of federal law.” *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001) (emphasis added). Indeed, “[i]n determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a **straightforward inquiry** into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Md., Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (emphasis added); *Franks v. Ross*, 313 F.3d 184, 197 (4th Cir. 2002) (same). Lighthouse easily satisfies each of this “straightforward inquiry.”

First, the gravamen of Lighthouse’s Verified Complaint makes it abundantly clear that its primary causes of action relate to ongoing violations of **federal** constitutional liberties. (JA016, V. Compl. ¶16 (“Lighthouse prays unto this Court that it not permit the cherished and fundamental liberties enshrined in the Constitution to be another tragic casualty of COVID-19.”); (*id.*, ¶19 (“This actions arises under the First and Fourteenth Amendments to the United States Constitution.”)); (*id.*, ¶¶84-100 (alleging that the Governor’s COVID-19 restrictions on religious worship violate the Free Exercise Clause of the First Amendment)); (*id.*, ¶¶101-115 (Lighthouse’s right to peaceably assemble under the First Amendment)); (*id.*, ¶¶116-130 (Lighthouse’s right to free speech under the First Amendment)); (*id.*, ¶¶131-146 (Establishment Clause of the First Amendment)); (*id.*, ¶¶147-157 (Equal Protection Clause of the Fourteenth Amendment)); (*id.*, ¶¶158-165 (Guarantee Clause of Article IV, §4 of the United States Constitution)); (*id.*, ¶¶204-216 (alleging that the Governor’s COVID-19 restrictions on religious worship violate the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc)).)

In fact, Lighthouse’s Motion for Temporary Restraining Order and Preliminary Injunction, as well as its Motion for Injunction Pending Appeal focused primarily on federal constitutional issues. (JA130-149, dkt. 3, Motion for Temporary Restraining Order and Preliminary Injunction, at 1-19); (JA200, dkt.18, Motion for Injunction Pending Appeal, at ¶¶8-9.) And, in its previous appeal, Lighthouse

focused almost exclusively on its federal constitutional claims under the First Amendment. (*See*, dkt. 15, Opening Brief at 8-51, 53-55.)

As to the second part of the straightforward inquiry, there can be no dispute that the primary relief sought by Lighthouse in this action is entirely prospective. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965) (“injunctive relief looks to the future” and is thus prospective); *Antrican v. Odom*, 290 F.3d 178, 185-86 (4th Cir. 2002) (injunctions and temporary restraining orders constitute prospective injunctive relief satisfying *Ex Parte Young*); *Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275, 292 (4th Cir. 2001) (“the Eleventh Amendment does not preclude individuals from bringing suit against State officials for prospective declaratory and injunctive relief designed to remedy ongoing violations of federal law”). Here, Lighthouse’s Verified Complaint prays for a TRO, preliminary and permanent injunctions, and declaratory relief. All such requests are prospective and easily satisfy the straightforward inquiry relevant to Lighthouse’s claims against the Governor’s Orders, and thus are not barred by the Eleventh Amendment. (JA021-022, V.Compl. at 45-49). Indeed, if Lighthouse’s claims for entirely prospective relief were somehow barred by the Eleventh Amendment, as the district court held (JA370-373, MTD Order at 8-11), then *Ex Parte Young* would necessarily represent some constitutional anomaly unknown to the law. Such is not the case.

**C. The District Court’s Decision That There Was No Ongoing Violation Of Federal Law Because The Governor Amended The Challenged Orders Ignores The Well-Plead Allegations Of Lighthouse’s Verified Complaint, Which Challenged The Entire Regime Of The Governor’s Orders.**

The district court concluded that Lighthouse’s claims challenged executive actions that were no longer in effect and thus “[t]here is no ongoing violation of federal law in this case.” (JA372, MTD Order at 10.) This, too, is plainly erroneous. To be sure, Lighthouse’s Verified Complaint discusses the regime established by Executive Orders 53 and 55, because those were the operative provisions at the time the Verified Complaint was filed. (JA017-020, V. Compl. ¶¶24-38.) However, the district court based its decision on the fact that Lighthouse had not amended its complaint (JA373, MTD Order at 11 n.2) and ignored the fact that Lighthouse not only challenged the orders in effect at the time of the filing of filing, but also **challenged and prayed for relief against all further iterations, amendments, and revisions to those Orders.** (JA045, V. Compl. at 45 (seeking a temporary restraining order against “the GATHERING ORDERS or any other order to the extent any such order prohibits religious worship services at Lighthouse” (emphasis added)); (*id.* at 46 (seeking preliminary and permanent injunction against “any further limitations or restrictions” and “any future modification, revision, or amendment of the GATHERING ORDERS or similar legal directive” (emphasis added).) Despite these allegations and requests for relief in Lighthouse’s

Verified Complaint, the district court held that there was no ongoing violation of federal law. This is plainly incorrect. Lighthouse challenged the entire regime of the Governor's COVID-19 restrictions, and plainly alleged an ongoing violation of federal law. The district court's decision to the contrary was plainly in error.

**D. The District Court's Decision Is Directly Contrary To The Binding Decisions Of The Supreme Court Holding That Temporary Modifications Of Covid-19 Restrictions On Religious Worship Do Not Otherwise Eliminate Ongoing Constitutional Violations.**

The district court not only ignored the fact that Lighthouse challenged the entire regime under which the Governor has been imposing discriminatory restrictions on religious worship for over a year, *supra* Section I.C, but also ignored the proper legal analysis for an ongoing violation of federal law. The ongoing violation analysis for purposes of *Ex Parte Young* closely mirrors that of a mootness inquiry, and the Supreme Court's recent decisions confirm the district court's error.

