UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SCOTT HERNDON, et al., Plaintiffs, v. Governor BRADLEY JAY LITTLE, in his official capacity, DAVE JEPPESEN, in his official capacity as Director of the Idaho Department of Health and Welfare, Defendants.	§	Case. No. 1:20-cv-00205-DCN **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS [DKT. 18]**

Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss, brought pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The complaint states a claim for declaratory and injunctive relief under *42 U.S.C. § 1983* and Plaintiffs have standing to bring their claims, because Defendants' orders have already caused and continue to threaten an immediate and irreparable denial of rights protected by the federal and state constitutions.

STATEMENT OF THE CASE

On April 30, 2020, while Defendants were prohibiting, and had prohibited for over five weeks, the free exercise of religion, Plaintiffs brought this action to declare unconstitutional the "Order to Self-Isolate" of the Director of the Idaho Department of Health and Welfare, dated March 25, 2020 and amended on April 15, 2020 (hereafter "Stay-Home Order"). Defendants then amended their original complaint to incorporate the orders dated May 1, 2020 (hereafter "Stay-Healthy Order 1") and May 16, 2020 (hereafter "Stay-Healthy Order 2"), which subsequently morphed into the order dated May 30, 2020 (hereafter "Stay-Healthy Order 3") and then more

recently into the order dated June 13, 2020 (hereafter "Stay-Healthy Order 4"). Plaintiffs brought this action to stop Governor Little and Director Jeppesen from violating their rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution; the Religious Land Use and Institutionalized Persons Act; Articles 1 and 21 of the Idaho Constitution; and the Idaho Religious Freedom Restoration Act.

Plaintiffs seek a judgment that these provisions of the Stay-Home Order and the several Stay-Healthy Orders, above, are unconstitutional and have violated Plaintiffs' constitutional rights, and that Defendants, who purport to reserve in the Stay-Healthy Orders 1-4 the right to "rescind[], supersede[], or amend[]" the same, be restrained and enjoined from reverting to and enforcing these provisions in the future.

Defendants' orders and actions are a moving target – always changing. According to the Defendants, changes are "based on evidence of a reduction of severe cases of COVID-19 within the state of Idaho; as well as, the advice and input of state epidemiologists, public health experts, and guidelines provided by the Centers for Diseases Control and Prevention ("CDC") and the White House." See Exhibit A, Idaho Rebounds Stage 4 - State of Idaho Stay Healthy Guidelines.

Defendants specifically claim the power to return to more draconian measures such as those imposed under the Stay-Home Order and the Stay-Healthy Order 1: "As the situation changes and more information is available, the Governor and public health officials can issue new orders and directives as needed." See Dkt. 8, ¶ 50, pages 8 & 9.

Indeed, although the Stay-Healthy Order 4 was prospectively to end on June 26, 2020 (see the order's header), it is now effective until at least July 24, 2020 according to the Defendants' website (https://rebound.idaho.gov/stages-of-reopening/, accessed on July 10, 2020),

while the text of the order itself has no end date. Per the same website, Ada County, Idaho (where Plaintiff Martin resides) regressed from Stage 4 back to a "modified Stage 3," thus demonstrating that at any time Defendants can and will reimpose the terms of any prior order. Moreover, this "modified Stage 3" appears to be based upon the Defendants' stage-3 *guidelines*, not the Stay-Home Order 3 (the actual order), adding to the confusion and chilling effect. Said more succinctly, Defendants assert the authority, and are in fact exercising the power, to continually change the facts for the purpose of preventing judicial review of their Orders and chilling the free exercise of religion.

ARGUMENT AND AUTHORITY

I. Standards for Dismissal

Although Defendants make much ado about the merits of Plaintiffs claims,

> "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case. See generally 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, p. 196, n. 8 and cases cited (2d ed.1990). As we stated in *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), '[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' *id.*, at 685, 66." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89–90 (1998). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Ibid.*, quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974).

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998) (held: on appeal of 12(b)(1) and 12(b)(6) motions, standing not found because the relief sought would not redress the

alleged harm). Rule 12(b)(6) motions are disfavored in the law, and a court will rarely encounter circumstances that justify granting them. *Mahone v. Addicks Utility District of Harris County*, 836 F.2d 921, 926 (5th Cir. 1988). A court may dismiss a claim only when it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations found in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). "Dismissal is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986)).

