No. 21-1153

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIGHTHOUSE FELLOWSHIP CHURCH,

Plaintiff–Appellant

v.

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

Defendant–Appellee

On Appeal from the United States District Court
for the Eastern District of Virginia
In Case No. 1:20-cv-00156 before The Honorable Arenda L. Wright Allen

REPLY BRIEF OF PLAINTIFF-APPELLANT

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiff-Appellant

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 that owns 10% or more of its stock.

Dated: July 2, 2021

/s/ Daniel J. Schmid
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

LEGAL ARGUMENT

I. LIGHTHOUSE'S CLAIMS ARE NOT MOOT, AND THE GOVERNOR'S ATTEMPTS TO EVADE REVIEW FAIL AS A MATTER OF LAW.

The Governor contends that Lighthouse's claims for relief fail as a matter of law because the challenged orders are no longer in effect. (Doc. 18-1, Brief of Appellee, "Appellee Br.," at 30-38.) This, too, was the district court's contention below. (JA372.) This argument has been rejected by the Supreme Court numerous times respecting the ever-changing COVID restrictions. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Whether viewed as an ongoing violation or a mootness contention,[1] the Governor fails to satisfy his demanding burden that the challenged restrictions will never be reinstated. The retention of authority to reinstate such unconstitutional restrictions precludes a finding of mootness. Further, there can be no dispute that Lighthouse's claims are not moot because the short duration of the Governor's challenged Orders are capable of repetition yet evading review. Lighthouse's claims for a permanent injunction and declaratory relief are not moot. Finally, Lighthouse's as-applied challenge to the Governor's Orders is not moot. As such, the district court's decision is in error and should be reversed.

---

[1] Though *Ex Parte Young* speaks in terms of an "ongoing violation of federal law," 209 U.S. 123, 159 (1908), as Lighthouse noted in its Opening Brief (doc. 13, "Opening Br.") that analysis mirrors the analysis Article III courts engage in for traditional mootness questions. (*See* Opening Br. at 23 (collecting cases).

A. The Supreme Court's *Tandon* Decision Laid Waste to the Governor's Attempt to Escape Judicial Scrutiny of His Unconstitutional Orders Because He Retains Authority to Reinstate His Prior Restrictions at Any Time.

In *Tandon*, the Supreme Court unequivocally declared that "**even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case."** *Tandon*, 141 S. Ct. at 1297 (emphasis added). The reasons for this is simple: "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner," *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (Gorsuch, J., statement). Indeed, "officials with a track record of moving the goalposts **retain authority to reinstate those heightened restrictions at any time**." *Tandon*, 141 S. Ct. at 1297 (emphasis added). **The Governor's retention of authority to reinstate his restrictions negates mootness** – despite temporarily modifying or suspending his unconstitutional regime. Litigants entitled to injunctive relief from unconstitutional restrictions on their cherished constitutional freedoms "**remain entitled to such relief where the applicants remain under a constant threat that government officials will use their power to reinstate the challenged restrictions**." *Id.* (emphasis added).

Here, though the Governor has modified, rescinded, changed, and amended his Executive Orders at a whim and has removed the original restrictions on

Lighthouse's religious worship services, there is nothing that prevents him from reinstating those restrictions at any time. The Governor cites to his most recent Executive Order Seventy-Nine and Order of Public Health Emergency Ten (Appellee Br. at 7 & n.2) for the proposition that all restrictions concerning gathering have been removed and thus there is nothing to enjoin here. (*Id.*) However, the Governor's new Executive Order, and the Frequently Asked Questions the Governor issued with it, demonstrate that he retains the authority to reinstate restrictions at any time. Indeed, under the question "Will this Order be changed," the Governor states:

> The Governor, in consultation with State Health Commissioner Oliver, may adjust this Order or issue new orders as needed, given the quickly-changing public health situation. **The Governor is keeping all options on the table, and should the health data demand fewer or more restrictions, he will put those into effect when necessary**.