**1. *Ex Parte Young*'s Ongoing Violation Analysis Mirrors a Mootness Analysis.**

The district court held that there was no ongoing violation of federal law because – during the time Lighthouse was litigating its preliminary injunction claims – the Governor modified his Executive Orders and restrictions. (JA372, MTD Order at 10 (“The Orders on which Plaintiff bases its Complaint are no longer in effect. They have been replaced by Executive Orders 67 and 72.”).) The district court's analysis is flawed because even if Lighthouse had not challenged the Governor's

entire regime, which it did, the mootness analysis concerning voluntary cessation mirrors that of the ongoing violation analysis under *Ex Parte Young*.

Numerous courts have held that the proper inquiry in determining whether there is an ongoing violation of federal law requires a court to undertake a voluntary cessation analysis to determine whether *Ex Parte Young*'s exception is applicable. *See, e.g., K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013); *Nat'l Ass'n of Bds. Of Pharm. v. Bd. of Regents of Univ. Sys. of Ga.*, 633 F.3d 1297, 1308-09 (11th Cir. 2011) (holding that a determination of whether a claim presents an ongoing violation of federal law for purposes of the 11th Amendment mirrors mootness analysis); *Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (“[A]t the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy ... *Ex parte Young*”); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1262-63 n.92 (M.D. Ala. 2017) (“**the mootness argument and the ongoing-violation argument . . . overlap**” (emphasis added)). This Court, too, has suggested (albeit in a different context) that an ongoing-violation requirement closely resembles the mootness analysis. *See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 697 (4th Cir. 1989) (analyzing whether a claim presents an ongoing violation under mootness analysis).

In *K.P.*, the Fifth Circuit was presented with an argument virtually identical to that of the district court here: “[T]he Board Parties contend that the Providers cannot demonstrate the ‘ongoing’ violation of federal law that *Ex Parte Young* requires. The gist of their argument seems to be that with the panel’s medical review now complete, any violation of federal law is no longer ongoing.” 729 F.3d at 439. (*Cf.* JA372, MTD Order at 10.) The Fifth Circuit squarely rejected that contention. Using the mootness inquiry, the court held that “[t]heir theory, if accepted, would work an end-run around the voluntary-cessation exception to mootness where a state actor is involved. And in any event . . . the threat of unlimited liability is ongoing because the Board has expressly relied on Act 825 before.” 729 F.3d at 439 (emphasis added).

The same is true here. In fact, in the record below, the Governor flatly admitted that previous restrictions could be reimposed at any time. Indeed, the Governor admits that – **at any moment** – prior versions of his gathering restrictions may be reinstated at his leisure. (JA330, dkt. 50, MTD at 10 (“To be sure, in the unfortunate event that Virginia should experience any future spikes in COVID-19 cases, the Governor and other public health officials might consider what, if any, further social-distancing measures are necessary.”)). As such, the Governor plainly admits that he believes his authority to reimpose the challenged restrictions and ongoing regime of executive action remains constitutional and unrestricted by

anything. This boundless exercise of never ceasing executive action curtailing the exercise of Virginians' liberties at a whim unquestionably keeps a controversy alive and constitutes an ongoing violation. Indeed, **“a threat of recurrence sufficient to render a claim not moot should also be sufficient for the ongoing-violation requirement.”** *Braggs*, 257 F. Supp. 3d at 1262 n.92 (emphasis added).

**2. The Supreme Court's *Catholic Diocese* Decision, as well as a Host of Circuit Precedent, Demonstrates that the Governor's Modification of His Otherwise Unconstitutional Regime Remains an Ongoing Violation of Federal Law.**

**a. *Catholic Diocese* compels a finding of an ongoing violation.**

Because the analysis of whether an ongoing violation resembles a voluntary cessation/mootness inquiry, the Supreme Court's recent decisions in *Catholic Diocese* and *Tandon* compel a finding that the district court erred in holding that there was no ongoing violation of federal law here. As *Catholic Diocese* held, the temporary change in restrictions is plainly insufficient to overcome a mootness inquiry. 141 S. Ct. at 68. Here, much like in *Catholic Diocese*, the district court contended that a change in the numerical restrictions on religious gatherings removed the ongoing violation and mooted a claim. (JA372, MTD Order at 10.) There, much like the district court below, the dissenting Justices requested that the Court stay its hand because the Governor of New York had changed his restrictions. 141 S. Ct. at 68 (“The dissenting opinions argue that we should withhold relief

because the relevant circumstances have changed [because] the Governor reclassified the areas in question.”). Additionally, the dissenting Justices argued – much like here – that plaintiffs could simply “renew their requests if this recent reclassification is reversed.” *Id.*

But, fatally for the district court’s findings below, the majority unequivocally rejected that proposition. Indeed, the majority held that “[t]here is no justification for that proposed course of action,” and that “[i]t is clear the matter is not moot.” *Id.* (emphasis added). The reason for this was simple: “injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified.” *Id.* Much like here, *Catholic Diocese* noted that “[t]he Governor regularly changes the classification of particular areas without prior notice,” which the Court noted would harm the applicants “before judicial relief can be obtained.” *Id.* Put simply, the Court held that given the ever-changing nature of COVID-19 restrictions on religious worship services, “**there is no reason why [Churches] should bear the risk of suffering further irreparable harm in the event of another reclassification.**” *Id.* at 68-69 (emphasis added).

Justice Gorsuch further elaborated on the reason the issue was not moot despite the reclassification:

Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are “yellow

zones” and the challenged restrictions on worship associated with “orange” and “red zones” do not apply. **So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.**

**To my mind, this reply only advances the case for intervention.** It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. **So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the “off” switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.**

*Id.* at 71-72 (Gorsuch, J., concurring) (emphasis added). *See also Tandon*, 2021 WL 1328507, \*1 (“even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case”).

