

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES—GENERAL

Case No. **EDCV 20-755 JGB (KKx)**

Date July 8, 2020

Title *Wendy Gish, et al. v. Gavin Newsom, et al.*

Present: The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ

Not Reported

Deputy Clerk

Court Reporter

Attorney(s) Present for Plaintiff(s):

Attorney(s) Present for Defendant(s):

None Present

None Present

**Proceedings:** Order (1) GRANTING State Defendants’ Motion to Dismiss (Dkt. No. 67); (2) GRANTING San Bernardino Defendants’ Motion to Dismiss (Dkt. No. 68); (3) GRANTING Riverside Defendants’ Motion to Dismiss (Dkt. No. 66); and (4) VACATING the July 13, 2020 Hearing (IN CHAMBERS)

Before the Court are three Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6): (1) a motion to dismiss filed by Defendants Xavier Becerra and Gavin Newsom (collectively, “State Defendants”) (“State Motion,” Dkt. No. 67); (2) a motion to dismiss filed by Defendants Jeff Hewitt, Kevin Jeffries, Karen Spiegel, Chad Bianco, George Johnson, Cameron Kaiser, V. Manuel Perez, Chuck Washington filed by Defendants Jeff Hewitt, Kevin Jeffries, Karen Spiegel, Chad Bianco, George Johnson, Cameron Kaiser, V. Manuel Perez, and Chuck Washington (collectively, “Riverside Defendants”) (“Riverside Motion,” Dkt. No. 66); and (3) a motion to dismiss filed by Defendants Josie Gonzales, Erin Gustafson, Curt Hagman, Robert Lovinggood, John McMahan, Dawn Rowe, and Janice Rutherford (collectively, “San Bernardino Defendants”) (“San Bernardino Motion,” Dkt. No. 68.) The Court determines these matters are appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering all papers filed in support of and in opposition to the Motions, the Court GRANTS Defendants’ Motions. The July 13, 2020 hearing is VACATED.

## I. BACKGROUND

On April 13, 2020, Plaintiffs filed their complaint against Defendants Xavier Becerra and Gavin Newsom (collectively, “State Defendants”); Chad Bianco, Jeff Hewitt, Kevin Jeffries, George Johnson, Cameron Kaiser, V. Manuel Perez, Karen Spiegel, and Chuck Washington

(collectively, “Riverside Defendants”); Erin Gustafson, John McMahon, Robert A. Lovinggood, Janice Rutherford, Dawn Rowe, Curt Hagman, and Josie Gonzales (collectively, “San Bernardino Defendants”). (“Complaint,” Dkt. No. 1.) The Complaint alleges eleven causes of action: (1) Violation of Free Exercise Clause of First Amendment to U.S. Constitution; (2) Violation of Establishment Clause of First Amendment to U.S. Constitution; (3) Violation of Free Speech Clause of First Amendment to U.S. Constitution; (4) Violation of First Amendment Freedom of Assembly Clause; (5) Violation of Due Process Clause of Fourteenth Amendment to U.S. Constitution; (6) Violation of Due Process Clause of Fourteenth Amendment to U.S. Constitution; (7) Violation of Equal Protection Clause of Fourteenth Amendment to U.S. Constitution; (8) Right to Liberty (Cal. Const. Art. 1, § 1); (9) Freedom of Speech (Cal. Const. Art. 1, § 2); (10) Freedom of Assembly (Cal. Const. Art. 1, § 3); and (11) Free Exercise and Enjoyment of Religion (Cal. Const. Art. 1, § 4).

On April 23, 2020, the Court denied Plaintiffs’ request for a temporary restraining order and preliminary injunction. (“TRO Order,” Dkt. No. 51.) On May 27, 2020, Defendants filed these Motions. (State Motion; Riverside Motion; San Bernardino Motion.) Plaintiffs opposed the Motions on June 22, 2020. (“Opposition,” Dkt. No. 72.) Defendants replied on June 29, 2020. (“San Bernardino Reply,” Dkt. No. 73; “State Reply,” Dkt. No. 74; “Riverside Reply,” Dkt. No. 75.)

## II. JUDICIAL NOTICE

In support of the Motions, Defendants submit requests for judicial notice. (“State Request,” Dkt. No. 69; “Riverside Request” Dkt. No. 66-1; “San Bernardino Request,” Dkt. No. 68-1.) Plaintiffs do not object to the Requests.

