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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 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Governor Bradley Jay Little and Idaho Department of Health and Welfare Director Dave Jeppesen by and through their attorneys of record, Steven L. Olsen and Dayton P. Reed, submit this memorandum in support of their Motion to Dismiss.

I. BACKGROUND

A. Introduction

Plaintiffs ask this Court to enjoin enforcement of orders that expired before Plaintiffs filed their Amended Complaint based on claimed restrictions to their religious liberties that did not exist

when they filed their complaint and do not exist now. Moreover, Defendants' prior orders to protect the public health and safety during a once-in-a-century pandemic are constitutionally sound. Plaintiffs' case is as meritless as it is moot.

B. Defendants Issued Orders That Were Constitutionally and Statutorily Allowed and Appropriately Protected the Public at the Onset of the COVID-19 Pandemic.

As the devastating impacts of the COVID-19 pandemic swept across the United States, Governor Little and Director Jeppesen took action to protect the health and safety of Idaho's citizens. Acting under constitutional and statutory authority, and consistent with the advice of health care experts who understood how best to prevent the spread of this deadly virus, Defendants issued orders directing actions designed to stem the spread of COVID-19.

On March 25, 2020, Director Jeppesen, as directed by Governor Little, issued an Order to Self-Isolate ("March 25 Order"). The order was based on the undeniable fact that COVID-19 "is easily transmitted, especially in group settings, and that it is essential that the spread of the virus be slowed to protect the ability of public and private health care providers to handle the influx of new patients and safeguard public health and safety."[1]

Given the dangers presented by COVID-19, the March 25 Order directed that "Gatherings of individuals outside the home are prohibited, with certain exceptions for essential activities or essential travel or to perform work for essential businesses . . . ."[2] The order also directed the closure of all restaurants and cafes (with the exception of take-out or delivery service), indoor gyms, recreational facilities, bars and nightclubs. The order also directed the following:

> All people in Idaho shall immediately cease hosting or participating in all public and private gatherings and multi-person activities for social, spiritual and recreational purposes, regardless of the number of people involved, except as specifically identified in Section 8. Such activity includes, but is not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. . . .

[1] Dkt. 10-1 at 9.
[2] *Id.* at 10.

The March 25 Order was amended on April 15, 2020, and by its terms was set to continue "in effect until 11:59 p.m. on April 30, 2020 or until it is extended, rescinded, superseded or amended in writing by the Director," subject to the limited exceptions and under the terms and conditions more particularly set forth below.[3]

In a posting on the Governor's website on March 27, two days after issuing his March 25 Order, the Governor explained that clergy and church members could produce, record and stream church services to the members of their congregations.[4] Further, in a posting on April 2, 2020, the Governor made clear Idahoans could attend drive-in church services.[5]

On April 23, in advance of the anticipated expiration date of the Order to Self-Isolate, Defendants issued "Guidelines for Opening Up Idaho" ("Guidelines").[6] The Guidelines noted that the Governor, with the "help of the Department of Health and Welfare and guidance issued by President Donald Trump and the Centers for Disease Control and Prevention" had established a "data-driven approach to opening up Idaho's economy."[7] The Guidelines provided a staged approach to reopening those activities that had been temporarily closed because of COVID-19. The Guidelines projected each of its 4 stages would last two weeks, beginning May 1, 2020.

At that point on April 23, Plaintiffs and the public were well-informed that Defendants intended to rescind the March 25 and April 30 Orders and replace them with subsequent orders that did not contain any of the prohibitions that Plaintiffs' claims are based upon.[8]

The Guidelines were just that, *guidelines*, which were subject to change dependent upon the circumstances that existed at the time Defendants were deciding next steps for reopening Idaho.