As is equally true here, “[i]t is easy enough to say it would be a small thing to require the parties to refile their applications later.” *Id.* at 72. “But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. **Nor may we discount the burden on the faithful who have lived for months under New York’s unconstitutional regime unable to attend religious services.**” *Id.* (emphasis added). It was for that reason Justice Gorsuch thought a finding of mootness would impose the precise harm from

which the congregations were seeking relief. Justice Kavanaugh elaborated even further, succinctly stating that “[t]here is no good reason to delay issuance of the injunctions” despite the changed restrictions.” *Id.* at 74 (Kavanaugh, J., concurring) (emphasis added).

If the ongoing violation inquiry mirrors that of a mootness inquiry, which it does (*supra* Section I.C.2), then the binding decision of the Supreme Court in *Catholic Diocese* compels a finding that the Governor’s temporary changes in his ever-changing restrictions represent ongoing violations of federal law.

**b. The decisions of numerous other courts in the COVID-19 context also compel a finding of an ongoing violation.**

Numerous other courts have likewise concluded that a temporary change in COVID restrictions issued, amended, modified, or rescinded by a governor is insufficient to moot a claim, and thus also compel a finding that the district court erred in holding that no ongoing violation existed here. *See, e.g., Bayley’s Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App’x 317 (9th Cir. 2020); *Augudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020). *See also Roman Catholic Archbishop of Wash. v. Bowser*, No. 20-cv-03625 (TNM), 2021 WL 1146399 (D.D.C. Mar. 25, 2021).

In *Bayley's Campground*, as here, plaintiffs requested injunctive relief against the Governor's COVID-19 executive orders, which were subsequently superseded by a different order. 985 F.3d at 157 (“The plaintiffs contend that, even though EO 34 has been superseded by EO 57, their request for injunctive relief from the self-quarantine requirement is not moot because it pertains to an executive action that the Governor voluntarily rescinded and could unilaterally reimpose. . . . **We agree.**” (emphasis added)). “The Governor has not denied that a spike in the spread of the virus in Maine could lead her to impose a self-quarantine requirement just as strict as EO 34’s.” *Id.* The same is true here. (JA330, dkt. 50, MTD at 10 (noting the Governor reserved the right to re-impose restrictions on religious worship services should spikes occur).) As the First Circuit stated, the Governor must make it “**absolutely clear**” that the conduct will not recur. *Bayley's Campground*, 985 F.3d at 157 (emphasis added). Explicitly reserving the right to reinstitute restrictions at the gubernatorial whim is the polar opposite of making it absolutely clear that she will never return to her old ways. And the reason for this high standard is simple: a finding of mootness in the instant case “would run the risk of effectively insulating from judicial review an allegedly overly broad executive emergency response, so long as it is iteratively imposed for only relatively brief periods of time.” *Id.* “Accordingly, we conclude that the plaintiff’s request for injunctive relief from EO 34 . . . is not moot.” *Id.*

In *Calvary Chapel Dayton Valley*, the Ninth Circuit encountered a restriction on religious worship services that was no longer in effect. 982 F.3d at 1230 n.1 (“Although the Directive is no longer in effect, we held in an order denying the State’s motion to dismiss that Calvary Chapel’s case is not moot.”). The reasoning for the holding applies squarely here: “Governor Sisolak could restore the Directive’s restrictions just as easily as he replaced them, or impose even more severe restrictions.” *Id.* And, also like here, the Ninth Circuit noted that the frequency and numerosity of the Governor’s executive actions counseled in favor of a finding that the matter was not moot. *Id.* (“In fact, Governor Sisolak has issued numerous emergency directives [and] all subsequent directives are subject to the same principles outlined in this opinion, as many of the issues we identify in the Directive persist.”). *See also Calvary Chapel Lone Mountain*, 831 F. App’x at 318 n.2 (holding that although the challenged restriction was “no longer in effect,” “Calvary Chapel’s case is not moot”).

In *Agudath Israel*, the Governor of New York likewise argued that a change in the challenged restrictions mooted appellant’s claims for relief. 983 F.3d at 631 n.16. In fact, just like the district court below (JA330, MTD Order at 10), the Governor of New York argued that “the case was moot due to his modification of zone boundaries to remove the applicants’ churches and synagogues from [the challenged restrictions].” 983 F.3d at 631. Noting the Supreme Court’s decision in

*Catholic Diocese*, 141 S. Ct. at 68, the Second Circuit stated that “[t]he Supreme Court squarely rejected that argument, as do we.” *Id.* (emphasis added).

The Seventh Circuit’s decision in *Elim* is particularly instructive. In *Elim*, the court noted “that the Governor could restore the approach of Executive Order 2020-32 as easily as he replaced it—and that the Restore Illinois plan (May 5, 2020) reserves the option of doing just this if conditions deteriorate.” 962 F.3d at 344 The Seventh Circuit noted that because the Restore Illinois Plan and the executive order scheme permitted the Governor to reimpose previous restrictions, the action was not moot. *Id.* at 345 (“The list of criteria for moving back to Phase 2 (that is, replacing the current rules with older ones) shows that it is not absolutely clear that the terms of Executive Order 2020-32 will never be restored.”). “**It follows that the dispute is not moot and that we must address the merits of plaintiff’s challenge to Executive Order 2020-32 even though it is no longer in effect.**” *Id.* (emphasis added).

In *Roman Catholic Archbishop*, the district court noted that “[f]acing similar circumstances, the Supreme Court and lower courts have concluded that challenges to worship restrictions were not moot.” 2021 WL 1146399, at \*4. And, because the temporary change in restrictions provided no assurances that religious adherents would not again be subject to discriminatory restrictions on religious worship, the district court held that the matter was not moot. *Id.*

As these cases demonstrate, in the COVID-19 era of discriminatory restrictions on religious worship services, the temporary changes to governor-imposed edicts across the country have met with near unanimous conclusions that such revisions do not moot a claim. And, because “**a threat of recurrence sufficient to render a claim not moot should also be sufficient for the ongoing-violation requirement,**” *Braggs*, 257 F. Supp. 3d at 1262 n.92 (emphasis added), the district court’s failure to recognize the Supreme Court’s binding decision and the universal precedent of other federal courts demonstrates its clear error in finding that there was no ongoing violation of federal law in the instant matter.