Forward Virginia: Guidelines, *Frequently Asked Questions*, (May 28, 2021), https://www.virginia.gov/coronavirus/forwardvirginia/faq/ (last visited June 30, 2021) (emphasis added).[2]

Moreover, even assuming that the currently operative Executive Order Seventy-Nine and its accompanying guidance documents did not explicitly reserve

---

[2] This Court may take judicial notice of official government documents, such as the Governor's Executive Order Seventy-Nine and Order of Public Health Emergency Ten and its corresponding documentation. *See, e.g.*, *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) ("we may properly take judicial notice of matters of public record"); *Witthohn v. Fed. Ins. Co.*, 164 F. App'x 395, 397 (4th Cir. 2006) ("court may clearly take judicial notice of these public records").

the right to reinstate prior restrictions, which they do, the Governor has made it clear on the record below that he retains the authority – and the willingness to deploy it – to reinstate prior restrictions if he deems it necessary. (*See, e.g.*, JA330 ("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-distances measures are necessary**." (emphasis added)).) And, under this Court's binding precedent, this retention of authority is fatal to any contention that Lighthouse's claims are moot. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (holding that the "power to reassess [the challenged conduct] at any time" precludes a finding of mootness); *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018) ("[W]e have held that a defendant does not meet its burden of demonstrating mootness when it retains the authority to reassess the challenged policy at any time."). Thus, the Governor's explicit retention of authority to reassess and reinstate prior restrictions is fatal to his claims of mootness under this Court's binding precedent.

And, the Governor's public health officials (as well as those of federal and state officials throughout the country) are already raising significant concerns over the purported Delta variant of the coronavirus and its potential to impact the Commonwealth. The Governor's Department of Health states that the purported Delta variant "is believed to spread more easily and quickly than other variants" and

is "associate[ed] with more serious illness or death."[3] The Governor's State Vaccination Coordinator has warned that the Delta variant demonstrates that "although it may feel like it, **the pandemic is not over**" and that "the work is far from over."[4] In fact, the Governor's State Vaccination Coordinator has publicly stated that the Governor's "effort must continue" because he expects the Delta variant to cause "**another surge in disease**" late this summer or early fall.[5] The Governor's official continued: "So we are seeing the Delta variant here in Virginia and we are seeing it spread unrelated to travel. **And we can fully expect that we will see the Delta variant continue to probably double every week**."[6] Thus, when combined with the Governor's unequivocal statements that he is "keeping all options of the table" for if a surge in cases occurs, Forward Virginia: Guidelines, *Frequently Asked Questions*, (May 28, 2021),

---

[3] Virginia Department of Health, *Variants of the Virus that Causes COVID-19* (July 1, 2021), https://www.vdh.virginia.gov/coronavirus/variants/.

[4] Talya Cunningham, *Richmond health officials warn of Delta variant; 48 confirmed cases in Virginia* (June 29, 2021), https://www.wric.com/health/coronavirus/richmond-health-officials-warn-of-delta-variant-48-confirmed-cases-in-virginia/ (emphasis added).

[5] Dean Mirshahi, *Virginia's vaccine coordinator expects Delta variant to cause 'another surge in disease'* (June 29, 2021), https://www.wric.com/news/local-news/richmond/watch-mayor-stoney-to-address-richmonds-covid-19-response-promote-vaccination-events/ (emphasis added).

[6] *Id.* (emphasis added).

https://www.virginia.gov/coronavirus/forwardvirginia/faq/ (last visited June 30, 2021), which his own official now claim may be already occurring, there is little doubt that Lighthouse's claims are not moot.

B. For Purposes of *Ex Parte Young* or Traditional Mootness, the Governor Has Not and Cannot Satisfy His Demanding Burden to Demonstrate that it is "Absolutely Clear" the Restrictions Will Not Be Reinstated.

1. The Governor Bears the Formidable Burden to Demonstrate that it is "Absolutely Clear" that the Restrictions will not be Reinstated.

The Supreme Court and every Court of Appeals have found changes in COVID-19 orders do not result in mootness. (*see* Opening Br. at 43-47). The Governor's **temporary** shift from the discriminatory restrictions on religious gatherings and worship—which he has vigorously defended in this Court and at the district court below—is not enough to remove his conduct from review. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("**It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.**" (emphasis added)).

