UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE

MARYVILLE BAPTIST CHURCH, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:20-cv-00278-DJH
ANDY BESHEAR, in his official capacity as the Governor of the Commonwealth of Kentucky,	)	
Defendant.	)	

GOVERNOR BESHEAR'S FIRST AMENDED MOTION TO DISMISS

Comes now, Defendant Governor Andy Beshear, in his official capacity, by and through counsel, and moves this Court pursuant to Fed. R. Civ. P ("FRCP") 12(b)(1) and (6) to dismiss Plaintiffs' claims. Due to a change in circumstances, Plaintiffs' claims are now moot, depriving this Court of subject matter jurisdiction. In addition, under the doctrine of sovereign immunity, this Court lacks subject matter jurisdiction over Plaintiffs' claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and claims under state law. (Doc. 1.). Alternatively, Plaintiffs fail to plead a claim under the RLUIPA. Finally, all of the claims should be dismissed pursuant to FRCP 12(b)(6) for the reasons set forth in Governor Beshear's Response to the Renewed Emergency Motion for Injunction Pending Appeal (Doc. 31), which is incorporated fully herein by reference. Those reasons have been applied by other District Courts to deny similarly requested relief. *See Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-832 JAM/CKD, --- F.Supp.3d ---, 2020 WL 2121111 (E.D. Cal. May 5, 2020); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, --- F.Supp.3d ---, 2020 WL 1905586 (D. N.M. April 17, 2020).

A Memorandum of Law and Proposed Order are attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I electronically filed the foregoing Amended Motion to Dismiss, Memorandum of Law, and Proposed Order via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ S. Travis Mayo
S. Travis Mayo

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Plaintiffs,	)	
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ANDY BESHEAR, in his official capacity as the Governor of the Commonwealth of Kentucky,	)	
Defendant.	)	

GOVERNOR BESHEAR'S MEMORANDUM OF LAW
IN SUPPORT OF FIRST AMENDED MOTION TO DISMISS

Pursuant to Fed. R. Civ. P ("FRCP") 12(b)(1) and (6), this Court should dismiss Plaintiffs' claims. Due to a change in circumstances, Plaintiffs' claims are now moot, depriving this Court of subject matter jurisdiction. In addition, under the doctrine of sovereign immunity, this Court lacks subject matter jurisdiction over Plaintiffs' claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and claims under state law. (Doc. 1.). Alternatively, Plaintiffs fail to plead a claim under the RLUIPA. Finally, all of the claims should be dismissed pursuant to FRCP 12(b)(6) for the reasons set forth in Governor Beshear's Response to the Renewed Emergency Motion for Injunction Pending Appeal (Doc. 31), which is incorporated fully herein by reference. Those reasons have been applied by other District Courts to deny similarly requested relief. *See Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-832 JAM/CKD, --- F.Supp.3d ---, 2020 WL 2121111 (E.D. Cal. May 5, 2020); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, --- F.Supp.3d ---, 2020 WL 1905586 (D. N.M. April 17, 2020).

BACKGROUND

I. Procedural Background

This action stems from a dispute over the application of a March 19, 2020 Executive Order issued by the then-Acting and now current Secretary of the Kentucky Cabinet for Health and Family Services, acting as the Governor's designee. Aimed at addressing the COVID-19 pandemic and declared state of emergency in the Commonwealth of Kentucky, the Order prohibits "all mass gatherings[,]" defined as "any event or convening that brings together groups of individuals, including, but not limited to community, civic, public, leisure, faith-based, or sporting events, parades; concerts; festivals; conventions; fundraisers; and similar activities." (Doc. 1-5, PageID # 66.)

On April 17, 2020, Plaintiffs filed a Verified Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunctive Relief and Damages against the Governor in his official capacity challenging the mass gatherings order. (Doc. 1.) The Complaint sets forth seven federal claims: four claims under the First Amendment, a claim under Article IV of the United States Constitution, an equal protection claim, and an alleged violation of RLUIPA. (Doc. 1.) Plaintiffs also allege five state law claims, including four claims arising under the Kentucky Constitution and a claim that the Order violates the Kentucky Religious Freedom Restoration Act. (Doc. 1.)