**3. Lighthouse’s Allegation that the Regime Constitutes an Ongoing Violation is Plainly Sufficient to Withstand Dismissal.**

The district court’s conclusion that there was no ongoing violation of federal law also fails for a separate and independent reason: its decision came at the pleading stage – **not on a merits determination**. As is well known, the district court is required to take all facts as true and draw all reasonable inferences in the plaintiff’s favor for purposes of a motion to dismiss, even for purposes of Eleventh Amendment analysis. *Willner v. Dimon*, 849 F.3d 93, 100 (4th Cir. 2017) (“When reviewing a district court’s grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), we accept as true all factual allegations set forth in the complaint.”); *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2017) (same).

And, for purposes of this Court’s de novo review of Lighthouse’s invocation of *Ex Parte Young*, the **allegation** of an ongoing violation of federal law is sufficient as a matter of law. *See, e.g., Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (“**An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction.**” (emphasis added)); *Verizon Md., Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 646 (2002) (“the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim . . . An *allegation* of an ongoing violation of federal law is ordinarily sufficient” (quoting *Coeur d’Alene*, 521 U.S. at 281) (emphasis original)); *D.T.M. ex rel. McCartney v. Cansler*, 382 F. App’x 334, 338 (4th Cir. 2010) (“to fall within the *Ex parte Young* exception, **it is sufficient for Plaintiff’s suit to allege an ongoing violation of federal law, actually proving such an ongoing violation is unnecessary**” (bold emphasis added)); *South Carolina Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (same); *Summit Med. Assoc., P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999) (same).

Thus, where Lighthouse has plainly alleged that the Governor’s Orders imposing discriminatory restrictions on religious worship services violate the First and Fourteenth Amendments (JA032-041, V. Compl. ¶¶84-157), that allegation alone is sufficient to invoke the *Ex Parte Young* exception to the Governor’s purported immunity under the Eleventh Amendment. The district court’s

impermissible adventure into the merits of Lighthouse's allegations (JA373, MTD Order at 11 & n.2) rather than accepting as sufficient the allegation of an ongoing violation of federal law was plainly in error.

**D. The District Court's Decision That The Governor Did Not Have A Special Relationship To His Own Executive Orders, That Only He Can Issue, Amend, Re-Issue, And Continue Is Plainly In Error.**

The district court concluded that even if there was an ongoing violation of federal law – which there is – the Governor would still be immune under the Eleventh Amendment because he has no connection to the Executive Orders that only he can issue. (JA374, MTD Order at 12.) This, too, is erroneous.

**1. The Governor's Proximity to and Responsibility for the Challenged Orders Creates the Requisite Special Relationship.**

The district court erroneously packaged Lighthouse's argument as one asserting merely that the Governor's general duty to enforce the law provides he requisite special connection (JA374-377, MTD Order at 12-15), and concluded that such a general duty was insufficient to invoke *Ex Parte Young* against the Governor. (*Id.*). The district court erred on both the facts and the law.

First, there is no question that "*Ex Parte Young* requires a special relation between the state officer sued and the challenged statute to avoid the Eleventh Amendment's bar," *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001), and that a general duty to enforce the laws is insufficient. *South Carolina*

*Wildlife Fed'n*, 549 F.3d at 333. However, the proper analysis for determining whether such a special relationship exists is wholly absent from the district court's decision. In fact, the district court wholly ignored this Court's precedents concerning the appropriate connection and opted instead to merely analyze the general propositions as sufficient to dismiss Lighthouse's claims. This is reversible error.

As this Court has made clear, the Governor's connection to the challenged orders **“need not be qualitatively special; rather, ‘special relation’ under *Ex parte Young* has served as a measure of proximity to and responsibility for the challenged state action.”** *S.C. Wildlife Fed'n*, 549 F.3d at 333 (bold emphasis added). *See also Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015) (contrasting the insufficient “general duty to enforce the law of the state” with the requisite “*proximity to and responsibility for the challenged state action* (emphasis original)); *McBurney v. Cuccinelli*, 616 F.3d 393, 399-400 (4th Cir. 2010) (same). *See also Farm Labor Organizing Comm. v. Stein*, No. 1:17-cv-1037, 2018 WL 3999638, \*7 (M.D.N.C. Aug. 21, 2018) (same); *Ansley v. Warren*, No. 1:16-cv-00054, 2016 WL 5213937, \*5 (W.D.N.C. Sept. 20, 2016) (same).

In *South Carolina Wildlife Federation*, this Court looked to a number of factors to determine whether the named government official had the requisite proximity to and responsibility for the challenged action. 549 F.3d at 332-33. It noted that “[a] court may look to state law to determine whether the requisite connection

exists,” whether the named defendant has “supervisory authority” over the challenged action, whether the named defendant was “deeply involved” in the challenged action, whether the named defendant had “responsibility for carrying out its policies,” and whether the named defendant represented the challenged policies in public. *Id.* at 333. Similarly, in *Ansley*, the court looked to whether the named defendant had “supervisory control” over the challenged action and whether the named defendant was the “head of the agency” responsible for the challenged action. 2016 WL 5213937, at \*7. In both instances, because those elements were present, the courts concluded that the named defendant was the proper official for purposes of *Ex Parte Young*.