> **[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued**. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that **a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear**

> **the allegedly wrongful behavior could not reasonably be expected to recur**.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (emphasis added) (internal quotation marks and citation omitted). *See also Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (government has burden to demonstrate that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *Porter v. Clarke*, 852 F.3d 358, 360 (4th Cir. 2017) (same). And, as this Court has noted, "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014).

2. The Governor Has Not and Cannot Satisfy His Demanding Burden.

Applying this "formidable burden," the Supreme Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that a state governor's "voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 137 S. Ct. 2012, 2019 n.1 (2017) (cleaned up). Here, the Governor "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his] policy," *id.*, of imposing unique and discriminatory numerical limits and restrictions on religious worship services, because his change

in policy is neither permanent nor irrevocable. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983).

In his Brief, the Governor specifically declines to state that it "absolutely clear" that he will not reinstate his restrictions. (Appellee Br. at 32.) In fact, all the Governor claims is that "there is no indication" that the Governor would reinstate his prior restrictions. (*Id.*) Importantly, the Governor has "neither asserted nor demonstrated that [she] will **never** resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (emphasis added). Rather, the Governor has laid the groundwork for imposing more restrictions going forward. To this day, the Governor's own public statements show that he "**is keeping all options on the table, and should the health data demand fewer or more restrictions, he will put those into effect when necessary**." Forward Virginia: Guidelines, *Frequently Asked Questions*, (May 28, 2021), https://www.virginia.gov/coronavirus/forwardvirginia/faq/ (last visited June 30, 2021) (emphasis added). And, as discussed *supra*, the Governor has stated on the record that he retains the authority and willingness to reinstate prior restrictions if the Commonwealth were to experience a spike in COVID-19 cases. (JA330.) This explicit retention of authority to reassess and reinstate the prior restrictions at any time (*i.e.*, "keeping all options open") plainly precludes a finding of mootness under this Court's binding precedent. *See Pashby*, 709 F.3d at 316; *Deal*, 911 F.3d at 192.

The Governor not disavowed reinstatement of his restrictions on religious gatherings. He has expressly reserved and pursued the right to reinstate them. His obvious hedging precludes any mootness argument. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where intent to reinstate is present, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . ."); *id* at *5–6 ("The Court is not fooled.").

3. The Governor's Continued Defense of His Unconstitutional Restrictions on Lighthouse's Religious Worship Services Precludes a Finding of Mootness.

A case is not moot where, as here, the Governor "did not voluntarily cease the challenged activity because he felt [it] was improper," and "has at all times continued to argue vigorously that his actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985); *Pierc*e, 2019 WL 4750138, at *5 ("[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case."). In numerous filings in the district court and in his Brief before this Court, the Governor continues to assert that his original restrictions were constitutional, (*see, e.g.*, Appellee Br. at 4-5 (arguing that – despite his discriminatory restrictions on religious worship services – the Governor was "careful

to preserve religious liberty while protecting religious liberty"); JA330, dkt. 50, Defendant's Motion to Dismiss, at 10 (arguing that the previous restrictions were constitutional).) Thus, "[t]here is nothing in the parties' submissions or the record to demonstrate the Governor changed [his] mind about the merits of Plaintiff's claim." *Pierce*, 2019 WL 4750138, at *6.

Moreover, the Governor's orders are issued only at his whim and are not subject to the stringent legislative process that would entitle them to a presumption of permanence. *See McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) ("[W]hile a **statutory** change 'is usually enough to render a case moot,' **an executive action that is not governed by any clear or codified procedures cannot moot a claim**." (emphasis added)). To be sure, as demonstrated above, the Governor's currently operative Executive Order Seventy-Nine and its accompanying guidance documents explicitly reserve the right to reinstate and reimpose restrictions as health metrics and health criteria change, again – at his whim. The Governor has already laid the groundwork for imposing more, not fewer restrictions going forward. Thus, not only has the Governor **not** affirmatively and positively disclaimed any intention to ever reinstate his unconstitutional restriction on religious worship services, but there is evidence he can reinstate restrictions at any time. "The Governor did not experience a change of heart that may counsel against a mootness finding." *Id.* Furthermore, "[g]iven the importance of the issues

at bar . . . the public interest in having the legality of the Governor's behavior settled weighs against a mootness ruling." *Id.* at *7.

