IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

ARK ENCOUNTER, LLC, et al.,
Plaintiffs,

v.

BOB STEWART, individually, and in his official capacity as Secretary of the Kentucky Tourism, Arts and Heritage Cabinet, et al.,
Defendants.

No. 3:15-cv-00013-GFVT

INTERVENORS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Intervenors Reverend Dr. Christopher M. Caldwell, Linda Allewalt, Reverend Dr. Paul D. Simmons, and Philip J. Tamplin, Jr. respectfully move the Court to dismiss Plaintiffs' Complaint, with prejudice, under Federal Rule of Civil Procedure 12(b)(6). The grounds for this motion are set out in the accompanying memorandum. Intervenors request oral argument.

Respectfully submitted,

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INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Answers in Genesis is "a Christian non-profit ministry endeavoring to proclaim the absolute truth and authority of the Bible." Compl. ¶ 16. Because Plaintiffs consider "the biblical account of Noah's Ark and the Flood a unique and powerful reminder of God's judgment of sin and His wonderful gift of salvation," Plaintiffs wish to build Ark Encounter, "an Ark attraction that would recreate this reminder of judgment and salvation." *Id.* ¶ 31. Ark Encounter is religious from bow to stern; the project will be "a sign to the world that the Bible is true and that its message of salvation is to be heeded." *Id.* ¶ 26; *see also id.* ¶¶ 29, 31–34.

Plaintiffs allege that both the United States and Kentucky Constitutions require the Commonwealth's taxpayers to subsidize—to the tune of $18 million—a museum designed to be "a method of communicating a salvation message to attendees that analogize[s] the door of the Ark with faith in Jesus Christ." *Id.* ¶ 36. Taxpayer support is compelled, maintain Plaintiffs, even though the purpose of the

project is to convey that "all have sinned and suffer the penalty of death, there is a coming final judgment—by fire, just as there was past judgment by a Flood, Noah's Ark and the global Flood really happened in history, and God has provided an Ark of salvation for us (as he did with Noah)—the Lord Jesus." *Id.* ¶ 47 (internal numbering omitted).

Plaintiffs undoubtedly have the right to zealously disseminate these views, through a museum or otherwise. But nothing allows them to demand that Kentucky taxpayers foot the bill. The Defendants, Governor Steven Beshear and Secretary Bob Stewart, correctly determined that providing Ark Encounter with a tourism subsidy would violate the law and public policy of the Commonwealth, because of Ark Encounter's intended function as "an evangelistic opportunity to outreach for [Answers in Genesis'] ministry," *id.* ¶ 33, and because Plaintiffs intend to discriminate based on religion in hiring for the project, *see id.* ¶ 148.

In *Locke v. Davey*, 540 U.S. 712 (2004), the U.S. Supreme Court rejected the argument that the U.S. Constitution requires states to fund religious exercise and secular activity alike. Plaintiffs' case is even weaker here because, unlike in *Locke*, the federal Establishment Clause affirmatively prohibits the type of government support for religion that Plaintiffs seek. Plaintiffs' claims under Kentucky law are barred by the Eleventh Amendment, and in any event fail on the merits; Kentucky law prohibits, not requires, the taxpayer funding of Plaintiffs' religious ministry.

By declining to provide taxpayer funds to Ark Encounter, Defendants vindicated Kentucky's tradition of ensuring that the separation of church and state

preserves the religious freedom of all Kentucky citizens. "When state involvement and support begins to be part of [a religious organization's] operations, this freedom goes away." *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 688 (Ky. 2010) (Cunningham, J., concurring). Because nothing in federal or Kentucky law requires Kentucky taxpayers to fund Plaintiffs' religious ministry, the complaint should be dismissed and the preliminary injunction motion denied.

Background

Plaintiff Answers in Genesis is "a Christian non-profit ministry endeavoring to proclaim the absolute truth and authority of the Bible." Compl. ¶ 16; *see also* Exhibit Q [Dkt. #15-18] at 10–11 ("Exhibit" refers to exhibits accompanying Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction [Dkt. # 15-1]). Answers in Genesis owns and operates the Creation Museum, which it uses to "illustrate[] the truth of the creation account described in the Bible." Compl. ¶ 26.

Answers in Genesis founded Plaintiff Ark Encounter, LLC through its subsidiary, Plaintiff Crosswater Canyon, to construct and operate a similar, large scale model of Noah's Ark. *Id.* ¶¶ 11–13. Plaintiffs are building the Ark model to create "an evangelistic opportunity and outreach for its ministry, enabling [Answers in Genesis] to teach the world about the Bible and the message of salvation ...." *Id.* ¶ 33.

A. Plaintiffs' First Application for Tax Subsidies.

In July 2010, Plaintiffs approached the Kentucky Arts, Tourism, and Heritage Cabinet ("Cabinet"), seeking tax subsidies under the Kentucky Tourism Development Act. *Id.* ¶ 84. The Act offers selective tax incentives encouraging the

development of tourist attractions in the Commonwealth. *See* KRS 148.853(1)–(2). Companies that receive approval under the Act may recover up to 25% of the cost of developing a tourist attraction through sales tax rebates disbursed over the course of 10 years. KRS 148.853(3)(b)(1).