So, too, here. Looking to the laws of the Commonwealth, as *S.C. Wildlife Federation* instructs, the Governor plainly has the requisite proximity to and responsibility for the challenged Executive Orders. Indeed, only the Governor can issue such Executive Orders so he necessarily has the requisite proximity to and responsibility for such orders. Virginia law clearly provides the Governor with the requisite connection to subject him to suit under *Ex Parte Young* for his Executive Orders. Under the Constitution of Virginia, “[t]he chief executive power of the Commonwealth shall be vested in a Governor.” Va. Const. Art. V, §1. Under that same provision, the Governor is not only tasked with “faithfully execut[ing] the laws,” which some courts have found too general to avoid Eleventh Amendment

problems, but, **in the very section under which he purports to exercise his authority to issue the Orders at all**, the Constitution of Virginia specifically grants him **enforcement** authority over the Orders, **particularly in times of emergency**. *See* Va. Const. Art. V, §7 (“The Governor . . . shall have the power to . . . **enforce** the execution of the laws.” (emphasis added)). Thus, the Governor’s authority to enforce his own Orders is plainly contemplated, and indeed **mandated**, by the Constitution of Virginia, including by virtue of the specific provisions under which he claims authority to impose his onerous restrictions on Lighthouse’s religious gatherings.

This district court found that Article V’s grant of authority to the Governor was merely a general grant of authority and thus insufficient to satisfy the requisite connection to his Executive Orders. (JA377, MTD Order at 15.) This district court’s previous contention that Article V makes no mention of “times of emergency” (JA308, dkt. 49, Order Denying Motion for Injunction Pending Appeal, at 8 n.2) was the sole basis for its determination that the Constitution of Virginia merely gives the Governor general authority. That conclusion is plainly in error. Article V, §7 specifically states that the Governor “shall have power to embody such forces to **repel invasion, suppress insurrection, and enforce the execution of the laws.**” Va. Const. Art. V, §7 (emphasis added). If times of “invasion,” whether by visible forces of hostile actors or invisible forces of a purported pandemic, and times of

“insurrection” do not constitute “times of emergency,” then it is hard to see what would count.

The Constitution of Virginia specifically gives the Governor responsibility for and proximity to his Executive Orders and removes the cloak of immunity that the Eleventh Amendment might otherwise provide in different situations. The Governor cannot use the provisions of Article V that he likes as a sword to impose his seemingly endless orders unconstitutionally restricting religious worship services, while at the same time ignoring the other provisions of Article V that he does not like as a shield to claim no responsibility for his Orders. The exercise of his constitutional authority under Article V has consequences, and those are plainly outlined in his authority and mandate to enforce the orders he issues under that emergency section. At minimum, the Constitution of Virginia gives the Governor specific “*responsibility for*” his Executive Orders, *S.C. Wildlife Fed’n*, 549 F.3d at 333 (emphasis original), as he is the only official tasked with issuing such Executive Orders in times of emergency, and plainly puts him in close “*proximity to*” his challenged Orders, *id.*, as again the Constitution places him as the official responsible for execution of the laws in times of emergency.

Moreover, if the Virginia Constitution’s provisions were not alone sufficient to demonstrate the Governor’s authority to enforce his own executive orders – which it is – the Governor has explicit and unquestioned proximity to and responsibility for

his Orders under the Virginia Code. Indeed, under Virginia statutory law concerning the Governor's purported authority during times of a declared emergency, the Virginia Code makes the Governor the "Director of Emergency Management," and requires him to "take such action from time to time as is necessary." Va. Code §44-146.17. In that statutory grant of authority, the Governor is responsible for ensuring that the provisions of the Emergency Operations Plan are enforced and effectuated. *Id.* The Governor is empowered to delegate enforcement authority, to take all measures necessary to aid in the Commonwealth's response to the declared emergency, and to direct state and local law enforcement and emergency agencies to coordinate the response to the declared emergency with the Commonwealth's emergency plans, which only he controls as the Director of Emergency Management. Va. Code §44-146.17.

Additionally, the Governor is granted the "exercise of emergency measures" and given the power to "implement emergency mitigation, preparedness, response and recovery actions." Va. Code §44-146.17. "Emergency measures," as defined in the preceding section of the same Virginia Code, means "the preparation for **and the carrying out of functions,**" including "firefighting services, **police** services, medical and health services" and many other enforcement mechanisms. Va. Code §44-146.16 (emphasis added).

This is plainly not some general capacity to enforce the law, but a specific grant of authority to enforce the laws (or Executive Orders that only the Governor can make) during a public health emergency. Indeed, Va. Code §44-146.17 plainly vest the Governor with “supervisory authority” over his Executive Orders by making him the director of emergency management. *S.C. Wildlife Fed’n*, 549 F.3d at 333. Virginia Code §44-146.17 plainly requires him to be “deeply involved” in the Executive Orders and grants him “responsibility for carrying out its policies.” *Wildlife Fed’n*, 549 F.3d at 333.

Indeed, in such times as these, it appears while the Governor is governing by the “flick of a pen,” *Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring), the Governor has contended that he – alone – has the authority to enforce and execute his Orders, except when it is convenient in litigation to say otherwise and attempt to invoke the cloak of immunity he might otherwise have if the Constitution of Virginia and Virginia Code said differently. Lighthouse has challenged the Governor’s specific Executive Orders that only he can issue, that violate the First Amendment, and that are solely the responsibility of the Governor. If that does not suffice to establish the necessary proximity to and responsibility for the challenged actions, then nothing ever could. *See, e.g., Duke Energy Trading & Marketing, LLC v. Davis*, 267 F.3d 1042, 1052-54 (9th Cir. 2001) (“seeking an injunction against a specific

executive order in an area preempted by federal law . . . falls squarely under *Ex Parte Young*”). The district court’s conclusion to the contrary is plainly in error.

