The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HARBORVIEW FELLOWSHIP,

Plaintiff,

v.

GOVERNOR JAY INSLEE, in his official capacity; SECRETARY OF HEALTH UMAIR SHAH, in his official capacity; and ROBERT FERGUSON, in his official capacity as Attorney General of Washington,

Defendants.

NO. 3:20-cv-05518-RJB

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

NOTE ON MOTION CALENDAR: February 12, 2021

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

ATTORNEY GENERAL OF WASHINGTON
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Constitutional Provisions

Statutes

Rules

Other Authorities

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I. INTRODUCTION

More than six months ago, this Court correctly denied Plaintiff Harborview Fellowship's Motion for Temporary Restraining Order (TRO Motion) because, inter alia, it lacked Article III standing to assert this pre-enforcement challenge to Defendant Governor Jay Inslee's Religious and Faith-based Organization COVID-19 Requirements (the Religious Services Guidance or Guidance). Dkt. #42; Declaration of Zachary Pekelis Jones (Jones Decl.), Ex. A at 30–32 (transcript of Court's oral ruling on TRO Motion). Since then, nothing has changed to confer Harborview with standing. Under the Ninth Circuit's three-factor test, Harborview continues to lack standing because (1) it has not articulated a "concrete plan" to violate the Guidance; (2) it has not been the target of a "specific threat" of enforcement; and (3) it can show no "history of past prosecution or enforcement under [the Guidance]" because, quite simply, it has not been enforced against anyone. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). For that reason, and because the Eleventh Amendment bars Harborview's claims against Defendants Washington Governor Jay Inslee, Secretary of Health Umair Shah,[1] and Attorney General Robert Ferguson, the Complaint should be dismissed without prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

Defendants incorporate by reference the factual background set forth in their Response to Harborview's TRO Motion, which describes the COVID-19 pandemic, Washington State's response, and this case's procedural history through June 11, 2020. Dkt. #21 at 4–10. What follows is a summary of the relevant factual developments since the Court's denial of the TRO motion.

[1] The Governor appointed Umair A. Shah Secretary of Health on December 21, 2020. *See* Wash. Dep't of Health, *Washington State Department of Health welcomes new Secretary of Health, Dr. Umair A. Shah*, Dec. 21, 2020, https://www.doh.wa.gov/Newsroom/Articles/ID/2532/Washington-State-Department-of-Health-welcomes-new-secretary-of-health-Dr-Umair-A-Shah. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Defendants have substituted Dr. Shah for former Secretary John Wiesman in the case caption and respectfully request that the Court direct the Clerk of court to substitute Dr. Shah for Dr. Wiesman as a party. *See, e.g.*, *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1099 n.1 (W.D. Wash. 2019).

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A. Harborview's Second Amended Complaint

On August 21, 2020, Harborview filed a Second Amended Complaint (Complaint), which remains the operative complaint. Dkt. #53. The Complaint added as defendants two local officials, Sheriff Paul Pastor and Anthony L-T Chen, the Tacoma-Pierce County Health Department's Director of Health (together, the Local Defendants). *Id.* ¶¶ 9, 10. The Complaint also revised its factual allegations to reflect the Governor's decision in June to raise the Guidance's occupancy caps to 200 people for outdoor services and, for indoor services in Phase 2 counties, from to 25 percent capacity or 200 attendees, whichever is lower. *Id.* ¶ 2. Originally, the Guidance had permitted outdoor services of 100 people and indoor services in Phase 2 counties of the lower of 25 percent capacity or 50 attendees. *See* Dkt. #16 at 6.

The Complaint also alleged that Harborview had "resumed in-person outdoor worship on its property" and that such outdoor services "have exceeded the attendance cap imposed by the" Guidance. Dkt. #53 ¶ 75. As for indoor services, the Complaint alleged that Harborview would "resume indoor in-person worship on September 13, 2020," which services "will not be limited to 25% of building capacity." *Id.* ¶ 77. Harborview claims that its services "*may be* inspected and shut down," "*may be* reported to the governor as out of compliance with the" Guidance, and "*may be* subject to criminal and civil penalties if their worship services are not in compliance with the" Guidance. *Id.* ¶¶ 78–80 (emphasis added). As in its earlier complaints, Harborview makes no allegation that any state or local official has threatened to enforce the Guidance against it.