A court may take judicial notice of an adjudicative fact not subject to “reasonable dispute,” either because it is “generally known within the territorial jurisdiction of the trial court,” or it is capable of accurate and ready determination by resort to sources whose “accuracy cannot reasonably be questioned.” Fed. R. Evid. 201. Under Federal Rule of Evidence 201, “[a] court must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2). Judicial notice is appropriate here. The documents at issue are publicly available and not subject to reasonable dispute. Accordingly, the Court GRANTS the Requests.

## III. FACTUAL ALLEGATIONS

Plaintiffs allege the following facts, which are assumed to be true for the purposes of this motion.

Defendant Newsom, the Governor of California, declared a State of Emergency in California on March 4, 2020. (Complaint ¶ 30.) On March 19, 2020, Newsom issued Executive Order N-33-20, which directed all California residents to heed the State’s public health directives

relating to COVID-19, including the March 19, 2020 Order of the State Public Health Officer (“State Order”). (*Id.* ¶ 31.)

On April 6, 2020, Defendants Kaiser and Johnson issued an Amended Order of the Health Officer for the County of Riverside and of the County Executive Officer as Director of Emergency Services (“Riverside Order”). (*Id.* ¶ 62.) The Riverside Order prohibited “[a]ll public or private gatherings . . . including, but not limited to an auditorium, . . . church, . . . or any other indoor or outdoor space used for any non-essential purpose including, but not limited to . . . church . . . .” (*Id.* ¶ 63.) Consistent with the State Order, the Riverside Order exempted essential business, including “courts of law, medical providers . . . daycare and child care . . . [and] necessary shopping at fuel stations, stores or malls,” provided that a “state and federal guidelines for infection control” are observed. (*Id.* ¶ 64.)

On April 7, 2020, Defendant Gustafson, the San Bernardino Health Officer, signed the Order of the Health Officer of the County of San Bernardino for the Control of COVID-19 (“San Bernardino Order”). (*Id.* ¶ 36.) The San Bernardino Order “allow[ed] faith based services that are provided through streaming or other technology, while individuals remain in their homes, but does not allow individuals to leave their home for driving parades or drive-up services, or for picking up non-essential items.” (*Id.* ¶ 37.)

Plaintiffs’ deeply held and sincere religious beliefs require them to worship in person. (*Id.* ¶¶ 6–9.) They seek an order from this Court “enjoining and prohibiting Defendants from enforcing the Orders” and “declaring that the Orders, facially and as-applied to Plaintiffs, violate the First and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 1, 2, and 4 of the California Constitution.” (*Id.* ¶ 184.)

#### IV. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) must be read in conjunction with Federal Rule of Civil Procedure 8(a), which requires a “short and plain statement of the claim showing that a pleader is entitled to relief,” in order to give the defendant “fair notice of what the claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); see *Horosny v. Burlington Coat Factory, Inc.*, No. 15–05005, 2015 WL 12532178, at \*3 (C.D. Cal. Oct. 26, 2015). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *ARC Ecology v. U.S. Dep’t of Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005); *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of

action will not do.” Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint “must be enough to raise a right to relief above the speculative level.” Id.

To survive a motion to dismiss, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it stops short of the line between possibility and plausibility of ‘entitlement to relief.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must “contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively,” and (2) “the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

## V. DISCUSSION

### A. Jurisdiction to Hear the Motions

Plaintiffs argue that the Court lacks jurisdiction to hear the Motions because they have appealed the TRO Order. (Opposition at 6–7.) “The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam). However, it is well-settled that “an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case.” Plotkin v. Pacific Tel. and Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982). An “appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.” Britton v. Coop Banking Grp., 916 F.2d 1405, 1412 (9th Cir. 1990).

Plaintiffs have appealed the TRO Order, which found, among other things, that Plaintiffs were not likely to succeed on the merits of their claims. (See TRO Order.) Accordingly, the Court lacks jurisdiction to dismiss claims as insufficiently pleaded, as that issue is pending before the Ninth Circuit.

However, the Court remains free to decide other issues, even if those issues result in the dismissal of Plaintiffs’ claims. Plotkin illustrates this point. See Plotkin, 688 F.2d at 1292–93. In that case, the district court denied the plaintiff’s preliminary injunction, finding plaintiff was not likely to succeed for failure to exhaust administrative remedies. Id. at 1292. Plaintiff appealed. Id. While the appeal was pending, the district court granted summary judgment, finding that “even if the plaintiffs were not required to exhaust their administrative remedies, they would not be entitled to the relief sought.” Id. The Ninth Circuit then rejected plaintiff’s argument that the district court lacked jurisdiction to enter summary judgment, holding “that an appeal from an

interlocutory order does not stay the proceedings, as it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case.” Id. at 1293; see also Britton, 916 F.2d at 1412 (holding that a district court retained jurisdiction to issue a default judgment while there was a pending interlocutory appeal regarding denial of motion to compel arbitration).