**2. The Article III Courts to Address Sovereign Immunity in the Context of COVID-19 Executive Orders Have Concluded that Governors Possess the Necessary Relationship.**

In similar challenges to virtually identical restrictions during COVID-19, federal courts have rejected similar claims that a governor is immune from suit over executive orders that only a governor could issue. *See, e.g., First Baptist Church v. Kelly*, 457 F. Supp. 3d 1072 (D. Kan. 2020) (holding Eleventh Amendment did not bar similar COVID-19 claims against the Governor of Kansas because the plaintiff church sought only prospective relief and the governor had statutory and constitutional authority to enforce laws during a public health emergency); *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651 (E.D.N.C. 2020) (holding governor had sufficient “proximity to and responsibility for the challenged” executive orders restricting religious worship to subject him to suit under *Ex Parte Young* (citing *S.C. Wildlife Fed’n*, 549 F.3d at 333)); *Heights Apartments, LLC v. Walz*, No. 20-CV-2051, 2020 WL 7828818, \*6 (D. Minn. Dec. 31, 2020) (holding governor’s sole authority to issue and extend executive orders relating to COVID-19 provided “special relationship: sufficient to invoke *Ex Parte Young* exception).

In *First Baptist Church*, subsequent to the initial temporary restraining order, the Kansas Governor requested modification of that order, claiming that the Eleventh

Amendment barred such claims. 457 F. Supp. 3d at 1076. The district court rejected that argument. Despite the Kansas Governor's similar arguments to those at issue here, the district court found that "it is not necessary that a duty to enforce [the challenged law] be declared in the same act which is to be enforced." *Id.* at 1077. There, as here, the Kansas Constitution charged the Governor with not only the general duty to see that the law is "faithfully executed," but also granted him "express constitutional responsibility for '*enforcement* of the laws.'" *Id.* at 1080 (italics original). Not only that, but, as here, the relevant emergency declaration statutes in Kansas gave him broad authority to see that executive orders and emergency declarations were enforced. *Id.* There, as here, the Kansas Governor was entitled to ensure that state and local emergency and law enforcement agencies cooperated in the response, to take action which may be necessary for the effectiveness of an emergency response plan, to delegate authority to enforce the laws, and to issue executive action concerning the declared emergency. *Id.* All these things, which are equally present under Virginia law here, led the district court to conclude that "the governor has sufficient connection with the enforcement of the relevant executive order to satisfy [*Ex Parte Young*]." *Id.* at 1081.

Indeed, "[t]he fact that the state officer by virtue of his office, has *some* connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not

material **so long as it exists.**” *Ex Parte Young*, 209 U.S. at 157 (emphasis added).

The district court’s conclusion is an outlier among COVID-19 executive order cases, is clearly erroneous, and should be reversed.

**E. The Supreme Court’s Numerous Decisions From Enforcing Unconstitutional Restrictions and Prohibitions On Religious Worship, As Well As Those Of Countless Circuit Courts Addressing Identical Issues Enjoining Governors Across The Country, Demonstrates The District Court’s Error In Finding That The Governor Is Immune From Lighthouse’s Claims.**

The Supreme Court has held numerous times that discriminatory COVID-19 restrictions imposed on religious worship services by governor’s executive orders violate the First Amendment and must be enjoined. *See, e.g., Catholic Diocese*, 141 at 68 (enjoining **Governor of New York** from enforcing his executive orders restricting religious worship services); *Tandon*, 2021 WL 1328507 (enjoining **Governor of California** from enforcing unconstitutional restrictions on in-home worship); *South Bay*, 141 S. Ct. 716 (enjoining **Governor of California** from enforcing his executive orders restricting religious worship services); *Harvest Rock Church*, 2021 WL 406257, \*1 (enjoining **Governor of California** from enforcing his executive orders restricting religious worship services); *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (vacating denial of injunctive relief against **Governor of California**); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same for **Governor of Colorado**); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same for **Governor**

**of New Jersey**); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same for **Governor of California**); *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021) (same for **Governor of California**). There has not been a single instance where the Supreme Court has hesitated to reach this result because of a purported Eleventh Amendment problem. In fact, **neither the Supreme Court, district court, nor court of appeals even mentioned the Eleventh Amendment in any of these cases**. And every case has named the Governor who issued the COVID executive orders.

The silence of the Supreme Court and every court to address COVID executive orders issued by a governor on the Eleventh Amendment is deafening and fatal to the district court's erroneous conclusions. The decision below is the only one in the nation, and **there have been over 90 cases challenging restrictions on religious worship at the Supreme Court, Courts of Appeal, and the district courts**. Indeed, "a federal court **must** examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (emphasis added). *See also Charley's Taxi Radio Dispatch v. SIDA of Hi*, 810 F.2d 869, 873 n.2 (9th Cir. 1987) ("the effect of the Eleventh Amendment must be considered *sua sponte* by federal courts"). Because the Court has an independent duty to assess its jurisdiction *sua sponte*, its complete silence on the Eleventh Amendment necessarily

implicates a total lack of import for these challenges to executive orders restricting religious worship. The Supreme Court's decisions specifically enjoining **governors** from imposing unconstitutional restrictions plainly contemplates that such officials are not cloaked in any immunity whatsoever.

The same is true in the mountain of circuit court decisions to address COVID-19 decision on religious worship services and a Governor's executive order. *See, e.g., Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) (enjoining Governor of Nevada's from enforcing 50-person cap on religious worship services); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020) (same); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d. Cir. 2020) (enjoining Governor of New York's religious worship services); *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814, \*17 (9th Cir. Jan. 22, 2021) (enjoining Governor of California's restrictions on religious worship services); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (enjoining Governor of California's restrictions on religious worship services); *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021) (discussing Governor of Maine's executive orders); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (adjudicating merits of claims against Governor of Illinois's executive orders); *Augudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020) (enjoining Governor of New York's executive order against religious worship

services); *Calvary Chapel of Bangor v. Mills*, 984 F.3d 21 (1st Cir. 2020) (adjudicating merits of claim against Governor of Maine's executive orders restricting religious worship services).

All of these courts have an identical obligation to review the Eleventh Amendment issues *sua sponte*, yet not a single circuit held that it was prohibited from reaching the merits of the claims against the Governors of these various states because of the Eleventh Amendment. The notion that the district court was somehow the only body to notice such a substantial constitutional problem with bringing claims against the executive orders of Governors throughout the Nation is absurd. The district court did not stumble upon a unique constitutional problem that every other jurist in the country seems to have overlooked. It simply reached a conclusion so out of step with the appropriate analysis that every other court to consider virtually identical challenges has undertaken. The Eleventh Amendment simply provides no refuge of immunity for the Governor's gross and ongoing violations of the First Amendment. The district court's determination is erroneous and must be reversed.