In December 2020, the Court dismissed all claims against the Local Defendants. The Court ruled, inter alia, that Harborview lacked standing because it did "not point to any action or inaction by" the Local Defendants which "caused it" (or will cause it) "injury." Dkt. #72 at 5; Dkt. #75 at 6.

B. The Fall and Winter "Surge" and the Temporary Restrictions

Starting in late September 2020, COVID-19 cases rose at unprecedented rates. The seven-day average for new cases in Washington reached an all-time high of 3,000—more than three times the pre-autumn high. *See* Fig. 1. A dangerous rise in hospitalizations followed. *See* Fig. 2.

Fig. 1: Washington Statewide COVID-19 Epidemiological Curve (Cases)[2]

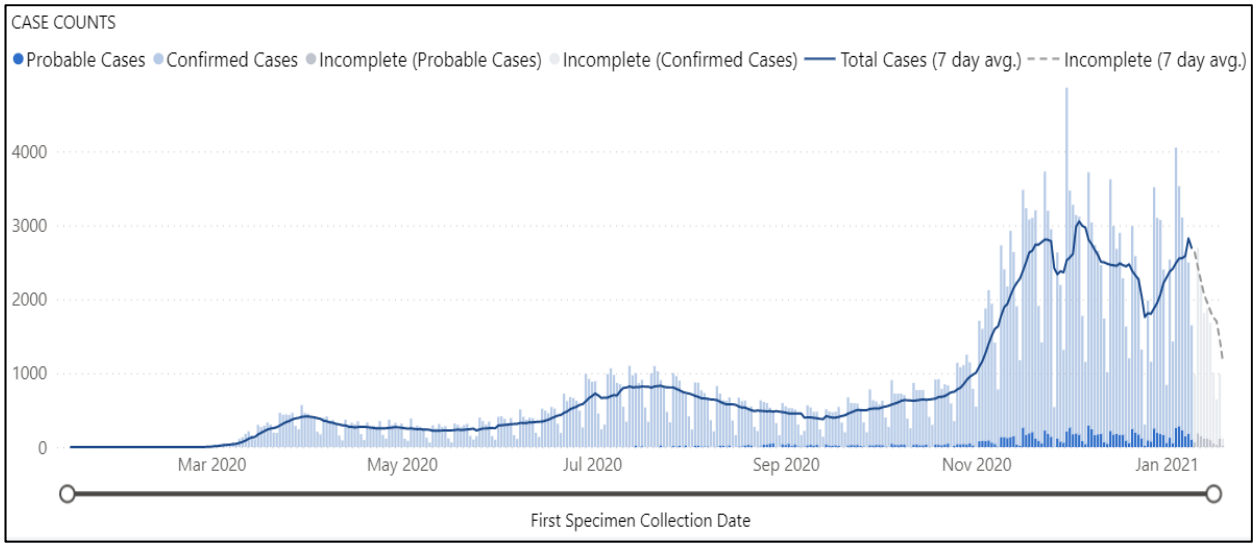
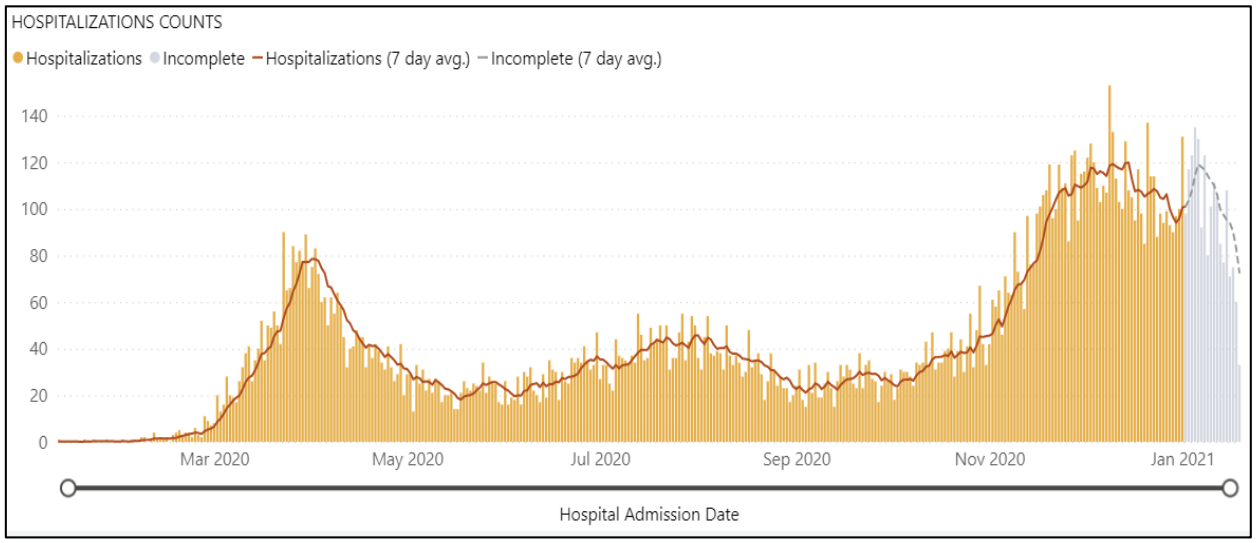


