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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 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS [DKT. 18]**

Plaintiffs' Response demonstrates that the Motion to Dismiss should be granted. They acknowledge the absence of an existing controversy and concede their case is moot, but plead for an exception without any basis. They argue various cases but fail to meaningfully address the recent and binding precedent that makes clear no constitutional violation ever occurred. No amount of argument by Plaintiffs can change these undisputed, dispositive facts:

(1) No prohibition prevents Plaintiffs from attending in-person religious meetings now, and nothing prevented them from doing so when they filed their Amended Complaint on May 27. On April 30, the day Plaintiffs filed their original Complaint, they were well-aware that the restriction they complained about was set to expire that day under Defendants' "Idaho Rebounds"

plan as provided in the April 30 Order attached by Plaintiffs to that Complaint.

(2) No quarantine requirement exists. The 14-day quarantine requirement for those traveling into Idaho was rescinded effective May 16, 2020, and never re-imposed, and *never* affected Plaintiffs because none of them contend they traveled from out of state and were prevented from attending in-person religious meetings.

Although Plaintiffs lack standing, they ask the Court to enjoin actions that occurred in the past. The Court cannot do that consistent with the limitations on *Ex parte Young* relief. Plaintiffs also ask this Court to issue an injunction against conduct that might occur in the future, but to do so without having a concrete set of facts on which to base its injunction. The Court cannot do that either. In sum, Plaintiffs' Amended Complaint should be dismissed.

I. ARGUMENT

A. Plaintiffs do not obtain standing to request prospective relief by asserting that Defendants' actions caused them injury in the past.

Plaintiffs assert that "[b]oth 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." (Dkt. 19 at 5.) However, the harm Plaintiffs refer to did not exist when they filed their Amended Complaint on May 27. Further, when Plaintiffs filed their Complaint on April 30, 2020, they were aware that Defendants had already issued an order under a previously announced plan that did not inhibit Plaintiffs' attendance at in-person religious meetings or their participation in sacraments during those meetings, which was the Complaint's gravamen. When Plaintiffs filed their Amended Complaint on May 27, there were still no restrictions on in-person religious meetings, and the quarantine requirement, which was the only new restriction complained of in their Amended Complaint, had been rescinded by Defendants' May 14 Order, effective May 16, 2020. Remarkably, none of the Plaintiffs claim they were ever prevented from exercising their religious rights because of the quarantine. And it is difficult to understand how the Stay-Healthy Order 2 (issued on May 14) has any chilling effect on Plaintiffs when, by its terms,

Plaintiffs are able to attend in-person religious meetings and participate in sacraments, and there is no quarantine requirement. Further, as explained in Defendants' moving papers, Plaintiffs' unfounded speculation about future orders does not give them standing. (Dkt. 18-1 at 10-13.)

Plaintiffs assert that "[s]tanding requires simply that 'a plaintiff must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him.'" (Dkt. 19 at 6 (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983)).) Plaintiffs take the statement in *Stoianoff* out of context. In *Stoianoff*, the plaintiff brought a pre-enforcement facial challenge to a Montana statute. *Stoianoff,* 695 F.2d at 1216. The court considered whether a party has standing when he "has alleged an intention to engage in a course of conduct *arguably affected with a constitutional interest*, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 1223 (underline added; citation omitted). Notably missing in the present case is any law or order currently in place which could be applied against Plaintiffs. This fact is dispositive of this issue.

Of more relevance here, therefore, is *City of Los Angeles v. Lyons*, where the Supreme Court stated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). Plaintiffs present no continuing adverse effects, and no case or controversy to this Court, and their Amended Complaint should be dismissed.

B. Plaintiffs do not obtain standing by simply asserting a First Amendment claim.

Plaintiffs contend that because they have asserted their First Amendment rights were violated, they have been injured and so have standing. They cite three cases in support of their contention. (*See* Dkt. 19 at 6-7.) However, in each of those cases, unlike the present case, the alleged constitutional injury was ongoing at the time the complaint was filed. Here, Plaintiffs can point to no injury that existed when they filed their Amended Complaint. And Plaintiffs' claim that they suffered injury when they filed their original Complaint, under an order they knew had been rescinded effective at midnight on the filing day, does not provide them with standing.