C. At Minimum, the Governor's Orders Capable of Repetition, Yet Evading Review Because of the Short Duration of the Challenged Orders.

Not only can the Governor not carry his burden under the voluntary cessation doctrine, but this case also "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id. See also Incumaa v. Ozmint*, 507 F.2d 281, 289 (4th Cir. 2007) (same). Both circumstances are present.

Given the rapidly changing COVID-19 landscape, there is no question that the duration of the Governor's total prohibition on religious gatherings was always going to be "too short to be fully litigated prior to cessation or expiration." *Wisconsin Right to Life*, 551 U.S. at 462. As this Court has stated, the capable of repetition yet evading review is plainly applicable where "[t]he controversy involved is 'short run,'" *Leonard v. Hammond*, 804 F.2d 839, 843 (4th Cir. 1986), and "the challenged actions 'do not last long enough for complete judicial review of the controversies

they engender.'" *Id.* (quoting *Super Tire Eng'rg Co. v. McCorkle*, 416 U.S. 115, 126 (1974)). Indeed, Executive Order 51 was issued March 12, 2020 (JA017, V. Compl. ¶24), was superseded eleven days later on March 23, 2020 by Executive Order 53 (JA018, V. Compl. ¶26), superseded again seven days later on March 30, 2020 by Executive Order 55 (JA018, V. Compl. ¶29), supplemented again one week later by the Faith Communities Guidance Document (JA019, V. Compl. ¶36), and has been changed, updated, revised, modified, extended, supplemented, and continued throughout the last year. **It appears that the life span of the Orders runs from 7 days or less to 30 days**. The duration of these restrictions is thus too short to be fully litigated. *See Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (two years is too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (two years is too short).

Kingdomware Tech. involved the claims of a veteran-owned business against the Department of Veterans Affairs (VA) for failing to follow procurement rules that would have given the business a competitive advantage in bidding for VA procurement contracts. *See* 136 S. Ct. at 1973. Because the case reached the Court four years after it was commenced, and the work the business desired to perform for the VA was already complete, the Court found that "no live controversy in the

ordinary sense remains because no court is now capable of granting the relief petitioner seeks." *Id.* at 1975–76. The Court concluded, however, that the "capable of repetition, yet evading review" exception applied because the short-term procurement contracts at issue "were fully performed in less than two years after they were awarded," and that "a period of two years is too short to complete judicial review of the lawfulness of the procurement." *Id.* at 1976 (internal quotation marks omitted) (citing, *inter alia*, *Southern Pac. Terminal Co.*, 219 U.S. at 514–516). Thus, "we have jurisdiction because the same legal issue in this case is likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete." *Id.*

In *First Nat. Bank*, two banks that wanted to spend money to influence the vote on state referendum proposals were restricted in their advocacy by state criminal statutes. *See* 435 U.S. at 767–68. In determining whether the banks' claims were moot, because the vote on the most recent referendum was already concluded, the Court found that "[u]nder no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment" because in each of the four previous referendum attempts by the state legislature "the period of time between legislative authorization of the proposal and its submission to the voters was

approximately 18 months," which "proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Id.* at 774–75. The Court also found that, given the legislature's track record with referenda and the banks' continuing desire to influence referendum votes, there could be no serious doubt that the banks would be subject to the criminal statute's restrictions in the future. *Id.* Thus, the Court held the case was not moot. *Id.* at 775.

The same is true here. A moving target that imposes discriminatory restrictions, modifies and amends those restrictions, reinstitutes previous restrictions, and fundamentally restrict the rights of all Virginians based on the whim of the Executive at intervals spanning from a mere few days to less than one month simply cannot be fully addressed prior to the Governor's next "flick of a pen." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). The Governor's Orders are textbook examples of restrictions that are capable of repetition yet evading review, and thus Lighthouse's claims are not moot.

D. Even Assuming *Arguendo* that Some Claims for Injunctive Relief Are Moot in Different Contexts, Lighthouse's Claims for a Permanent Injunction and Declaratory Relief are Not Moot.