Fig. 2: Washington Statewide COVID-19 Epidemiological Curve (Hospitalizations)[3]



[2] Wash. Dep't of Health, COVID-19 Data Dashboard, Epidemiological Curves www.doh.wa.gov/Emergencies/COVID19/DataDashboard (updated Jan. 19, 2021).

[3] Wash. Dep't of Health, COVID-19 Data Dashboard, Epidemiological Curves www.doh.wa.gov/Emergencies/COVID19/DataDashboard (updated Jan. 19, 2021).

C. The Temporary Restrictions

In response to this "fall surge," on November 17, 2020, the Governor set new temporary restrictions on in-person gatherings, businesses, and other activities statewide. Declaration of Kathryn Leathers (Leathers Decl.) ¶ 12. These restrictions were in place for eight weeks, having expired on January 11, 2021. *Id.* ¶ 18, Ex. E. The temporary restrictions prohibited all indoor social gatherings with persons outside one's household unless certain testing and quarantine requirements were met. *Id.*, Ex. B at 3. Outdoor social gatherings were permitted, but with no more than five non-household members. *Id.* The temporary restrictions also barred numerous activities that had been allowed in Phase 2 under the Safe Start Plan, such as indoor restaurant dining, museums, and gyms. *Id.* at 3–4. Other activities were permitted, but with stricter limits than under the Safe Start Plan. For example, professional services businesses (*e.g.*, office work) had to "mandate that employees work from home when possible and close offices to the public if possible." *Id.* at 4. Where remote work was impossible, professional services businesses had to limit occupancy to 25 percent of occupancy limits. *Id.*

D. Amendments to the Religious Services Guidance

In contrast to the heightened limits on most other activities, the temporary restrictions left religious gatherings largely unchanged. Indeed, in some respects the temporary restrictions were actually more accommodating of religious worship than the earlier Guidance. The temporary restrictions permitted indoor services at the lower of 25 percent of capacity or 200 people, and outdoor services of up to 200 people. Leathers Decl. ¶ 14, Ex. A at 4. On December 21, 2020, however, the Governor made the 200-person cap advisory only, for both indoor and outdoor services, leaving the 25 percent indoor capacity limit as the only mandatory attendance restriction. *Id.* ¶ 17, Exs. B at 4, C at 1.[4]

[4] The Governor made this change in response to the Ninth Circuit's decision the previous week in *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020), which "preliminarily enjoin[ed] [Nevada] from imposing attendance limitations on in-person services in houses of worship that are less favorable than 25% of the fire-code capacity." *See* Leathers Decl. ¶ 17, Ex. D.