Otherwise said, a motion to dismiss should not be granted unless "it appears beyond doubt that [Plaintiffs] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1248 (9th Cir. 2019), cert. denied sub nom. *Takeda Pharm. v. Painters & Allied Trades*, No. 19-1069, 2020 WL 3038299 (U.S. June 8, 2020), and cert. denied sub nom. *Takeda Pharm. v. Painters & Allied Trades*, No. 19-1069, 2020 WL 3038299 (U.S. June 8, 2020) (internal quotation marks omitted). But moreover, the claimant is not required to set out in detail the facts upon which the claim is based; rather, the Rules require that the claim simply give the defendant "fair notice." *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination*, 507 U.S. 163, 168 (1993).

A claim may be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). "In deciding such a

motion, all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Ibid*., quoting *Cahill*, 80 F.3d at 338. "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Ibid*., citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). For the reasons explained below, Defendants cannot meet that burden.

II. This Court Has Jurisdiction over Plaintiffs' Claims

A. Plaintiffs Have Standing to Bring this Action

Defendants rightly note that, "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

But Defendants then wrongly claim that Plaintiffs suffered no injury in fact, whereas, on the very day Plaintiffs filed their original complaint (April 30, 2020), they were prohibited, according to the Stay-Home Order, from exercising their faith, and they had been so prohibited since March 25, 2020. Both the original complaint and the amended complaint set forth in detailed particularity how each Plaintiff was harmed first by the Stay-Home Order and, later, by the Stay-Healthy Order 1, and how each continues to be harmed by the chilling effect of the Stay-Healthy Order 2. As noted above, "In deciding [this] motion, all material allegations of the

complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Navarro* 250 F.3d at 732, quoting *Cahill*, 80 F.3d at 338.

Standing requires simply that "a plaintiff must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him." *Stoianoff v. State of Mont.*, 695 F.2d 1214, 1223 (9th Cir. 1983), quoting *Steffel v. Thompson*, 415 U.S. 452, 458–59 (1974). See also *O'Shea v. Littleton*, 414 U.S. 488, 493–99 (1974); *Brache v. County of Westchester*, 658 F.2d 47 (2d Cir. 1981), cert. denied 455 U.S. 1005 (1982). Plaintiffs demonstrated the requisite threat in the verified complaint and the attached declarations, including documenting actual interactions with local law enforcement.

Defendants wrongly claim that Plaintiffs suffered no injury in fact. As a statement of law, Defendants' assertion is incorrect. As the 9th Circuit explained, "The Supreme Court has made clear that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment overbreadth claim had thereby also demonstrated irreparable harm). Further, "Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Id*. (citing *San Diego Committee v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986). Citing itself, the 9th Circuit later said: "To establish irreparable injury in the First Amendment context, [plaintiffs] need only 'demonstrat[e] the existence of a colorable First

Amendment claim.'" *Sammartano v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir.2002) (quoting *Viacom Int'l, Inc. v. FCC*, 828 F.Supp. 741, 744 (N.D. Ca. 1993)).

Plaintiffs have standing because: (1) they were prohibited from freely exercising their religion and only permitted to exercise according to government mandate; (2) they were informed by local law enforcement that the continued exercise of their constitutionally protected fundamental rights, according to their customary and ancient practice, was now deemed unlawful according to the challenged orders; (3) they were aware of other prosecutions under the same or similar orders both in Idaho and in other states; (4) the source of the prohibition is the challenged orders themselves, and (5) a declaration that said orders are unconstitutional will prevent enforcement and prevent the continuation of the current chilling effect in the future.

B. The Case and Controversy Are Not Moot

It is well settled that, "A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice." (*Friends of the Earth* at 169-170, quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).) This is particularly the case when the voluntary cessation is temporary in nature. See, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983): "[T]he case is not moot, since the moratorium by its terms is not permanent." That is the situation here, as noted above: the text of the orders themselves, as well as the text of Defendants' own website, affirms that increased restrictions and reversion to prior restrictions are possible. And in point of fact a reversion to stricter restrictions of the past has happened in at least one county in Idaho, as noted above, even a county in which one of the Plaintiffs himself resides. The Defendants' "repeal of the objectionable language" in the orders at issue here, as in City of Mesquite, "would

not preclude [them] from reenacting the same provision[s] if the District Court's judgment were vacated." (*City of Mesquite*, 455 U.S. at 283.)

Indeed, "the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (*Friends of the Earth* at 170, quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968). The burden lies with Defendants to prove this: "The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Ibid*. Defendants have failed to meet this heavy burden. In fact, they have openly admitted that they cannot do so.