Also on April 17, Plaintiffs filed an Emergency Motion for Temporary Restraining Order. (Doc. 3.) This Court denied the motion. (Doc. 9.) Plaintiffs appealed the denial of the motion to the Sixth Circuit Court of Appeals. (Doc. 16.) That appeal is pending.

In the meantime, Plaintiffs filed Emergency Motions for Preliminary Injunction Pending Appeal in both this Court and the Sixth Circuit. (Doc. 17); *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427 (6th Cir. May 2, 2020), ECF No. 4-1. In a per curiam order, the Sixth Circuit granted the motion in part to enjoin the mass gatherings order to the extent it applied to or was enforced against drive-in faith-based services. (Doc. 23.) The Sixth Circuit's Order did not enjoin the mass gatherings order as it applied to in-person faith-based services. (*Id*.) Of note, in closing, the Sixth Circuit requested that this Court "prioritize resolution of the claims[.]" (*Id*. at 295.) To that end, the Governor filed a Motion to Dismiss (Doc. 33.)

After filing that Motion to Dismiss, an Eastern District of Kentucky District Court issued a statewide temporary restraining order preventing the Governor or any Commonwealth official from enforcing the prohibition on mass gatherings as to in-person services of faith-based organizations. *See* Opinion and Order (Doc. 24), *Tabernacle Baptist Church v. Beshear*, No. 3:20-cv-00033-GFVT (E.D.Ky. May 8, 2020). This Court also preliminarily enjoined enforcement of the prohibition on mass gatherings "as to in-person services at Maryville Baptist Church so long as the church, its ministers, and its congregants adhere to public health requirements set by state officials." (Doc. 35, PageID #: 580.)

In response to these orders, the Secretary of the Cabinet for Health and Family Services amended the March 19, 2020 order prohibiting mass gatherings. On May 9, 2020, the Secretary issued an Order amending the prohibition on mass gatherings. (Doc. 36-1.) Pursuant to that Order, the prohibition on mass gatherings no longer applies to in-person services of faith-based organizations. (*Id*.) The Order requires faith-based organizations that have in-person services to implement and follow the Guidelines for Places of Worship that the Order attaches and incorporates by reference. (*Id*.). The Guidelines provide that places of worship will be expected

to meet the Healthy at Work Minimum Requirements for all entities in Kentucky and, in addition, should follow the guidelines for places of worship in order to reopen and remain open. (*Id.*) The Guidelines are mostly permissive, but, consistent with the Court's May 8, 2020 Order, require that places of worship having in-person services adhere to social distancing and hygiene guidelines of the CDC and public health officials. (*Id.*)

II. Factual Background

The Governor adopts by incorporation and reference the Response in Opposition to Plaintiffs' Renewed Emergency Motion for Injunction Pending Appeal as to the necessary factual background regarding the spread of COVID-19 and the Commonwealth's response. (*See* Doc. 31. PageID #: 406 – 421.)

Since those filings, Maryville Baptist Church held in-person services on May 10, 2020, but did not comply with the requirements set forth in this Court's preliminary injunction Order. As shown by the video of the in-person service, the service began with members of the choir standing well within six (6) feet of one another, not adhering to social distancing guidelines.[1] Later during the in-person service, members of the congregation, including some members of the vulnerable population at higher risk during the COVID-19 pandemic, stood with the pastor, side by side, not adhering to social distancing, without any face coverings, and at times touched or hugged one another. (*Id.* at 25:30-37:02.)

Defendants now amend their prior Motion to Dismiss (Doc. 33) to include these procedural and factual developments.

[1] Video of Maryville Baptist Church Service, May 10, 2020, at 0:01-20:36, available at https://www.facebook.com/maryville.baptist/videos/3165718850157409/ (last visited May 11, 2020).

