20-UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

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

NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs, Maryville Baptist Church, Inc. and Dr. Jack Roberts ("Plaintiffs"), by and through the undersigned counsel, hereby submit for this Court's consideration the United States Supreme Court's decision in *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507 (U.S. Apr. 9, 2021) (Exhibit A), the United States Supreme Court's decision in *South Bay United Pentecostal Church v. Newsom*, No. 20-746 (U.S. Apr. 27, 2021) (Exhibit B), and the United States District Court for the District of Columbia's decision in *Roman Catholic Archbishop of Washington v. Bowser*, No. 20-cv-03265, 2021 WL 1146399 (D.D.C. Mar. 25, 2021) (Exhibit C).

A. As is True Here, A Change in Restrictions Does Not Moot Plaintiffs' Claims Permanent Injunctive Relief Against The Governor.

As it has in the past, the Supreme Court made clear – yet again – that removal or modification of COVID restrictions on religious worship does not moot a claim for injunctive relief. (Exhibit A, "*Tandon* Slip. Op.," at 2.) The Supreme Court's *Tandon* decision demonstrates that the Governor's contention that his modification of restrictions removes any need for injunctive relief (dkt. 60, Governor's Brief on Mootness, at 7-14; dkt. 62, Governor's Response on Mootness, at 2-9) is plainly incorrect. Indeed, as the Supreme Court held:

> **[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot a case. And so long as the case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions.**

(*Tandon* Slip Op. at 2 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___ (2020)) (emphasis added).

This holding is relevant to Plaintiffs' contentions on pp. 4-15 of Plaintiffs' Brief Addressing Why the Case Is Not Moot (dkt. 61) and pp. 2-8 of Plaintiffs' Response to Governor Beshear's Brief on Issues of Mootness (dkt. 63). In particular, because the Governor has claimed continued authority to modify, extend, revise, and re-impose prior restrictions at whim in the past year, and did in fact do just that at many times (*see* dkt. 61 at 2-3), the Supreme Court's holding is of particular import here. It found that a case is not moot when "**officials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time**." (*Tandon* Slip Op. at 3 (emphasis added).)

The District of Columbia district court in *Roman Catholic Archbishop* reached an identical conclusion, that changes in restrictions do not moot otherwise valid claims for injunctive relief when the threat remains pending. (Exhibit C, *Roman Catholic Archbishop*, at 7-8.) Much like the Governor argues here (dkt. 60, at 7-14; dkt. 62, at 2-13), the District of Columbia argued that a reprieve from current restrictions on religious worship services mooted the Archbishop's request for a preliminary injunction. (Exhibit C, *Roman Catholic Archbishop* at 7-8.) The court squarely rejected that argument, noting that the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), compelled the contrary conclusion. (*Id.* at 7.) Indeed, noting that *Catholic Diocese* faced similar contentions regarding mootness, the district court held that "**the Supreme Court and lower courts have concluded that challenges to worship**

restrictions were not moot" despite changed circumstances. (*Id.* (emphasis added).) The district court concluded that the Ninth Circuit's decision in *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020) likewise compelled a finding that a change in religious worship restrictions does not moot a case when the plaintiff remains under a threat that the restrictions will be reclassified. (*Id.* at 8.)

Coupled with the fact that the Governor here only "rescinded" his blatantly unconstitutional restrictions when the Sixth Circuit and this Court both **enjoined** him from enforcing his restrictions, and given that the Governor continues his defense of his unconstitutional regime (*see* dkt. 61, at 10), this case is not moot.

B. Discriminatory Percentage Caps Imposed on Religious Worship Services Cannot Survive the Supreme Court's Precedent.

The Governor contends in the instant litigation that *Catholic Diocese* does not require injunctive relief against the Governor's discriminatory restrictions on religious worship services. (Dkt. 62, at 8-9.). As should this Court, the Supreme Court resoundingly rejected any contention that *Catholic Diocese* does not compel injunctive relief against discriminatory restrictions on religious worship services. In fact, the Supreme Court explicitly stated that it was clearly "erroneous" to refuse to follow the Court's prior holdings in similar COVID-19 religious cases. (*Tandon* Slip Op. at 1.)

The Court laid out a few general principles that all compel a preliminary injunction here.

1. Treating *Some* Secular Gatherings Less Favorably Or Equally Is Irrelevant.

The Court made clear that treating some nonreligious gatherings less favorably than religious gatherings is irrelevant if the government treats **any** nonreligious gatherings of like kind more favorably.

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, **whenever they treat *any* comparable secular activity more favorably than religious exercise**. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.

(*Tandon* Slip Op. at 1 (bold emphasis added) (cleaned up).)