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[3] Dkt. 10-1 at 3.
[4] State of Idaho, Statewide Stay-Home Order, Additional Guidance (updated Mar. 27, 2020), available at: https://coronavirus.idaho.gov/statewide-stay-home-order/.
[5] State of Idaho, Additional Guidance on Statewide Stay-Home Order (updated Apr. 2, 2020), available at: https://coronavirus.idaho.gov/additional-guidance-on-statewide-stay-home-order/.
[6] Dkt. 8-20.
[7] *Id.* at 1.
[8] *Gov. Little announces 4-stage plan to reopen Idaho*, KIFI/KIDK (Apr. 23 2020 9:57 AM), https://localnews8.com/health/coronavirus/2020/04/23/gov-little-to-hold-press-conference-regarding-economic-recovery-in-idaho/

And there were changes in those guidelines. For example, rather than allowing bars, breweries, wineries, and distilleries to open during phase 4 of the reopening on June 13 as originally planned, Defendants allowed those businesses to reopen during phase 3, which started on May 30, 2020.[9] Also changed was the 14-day quarantine requirement for those persons traveling into the state of Idaho. That quarantine requirement was initially scheduled to be phased out on May 30, 2020,[10] but was instead phased out on May 16, 2020.[11]

On April 30, 2020, as provided for in the March 25 Order, Defendants issued a new order, the Stay Healthy Order for Stage 1 ("April 30 Order"), which lifted the restrictions on all public and private gatherings, stating instead that they should be "avoided," but not prohibiting them.[12] The April 30 Order also required certain businesses and activities to remain closed. Religious meetings were not one of those activities.[13] The Order also removed restrictions on intra-state travel.[14] As to Social Distancing and Sanitation Requirements, the April 30 Order stated that "[i]ndividuals shall maintain at least six-foot physical distancing from other individuals whenever possible."[15] The April 30 Order contained language indicating that it was effective as of May 1, 2020 and would continue to remain in effect until it was "extended, rescinded, superseded, or amended in writing by the Governor and Director."[16]

The April 30 Order was followed by a May 14, 2020 Order for Stage 2 of Idaho's reopening, which became effective on May 16, 2020, continued to allow public and private gatherings, stating that public gatherings of more than 10 people "should be avoided,"[17] but

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[9] May 28, 2020 Order, available at: https://coronavirus.idaho.gov/wp-content/uploads/2020/06/stay-healthy-order-stage3.pdf at 3; State of Idaho, Idaho Rebounds: Our Path to Prosperity, Business-specific protocols for opening, available at: https://rebound.idaho.gov/business-specific-protocols-for-opening/ (last visited Jun. 24, 2020).
[10] Dkt. 8-20 at 8.
[11] Dkt. 8-13 at 1.
[12] Dkt. 8-11 at 1, 4.
[13] *Id.* at 4.
[14] *Id.* at 1
[15] *Id.* at 4.
[16] *Id.* at 1.
[17] Dkt. 8-13 at 3.

nevertheless permitting them. The May 14 Order directed that certain businesses and activities remain closed. Again, religious meetings were not one of the activities proscribed. Those participating in public gatherings were directed, "whenever possible" to follow the same Social Distancing and Sanitation Requirements found in the April 30 Order.[18] The May 14 Order also "strongly encouraged" certain individuals arriving from outside Idaho to self-quarantine, but did not require it.[19]

Since the May 14 Order was issued, the State of Idaho has progressed from a Stage 2 opening to Stage 4 opening where all businesses can operate and "gatherings of any size are allowed but should adhere to the physical distancing and sanitation requirements" as provided in the June 11, 2020 Stage 4 Stay Healthy Guidelines ("June 11 Guidelines") issued by Defendants.[20] Religious in-person meetings continue to be allowed. Idahoans can participate in the sacraments of communion and baptism and there are no mandated quarantine requirements for those traveling into Idaho.[21]

The following table summarizes the dates of the various events referenced above.

Date	**Event**	**Impact on religious services or on the 14-day quarantine for persons entering Idaho from outside Idaho.**
March 25, 2020	Order to Self-Isolate issued.	
April 15, 2020	Amended Order to Self-Isolate issued.	
April 23, 2020	Defendants issue Idaho's Reopening Guidelines.	
April 30, 2020 (eff. May 1, 2020)	Defendants issue their Stay Healthy Order for phase one. (Dkt. 8-11.)	In-person religious services permitted while maintaining 6-foot physical distancing whenever possible; no restrictions on travel except for 14-day quarantine requirement for those entering Idaho.
April 30, 2020	Plaintiffs file their first complaint. (Dkt. 5.)	