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E. Healthy Washington – Roadmap to Recovery

On January 5, 2021, the Governor announced a new phased reopening plan to replace the temporary restrictions, "Healthy Washington – Roadmap to Recovery" (the Healthy Washington Plan). Leathers Decl. ¶ 19, Exs. F, G. Under the Healthy Washington Plan, which took effect on January 11, the state's 39 counties are divided into eight regions. *Id.*, Ex. G at 1. Employing a phased reopening model, the Healthy Washington Plan classifies each region in a given phase based on four metrics: COVID-19 case rate, test positivity rate, COVID-19 hospital admission rate, and ICU occupancy level. *Id.* at 2. When a region satisfies the target metrics based on the most recent data released by the State Department of Health, it moves to the next reopening phase. *Id.*

All regions began on January 11, 2021, in Phase 1 of the Healthy Washington Plan, the most restrictive phase. *Id.* at 3. As under the temporary restrictions, indoor social gatherings with members outside one's household are prohibited in Phase 1. *Id.* at 4. So, too, are indoor restaurant dining, indoor wedding or funeral receptions, and indoor entertainment establishments such as theaters, concert halls, and museums (except for single-household rentals or tours). *Id.* Other businesses may open but with 25 percent capacity limits, including retail stores, personal services, and professional services (with remote work "strongly encouraged"). *Id.* The Puget Sound Region, which includes Pierce County, remains in Phase 1 as of the date of this filing.[5]

F. Current Religious Services Guidance

Under the Guidance dated January 11, 2021, the rules pertaining to religious worship remain the same or more lenient than under the temporary restrictions. Indoor religious services remain capped at 25 percent of room or building capacity (with a "recommended" 200-person maximum), while outdoor services have no mandatory attendance limits. Leathers Decl., Ex. H at 1. The current Guidance is more permissive than the prior version in several respects. For example, it permits one person at a time to speak during a service without a face covering. *Id.* It also relaxes the restrictions

[5] *See* Wash. Dep't of Health, *Roadmap to Recovery Report* 3 (Jan. 2021), https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/421-006-RoadmapToRecovery-20210115.pdf.

on singing and musical performances by allowing, inter alia: (1) up to 15 people (whether in a choir or the congregation) to sing indoors during the service, provided each singer maintains at least 9 feet of physical distance and wears a three-layer surgical mask, *id.* at 3; (2) outdoor singing with no cap on the number of singers so long as the same distancing and masking requirements are followed, *id.*; and (3) musical ensembles (including those with woodwind and brass instruments) and other artists to perform during the service so long as they follow the safety and health rules set out in the "Theater and Performing Arts" guidance, *id.* at 4; *see id.*, Ex. I. That document, consistent with the Religious Services Guidance, prohibits singing groups of more than 15 people and requires everyone during singing performances "to wear a three-layer surgical mask and maintain at least 9 feet . . . of physical distance from others." *Id.*, Ex. I at 2.

III. ARGUMENT

The Court lacks subject matter jurisdiction for two separate reasons. First, Harborview lacks standing in this pre-enforcement challenge to the Guidance because it cannot establish a genuine threat of imminent prosecution under the controlling *Thomas* factors. Second, the Eleventh Amendment bars Harborview's claims against the three remaining Defendants because none has any direct connection to enforcement of the Guidance. The absence of subject matter jurisdiction compels dismissal of the Complaint without prejudice. *See, e.g.*, *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam).

A. Legal Standard

Unlike other defenses interposed by motion under Federal Rule of Civil Procedure Rule 12(b), defects in subject matter jurisdiction are non-waivable and may be raised at any time during the proceedings or even sua sponte by the court. *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992). Under Rule 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

A Rule 12(b)(1) motion may challenge the existence of subject matter jurisdiction in two ways. First, a "facial attack" 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 a facial attack, the court adjudicates the motion much as a Rule 12(b)(6) motion, confining its analysis to the allegations contained in the complaint, documents attached thereto or referenced therein, and any judicially noticeable facts, taking all allegations of material fact as true and construing them in the light most favorable to the plaintiff. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (per curiam); *Kalaka Nui, Inc. v. Actus Lend Lease, LLC*, No. CIV. 08-00308SOM/LEK, 2009 WL 1227892, at *1 (D. Haw. May 5, 2009).