In *Elrod v. Burns*, 427 U.S. 347, 347 (1976), employees of the county sheriff, brought a class action alleging they were fired or threatened with dismissal because they were not affiliated with or supported by the sheriff's political party. At the time of the lawsuit, the sheriff, a Democrat, had fired all but one of the Republican-affiliated employees who were not protected from arbitrary dismissal, and the remaining Republican-affiliated employee was in "imminent danger" of being discharged. *Id.* at 351. It was in this context that the court said 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. *Id.* at 373-74 (citation omitted). In *Elrod*, the alleged injury and loss of protected First Amendment freedoms was ongoing when those plaintiffs filed their complaint. In this case, the only order under which Plaintiffs can assert any injury is Defendants' March 25 Order, which was rescinded 26 days before Plaintiffs filed their Amended Complaint and was set to expire at midnight on the very day Plaintiffs filed their original Complaint. The circumstances in *Elrod* are far different than those here.

In *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998), the court considered the constitutionality of an ordinance that prohibited off-premise distribution of certain advertising leaflets. The Clark County ordinance at issue was in effect at the time of the lawsuit and allegedly prohibited a constitutional activity—free speech. Again, the circumstances in *S.O.C.* are factually and materially different from those here.

In *Sammartano v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir. 2002), abrogated on other grounds by *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), the plaintiffs were denied entrance to portions of a courthouse after refusing to remove clothing bearing symbols of motorcycle organizations. The court noted that "a party seeking 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 *Viacom Int'l, Inc. v. FCC*, 828 F. Supp. 741, 744 (N.D. Ca. 1993)). However, again, plaintiffs in *Sammartano* alleged an ongoing First Amendment injury. That is not the situation here, and it is fatal to Plaintiffs' case.

C. Plaintiffs do not satisfy the requirements for the voluntary cessation exception to the mootness doctrine.

Plaintiffs contend that their claims are not moot under the voluntary cessation exception to the mootness doctrine. The tenets of this exception are as follows:

> Courts have long recognized, however, a "voluntary cessation" exception to mootness. Under this doctrine, the mere cessation of illegal activity *in response to pending litigation* does not moot a case, unless the party alleging mootness can show that the "allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). Without such an exception, "the courts would be compelled to leave [t]he defendant . . . free to return to his old ways." *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (alterations in original) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169, 1173 (9th Cir. 2009) (emphasis added).

The voluntary cessation exception does not apply here. Plaintiffs' contention that Defendants voluntarily ceased any activity as a consequence of pending litigation or threatened litigation ignores the undisputed facts. A week before Plaintiffs filed their original Complaint, Defendants announced a plan for relaxing restrictions. Consistent with that plan, on April 30, 2020, Defendants issued an order that did not inhibit in-person religious meetings. Defendants' April 30 Order could hardly be in response to a lawsuit that had not been filed[1] before Defendants issued their April 30 Order, and one where Plaintiffs took no action to obtain the injunctive relief they contended they needed. Additionally, the amended March 25 Order contained an expiration date of April 30. (Dkt. 5-1 at 19.) The order with the challenged restriction was not rescinded because of threatened litigation, it just expired as planned. Further, 13 days before Plaintiffs filed their Amended Complaint on May 27, 2020, Defendants issued their May 14 Order, which rescinded the quarantine requirement. Again, Defendants' action was not in response to any pending litigation or in response to a threat of litigation.

In a May 6, 2020 letter, Plaintiffs identified actions they contended Defendants had taken which violated their constitutional rights, including their assertion that Defendants' quarantine

[1] Further, Plaintiffs present no evidence that they threatened Defendants with this lawsuit before its filing.

requirement was "unequal treatment." (Dkt. 8-12 at 4.) At the time of Plaintiffs' letter, though, Defendants had already announced a plan for reopening Idaho under "Idaho Rebounds," which provided for a rescission of the quarantine provision Plaintiffs said was objectionable. The quarantine provision was eliminated as part of Defendants' plan for reopening Idaho, not in response to either a lawsuit or a threatened lawsuit. Even more significantly, no Plaintiff—even those added in the Amended Complaint—has standing to challenge the quarantine provision because none alleged he was even subject to that provision. No Plaintiff alleged he travelled from out of state, had to quarantine, and was prevented from the free exercise of his religion.

In support of their mootness argument, Plaintiffs cite to *Friends of the Earth, Inc. v. Laidlaw Environmental Services, (TOC), Inc.*, 528 U.S. 167, 176 (2000). But in that case, plaintiffs, as required by statute, had issued a 60-day notice of their intention to file a citizen suit under the Clean Water Act, 33 U.S.C. § 1342. One day before the expiration of that 60-day notice, defendants acted to address plaintiffs' concerns. *Id.* at 176-77. That is not the factual setting in this case.