[18] Dkt. 8-13 at 3.
[19] *Id.*
[20] Stage 4 Stay Healthy Guidelines (Jun. 11, 2020), available at: https://rebound.idaho.gov/wp-content/uploads/stage4-stay-healthy-guidelines.pdf
[21] *Id.*

May 14, 2020 (eff. May 16, 2020)	Defendants issue their Stay Healthy Order for phase two. (Dkt. 8-13.)	14-day self-quarantine requirement for persons entering Idaho from outside Idaho is lifted.
May 27, 2020	Plaintiffs file their Amended Complaint. (Dkt. 8.)	
May 28, 2020 (eff. May 30, 2020)	Defendants issue their Stay Healthy Order for phrase three.	
June 11, 2020 (eff. June 13, 2020)	Defendants issue their Stay Healthy Guidelines for phrase four.	

C. Plaintiffs' Original Complaint and the Amended Complaint Are Based on Alleged Prohibitions That Predate Defendants' April 30 and May 14 Orders.

The operative complaint is Plaintiffs' Amended Complaint, filed on May 27, 2020. Weeks earlier, on April 30, 2020, Plaintiffs filed their first complaint in this matter, seeking a declaratory judgment, temporary restraining order and preliminary and permanent injunctive relief against Governor Little and Director Jeppesen.[22] All 13 of Plaintiffs' causes of action in the first complaint were premised on their contention that they were prevented by Defendants' March 25 Order from (1) attending in-person religious meetings and (2) participating in the sacraments of communion and baptism. The obvious problem with Plaintiffs' assertions is that they *could do both* under the provisions of the April 30, 2020 order referred to in the opening paragraph of Plaintiffs' complaint and *attached to it*.[23]

After filing their first complaint contending a need for immediate injunctive relief, Plaintiffs did virtually nothing to advance their claims. Plaintiffs waited until May 7 before serving their complaint on the Office of the Attorney General but under Federal Rule of Civil Procedure 4(e) that was not effective service on Defendants.[24] Further, Plaintiffs did nothing to obtain the

[22] The counts include First Amendment claims, including alleged violations of the Free Exercise Clause, the Establishment Clause, free speech, and the right to assemble; similar claims under the Idaho State Constitution; a Free Exercise of Religion Protected Act claim; procedural and substantive due process claims under the Fifth and Fourteenth Amendments; an Equal Protection claim under the Fourteenth Amendment; and a Religious Land Use and Institutionalized Persons Act claim.
[23] *See* Dkt. 5-1 at 20-26.
[24] Plaintiffs have never personally served either of the Defendants with that complaint. *See* Fed. R. Civ. P. 4(e)(1) and (2); Idaho R. Civ. P. 4(d)(1).

temporary restraining order or preliminary injunctive relief sought in their complaint. While contending that "The Stay-Home Order . . . has caused, is causing, and will continue to cause Plaintiffs immediate and irreparable harm, actual and undue hardship,"[25] they never filed a motion for a temporary restraining order or preliminary injunctive relief. Nor did Plaintiffs file a request for a hearing date, or contact Defendants to discuss a hearing date for the Court to consider a motion for a temporary restraining order or a motion for a preliminary injunction. Plaintiffs' inaction is a tacit admission that no controversy exists and their case is moot.