Second, a "factual attack" disputes "the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. In a factual attack, "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment," and it "need not presume the truthfulness of the plaintiff's allegations." *Id.* (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). If the jurisdictional issue is separable from the case's merits, the court may consider the evidence presented and resolve factual disputes where necessary to the determination of jurisdiction. *AAMC v. United States*, 217 F.3d 770, 778 (9th Cir. 2000); *Chaganti v. I2 Phone Int'l, Inc.*, 635 F. Supp. 2d 1065, 1070 (N.D. Cal. 2007), *aff'd*, 313 F. App'x 54 (9th Cir. 2009). In all cases, "[i]t is to be presumed that a cause lies outside this limited jurisdiction [of the federal courts], and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

With the exception of disputing one false factual allegation in the Complaint, this motion makes a facial attack, challenging the sufficiency of the Complaint's allegations to confer Article III standing. The exception is Harborview's allegation that "Governor Inslee's office has publicly stated its intention to seek enforcement of the Governor's proclamations and accompanying health regulations against worship or other religious services." Dkt. #53 ¶ 38. That allegation is separable from the merits of Harborview's claims and, as the evidence below demonstrates, it is patently false.

B. Harborview Cannot Establish Article III Standing or Ripeness

This pre-enforcement challenge is not justiciable because Plaintiffs cannot show a "'genuine threat of imminent prosecution.'" *Thomas*, 220 F.3d at 1139 (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). "Whether the question is viewed as one of standing or ripeness," *id.*, a person wishing to challenge a law before it is enforced "must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him," *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983); *see also Ellis v. Dyson*, 421 U.S. 426, 434 (1975) ("A genuine threat must be demonstrated if a case or controversy, within the meaning of Art. III . . . may be said to exist.").

In its en banc decision in *Thomas*, the Ninth Circuit set forth three factors governing the "genuine threat" analysis: (1) "whether the plaintiff[] [has] articulated a 'concrete plan' to violate the law in question"; (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings"; and (3) "the history of past prosecution or enforcement under the challenged [law]." 220 F.3d at 1139. Harborview satisfies none of the three factors. As this Court held in denying Harborview's TRO Motion, "there is no showing of a concrete plan to violate this law," "[t]here is no showing the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and there is "no showing of a history of past prosecution or enforcement under the challenged" Guidance. Jones Decl., Ex. A at 30:13–18. Nothing has transpired since the Court's ruling that would alter its analysis or ripen Harborview's claims.

1. Harborview lacks a "concrete plan" to violate the Guidance

First, Harborview has failed to establish that it has a "concrete plan" to violate the Religious Services Guidance. Harborview claims that its *outdoor* worship services "have exceeded the attendance cap" in the Guidance, but in December the Governor eliminated caps for outdoor services. Leathers Decl. ¶ 17. To the extent Harborview's Complaint challenges the now-obsolete outdoor caps, then, that claim is moot. *See Bd. of Trustees of Glazing Health & Welfare Tr. v.*

Chambers, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc) ("the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot").

The Complaint also states that Harborview "will resume indoor in-person worship on September 13, 2020," and that those indoor services "will not be limited to 25% of building capacity." Dkt. #53 ¶ 77. But this "hypothetical intent to violate the law . . . can hardly qualify as a concrete plan" in the absence of any indication that Harborview has actually held a single indoor service in the past six months that exceeded the Guidance's 25 percent capacity limit. *Thomas*, 220 F.3d at 1139–40. With a sanctuary capacity of 475, Harborview provides no reason to suppose that more than 118 of its parishioners are willing to risk their own and their family members' lives to attend noncompliant indoor services. The church's "general intent to violate [the Guidance] at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Id.* at 1139.