ARGUMENT

In light of recent factual developments, Plaintiffs' claims are now moot. Furthermore, the Court should deny Plaintiffs' requested relief due to their unclean hands. In addition, this Court lacks jurisdiction over Plaintiffs' state law claims and RLUIPA claim; sovereign immunity applies to these claims. Finally, Plaintiffs fail to plead a claim under RLUIPA and with respect to their Complaint as a whole. The Governor therefore requests that this Court dismiss Plaintiffs' Complaint.

I. Legal Standard

FRCP 12(b)(1) requires a court to dismiss a complaint when it lacks subject matter jurisdiction over the case. A federal court lacks subject matter jurisdiction over moot claims. *Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014). Similarly, a federal court lacks subject matter jurisdiction over claims against a State rightfully asserting its sovereign immunity. *Alden v. Maine*, 527 U.S. 706 (1999).

Alternatively, FRCP 12(b)(6) permits a district court to dismiss a complaint for "failure to state a claim upon which relief can be granted." For purposes of ruling on a Motion to Dismiss pursuant to FRCP 12(b)(6), the court construes the complaint in a light most favorable to the plaintiff and accepts as true all well-pled allegations in the complaint. *Robert N. Clemens Trust*, 485 F.3d at 845 (citation omitted). The "factual allegations must be enough to raise a right to relief above a speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (citations omitted). However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 2944, 92 L.Ed.2d 209 (1986) (citation omitted).

II. The Governor's Actions Amending The Prohibition On Mass Gatherings Renders Plaintiffs' Claims Moot.

This Court's jurisdiction is limited to "cases and controversies." U.S. CONST. art. III, § 2. The issue of mootness addresses whether an actual, live controversy exists during the litigation or whether an intervening event will render the Court's final adjudication merely advisory. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). In other words, a court that at one point had jurisdiction may lose that jurisdiction if the case becomes moot because an intervening event has "completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted).

The Sixth Circuit treats "cessation of the allegedly illegal conduct by government officials ... with more solicitude ... than similar action by private parties." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012). Therefore, government "self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Id.* "Legislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this requisite case-or-controversy because a statute must be analyzed by the ... court in its present form." *Id*.

This case became moot on May 9, 2020, when Governor Beshear amended the March 19, 2020 Executive Order prohibiting mass gatherings. That order – the only order at issue in this matter – no longer applies to in-person services of faith-based organizations. The Sixth Circuit recognized the issue of mootness in its per curiam order, stating, "The case will become moot just over three Sundays from now, May 20, when the Governor has agreed to permit places of worship to reopen." *Maryville Baptist Church v. Beshear*, --- F.3d --- (6th Cir. 2020). This remains true even though the Governor initiated the May 20 reopening plan on May 9. In other words, the case that would have been moot on May 20 is now moot as of May 9.

Moreover, any opinion from this Court on the merits of Plaintiffs' claims would amount to an advisory opinion, which Article III of the Constitution prohibits. *Fialka –Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 715 (6th Cir. 2011). To address the merits, the Court would have to operate under the hypothetical that the mass gatherings order still applied to faith-based organizations or that the Governor will enact these same measures again. Employment of such hypotheticals is the hallmark of a prohibited advisory opinion. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

This Court should dismiss Plaintiffs' Complaint as moot.

III. The Court Should Deny Further Injunctive Relief Due To Plaintiffs' Unclean Hands.

The Court should also dismiss these Plaintiffs' claims for equitable relief because Plaintiffs have demonstrated unclean hands by conducting in-person services without respecting CDC guidelines for social distancing, as required by this Court's May 8, 2020 Order. In fact, Plaintiffs' entire request for relief was predicated on their assertion they would comply with the measures applicable to life-sustaining businesses, including social distancing and hygiene guidelines. (*See generally* Complaint, Doc. 1.)

The unclean hands doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the opposing party." *Cleveland Newspaper Guild, Local 1 v. Plain Dealer Pub. Co.*, 839 F.2d 1147, 1155 (6th Cir. 1988) (quotation marks and citation omitted). The unclean hands doctrine has been invoked to bar relief where, as here, Plaintiffs have engaged in action in violation of the law while the case is pending. As the Seventh Circuit has explained, "[p]arties who believe that a statute or ordinance is unconstitutional must wait for that to happen before treating the challenged law as nonexistent. They do not have free rein to

invoke a court's jurisdiction over a challenge to an ordinance, but to then act like the law does not exist before the court reaches the merits of its challenge." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 370 (7th Cir. 2019).