## **II. THE SUPREME COURT'S *PENNHURST* DECISION PROVIDES NO REFUGE FOR THE GOVERNOR FROM LIGHTHOUSE'S CLAIMS SEEKING PROSPECTIVE RELIEF UNDER STATE LAW.**

The district court concluded that Lighthouse could not seek injunctive relief on its pendent state law claims because they, too, were barred by the Eleventh Amendment under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106

(1984). (JA380, MTD Order at 18.) *Pennhurst*, however, does not extend as far as the district court would have it reach, particularly where – as here – Lighthouse is not seeking the kind of institutional, affirmative, and intrusive relief at issue in *Pennhurst*. But, to the extent *Pennhurst* might bar Lighthouse from asserting its pendent claims against the Governor, that decision is itself in error, inconsistent with broader Supreme Court precedent, and should be revisited.<sup>3</sup>

**A. The Supreme Court’s Decision In *Pennhurst* Does Not Bar Lighthouse’s Claims For Prospective Relief Against The Governor’s Preventing Him From Exceeding His Authority.**

The district court took an expansive reading of *Pennhurst* claiming that it stands for the proposition that “suits against state officers for violations of state law are absolutely barred by Eleventh Amendment immunity.” (JA380, MTD Order at 18.) The answer, however, is not so cut and dried. As *Pennhurst* itself recognized, **“the difference between permissible and impermissible relief ‘will not in many instances be that between day and night.’”** *Pennhurst*, 465 U.S. at 105 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1974)) (emphasis added). As is true in over Eleventh Amendment context, under *Pennhurst*, the relevant inquiry is still whether “a suit against state officials” is really a suit against the state where the “state is the real, substantial party in interest.” *Id.* at 101. And, the proper inquiry for that determination is whether the state is the real party in interest rests on the “general

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<sup>3</sup> See *infra* Section II.B and specifically note 3.

criterion for determining when a suit is in fact against the sovereign is **the effect of the relief sought.**” *Id.* at 107 (bold emphasis added).

It is this effect that differentiates *Pennhurst* from the case at bar. In *Pennhurst*, though styled as a case against State officials for prospective relief, the **effect** of the requested relief was anything but prospective. Indeed, the relief sought and ordered “**in effect was that a major state institution be closed and smaller state institutions be created and expansively funded.**” *Id.* at 107 (emphasis added). That is hardly the type of prospective injunctive relief typically requested in suits against State officials, and can hardly be thought prospective at all since it required the expenditure of public funds as a result of the relief ordered. As the Court recognized, the relief ordered could only be carried out if the State – itself – expended its funding to comply. *Id.* at 107 n.17 (“The point is that the courts below did not have jurisdiction because **the relief ordered so plainly ran against the State.** No one questions that the petitioners in operating *Pennhurst* were acting in their official capacity. Nor can it be questioned that the judgments under review commanded action that could be taken by petitioners only in their official capacity—and, **of course, only if the State provided the necessary funding.**” (emphasis added)). As a result, *Pennhurst* concluded, “all the relief ordered by the court below was **institutional and official in character,**” *id.* at 109 (emphasis added), rather than against an individual state official who “was stripped of his official or representative

character” and therefore disrobed of his “immunity from responsibility.” *Ex Parte Young*, 209 U.S. at 160. Because of its official character and direct effect on the State treasury, *Pennhurst* held that the Eleventh Amendment barred such relief when based on alleged violations of state law.

Such institutional, official, monetary, systematic, and affirmative relief is directly contrary to the wholly prospective relief seeking to enjoin the Governor from enforcing unconstitutional Executive Orders in direct contravention to the laws of the Commonwealth. *Cf. Pennhurst*, 465 U.S. at 912-13 (“none of the Eleventh Amendment cases can be said to hold that injunctive relief could be ordered against State official for **failing** to carry out their duties under State statutes” (emphasis added)). But, Lighthouse is not seeking injunctive relief against the Governor for failing to carry out any duty imposed upon him by the Commonwealth, but rather seeking to enjoin the exercise of unlawful executive decrees. And, this critical distinction is what differentiates *Pennhurst* from the case at bar. Indeed, as the Supreme Court has plainly held, “**the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional.**” *Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982) (emphasis added).

As the Fifth Circuit has recognized,

*Pennhurst* stands for the proposition that the Eleventh Amendment bars suit not, as the district court found here, where the state official's actions are alleged to be *unauthorized* by state law but where state law imposes an affirmative duty upon the official, and it is that duty that provides the basis for the injunctive relief sought.

*Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.3d 962, 966 n.5 (5th Cir. 1993) (emphasis original). *See also K.P. v. LeBlanc*, 729 F.3d 427, 440 (5th Cir. 2013) (noting that *Pennhurst* does not bar an action against a state official where it seeks to **prevent the official from taking unauthorized action**, but rather bars suits seeking an injunction based on some affirmative duty of state law). And, here, Lighthouse has plainly alleged that the Governor has issued discriminatory and unconstitutional restrictions on religious worship services that violate not only the First Amendment, but the laws of the Commonwealth as well. (JA032-053, V. Compl. ¶¶84-146, 166-203, 217-234.)