2. Harborview has received no "specific threat" of enforcement

Second, Harborview does not allege that any official has made a "specific threat" to commence proceedings against them for violating the Guidance. *Thomas*, 220 F.3d at 1140. A "specific threat" means more than that a "proscriptive statute" is on the books. *Id*. at 1139–40. Rather, Harborview must show a "specific threat of enforcement" that was "directed toward" it. *Id.* at 1140; *accord K. Y. ex rel. Yu v. Schmitt*, 799 F. App'x 485, 490–91 (9th Cir. 2020) (Wallace, J., concurring in part) (second factor not met where "[o]ther than K.Y.'s allegation of a subjective chill, the First Amended Complaint 'is devoid of any threat—generalized or specific—directed toward' K.Y.") (quoting *Thomas*, 220 F.3d at 1140); *Gibson v. City of Vancouver*, No. 3:20-CV-06162BHS, 2020 WL 7641202, at *3 (W.D. Wash. Dec. 23, 2020) (plaintiff lacks standing to challenge constitutionality of Religious Services Guidance because he "cannot point to an analogous specific threat . . . to selectively target *him* for prosecution for violating the Guidance.") (emphasis added); *Sanchez v. City of Coalinga*, No. 1:18-CV-01018-SAB, 2018 WL 4844169, at *4 (E.D. Cal. Sept. 27, 2018) (Plaintiffs lacked standing where their

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"complaint is devoid of any generalized or specific threat of enforcement directed toward Plaintiffs."). Harborview has failed to do so. To the contrary, the church "do[es] not identify even a general threat made against [it]." *San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1127.

The Complaint alleges that "Governor Inslee's office has publicly stated its intention to seek enforcement of the Governor's proclamations and accompanying health regulations against worship or other religious services." Dkt. #53 ¶ 38. As its only support for that allegation, the Complaint cites an article, *id.* ¶ 38 n.5, which describes an August 2020 "prayer rally" in a Seattle park with "hundreds of people, many of them not wearing masks or social distancing." Jones Decl., Ex. E. The Seattle Police Department (SPD) is quoted as saying "'SPD will not be enforcing COVID-19 orders,'" and that "there is no law on the books that would come into play." *Id.* In response, a spokesperson for the Governor is quoted as saying that "'not following the governor's orders can result in a gross misdemeanor . . . . This is a law, so it can be enforced by local law enforcement. Now, whether or not they chose to do so is a different question.'" *Id.* That statement does not remotely suggest that the Governor's Office "intend[s] to seek enforcement of [Guidance] . . . against worship or other religious services," as Harborview alleges. Dkt. #53 ¶ 38. And, in fact, the Governor's policy is quite the opposite. As his general counsel testifies, "the Governor does not view arrests and prosecutions of those peacefully expressing their views or practicing their religion in a manner that does not endanger others as an appropriate means of protecting public health." Leathers Decl. ¶ 24.

It is true that Washington law makes violation of an emergency proclamation a gross misdemeanor, RCW 43.06.220(5), which is punishable by "up to" a 364-day jail sentence or "not more than" $5,000, RCW 9.92.020. But the "mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality . . . if real threat of enforcement is wanting." *Poe v. Ullman*, 367 U.S. 497, 507 (1961). Because the Complaint does not allege a specific threat by any authority—whether the Governor or local law enforcement agencies with jurisdiction over Harborview—to actually

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enforce this statute against it, the second *Thomas* factor also indicates that the church lacks standing. *Cf.* Dkt. #65 at 7 (in Pierce County Sheriff's motion to dismiss, noting that his Department "has released multiple statements confirming it does not intend to punish people for violating the proclamation but only educate them on the proclamation and the dangers of COVID").