Lighthouse's claims for declaratory relief and a permanent injunction preventing the Governor from reinstating his prior restrictions are not moot. As the Seventh Circuit eloquently stated, "**[t]he court may consider how easily former**

practices might be resumed at any time in determining the appropriateness of injunctive relief." *United Air Lines, Inc. v. Air Line Pilots Ass'n Int'l.*, 563 F.3d 257, 275 (7th Cir. 2009) (emphasis added). *See also Scotch Whiskey Ass'n v. Barton Distilling Co.*, 489 F.2d 809, 13 (7th Cir. 1973) (holding that district court did not abuse its discretion when entering an injunction against unlawful conduct that "had ceased before the trial takes place"). Indeed,

> **While the preliminary injunction diminished the *immediate* threat of prosecution, it is important not to confuse the threat of enforcement that existed relative to Hatchett's immediate advocacy, with the broader threat of enforcement that must be considered by this Court with respect to Hatchett's requests for declaratory and permanent injunctive relief.**

Hatchett v. Barland, 816 F. Supp. 2d 583, 593 (E.D. Wis. 2011) (emphasis added). And, though preliminary injunctive relief claims may become moot in circumstances unlike those at issue here, "**[t]he case itself is not moot, because a request for a permanent injunction was pending**" and where plaintiff was subject to potential for conduct in the future. *Certified Grocers of Ill., Inc. v. Produce, Fresh, & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florist, Nursery, Landscaping & Allied Emps., Drivers, Chauffeurs, Warehouseman & Helpers Union, Chicago & Vicinity, Ill., Local 703*, 816 F.3d 329, 331 (7th Cir. 1987) (emphasis added). Claims for a permanent injunction are not moot where – as here – "prior patterns of contradictory behavior left the court with no assurances that the alleged constitutional violations would not recur." *Brown v. Colegio De Abagados*

de Puerto Rico, 613 F.3d 44, 48 (1st Cir. 2010). And, in *Harvest Rock Church v. Newsom*, dkt. 95, No. 2:20-cv-6414 (C.D. Cal. May 14, 2021), that is precisely what the district court did – issue a permanent injunction against restrictions that had been rescinded but could be reinstated at any time

Here, Lighthouse sought a permanent injunction against the entirety of the Governor's COVID regime, against the underlying authority for him to even issue restrictions on constitutionally protected exercise of religion, and against the currently operative framework under which the Governor retains the authority to impose restrictions on Lighthouse's religious worship services at any time. Indeed, while the free exercise component of Lighthouse's claims has been litigated before this Court and others, there are many other aspects to Lighthouse's Verified Complaint that have not been adjudicated and are not moot. Lighthouse sought declaratory relief and a permanent injunction against the Governor's authority to issue restrictions on religious worship under the Guarantee Clause. (JA041, V. Compl. ¶¶158-165.) That claim, which challenges the Governor's "exercise of exclusive and unaccountable executive authority" as to the entirety of his regime, and therefore cannot be mooted by his changed restrictions issued under the challenged authority.

E. Lighthouse Challenged the Governor's Orders As-Applied, and Its As-Applied Claims are Not Moot.

The Governor also ignores the fact that Lighthouse has challenged each of his Executive Actions and the underlying authority under which he took such actions both facially and as-applied. (*See* JA032-041, V. Compl. ¶¶88-99, 103-114, 118-129, 139-145, 149-156 (alleging that the Governor's Orders and the authority under which he issued them are unconstitutional as-applied to Lighthouse's religious worship services).) Importantly, an as-applied challenge "examine[s] the facts of the case before [it] exclusively, and not any set of hypothetical facts under which the statute might be constitutional." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012). And, as this Court has recognized, "amendments to the picketing ordinances do not moot Green's as-applied challenges to the original ordinances." *Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008). *See also Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 263 (3d Cir. 2002) ("although facial challenge were mooted by the amendment, the as-applied challenges were not because relief was still available for these claim, which the amendment had not redressed"); *id.* at 263 n.5 (noting that the declaratory and injunctive relief is still available for as-applied challenges even after amendment to the challenged regulation); *Parker v. Judicial Inquiry Comm'n of Ala.*, No. 2:16-CV-442-WKW, 2017 WL 3820958, *8 (M.D. Ala. Aug. 31, 2017) (holding that government actions cannot moot an as-

applied challenge where plaintiff remains subject to the authority under which the allegedly offending government action was instituted)