Further, contrary to Plaintiffs' assertions that Defendants are likely to issue an order restricting in-person religious meetings, the trend in Idaho has been for Defendants to issue guidelines, and not orders that mandate restrictions, to address the pandemic. The last Stay Home order issued by Defendants was on April 15, 2020 and expired on April 30. The last order Defendants issued at all was on May 28, 2020. On June 11, 2020, Defendants issued guidelines (not an order as asserted by Plaintiffs) and have continued that approach since.[2] Most recently, Defendants have adopted a plan of state and local collaboration to deal with the pandemic, leaving the decision for restrictions up to local officials, not to Defendants.[3] Plaintiffs argue that

[2] Governor's Actions, https://coronavirus.idaho.gov/governors-actions/ (updated Jul. 24, 2020, 10:28 am) (click on "Governor's Proclamations and Executive Orders" and a chronological list is provided).

[3] Keith Ridler, *Idaho to remain in Stage 4 for another two weeks, Governor Little says*, Assoc. Press (Jul. 23, 2020), https://idahonews.com/news/coronavirus/gov-little-to-address-idahoans-about-stage-4-again.

restrictions imposed by county officials and even those imposed by other states prevent their claims against Defendants from being moot. But Plaintiffs cannot bring a claim against Defendants based on the actions of others.

Finally, Plaintiffs contend that because an article by the Harvard Global Health Institute recommends that Idaho shut down, and because California has, Defendants will issue an order prohibiting in-person religious gatherings. Plaintiffs' speculation does not satisfy the requirement that there be "a reasonable expectation" that Plaintiffs will be subject to the alleged unconstitutional conduct again. For the reasons discussed above, and in Defendants' prior memorandum, this Court should dismiss Plaintiffs' Amended Complaint on mootness grounds.

D. This Court can rule as a matter of law under Rule 12(b)(6) that Plaintiffs have failed to allege a plausible claim for relief.

Plaintiffs contend that it is inappropriate for this Court to reach the merits of their case on a 12(b)(6) motion. In fact, this Court can do just that, and should. Plaintiffs fail to address, in any substantive way, the legal arguments Defendants make in support of their motion to dismiss. Instead, they cite without discussion to decisions they contend should lead the Court to deny Defendants' motion. However, those cases where plaintiffs were granted injunctions are not binding or persuasive authority, and as discussed below, they cannot be relied upon to deny Defendants' Motion to Dismiss:

- *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020): Unlike the Idaho orders which allowed drive-in church services, the TRO in *On Fire Christian* enjoined Louisville only from prohibiting drive-in church services.

- *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020): Unlike the Idaho orders, the injunction in *First Baptist Church* appears to prohibit all religious assembly, including both in-person and drive-in services.

- *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020): The TRO in *Maryville Baptist* only enjoined prohibitions on drive-thru religious services; the court declined to enjoin restrictions on in-person services.

- *Tabernacle Baptist v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020): *Tabernacle Baptist* employs flawed reasoning: Chief Justice Roberts and Judge Easterbrook both have explained how in-person worship services are materially different than shopping. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020).

- *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020): The Seventh Circuit—with the benefit of a Supreme Court decision that was issued after the *Roberts* decision—specifically rejected the reasoning in the *Roberts* case in favor of Chief Justice Robert's reasoning in *South Bay United Pentecostal Church*.

- *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 WL 2514313 (E.D.N.C. May 16, 2020): Unlike the Idaho orders, the order at issue in *Berean Baptist* gave a sheriff or local law enforcement officer discretion to decide whether a religious gathering could take place, based upon the opinion of the officer that worship outside would be impossible. This fact was determinative on the question of whether the order was neutral toward religion.

- *First Pentecostal Church of Holy Springs v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020): The court in *First Pentecostal* did not analyze the constitutionality of the governor's regulations, but merely granted a temporary emergency injunction pending appeal, and denied all further relief.