3. The Guidance has no "history of enforcement"

Finally, Harborview has not identified any enforcement action initiated against a church, faith-based organization, or individual for violating the Guidance. The Complaint alleges that Defendant "Attorney General Ferguson has, in fact, taken actions to enforce the Stay Home – Stay Healthy proclamation," citing a single example: "[O]n May 19, 2020, he sued a business owner for violating of the proclamations." Dkt. #53 ¶ 39 & n.6 (citing *State v. Power Alley Fitness, Inc.*, Snohomish Cnty. Super. Ct. Cause No. 20-2-02973-31). That action was one of two Consumer Protection Act lawsuits the Attorney General brought last spring against gyms that refused to close in defiance of the Governor's initial phased reopening plan. *See* Dkt. #33, Ex. C. Filed only after "business owners . . . received multiple warnings"—those lawsuits alleged that the "gyms [were] gaining an unfair advantage over their competitors who [were] complying with the proclamation." *Id*. They are not remotely relevant to the third *Thomas* factor, which considers history of past enforcement against parties "similarly situated" to the plaintiff. *Lopez v. Candaele*, 630 F.3d 775, 786–87 (9th Cir. 2010); *Nw. Sch. of Safety v. Ferguson*, 699 F. App'x 707, 709 (9th Cir. 2017) ("Absent a history of enforcement against conduct like that alleged here, Appellants fail to show a genuine threat of prosecution conferring standing under the law of this Circuit."); *see also K. Y.*, 799 F. App'x at 490–91 (Wallace, J., concurring) ("[F]or a threat to be credible based on allegations of past enforcement, a plaintiff must allege '[p]ast enforcement *against the same conduct*.'") (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (emphasis in *K. Y.*)); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1142 (9th Cir. 2009) ("There is no evidence that [plaintiff] is similar to the

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organizations or individuals who have been designated [as terrorists] by the President."). Consumer protection lawsuits against gyms for violating the Governor's business closure order—after receiving repeated warnings from officials—are not remotely analogous to criminal prosecutions of churches for exceeding the Religious Services Guidance's occupancy caps.

Plaintiffs have failed to point to a single example of an enforcement action by anyone for noncompliance with the Guidance, and to Defendants' knowledge, no such action (or threat of such action) has occurred in Washington. Jones Decl. ¶ 3; Leathers Decl. ¶ 24. Notably, the State has forborne enforcement of the Guidance even in the face of some churches' very public—and well-publicized—defiance of the occupancy limits. *See, e.g.*, Jones Decl., Exs. B–E.

Because Harborview cannot establish any history of enforcement of the Guidance, nor the other two *Thomas* factors, the church lacks standing, its claims are unripe, and its lawsuit should be dismissed for lack of subject matter jurisdiction.

C. The Eleventh Amendment Bars Harborview's Remaining Claims

Harborview's Complaint should also be dismissed due to the "jurisdictional bar of the Eleventh Amendment," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996), which prohibits "federal courts from hearing suits brought by private citizens against state governments without the state's consent," *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997). The narrow exception articulated in *Ex parte Young*, 209 U.S. 123, 157 (1908), permits suits for prospective injunctive relief against state officials, but only if the state official sued has "some connection with the enforcement of the act." That connection "must be fairly direct," and "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision" does not suffice. *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). If an official "cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own prosecution, he may not be a proper defendant." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004).

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Because no Defendant has a "fairly direct" connection to enforcement of the Religious Services Guidance, the *Ex parte Young* exception does not apply and the Eleventh Amendment bars Harborview's claims. While the Governor has authority to issue (and amend or rescind) an emergency order, RCW 38.52.050(3)(a), enforcement power generally lies with independent local law enforcement officials. *See, e.g.*, RCW 43.06.220(5) (making willful violation of any emergency order issued by the Governor a gross misdemeanor). This connection to enforcement is far too remote to permit an *Ex parte Young* suit against the Governor. "Were the law otherwise, the exception would always apply" and "[g]overnors who influence state executive branch policies (which virtually all governors do) would always be subject to suit under *Ex parte Young*." *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311 (D. Ariz. 2015). Consistent with this principle, the Fifth Circuit has concluded that the *Ex parte Young* exception did not apply to a lawsuit challenging the Texas Governor's COVID-19 orders because "[t]he power to promulgate law is not the power to enforce it" and the governor "lack[ed] the required enforcement connection to" his emergency order. *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020); *see also Lighthouse Fellowship Church v. Northam*, 462 F. Supp. 3d 635, 644 (E.D. Va. 2020) (denying injunction where governor lacked authority to enforce COVID-19 order).