In an apparent attempt to revive the failed complaint, Plaintiffs filed an Amended Complaint on May 27, 2020.[26] They retained all of their original 13 causes of action,[27] contending their rights were violated in the same manner alleged in their first complaint, and added a fourteenth cause of action, asserting that their rights were violated by an order that required persons traveling into the state of Idaho to quarantine for 14 days. This cause of action suffers from the same deficiencies as Plaintiffs' previous 13: *the restrictions they asserted as violating their constitutional rights did not exist when they filed their amended complaint.*

In the May 14, 2020 order that became effective May 16, 2020, Defendants continued to allow in-person religious meetings and removed the requirement that those entering the state quarantine for 14 days.[28] Remarkably, although four new Plaintiffs were added to the Amended Complaint,[29] none of the Plaintiffs contend that they had traveled from out-of-state and were prevented from attending religious in-person meetings because of the quarantine requirement,

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[25] Dkt. 5 ¶ 69.
[26] Since Plaintiffs filed their Amended Complaint, they have done nothing to advance their case. They have filed no motions and set no hearings. Plaintiffs did successfully serve their complaint when Defendants accepted service of the Amended Complaint on June 10, 2020, 41 days after Plaintiffs filed their first complaint asserting the need for immediate action.
[27] The counts include First Amendment claims, including alleged violations of the Free Exercise Clause, the Establishment Clause, free speech, and the right to assemble; similar claims under the Idaho State Constitution; a Free Exercise of Religion Protected Act claim; procedural and substantive due process claims under the Fifth and Fourteenth Amendments; an Equal Protection claim under the Fourteenth Amendment; and a Religious Land Use and Institutionalized Persons Act claim.
[28] Dkt. 8-13.
[29] *Compare* Dkt. 5 *with* Dkt. 8.

which was not in effect when the Amended Complaint was filed.[30] Plaintiffs' newest cause of action, then, is one that never could have been successfully asserted because at no time did any of the Plaintiffs suffer an injury from the expired 14-day quarantine requirement.[31]

Put simply, on the date Plaintiffs filed their Amended Complaint, in-person religious meetings and participation in the sacraments of communion and baptism were allowed,[32] interstate travel to religious meetings was allowed, and there is no order prohibiting such activity in effect now.[33]

In their Amended Complaint, Plaintiffs assert that because there is a *possibility* that Defendants could theoretically enter an order that would prevent them from attending "in-person church services at any such place of worship" or "prohibit interstate, or intrastate, travel for religious purposes"[34] this Court should issue a temporary restraining order and a permanent injunction prohibiting Defendants from ever entering an order *in the future* that prohibits those activities. For the reasons discussed below, this Court should reject Plaintiffs' request and dismiss their Amended Complaint. These allegations are entirely speculative and contrary to the trend of reopening that has been ongoing in Idaho since before Plaintiff's filed this action.[35]

II. STANDARD

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). "Article

[30] *See* Dkts. 8-4, 8-8, 8-9, 8-10, 8-15, 8-16, 8-17, 8-18, and 8-19.
[31] Plaintiff Gulotta contends that he risked criminal sanctions if he allowed "someone engaged in interstate travel to attend his church in Idaho," but the language of Defendants' orders does not support that assertion. Dkt. 8 ¶ 19.
[32] Apparently, to explain to this Court and to Defendants why they filed their first complaint even though there had been an order issued allowing Idahoans to attend in-person religious meetings, Plaintiffs stated in their Amended Complaint that "[t]he Stay-Healthy Order 1 was not available to Plaintiffs or their Counsel at the time the original complaint was filed." Dkt. 8 ¶ 33. However, in fact, Plaintiffs *did have* the Stay Healthy Order available when they filed their first complaint. They attached it to that complaint as Exhibit A (Dkt. 10-1), pages 20-26.
[33] The current order, issued June 11, 2020, entitled "Stay Health Guidelines," is subject to judicial notice, as a matter of public record. Fed. R. Evid. 201. It is available at: https://rebound.idaho.gov/wp-content/uploads/stage4-stay-healthy-guidelines.pdf.
[34] Dkt. 8 at 39.