The orders at issue here, both in their original form (the Stay-Home Order and the Stay-Healthy Order 1) and the subsequent versions amended after Plaintiffs began settlement negotiations with Defendants (the Stay-Healthy Orders 2, 3, and 4), state on their face that at any time they can be "extended, rescinded, superseded, or amended" and/or government agencies "may enact more stringent public health orders than those set out in [the respective order]." (Complaint ¶33, page 6, citing the Stay-Healthy Order of May 16, 2020.)

This Court may take judicial notice, and Plaintiffs respectfully ask the Court to do so, that even as Defendants were drafting their Motion to Dismiss, governmental jurisdictions around the nation, including Ada County, Idaho, where Plaintiff Martin resides, were *increasing* their restrictions. See Exhibit B, Central District Health Order and Exhibits C thru E, Florida, Texas and Nevada Orders/Directives. As Plaintiffs were finalizing this response, the Governor of California again prohibited indoor activities, including the exercise of religion. See Exhibit F,

(https://covid19.ca.gov/roadmap-counties, accessed on July 14, 2020). Contrast that to Defendants' utterly spurious claim that, "the trend in Idaho has been to reopen the state." (Dkt. 18-1, p. 14.) Since Defendants filed their motion, local jurisdictions across Idaho – including both Ada County and its seat Boise (where Plaintiff Martin resides) and Moscow (where Plaintiff Rench resides) – have imposed greater restrictions, including the requirement of wearing masks. See Exhibit G, Moscow Amended Emergency Order No.20-03 Face Coverings & 6 foot Social Distancing, and Exhibit H, Boise Emergency Order No. 20-10 Face Coverings Required. Indeed, in Defendants' own Memorandum in Support of Defendants' Motion to Dismiss, they admit that "COVID-19 spread is widely reported, and these reports show that spread has increased in Idaho as gatherings have been phased in–including a large spike related to a religious gathering in Idaho Falls." (Dkt. 18-1, p. 16.) Thus, Defendants themselves, even in their memorandum in support of their own motion to dismiss this lawsuit as moot, impliedly threaten that they might again close churches due to "a large spike related to religious gatherings," just as California's Governor Newsom did this week. *Ibid*.

Indeed, according to the Harvard Global Health Institute, several states should already be under stay-home orders and in others – including Idaho – "stay-at-home orders…[are] advised." See Exhibit I, Forbes Article: Stay-At-Home Orders Necessary or Advised in 20 States, per Harvard's COVID -19 Tracking Site. The Harvard report came out shortly before California shut down again; will Idaho likewise follow the report's recommendation and again close churches? In no wise can it be said that it is, "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (*Friends of the Earth* at 170, quoting *Concentrated Phosphate* at 203.)

On the very day Plaintiffs filed their original complaint – April 30, 2020 – the Stay-Home Order was in effect and it was a violation of their constitutional rights. It had already been in effect since March 25, 2020. During settlement negotiations in early May, 2020, Defendants' Stay-Healthy Order 1 continued to violate Plaintiffs' fundamental rights. In the midst of settlement negotiations, Defendants amended their order to remove the alleged violations with the "Stay-Healthy Order 2"[1], but retained both in their orders and on their website a notice that at any time, they could revert to their prior, or even a more restrictive, order.

Again, Defendants have the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur." *Ibid*. Defendants have failed to meet this burden and, because of the facts as they are, cannot meet this burden.

C. Eleventh Amendment Immunity Does Not Bar the Claim Brought under the Idaho Religious Freedom Restoration Act for Prospective Injunctive Relief

Defendants argue that the cause of action under the Idaho Religious Freedom Restoration Act cannot be heard in federal court (this court). As the Supreme Court explained, where causes of action under both state and federal law are brought in the same complaint in a federal court, and where the federal court has jurisdiction over the federal-law claims, the court may take jurisdiction over the state-law claims as well. More specifically:

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[1] At the same time, Defendants also changed the historical record of the guidelines promulgated for the Stay-Healthy Order 1 ("Stage 1") from "Places of worship **can open if they adhere** to strict physical distancing, sanitation protocol, and any CDC guidance" to "Places of worship **can open and should adhere** to physical distancing, sanitation protocol, and State and CDC guidance". See Dkt. 8 p. 7 ¶ 41 and Dkt. 8-20 (emphasis added). Thus, while the Stay-Healthy Order 1 was in effect, churches were *required* to follow certain protocols in order to open, but when Defendants promulgated the Stay-Healthy Order 2, they changed the historical record of the guidelines to make it appear as if, during the Stay-Healthy Order 1, such protocols were only *recommended* ("should") and churches were permitted to open *even if they did not follow them*.