Thus, an injunction that merely seeks to restrain the Governor from engaging in unauthorized action is not the type of institutional intrusion into the affairs of the State with which *Pennhurst* is concerned. Indeed, the doctrine arising from *Pennhurst* suggests that its holding “extends only to the sort of injunctive relief sought in *Pennhurst*, *i.e.*, far-reaching, ‘affirmative’ reliefs that requires state officials to conform to a detailed regulatory system as prescribed by state law” and then imposing affirmative duties of expending state funds to comply with the ordered relief. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1498 n.9 (1st Cir. 1987). Indeed, “**the**

sort of ‘prohibitive’ injunction sought here does not rise to the level of interference that triggers sovereign immunity.” *Id.* (emphasis added). Here, because Lighthouse merely sought a prohibitive injunction, not the far-reaching, affirmative relief at issue in *Pennhurst*, the Eleventh Amendment does not bar its claims against the Governor as the district court held.

**B. To The Extent *Pennhurst* Does Prevent Lighthouse From Raising Pendent State Law Claims Under The Court’s Supplemental Jurisdiction, It Is In Error And Should Be Revisited And Overturned.**

To the extent that *Pennhurst* does compel a conclusion that Lighthouse cannot bring its state law claims under the district court’s pendent lite jurisdiction, that decision was wrongly decided and should be revisited.<sup>4</sup> There is no question that *Pennhurst* has been “roundly criticized.” *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 435 (6th Cir. 2000); *Costco Wholesale Corp. v. Hoen*, No. CO4-360P, 2004 WL 7339619, \*9 (W.D. Wash. Dec. 1, 2004) (“*Pennhurst* has been criticized

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<sup>4</sup> Should this Court accept the district court’s reading of *Pennhurst*, Lighthouse is cognizant of the fact that “only [the Supreme] Court can overrule one of its precedents,” *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983), and that “[e]ven were [this Court] to agree with [Appellants’] prognostication that it is only a matter of time before the Supreme Court overrules its precedent, [this Court] is not free to overrule or ignore the Supreme Court’s precedents.” *United States v. Cheek*, 415 F.3d 349, 352–53 (4th Cir. 2007). Nevertheless, Lighthouse includes this argument for preservation purposes. *See United States v. McLeod*, 808 F.3d 972, 974 (4th Cir. 2015) (recognizing the need to “rais[e] the argument only to preserve it for further review by the Supreme Court); *United States v. Anderson*, 317 F. App’x 313, 315 (4th Cir. 2008) (same)

because it ignores the interests of judicial economy that usually justifies supplemental jurisdiction”); *Butler v. Ohio St. Univ. Med. Ctr.*, No. 2:06-cv-1075, 2008 WL 11351363, \* (S.D. Ohio June 23, 2008) (same). *See also* George D. Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 Va. L. Rev. 343 (1985) (“The very little published analysis of *Pennhurst II* that has appeared to date suggests that the decision will play to almost universally hostile reviews.”)

And, the reason for this criticism is evident from the flawed results it produces. In cases, such as *Lighthouse*’s, “there is a matter arising from a common nucleus of operative facts that should be adjudicated with little difficulty,” and can be decided upon state law grounds. *McNeilus*, 226 F.3d at 435. And, deciding some matters on the state law grounds – such as *Lighthouse*’s Virginia Religious Freedom Restoration Act claims – would be entirely consistent with the long-established preference for constitutional avoidance. *See Norfolk Southern R. Co. v. City of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010) (noting the preference for the doctrine of constitutional avoidance where “federal courts strive to avoid rendering constitutional rulings unless absolutely necessary”). Adherence to that doctrine was the normal basis of operation for the Supreme Court prior to *Pennhurst*, where federal constitutional claims can be ignored along with any unnecessary sweeping

decisions when state law grounds exists for adjudicating the matter. *See, e.g., Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909). Unfortunately, “that path [appears] no longer available to lower federal appellate courts, because *Pennhurst* ‘overrul[ed] the entire history of *Siler/Ashwander* doctrine in cases where injunctive relief is requested against the state.’” *McNeilus*, 226 F.3d at 435 n.1.

As Justice Stevens noted in his dissent in *Pennhurst*,

a century and a half of this Court’s Eleventh Amendment jurisprudence has established the following. A suit alleging that the official had acted within his authority but in a manner contrary to state statutes was not barred because the Eleventh Amendment prohibits suits against States; **it does not bar suits against state officials for actions not permitted by the State under its own law. The sovereign could not and would not authorize its officers to violate its own law; hence an action against a state officer seeking redress for conduct not permitted by state law is a suit against the officer, not the sovereign.** *Ex parte Young* concluded in as explicit a fashion as possible that unconstitutional action by state officials is not action by the State even if it purports to be authorized by state law, *because the federal Constitution strikes down the state law shield*. In the tort cases, if the plaintiff proves his case, there is by definition no state-law defense to shield the defendant. Similarly, *when the state officer violates a state statute, the sovereign has by definition erected no shield against liability. These precedents make clear that there is no foundation for the contention that the majority embraces—that Ex parte Young authorizes injunctive relief against state officials only on the basis of federal law. To the contrary, Young is as clear as a bell: the Eleventh Amendment does not apply where there is no state-law shield. That simple principle should control this case.*

*Pennhurst*, 465 U.S. at 158-59 (1984) (Stevens, J., dissenting) (bold emphasis added). Justice Stevens was correct then, and his opinion remains correct today. To

the extent this Court believes *Pennhurst* precludes Lighthouse's pendente claims, that decision is an anathema, should be revisited, and overturned.

### **CONCLUSION**

For the foregoing reasons, the Governor is not immune from any of Lighthouse's claims, and the district court's decision should be reversed.

### **REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

Pursuant to Fed. R. App. P. 34(a) and 4th Cir. R. 34(a), Lighthouse respectfully requests that oral argument be permitted in this appeal because it would assist the Court in understanding and deciding the weighty constitutional issues presented by Governor Northam's COVID-19 executive orders, which impose unique and unprecedented restrictions on Lighthouse's rights to gather for religious worship in a time of uncertainty.

Respectfully submitted,

Dated: April 12, 2021

/s/ Daniel J. Schmid

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I hereby certify that on this 12th day of April, 2021, a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Daniel J. Schmid  
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