The Northern District of Illinois decision in *D'Acquisto v. Washington*, 750 F. Supp. 342 (N.D. Ill. 1990) is instructive of this point. There, though the particular challenged activity may have concluded, the plaintiff challenged the deprivation of his constitutional rights by the government's past actions as-applied to him. *Id.* at 346. The government contended that because the challenged actions had already been completed, the case was moot. *Id.* This Court disagreed. "**To hold that the claims of plaintiffs and those similarly situated were mooted by completion of the procedures they challenge would effectively eliminate the possibility of any 'as applied' challenge to those procedures. Dismissal of this action on grounds of mootness would be inappropriate under the circumstances**." *Id.* (emphasis added).

The same is true here. Though the Governor may have modified, amended, or rescinded prior restrictions, there is no dispute that Lighthouse's as-applied challenges remain against those prior orders that have been unconstitutionally applied against Lighthouse's Pastor. Indeed, Lighthouse's Pastor was given criminal citations for violation of the Governor's Orders. (JA023, V. Compl. ¶56.) Thus, Lighthouse's as-applied challenges, which seek a permanent injunction against the Governor's Orders as-applied to Lighthouse are not moot.

II. THE GOVERNOR IS THE PROPER DEFENDANT UNDER *EX PARTE YOUNG*.

A. The Governor Has The Requisite Special Relationship To His Own Executive Orders.

Both the district court below and the Governor ignore the relevant test for whether the Governor has a special relationship to his Executive Orders for which his immunity under *Ex Parte Young* evaporates. As this Court has made clear, the special relation requirement of *Ex Parte Young* "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. **This requirement ensures that a federal injunction will be effective with respect to the underlying claim**." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 444 (4th Cir. 2008) (cleaned up) (bold emphasis added). *See also McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (same). In fact, "**[p]rimarily, the requirement has been to injunctive actions here the relationship between the state official sought to be enjoined and the enforcement of the state statute is *significantly attenuated***." *S.C. Wildlife Fed'n*, 549 F.3d at 332-33 (emphasis added).

The Governor entirely ignores this test and relies instead on the fictitious claim that Lighthouse's claims are based on some "general duty to enforce the laws" of the Commonwealth, which is admittedly insufficient. (Appellee Br. at 17-18.) But, when analyzed under this Court's two-part test for determining whether the

Governor has a special relationship to his executive orders demonstrates the error of the Governor's ways. In determining proximity to and responsibility for the challenged action, this Court has found it relevant that the official was "deeply involved" in the challenged action, that the action happened under the official's "supervision," and the official was the signatory to the relevant action. *S.C. Wildlife Fed'n*, 549 F.3d at 333.

In fact, numerous courts have held that direct supervision and responsibility for the challenged action is sufficient to give rise to the requisite special relation. *See, e.g., D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334 (4th Cir. 2010) (holding that the official "responsible for assuring that the agency's decisions comply with federal law" has the necessary special relation to satisfy *Ex Parte Young*); *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002) (official directly responsible for overseeing program have special relation to the law sufficient to satisfy *Ex Parte Young*); *El-Amin v. McDonnell*, No. 3:12-cv-00538-JAG, 2013 WL 11993357, *6 n.10, *8 (E.D. Va. Mar. 22, 2013) (holding that the Governor of Virginia's "unique role" in the use of his "executive powers" is sufficient to establish the relevant special relation requirement); *Olavarria v. North Carolina*, No. 5:19-CV-162-FL, 2020 WL 573119, *3 (E.D.N.C. Feb. 5, 2020) (held that a government official who "administers" the challenged conduct "giv[es] rise to the special relation necessary to sustain a claim under *Young*"). And, in *Berean Baptist Church v. Cooper*, the

district court held that the Governor of North Carolina's issuance of the challenged COVID-19 executive order and his office's issuance of the relevant guidance documents plainly satisfied the special relation requirement of *Ex Parte Young*. 460 F. Supp. 3d 651, 665 n.3 (E.D.N.C. May 16, 2020).