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' U.S.Const., Art. III, s 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966) (held: the district court did not err in not dismissing the state-law claim). The Supreme Court affirmed this jurisdictional law in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) where it said:

> The [*Gibbs*] Court stated that a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case "derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." 383 U.S., at 725, 86 S.Ct., at 1138. The Court intended this standard not only to clarify, but also to broaden, the scope of federal pendent jurisdiction. See *ibid*. (stating that the prior approach, at least as applied by lower courts, was "unnecessarily grudging"). According to *Gibbs*, "considerations of judicial economy, convenience and fairness to litigants" support a wide-ranging power in the federal courts to decide state-law claims in cases that also present federal questions. *Id*., at 726, 86 S.Ct., at 1139.

Carnegie-Mellon at 349. (Held: federal district court had discretion to remand to state court a removed case involving pendent claims.) Two years after that holding, Congress codified the Court's rule into law as *28 U.S.C.A. § 1367(a)*. That statute reads:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United

> States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The exceptions in (b) and (c) do not apply to this action; thus, jurisdiction over the state-law causes of action is proper both under statute and the pre-statute case law of the Supreme Court. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), where the Supreme Court explicitly recognized this statutory jurisdiction:

> We note, too, that, under *28 U.S.C. § 1367*, federal courts may exercise "supplemental" jurisdiction over state-law claims linked to a claim based on federal law. Plaintiffs suing under Title VII may avail themselves of the opportunity *§ 1367* provides to pursue complete relief in a federal-court lawsuit. Arbaugh did so in the instant case by adding to her federal complaint pendent claims arising under state law that would not independently qualify for federal-court adjudication.

Arbaugh at 506. (Held: district court had jurisdiction).

Here, too, the state law claim is "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C.A. § 1367(a)* This Court has jurisdiction over Idaho state law claims.

Defendants cite the 7th Circuit case of *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 3249062 (7th Cir. June 16, 2020), for that court's holding that, "a federal court cannot issue relief against a state under state law." *Id*. at *4. Respectfully, that conclusion misses the point raised by Plaintiffs, which is that the Idaho state Act and the U.S. Constitution are so similar that any analysis and holding under the U.S. Constitution will mirror the analysis and holding under the other. This is not a situation where plaintiffs are seeking to bring a random suit in an improper court, but rather, this is a situation where the federal and state laws are so similar that to not bring the action would be improper. See, *e.g.*, *Agua Caliente v Hardin*, 223 F.3d 1041

(9th 2000) (Indian tribe could bring suit against state in federal court), where the 9th Circuit noted that, "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law" and "a careful balancing is required when determining whether the *Young* exception applies in a given case" and a "case-by-case approach to the *Young* doctrine has been evident from the start." *Id*. at 1046 (internal quotations omitted).

Plaintiffs believe that the instant case can be distinguished from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), holding that the Eleventh Amendment prohibited federal district court from ordering state officials to conform their conduct to state law, because in this case, the "need to reconcile competing interests [between state and federal jurisdiction] is [*not*] wholly absent," because the particular laws at issue are so similar. *Id*. at 106. A violation of the Idaho Act would almost certainly be a violation of the First Amendment, and vice versa. Therefore, this court exercising jurisdiction does not "conflict[] directly with the principles of federalism that underly the Eleventh Amendment." *Ibid*. This again because the state law claim is "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C.A. § 1367(a)*

III. A Motion to Dismiss under Rule 12(b)(1) and 12(b)(6) Is Not the Proper Place to Argue the Case on the Merits

Defendants spend much time arguing the merits of the case – that the restrictions in the challenged orders were necessary and did not violate Plaintiffs' constitutional rights – as if they

were filing a motion for summary judgment under Rule 56[2]. Under Rule 12(b), a court is not weighing the evidence or checking for disputes of material fact or otherwise digging into the merits of either party's argument. And, obviously, were that to be done, a motion for summary judgment would have to be denied, as evidenced by the uneven decisions in other jurisdictions:

Before Plaintiffs filed their original complaint the following opinions were published:

1. Open letter to Governor Little from Bonner County Sheriff dated April 2, 2020, opining that the orders challenged in this case are unconstitutional. See Exhibit J.
2. *On Fire Christian Center, Inc. v. Fischer,* 2020 WL 1820249, (W.D. Ky. April 11, 2020), TRO for Christian Center granted.
3. Attorney General William Barr's statement on Religious Practice and Social Distancing and United States' Statement of Interest in Support of Plaintiffs Temple Baptist Church, April 15, 2020. See Exhibit K.
4. *First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kan. April 18, 2020), TRO for church granted.