The Supreme Court found that because California treated **some** gatherings more favorably than religious worship services, its restrictions were not neutral and violate the First Amendment. (*Tandon* Slip Op. at 3.) This holding is relevant to Plaintiffs' contentions throughout the instant litigation that the Governor's discriminatory treatment of Plaintiffs' religious worship services cannot withstand First Amendment scrutiny. (*See* Dkt. 1, Verified Complaint, at ¶¶90-145, and pp. 48-51.)

2. Comparability Is Defined By Risk Asserted By Government.

Tandon also established that comparability requires a comparison of risks, not comparison of why people gather. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. . . . **Comparability is concerned with the risks various activities pose, not the reasons why people gather**." (*Tandon* Slip Op. at 2 (emphasis added) (cleaned up).) This holding is relevant to Plaintiffs' requests for permanent injunctive relief. (Dkt. 1, Verified Complaint, at 48-51.)

3. The Government Must Demonstrate Why Precautions Allowed For Nonreligious Gatherings Cannot Work For Religious Gatherings.

The Court also made clear that to survive strict scrutiny and demonstrate that the regulations are narrowly tailored, the government "must do more than assert that certain risk factors 'are always present in worship, or always absent from the other secular activities' the

government may allow." (*Tandon* Slip Op. at 2 (quoting *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (Gorsuch, J., statement).)

> Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. **Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too**.

(*Tandon* Slip Op. at 2 (emphasis added).) Indeed, "[t]he State 'cannot assume the worst when people go to worship but assume the best when they go to work.'" (*Tandon* Slip Op. at 3 (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020).)

The district court in *Roman Catholic Archbishop* found similarly. There, the court enjoined the District of Columbia's restrictions, which imposed a 25% or 250-person cap on religious worship. (Exhibit C, *Roman Catholic Archbishop* at 23.) Specifically, because restrictions more favorable than 250-people or 25% have been employed in other jurisdictions, the court concluded that the District of Columbia had not deployed the least restrictive means. (*Id.* ("**[T]he regulations in other jurisdictions—especially in neighboring ones—make it harder for the District to meet its burden to show that the means chosen are the least restrictive**." (emphasis added)).) As the court made clear, discriminatory restrictions on religious worship "represent[] a fundamental misunderstanding of the government's role in crafting public health restrictions that infringe on constitutionally protected rights. **Broad brush strokes are fine for business regulations, but not for restricting the free exercise of religion**." (*Id.* at 26 (emphasis added).) Thus, "the Court finds that the 250-person cap and the 25 percent capacity limit . . . are not narrowly tailored." (*Id.*)

C. The Supreme Court's *Tandon* Decision Demonstrates Its Exasperation With Lower Courts Failing To Enjoin Discriminatory Restrictions On Religious Worship.

Finally, the Supreme Court's precedent in the COVID arena demands a permanent injunction here. And, for those lower courts that have refused to follow its clear roadmap, reversal is a certain end. As the Court held: "**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* Slip Op. at 4 (collecting cases).) And, because "California's Blueprint System contains myriad exceptions and accommodations for comparable activities," much like the Governor's scheme here, it failed strict scrutiny. (*Id.* at 4.)

Indeed, multiple failures to follow the Supreme Court's clear roadmap in the numerous decisions vacating and enjoining discriminatory COVID restrictions have been found clearly "erroneous." (Exhibit A, *Tandon* Slip Op. at 1 ("The Ninth Circuit's failure to grant an injunction pending appeal was erroneous."); (Exhibit C, *Roman Catholic Archbishop* at 11 n.5. ("[t]he Supreme Court confirmed as much in its recent grant of injunctive relief in *Gateway City Church v. Newsom*, where it explained that 'the Ninth Circuit's failure to grant relief was erroneous.'" (citing No. 20A138, 2020 WL 753575, at *1 (U.S. Feb. 26, 2021)).)

And, just yesterday, the Supreme Court yet again summarily reversed a lower court **for the sixth time** for its failure to follow its clear teachings. (*See* Exhibit B.) The conclusion is certain in this matter. The Governor's contentions concerning mootness and his contentions concerning the constitutionality of his blatantly unconstitutional restrictions have now been demonstrated as absurd.

Respectfully submitted,

/s/ Daniel J. Schmid
Mathew D. Staver*
Horatio G. Mihet*
Roger K. Gannam*
Daniel J. Schmid*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: court@lc.org
hmihet@lc.org
rgannam@lc.org
dschmid@lc.org

Attorneys for Plaintiffs

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2021, I caused a true and correct copy of t he foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Daniel J. Schmid
Daniel J. Schmid