Following the Fifth Circuit, three different courts of this district that have concluded that the Eleventh Amendment bars claims against the Governor arising from his COVID-19 emergency orders. *See Faust v. Inslee*, No. C20-5356 BHS, 2020 WL 4816147 (W.D. Wash. Aug. 19, 2020) (dismissing claims against the Governor based on his "Stay Home" Proclamation because "he lacks the power to enforce any relevant portion of his proclamations"); *MacEwen v. Inslee*, No. C20-5423 BHS, 2020 WL 4261323 at *2 (W.D. Wash. July 24, 2020) (denying motion for preliminary injunction against COVID-19 proclamations based on conclusion that the Governor "does not have any connection with the enforcement of the Proclamations") (citing *In re Abbott*, 956 F.3d 696 (5th Cir. 2020)); *Didier v. Inslee*, C20-5408 BHS, 2020 WL 4277345, at *1 (W.D. Wash. July 24, 2020) (same). In denying the *Didier* and *MacEwen* motions for

preliminary injunction, the Court ordered plaintiffs to show cause why their complaints should not be dismissed for lack of subject matter jurisdiction, and later dismissed each case. *MacEwen v. Inslee*, No. C20-5423 BHS, Dkt. #45 (W.D. Wash. Aug. 10, 2020); *Didier v. Inslee*, C20-5408 BHS, 2020 WL 4277345, Dkt. #31 (W.D. Wash. Aug. 10, 2020). This Court should join Judge Settle in concluding that the Eleventh Amendment bars claims against the Governor arising from his emergency proclamations.

The Attorney General's connection to enforcement of the Guidance is just as remote as the Governor's. Certainly, the Attorney General's Office (AGO) has the authority to pursue certain types of *civil* actions against businesses for violating COVID-19 proclamations. For example, AGO has filed civil actions against noncompliant businesses for anticompetitive or unfair business practices under the Consumer Protection Act. RCW 19.86.080(1); *see, e.g.*, Dkt. #33 at 11. AGO also represents the Washington Department of Labor & Industries in civil actions against restaurants that, by continuing to offer indoor dining service in violation of COVID-19 restrictions, have put their employees' health in danger. *See* RCW 49.17.130, .170; *see, e.g.*, Jones Decl., Exs. F, G. Plainly, none of those statutory provisions would remotely authorize AGO to criminally prosecute a house of worship under RCW 43.06.220(5) for violating the Guidance. The Attorney General has no connection to enforcement of the Guidance, which is why neither he nor any other official of which Defendants are aware has ever attempted to enforce the Guidance against a house of worship (or anyone else, for that matter). Leathers Decl. ¶ 24; Jones Decl. ¶ 3. The Eleventh Amendment, then, bars Harborview's claims against all three remaining Defendants and requires dismissal of its Complaint.[6]

[6] Secretary of Health Umair Shah is also a Defendant, but Harborview does not allege that he has any authority to enforce the Guidance. *Compare* Dkt. #53 ¶¶ 8 (alleging that "Attorney General Ferguson has authority to enforce the proclamations issued by Governor Inslee"), 9 (alleging that "Sheriff Pastor has the authority to enforce the proclamations issued by Governor Inslee and orders issued by Secretary [Shah]"), *and* 10 (alleging that "Director Chen has the authority to enforce the public health statutes and orders of Secretary [Shah]"), *with id.* ¶ 35 (alleging only that "Secretary [Shah] . . . [has] the authority to make decisions regulating the conduct of religious worship," not that he has any power to enforce such regulations). The Eleventh Amendment therefore clearly bars any claim against Secretary Shah, whom Harborview does not even contend to have any "connection with the enforcement" of the Guidance. *Ex parte Young*, 209 U.S. at 157.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court dismiss the Complaint without prejudice for lack of subject matter jurisdiction.

DATED this 21st day of January, 2021.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

DATED this 21st day of January, 2021, at Palm Springs, California.

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