After the original complaint the following opinions were published:

1. *Maryvale Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020), Denial of TRO reversed in part in favor of Church, May 2, 2020.
2. *Tabernacle Baptist v. Beshear*, 2020 WL 2305307 (E.D. Ky. May 8, 2020), TRO granted in favor of Tabernacle.

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[2] Plaintiffs note that the legal analysis for Rule 56 is quite different from that for Rule 12(b) and therefore respectfully reserve the right to respond to a Rule 56 motion should the Court decide to convert the instant Rule 12(b) motion to a motion under Rule 56.

3. *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), Reversal of denial of TRO for church, May 9, 2020.

4. *Berean Baptist Church v. Cooper*, 2020 WL 2514313 (E.D. N.C. May 16, 2020), Church granted TRO.

5. U.S. DOJ Civil Rights Division open letter to California Governor Newsom dated May 19, 2020 ("Simply put, there is no pandemic exception to the U.S. Constitution and its Bill of Rights."). See Exhibit L.

6. *First Pentecostal Church v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020), Church granted TRO, May 22, 2020.

7. But also on May 22, the 9th Circuit ruled the other way on a TRO. In *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020), the 9th Circuit denied a church a TRO. Note, however, that the opinion of the 2-judge majority is three pages long. The first page is taken up by the caption and a statement that it is an appeal of a TRO denial. The second page is a boilerplate statement of jurisdiction and the test for evaluating an appeal of a TRO. On the third page, the majority affirms the denial with a mere four-sentence explanation plus a few case citations. That is the entire extent of the analysis performed by the 2-judge majority. One could say that is a conclusory statement unsupported by legal analysis. (Note, also, that the denial is of a TRO, a more stringent test than under a full trial on the merits.) In contrast, the dissenting judge spent 17 pages walking through the law and facts, performing a thorough legal analysis, and after 17 pages of analysis he concluded that a TRO was warranted. *Id*. In a 5:3 split the Supreme Court affirmed the Ninth Circuit on May

29th, 2020, but there again the dissent's analysis is deeper than the majority's analysis. *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020).

8. Open letter to the people of Carroll County, Iowa, by the Sheriff, dated June 5, 2020, stating that his office will not enforce the order to close churches. See Exhibit M.

The point being, even if this Court were to treat Defendants' motion as a motion for summary judgment, the motion would have to be denied, because the numerous favorable court decisions and "open letter" opinions of sheriffs, Attorneys General, and U.S. Attorneys agreeing with Plaintiffs evidences at a bare minimum that there are disputes of material fact that can only be resolved in a trial. Moreover, the overwhelming majority of winning cases suggests that Plaintiffs will prevail on the merits. As Assistant U.S. Attorney General, Civil Rights Division, Eric S. Dreiband put it, "There is no pandemic exception, however, to the fundamental liberties the Constitution safeguards. Indeed, 'individual rights secured by the Constitution do not disappear during a public health crisis.'" (Exhibit K, Quoting In re Abbott, --- F.3d ---, 2020 WL 1685929, at *6 (5th Cir. Apr. 7, 2020).) If there is, then our Constitutional Republic of united states is already lost.

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CONCLUSION

For the reasons stated herein, Plaintiffs request that the Court deny Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

Dated: July 15, 2020

Respectfully Submitted,

/s/ D. Colton Boyles

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EXHIBIT LIST

Exhibit	Item
A	Idaho Rebounds Stage 4 - State of Idaho Stay Healthy Guidelines.
B	Central District Health Order.
C - E	Florida, Texas and Nevada Orders/Directives.
F	https://covid19.ca.gov/roadmap-counties, accessed on July 14, 2020.
G	Moscow Amended Emergency Order No.20-03 Face Coverings & 6 foot Social Distancing.
H	Boise Emergency Order No. 20-10 Face Coverings Required.
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M	Open letter to the people of Carroll County, Iowa, by the Sheriff, dated June 5, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of July, 2020, I electronically filed the foregoing document with the **Clerk of the Court using the CM/ECF system** to the following CM/ECF registered participants:

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