III's 'case-or-controversy' requirement precludes federal courts from deciding 'questions that cannot affect the rights of litigants in the case before them.'" *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974)). Justiciability requires that plaintiffs have standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and that the claims are not moot, *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

A motion to dismiss based on non-justiciability is brought under Federal Rule Civil Procedure 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001); *Stavrianoudakis v. U.S. Dep't of Fish & Wildlife*, No. 1:18-CV-01505-LJO-BAM, 2020 WL 406767, at *4 n.9 (E.D. Cal. Jan. 24, 2020); *Democracy Rising PA v. Celluci*, 603 F. Supp. 2d 780, 788 (M.D. Pa. 2009). "A Rule 12(b)(1) jurisdictional attack may be facial or factual. . . . In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In resolving a facial attack, the Court must accept the factual allegations of the complaint as true and draw all reasonable inferences in Plaintiffs' favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir.2009).

For a complaint to withstand a motion to dismiss under Rule 12(b)(6), it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If the complaint has no cognizable legal theory, lacks sufficient facts alleged to support a cognizable legal theory, or lacks sufficient facts alleged to state a facially plausible claim to relief, then the complaint may be dismissed under Rule 12(b)(6). *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citations omitted).

III. ARGUMENT

The Amended Complaint is moot and fails to establish standing or subject-matter jurisdiction. Plaintiffs' claims are not justiciable. Plaintiffs seek to enjoin enforcement of

rescinded Orders and to enjoin Defendants from prohibiting in-person religious services, participation in sacraments, and travel for religious purposes. However, no such prohibitions exist or have ever existed since Plaintiffs filed their complaint. Moreover, Defendants' prior orders to protect the public health and safety during a once-in-a-century pandemic are constitutionally sound.

A. Plaintiffs Lack Standing.

Plaintiffs lack standing because a favorable decision will not provide them any relief from their alleged injury.

> To satisfy the "irreducible constitutional minimum" for standing, a plaintiff must establish "three elements": (1) injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable decision. . . . "A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought."

Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care, No. 18-55451, 2020 WL 2464926, at *6 (9th Cir. May 13, 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013)). Elaborating on this standard, the Supreme Court has explained:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal quotation marks, alterations, and citations omitted).

In their Amended Complaint, Plaintiffs assert that their free exercise rights were violated in the past by the provisions in the March 25 and April 30 Orders. However, those orders were no longer in effect when Plaintiffs filed their Amended Complaint. On May 1, 2020, Idahoans were no longer prohibited from attending in-person church services and travel to those services was allowed. They could participate in sacraments. The May 14 Order eliminated the 14-day

quarantine requirement for those traveling into the state of Idaho. Plaintiffs also fail to allege any injury-in-fact with respect to the 14-day quarantine, as none of them alleged they had been injured by it.[36]

An injunction barring enforcement of the March 25 and April 30 Orders would not redress any alleged injury because the challenged March 25 and April 30 Orders were rescinded before Plaintiffs even filed their complaint, and the current June 11 Guidelines contain no prohibition on in-person attendance at religious services or on travel, and no requirement that those traveling into the State must quarantine. *Cf. Renee v. Geary*, 501 U.S. 312, 320-21 ("Respondents have failed to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech. Respondents' generalized claim that petitioners have deleted party endorsements from candidate statements in past elections does not demonstrate a live controversy."). Finally, a declaration that defunct orders unlawfully burdened Plaintiffs' rights[37] would likewise provide no relief and is not relief that this Court has jurisdiction to award in any case.[38] Plaintiffs' Amended Complaint fails to allege redressability for purposes of Article III standing, and should be dismissed.

B. Plaintiffs' Claims Are Moot.

This case is moot for reasons similar to those establishing Plaintiffs lack standing: the challenged orders were rescinded before the complaint was ever filed, leaving Plaintiffs with no tangible interest in the outcome of the case.

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[36] *See* Dkts. 8-4, 8-8, 8-9, 8-10, 8-15, 8-16, 8-17, 8-18, and 8-19.

[37] Plaintiffs seek such an order in paragraph C of their Prayer For Relief. *See* Dkt. 8 at 39 ¶ C.