Here, **there is no other official in the Commonwealth that has authority to issue orders such as those challenged in Lighthouse's Verified Complaint**. Indeed, the Governor alone is vested with the authority to issue executive orders. *See* V.A. Code §44-146.17 (The Governor shall have, in addition to his powers hereinafter or elsewhere prescribed by law, the following powers and duties . . . Executive Orders, to include those declaring a state of emergency [and] may address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat . . . ."). This is not a general grant of authority such as to "faithfully execute the laws of the Commonwealth," which the district court held insufficient. (JA376.) This is the specific grant of authority concerning the Executive Orders at issue here, and it is a specific grant of authority to the Governor alone. Thus, the Governor alone has "proximity to and responsibility for" the challenged action. *S.C. Wildlife Fed'n*, 549 F.3d at 333. Indeed, as this Court said in *South Carolina Wildlife Federation*, where the state law "imposes duties upon the [Governor]" for the challenged actions, those duties "**are determinative of the existence of the necessary special relation**." *Id.*

(emphasis added). If no other official in the Commonwealth has the authority to do that which Lighthouse challenges in its Verified Complaint, then there can be no other government official with any proximity to or responsibility for the executive orders. As such, the Governor has the requisite special relation to his orders, and the district court's conclusion to the contrary was in error.

Moreover, though the district court and the Governor both largely ignore or attempt to evade the plain text of the Virginia Constitution, the specific section under which the Governor is authorized to issue Executive Orders also unequivocally states that he has the power and responsibility to enforce such orders. *See* Va. Const. Art. V, §7 ("The Governor . . . shall have the power to . . . **enforce** the execution of the laws." (emphasis added)). This statement of authority is fatal to the district court's erroneous contentions below. 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)

B. The Governor's Executive Agencies, Directly Under His Supervision, Threatened Enforcement of His Executive Orders.

The Governor contends that he is immune from litigation challenging the Executive Orders that only he can issue and that are handed down under his sole authority as Chief Executive of the Commonwealth because, *inter alia*, he did not

threaten to enforce his own orders. (Appellee Br. at 13.) As the record makes abundantly clear, the Virginia State Police did issue enforcement guidance documents and explicitly threatened to enforce the Governor's Executive Orders. (*See, e.g.*, JA071, dkt. 1-5, V. Compl. Ex.E, Virginia State Police Enforcement Practices of Governor's Executive Orders and Directives (noting that "violation of these Executive Order directives can result in an individual(s) or business being charges with a class one misdemeanor, which carries up to a year in jail and $2,500 fine").) Further, as the Virginia State Police's Enforcement Practices memorandum details: "**Governor Northam has directed state and local law enforcement**" on the appropriate practices for enforcement of his Orders. (JA071 (emphasis added).) Thus, the notion that the Governor neither enforced nor threatened to enforce his Executive Orders is plainly incorrect. As the head of the Executive Branch of the Commonwealth of Virginia, under which the Virginia State Police operates, the Governor indeed threatened to enforce his Orders and directed those who serve at his pleasure to do just that.

This point is further proven by the Virginia statutes relating to the Virginia State Police. The Virginia State Police operate exclusively under the direction and authority of the Governor of the Commonwealth of Virginia. *See* Va. Code §52-2 ("The Superintendent of State Police shall be **appointed by the Governor**, subject to confirmation by the General Assembly if in session when such appointment is

made, and if not in session, then at its next succeeding session. **Such officer shall hold his office at the pleasure of the Governor** for a term coincident with that of each Governor making the appointment." (emphasis added)).

CONCLUSION

Because the Supreme Court's decisions in *Tandon*, *Catholic Diocese*, and *South Bay Pentecostal Church* all compel a finding that Lighthouse's claims are not moot, and because the Governor is not immune from litigation against Executive Orders that only he has the authority to issue, has direct proximity to and responsibility for, and directed the enforcement of, the district court's decision is plainly in error and should be reversed.

Respectfully submitted,

Dated: July 2, 2021

/s/ Daniel J. Schmid
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 5,662 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 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
Daniel J. Schmid
Attorney for Plaintiff-Appellant