In this case, Plaintiffs secured the preliminary relief they sought – a limitation on the mass gatherings order's application to in-person services that comply with social distancing requirements. Among those requirements is that family groups maintain six feet of separation. (Doc. 35, PageID #: 580.) The Eastern District of Kentucky and Sixth Circuit reached similar results.

Yet Plaintiffs promptly held an in-person service during which individuals – including individuals who are plainly among the high-risk groups for COVID-19 – were well within six feet of each other and even touched each other, as the video recording indisputably shows.[2] Thus, Plaintiffs chose to flagrantly violate that part of the mass gatherings order that every court has upheld.

Plaintiffs' wrongful conduct bars further injunctive relief, especially given that Defendants have already revised the mass gatherings order in conformity with this Court's decision. In *GEFT Outdoors*, the Seventh Circuit affirmed a District Court's denial of injunctive relief against an ordinance that the plaintiff alleged violated the First Amendment, where the plaintiff chose to violate the ordinance while the motions were pending. *Id.* As that court explained, "[t]he district court, faced with a situation where GEFT had invoked the court's power over its dispute with Westfield, but then unilaterally acted in violation of a still-valid ordinance, did not abuse its discretion in determining that these actions supported denying GEFT's motion for equitable relief." *Id.*

[2] Video of Maryville Baptist Church Service, May 10, 2020, at 0:01-20:36, available at https://www.facebook.com/maryville.baptist/videos/3165718850157409/ (last visited May 11, 2020).

Indeed, Plaintiffs' conduct is more unconscionable than the conduct that barred injunctive relief in *GEFT Outdoors*, because Plaintiffs here did not simply act before the Court could rule – they instead violated the plain language of this Court's order, which upheld the social distancing requirements.

In light of Plaintiffs' unlawful conduct and Defendants' good-faith effort to comply with the orders of this Court, the Eastern District of Kentucky, and the Sixth Circuit, the Court should dismiss the Complaint. There is simply no risk that Plaintiffs' constitutional rights will be violated, assuming *arguendo* that this Court and the Sixth Circuit have correctly articulated those rights, and Plaintiffs' willful failure to comply with the orders of this Court and of the Eastern District of Kentucky bars any relief.

IV. The Eleventh Amendment Prohibits Plaintiffs' State Claims And RLUIPA Claims Against The Governor.

The Eleventh Amendment to the United States Constitution bars suits against the state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97-98 (1984). State officials sued in their official capacities are "arms of the state" entitled to assert the State's sovereign immunity on their own behalf. *See Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005). The Supreme Court acknowledges three exceptions: suits against state officials for injunctive relief challenging the constitutionality of the official's action, *see Ex parte Young*, 209 U.S. 123 (1908), suits to which states consent, *see Pennhurst*, 465 at 98, and suits invoking Congressional statutes pursuant to the Fourteenth Amendment, *see Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001). These exceptions are not applicable to Plaintiffs' state law claims and RLUIPA claim asserted in the Complaint. As to the state law claims, "because the purposes of *Ex parte Young* do not apply to a lawsuit designed to bring a State into compliance with state law, the States' constitutional immunity from suit prohibits all state-law claims filed against a State in federal court, whether

those claims are monetary or injunctive in nature." *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005) (citing *Pennhurst*, 465 U.S. at 106). Nor has the Commonwealth consented to suit in federal court on the state law claims. The Kentucky Constitution provides that the Commonwealth cannot waive immunity except by express legislative action. KY. CONST. § 231. *See also Edelman v. Jordan*, 415 U.S. 651, 673 (1977) (a state must specify "by the most express language" its intent to waive Eleventh Amendment immunity and subject itself to suit in federal court.) The Commonwealth has not done so.

As to the RLUIPA claim, that Act does not expressly abrogate a state's sovereign immunity. *See Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1025-26 (D.C. Cir. 2006).