[38] Sovereign immunity precludes a federal-court suit against a state official in his official capacity unless the claim fits within the *Ex parte Young*, 209 U.S. 123 (1908), exception. A state's Eleventh Amendment sovereign immunity extends to state employees acting in their official capacity because a suit against them is regarded as a suit against the state itself. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The *Ex parte Young* exception to sovereign immunity allows official-capacity suits against state employees only for "prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The exception does not permit courts to grant declaratory or injunctive relief relating "solely to past violations of federal law." *Id.* at 67.
To the extent Plaintiffs' Prayer For Relief seeks relief relating to past violations of federal law, it should be denied because such relief cannot be entered against these Defendants under the principles of *Ex Parte Young*. This basis for denying Plaintiffs' requested relief is in addition to those discussed in Defendants' standing and mootness arguments.

For a claim to be justiciable, an actual controversy must exist at all stages of the litigation, not merely at the time the complaint is filed. *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988).

In this case, no controversy existed at the time the Amended Complaint was filed because the orders Plaintiffs contend violated their free exercise rights had been rescinded well before they filed their Amended Complaint. The March 25 Order had been rescinded 26 days before Plaintiffs filed their Amended Complaint.[39] The April 30 Order had been rescinded 11 days before Plaintiffs had filed their Amended Complaint. And Plaintiffs still today can engage in the activities they have alleged are a necessary part of their religious practice. In fact, no controversy existed when Plaintiffs filed their first complaint on April 30, 2020.

In reality, Plaintiffs and the public were well-informed by April 23—a week before Plaintiff's original complaint was filed—that Defendants were planning to rescind the March 25 and April 30 Orders and replace them with subsequent orders that did not contain any of the prohibitions that Plaintiffs' claims are based upon.[40]

In *Spell v. Edward*s, No. 20-30358, 2020 WL 3287239 (5th Cir. Jun. 18, 2020), the Fifth Circuit considered a very similar challenge by a pastor to the Louisiana Governor's stay-at-home order which prohibited gatherings of more than ten people and expired during the litigation. The court concluded the plaintiff's case was moot:

> A Louisiana church and its pastor ask us [to] enjoin stay-at-home orders restricting in-person church services to ten congregants. But there is nothing for us to enjoin. The challenged order expired more than a month ago.

[39] Defendants do not agree that the March 25 Order prohibited Plaintiff's religious activities as they allege.

[40] *Gov. Little announces 4-stage plan to reopen Idaho*, KIFI/KIDK (Apr. 23 2020 9:57 AM), https://localnews8.com/health/coronavirus/2020/04/23/gov-little-to-hold-press-conference-regarding-economic-recovery-in-idaho/

Spell, 2020 WL 3287239, at *1.

In this case, there were no orders in place when Plaintiffs filed their Amended Complaint that prohibited Plaintiffs from engaging in the religious activities they declare are a necessary part of their religious worship. No actual controversy exists now, and no actual controversy existed when the Amended Complaint was filed. No effective relief can be granted. This case is moot and should be dismissed.

C. The Exception To The Mootness Doctrine Plaintiffs Propose Is Not Warranted Here.

The Court in *Spell* also addressed an issue raised by Plaintiffs in their complaint: whether this Court should still enter an injunction because it is possible that at some time in the future Defendants could issue those orders again. *See* Dkt. 8 ¶ 9-10, 48-60, 100-125; *see also Spell*, 2020 WL 3287239, at *3-4. As discussed below, Defendants' actions when issuing these orders were constitutionally sound. And even if they were not, this Court should not enjoin Defendants from entering orders that might sometime in the future in some undefined way restrict in-person religious meetings or travel.

Plaintiffs are asking this Court to issue prospective injunctive relief without having a concrete set of facts on which to issue such an injunction. There is no case or controversy on which this Court can act and so injunctive relief is inappropriate.

There is an exception to the mootness doctrine which allows a court to issue an injunction restraining conduct at issue if the conduct is temporary in nature and capable of repetition. *Hamamoto v. Ige*, 881 F.3d 719, 721 (9th Cir. 2018). The court in *Spell* considered such a request from plaintiffs and rejected it:

> Even if the first requirement (duration) is satisfied for the stay-at-home orders, the plaintiffs fail to establish that the Governor might reimpose another gathering restriction on places of worship. The trend in Louisiana has been to reopen the state, not to close it down. To be sure, no one knows what the future of COVID-19 holds. But it is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one. *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010) (requiring more than "merely a theoretical possibility" that the allegedly

> wrongful conduct would reoccur (quotation omitted)); *see also Cameron*, 2020 WL 2573463, at *2 (concluding that the exception did not apply to a mooted claim challenging expired COVID-19 restrictions in part because "it seem[ed] unlikely that [they] w[ould] be reissued").