The Supreme Court, however, has recently issued two decisions which are controlling authority, as has the Ninth Circuit. The Ninth Circuit evaluated Free Exercise case law, and refused to enjoin a governor's order that restricted in-person religious gatherings in light of the pandemic. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). The Supreme Court upheld this decision. *See S. Bay United Pentecostal Church*, 140 S. Ct. 1613 (2020) (Mem.). On July 24, 2020, the Court again indicated its unwillingness to interfere with a state's decisions on how it regulates in-person religious gatherings. In *Calvary Chapel Dayton Valley v. Sisolak*, __ S. Ct. __, 2020 WL 4251360 (2020) (mem.), the Court denied an application for injunctive relief from a church which objected to Nevada's imposition of greater restrictions on in-person religious

gatherings than on casinos. Under the Nevada Governor's directive, gatherings at places of worship were limited to 50 total people. *Id.*, 2020 WL 4251360, at *1. But secular gatherings, such as casinos, were allowed to fill to 50% of the venue's capacity. *Id.* Thus, places of worship in Nevada were explicitly treated less favorably than a variety of secular gatherings, and the Supreme Court still denied the requested injunctive relief. Here, the order in effect between March 25 and April 30 treated "multi-person activities or social, spiritual, and recreational purposes" the same. (Dkt. 10-1 at 3 ¶ 6.) The Court can consider the factual allegations on the face of Plaintiffs' Amended Complaint as true and conclude as a matter of law that Defendants' actions were constitutionally sound.

In this case, there have been no restrictions on in-person religious gatherings and no quarantine requirements for months. When those restrictions existed, they were constitutionally sound. Plaintiffs' Amended Complaint fails to state a cause for relief.

E. Plaintiffs attempt to avoid application of the Eleventh Amendment to their FERPA or other state law-based claims ignores the clear teaching of *Halderman*.

As Defendants explained in their opening memorandum (Dkt. 18-1 at 17-18), *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), reiterated the settled principle that "[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Id.* at 101; *accord Doe v. Regents*, 891 F.3d 1147, 1153 (9th Cir. 2018). The Supreme Court added:

> 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. ... [A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

Id. at 121 (citation omitted). Although 28 U.S.C. § 1367 has superseded the common law "pendent jurisdiction" doctrine, *Halderman* applies with equal force to state law claims brought under the § 1367(a) grant of jurisdiction. *E.g.*, *Bear Creek Limited LLC v. Idaho*, No. 4:18-cv-00469-CWD, 2019 WL 3220575, at *3 (D. Idaho July 17, 2019); *see generally* 13D Charles Alan Wright et al,

FEDERAL PRACTICE AND PROCEDURE § 3567 (Apr. 2020 Westlaw update) ("Legislative history makes clear that Congress intended to codify the result in *United Mine Workers of America v. Gibbs*[, 383 U.S. 715 (1966)]. In *Gibbs*, a 1966 case, the Supreme Court described the Article III reach of what was then known as 'pendent jurisdiction.'").

Notwithstanding *Halderman*'s clarity, Plaintiffs argue that Defendants "misse[d] the point raised by [the Amended Complaint], which is that the [Free Exercise of Religion Protected] 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." (Dkt. 19 at 12; *see id.* at 13 ("Plaintiffs believe that the instant case can be distinguished from ... *Halderman* ... because the particular laws at issue are so similar."). Aside from the fact that Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to 2000bb-4—upon which the Idaho legislature modeled FERPA—was enacted "to provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014), beyond the interpretation of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), the relative scope of the federal constitution and the state statute is irrelevant for Eleventh Amendment purposes.

Halderman simply leaves no doubt that where relief, whether prospective or retroactive, is sought against state officers in their official capacities for alleged violation of *state* law, this Court lacks jurisdiction absent Congressional abrogation or state consent to suit in federal court. *See, e.g.*, *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016) ("The Eleventh Amendment bars claims for damages against a state official acting in his or her official capacity."); *Vasquez v. Rackaukas*, 734 F.3d 1025, 1041 (citations omitted) (9th Cir. 2013) ("'A federal court[ ]' may not 'grant' injunctive 'relief against state officials on the basis of state law,' when those officials are sued in their official capacity."). Plaintiffs show neither. The same defect precludes exercise of § 1367(a) jurisdiction over Plaintiffs' other state law-based claims.

II. CONCLUSION

For the reasons set forth above, the Amended Complaint should be dismissed.

DATED this 29th day of July, 2020.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Steven L. Olsen*
STEVEN L. OLSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2020, I electronically filed the foregoing document with th**e Clerk of the Court using the CM/ECF system** to the following CM/ECF registered participant:

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