Mootness was not decided by the Court in the TRO Order. It is therefore not before the Ninth Circuit now. Accordingly, the Court retains jurisdiction to decide whether the case is now moot.<sup>1</sup> By deciding issues related to mootness, the Court is not altering its previous decision in the TRO Order, instead, it “simply moving the case along consistent with its view of the case as reflected in its [that order].” Britton, 916 F.2d at 1412.

## **B. Mootness**

Defendants argue that Plaintiffs’ claims are moot because they are based on a prohibition of in-person religious services that is no longer in effect. (State Motion at 8–10; San Bernardino Motion at 7–8.) To survive a mootness challenge, Plaintiffs must show that “‘an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.’” Seven Words LLC v. Network Solutions, 260 F.3d 1089, 1095 (9th Cir. 2001) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)). On May 25, 2020, California issued guidelines that allow for in-person religious gatherings. (State Request, Exhibit 1.) Accordingly, the Orders that Plaintiffs seeks to enjoin no longer bind Plaintiffs and an injunction is unnecessary.

Plaintiffs do not dispute that the absolute prohibition on in-person religious services is no longer in effect. Instead, they argue that the case is not moot because several exceptions to the mootness doctrine apply. (Opposition at 8–10.) First, they argue that the case is not moot because the Court could issue “a declaration . . . that faith-based services should not be treated more strictly than other activities, gatherings, or retail businesses.” (Id. at 8.) But if there is no live controversy, such a declaration would be tantamount to an advisory opinion. See Seven Words LLC, 260 F.3d at 1095 (holding that a claim is moot where plaintiff only “seeks an advisory opinion”). Plaintiffs desire for the Court to opine on the validity of a law that no longer restricts them does not revive their controversy—if that were the law, the mootness doctrine would cease to exist.

Second, Plaintiffs argue that the case is not moot because Defendants voluntarily ceased the challenged conduct. (Opposition at 8.) “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” Friends of the Earth, Inc. v. Laidlaw Envntl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). However, as Defendants rightly point out, they did not voluntarily cease their conduct—instead, they changed the relevant laws. (See State Reply at 3–4.) A change in

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<sup>1</sup> Because the Court resolves the Motions on mootness alone, it need not determine whether it retains jurisdiction to resolve other issues.

law “is usually enough to render a case moot, even if the [government] possesses the power to reenact the [law] after the lawsuit is dismissed.” Rosebrock v. Mathis, 745 F.3d 963, 971 (9th Cir. 2014); see also Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1031–32 (9th Cir. 2006) (holding that amendments to city ordinances had rendered facial challenges to those ordinances moot).

Third, Plaintiffs argue that the conduct is capable of repetition yet evading review. (Opposition at 9.) The Supreme Court has long held that those controversies “capable of repetition, yet evading review” justify “a conclusion of nonmootness.” Roe v. Wade, 410 U.S. 113, 125 (1973). This controversy, however, does not fall within that exception. Unlike the classic example of pregnancy-related regulations—which create controversies with a maximum life of nine months—there is no reason to conclude that any hypothetical future restrictions on in-person religious services will evade review. If Defendants do impose such restrictions, Plaintiffs will be free to challenge them anew.

It is undisputed that the law Plaintiffs seek to enjoin no longer restricts Plaintiffs from holding in-person religious services. Accordingly, Plaintiffs claims challenging those laws are moot and therefore, the Court DISMISSES all claims WITH LEAVE TO AMEND.<sup>2</sup>

## VI. LEAVE TO AMEND

Generally, a “district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citation omitted). Here, the Court identifies specific factual deficiencies which may be cured by amendment. Thus, the Court GRANTS LEAVE TO AMEND.

## VII. CONCLUSION

For the reasons above, the Court GRANTS Defendants’ Motions. The July 13, 2020 hearing is VACATED. Any amended complaint shall be filed no later than July 31, 2020.

**IT IS SO ORDERED.**

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<sup>2</sup> Leave to amend is appropriate to allow Plaintiffs to bring claims based on the orders (such as the May 25, 2020 order) that remain in effect.