Plaintiffs' claims also cannot survive as requests for declaratory judgment. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (holding that the Declaratory Judgment Act does not extend the jurisdiction of federal courts.)

Accordingly, sovereign immunity bars Plaintiffs' claims against the Governor in his official capacity for damages, prospective injunctive and declaratory relief under state law and RLUIPA.

V. Plaintiffs Fail To Plead A Claim Under The Religious Land Use And Institutionalized Persons Act.

The Court should dismiss Plaintiffs' RLUIPA claim for the additional reason that they have not stated a claim under that statute. Plaintiffs assert a violation of 42 U.S.C. § 2000cc(a)(1) of RLUIPA. That section states that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." 42 U.S.C. § 2000cc(a)(1). It applies in any situation in which:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2).

RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law." 42 U.S.C. § 2000cc-5(5). The mass gatherings order regulates conduct, not land use. Plaintiffs fail to allege the Governor imposed or implemented a "land use regulation." (*See* Doc. 1, PageID # 44-46.) Moreover, they disregard the application of 42 U.S.C. § 2000cc(a)(2) to their claim. Plaintiffs do not allege the burden was imposed "in a program or activity that receives Federal financial assistance[;] . . . [that it] affect[s] commerce with foreign nations, among the several States, or with Indian tribes;" or that it was imposed in a manner that allows the government to "make, individualized assessments of the proposed uses for the property involved."

Neither do Plaintiffs cite to any decision upholding a challenge under RLUIPA to a conduct-regulating statute. Interpreting RLUIPA to regulate conduct in such a way would raise constitutional questions about RLUIPA's congruence and proportionality. *See Cross Country Christian Ctr. v. Newsom*, -- F.3d --, 2020 WL 2121111, at *7 (E.D. Calif. Mar. 5, 2020) ((citing *Guru Nanak Sikh Soc. Of Yuba City v. County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 1161 L.Ed.2d 1020 (2005) ("To avoid RFRA's fate, Congress wrote that RLUIPA would apply only to regulations regarding land use and prison conditions.”))

Under the canon of constitutional avoidance, RLUIPA does not, by its plain terms, apply to the mass gatherings order.

Plaintiffs fail to plead this claim with the particularity required to survive a motion to dismiss.

VI. This Court Should Dismiss The Complaint Entirely For Plaintiffs' Failure to State a Claim.

Plaintiffs cannot prevail on any of their claims. The Governor's order prohibiting mass gatherings was a lawful response to a worldwide public health emergency. The Governor's Response to Plaintiff's Renewed Emergency Motion for Injunction Pending Appeal addresses these points, which is incorporated in this Motion. These points have been adopted by other District Courts to uphold similar orders in other states. *See Cross Culture Christian Ctr.,* No. 2:20-cv-832, --- F.Supp.3d ---, 2020 WL 2121111; *Legacy Church, Inc.*, No. CIV 20-0327 JB/SCY, --- F.Supp.3d ---, 2020 WL 1905586.

CONCLUSION

For the foregoing reasons, Governor Beshear respectfully asks the Court to dismiss Plaintiffs' Complaint as moot. Alternatively, the Governor respectfully requests that this Court apply the unclean hands doctrine to deny Plaintiffs' the relief sought. The Governor further requests that this Court dismiss Plaintiffs' state law claims and the claim asserted under the Religious Land Use and Institutionalized Persons Act pursuant to the doctrine of sovereign immunity. Additionally, Governor Beshear respectfully asks this Court to dismiss the Complaint in its entirety for Plaintiff's failure to state a claim as set forth herein and in Governor Beshear's Response to Plaintiffs' Renewed Emergency Motion for Injunction Pending Appeal.

Respectfully submitted,

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Defendant.	)	

ORDER

This matter having come before the Court on the Governor's Amended Motion to Dismiss, and the Court having reviewed the Amended Motion and being sufficiently advised, it is hereby ORDERED that the Amended Motion to Dismiss is GRANTED.

So Ordered this ___ day of _____, 2020.

_____
JUDGE DAVID J. HALE
United States District Court for the
Western District of Kentucky