Spell, 2020 WL 3287239, at *3.

The same is the case here—the trend in Idaho has been to reopen the state. Plaintiffs can only speculate as to whether there will be additional orders, whether the orders will impose restrictions, and the substance of any additional orders that might be entered by Defendants to address the COVID-19 pandemic. We do not know if any future orders will be issued or what they might contain. And under these circumstances, Plaintiffs cannot demonstrate with any reasonable certainty that Defendants will issue orders containing prohibitions to which they object.

Further, the United States Supreme Court has stated that the exception to the mootness doctrine is not applicable when a plaintiff had no standing to assert his claims in the first instance because such exception does not exist with respect to a plaintiff's standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,191 (2000). Indeed, "if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998)).

Here, where Plaintiffs clearly lacked standing because there was no live case or controversy, this Court then lacks the jurisdiction to issue an advisory opinion concerning past orders, or concerning yet-to-be-known requirements or restrictions of orders that may or may not be issued, and that may have no or different impacts on Plaintiffs.

D. Defendants' Orders Restricting Gatherings and Requiring Quarantining were Constitutionally Sound.

The March 25 Order had been superseded when this case was filed, and therefore has not impacted Plaintiffs' rights since the initiation of this lawsuit; nevertheless, that expired order was constitutionally sound. The State acknowledges that Plaintiffs have a right under the Free Exercise

Clause to worship and engage in religious practices. However, as the Supreme Court has explained, that right—like every constitutional right—is not absolute in every circumstance.

The Supreme Court has held that a law may burden religious exercise, without needing to meet strict scrutiny, if that law is neutral toward religion and generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990)).

The Seventh Circuit Court of Appeals applied this rule in deciding a challenge to the Illinois Governor's order responding to the COVID-19 pandemic in *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 3249062 (7th Cir. Jun. 16, 2020). While labeling religious services "essential," the order did not spare religious gatherings from a 10-person limit applicable to all gatherings. *Id.*, 2020 WL 3249062, at *2. The Seventh Circuit explained that, under *Smith*, "the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally applicable laws." *Id.*, 2020 WL 3249062, at *4. Rejecting the argument that the order is discriminatory because certain companies can continue to operate—like grocery stores—while churches are limited in their ability to gather, *id.*, 2020 WL 3249062, at *4-5, the Seventh Circuit observed that the Illinois order "did not set out to disadvantage religious services compared with secular events. Nor does the order discriminate among faiths," *id.*, 2020 WL 3249062, at *4. Ultimately, the Seventh Circuit held that the order did not violate the First Amendment under *Smith*. *Id.*, 2020 WL 3249062, at *6.

In addition to this general limitation on the right to Free Exercise under *Smith*, the Supreme Court has also explained that the exercise of "all rights" are subject to "reasonable conditions" that the government deems "essential to the safety, health, peace, good order, and morals of the community." *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). This limitation provides the government the power to protect the public health so long as the regulation has a real or substantial relation to public health, and is not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

Relying on *Jacobson*, the Fifth Circuit Court of Appeals determined that a burden imposed by Texas Governor Abbott on obtaining an abortion was constitutional in light of the COVID-19 pandemic. *In re Abbott*, 954 F.3d 772 (5th Cir. 2020). In reaching this conclusion, the court concluded that the Governor's order temporarily requiring postponement of all non-medically necessary procedures—including elective abortions—had a real or substantial relation to the objective of protecting public health[41], and was not "beyond question, in palpable conflict with the Constitution." *Id.* at 791.

The March 25 Order was likewise constitutional. First, it was a neutral law of general applicability, as it treated religious gatherings the same as all other "public and private gatherings and multi-person activities," including "community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." Dkt. 10-1 ¶ 6; *see S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of cert.) ("Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.").

Second, the March 25 Order had a real and substantial relation to public health. It is common knowledge that COVID-19 spreads through a population through contact, and that experts recommend reducing contact to slow the spread. *See Elim*, 2020 WL 3249062, at *1. The veracity of these principles has borne out across the globe, including here in Idaho. 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.[42] The March 25 Order restricted gatherings with the intent of slowing the spread of COVID-19. Dkt. 10-

[41] *Id.* at 787.
[42] Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, IDAHO STATESMAN (Jun. 4, 2020), https://www.idahostatesman.com/news/coronavirus/article243274446.html.

1 ¶¶ 1-2. Therefore, like the order in *In re Abbott*, the March 25 Order had a real and substantial relation to public health.

Third, the March 25 Order was clearly not a plain, palpable invasion of constitutional rights. Like the orders in *In re Abbott*, *Elim*, and *Newsom*, the March 25 Order was a temporary order that imposed a burden on a constitutional right without outright depriving it. The order in *In re Abbot* allowed some pre-viability abortions in life-threatening circumstances. The order in *Elim* allowed religious practice that did not involve gatherings of more than 10, including TV, drive-in, and internet-streamed worship services. *Elim*, 2020 WL 3249062, at *5. The order in *Newsom* allowed 25% capacity religious gatherings up to 100 people. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614. Similarly, the March 25 Order allowed clergy or church members to produce, record and stream religious services and to provide or participate in drive-in church services. Further, the order was temporary and included an explicit expiration date. Defendants' actions were measured, reasoned responses to an evolving crisis with lives at stake. The March 25 Order met the requirements under *Jacobson*—and then expired on its own terms and was replaced with an order removing the incidental burdens on free exercise.

E. Plaintiffs' Claim under Idaho's Free Exercise of Religion Protection Act is barred by the Eleventh Amendment.

Claims brought under Idaho's Religious Freedom Act, are barred by Eleventh Amendment Immunity in federal court. Plaintiffs' bring their complaint against Governor Little and Director Jeppesen in their official capacities. However, this does not allow Plaintiffs' to bring claims under state law in federal court. As the Ninth Circuit Court of Appeals has explained:

> The Eleventh Amendment protects states and state instrumentalities, such as The Regents, from suit in federal court. Under the *Ex parte Young* exception to that Eleventh Amendment bar, a party may seek prospective injunctive relief against an individual state officer in her official capacity. However, the *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant.

Doe v. Regents of the Univ. of Cal., 891 F.3d 1147, 1153 (9th Cir. 2018) (citing, *inter alia*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 117 (1984)) (remaining citations omitted).

Analyzing a challenge to an Illinois COVID-19 order, the Seventh Circuit Court of Appeals found that Illinois' Religious Freedom Restoration Act did not make a clear declaration of the intent to waive Eleventh Amendment Immunity, and therefore did not allow a suit to be brought under it in federal court. *Elim*, 2020 WL 3249062, at *4 (citing *Coll. Savings Bank v. Fla. Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666, 676 (1999)); *see Pennhurst*, 465 U.S. 89. The analyzed Illinois provision is virtually identical to its Idaho counterpart:

775 Ill. Comp. Stat. Ann. 35/20	Idaho Code § 73-402(4)
If a person's exercise of religion has been burdened in violation of this Act, that person may assert that violation as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government. A party who prevails in an action to enforce this Act against a government is entitled to recover attorney's fees and costs incurred in maintaining the claim or defense.	A person whose religious exercise is burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. A party who prevails in any action to enforce this chapter against a government shall recover attorney's fees and costs.

The claim brought under Idaho's Free Exercise of Religion Protection Act must be dismissed for this additional reason.

IV. CONCLUSION

For the reasons described above, Plaintiffs' Verified Complaint should be dismissed with prejudice.

DATED this 24th day of June, 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 24th day of June, 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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