To apply for tax incentives, a company must submit a proposal to the Cabinet setting forth the nature and scope of the proposed tourist attraction, as well as "[a]ny other information as required by the cabinet." KRS 148.855(3)(a). The Cabinet then assesses whether the project will meet three initial criteria related to its likely cost, fiscal impact, and tourism benefits. KRS 148.855(3)(b), 148 853(2)(a). If the Cabinet concludes that the project is likely to meet these criteria, "the secretary of the cabinet may submit a written request to the [Kentucky Tourism Development Finance Authority ("Authority")] for a preliminary approval of the eligible company and the tourism development project." KRS 148.855(3)(b)

Upon receiving the Secretary's request, the Authority "may ... grant preliminary approval to an eligible company." KRS 148.855(4). If the Authority does so, the Cabinet must commission an independent consultant to evaluate the likely return on the Commonwealth's investment. *See* KRS 148.855(4)–(6). Finally, after reviewing the application, other relevant information, and the independent consultant's report, the Secretary must "provide a recommendation to the authority regarding final approval of the tourism development project." KRS 148 855(9).

In 2011, the Cabinet approved sales-tax rebates for Ark Encounter worth $43 million. *See* Compl. ¶ 125; Exhibit D [Dkt. # 15-5] at 21. Plaintiffs originally told the

Cabinet that Ark Encounter was "a 160 acre complex of associated historical displays, museums, theaters, amenities, food and beverage, retail and event venues and parking." Compl. ¶ 105. Ark Encounter also assured the Cabinet that it would not "discriminate on the basis of religion when hiring employees for the project." *Id.* ¶ 127.

Despite the promise of tax incentives, Ark Encounter was delayed because the project struggled to attract outside funding. *Id.* ¶¶ 135, 149. As a result, Ark Encounter was forced to withdraw its initial application. *Id.* ¶¶ 149–50.

B. Plaintiffs' Second Application for Tax Subsidies.

After scaling back its proposed operations, Ark Encounter submitted a new application for tax incentives worth $18 million. *See Id.* ¶¶ 149–51, 201. By the time of this renewed application, some Cabinet officials had concluded that Plaintiffs had been less than forthcoming about the nature of their project. In a letter dated April 24, 2014, Cabinet General Counsel William Dexter flagged public statements by Answers In Genesis CEO Ken Ham leading Dexter to conclude "the Project [had] changed from a tourism attraction to an extension of [Answers in Genesis'] ministry." *Id.* ¶ 157; *see also* Exhibit G [Dkt. #15-8] at 2.

Dexter was especially surprised to learn about "Christ the Door Theater," which Plaintiffs had omitted from their original application. Compl. ¶ 138. In a speech in early 2014, the project's designer stated that Christ the Door Theater was Ark Encounter's "most important exhibit": "an evangelistic outreach" designed "to reach people for Christ" and convey "the full gospel message." Ark Encounter, *Ark Encounter Construction Begins*, at 37:14, YouTube (Mar. 3, 2014), http://tinyurl.com/

christdoor; *see also* Compl. ¶ 155. Dexter warned that that awarding tax credits to this project would amount to "impermissible state funding of religious indoctrination." Compl. ¶ 156.

Plaintiffs claim that "the project always retained an evangelistic overtone" but admit that "details about the specific design of the Ark and its particular exhibits were refined over time." *Id.* ¶ 159. In particular, "[t]he plans began to crystalize in more specific detail concerning how the Ark would be used to present biblical truths." *Id.* ¶ 138.

But Plaintiffs' counsel assured the Cabinet that "no religious indoctrination would take place in the park, as no one would be forced to accept any views and interpretations presented in the park." *Id.* ¶ 160; *see also* Exhibit H [Dkt. #15-9] at 2. Based on these assurances, Dexter wrote in June 2014 that the Cabinet had received assurances that "no visitor to the attraction will be subject to religious proselytizing .... nor will the project function as a church or contain a place designated for religious worship." Compl. ¶ 166; *see also* Exhibit K [Dkt. #15-12] at 1. With this understanding, the Secretary of the Cabinet, Defendant Bob Stewart, recommended preliminary approval of the project, which the Cabinet provided on July 29, 2014. Compl. ¶ 180. Nonetheless, Plaintiffs now allege that they had always reserved the right to engage in "proselytizing" and that "the project has always retained an evangelistic overtone." *Id.* ¶¶ 159, 165.

Plaintiffs also reneged on their agreement that they would not discriminate in hiring. Answers in Genesis's job listing for Ark Encounter, issued in August 2014,

required applicants to submit an "affirmation" of their "Christian testimony," as well as confirmation of their "agreement with the [Answers in Genesis] Statement of Faith." *Id.* ¶ 183; *see also* Exhibit Q [Dkt. # 15-18] at 7–8. According to that Statement of Faith, applicants were required to profess, among other things, that homosexuality is a sin on par with bestiality and incest, that the earth is only 6,000 years old, and that the Bible is literally true. *See* Exhibit Q [Dkt. # 15-18] at 10–11; *see also* Compl. ¶ 183.

After learning that Plaintiffs had reneged on their earlier promises, *see, e.g.*, Compl. ¶¶ 118, 127, the Cabinet withdrew its support for taxpayer funding of the project. *See id.* ¶¶ 183, 197–98; *see also* Mike Wynn, *Ark Encounter Park Won't Get Kentucky Tax Incentives*, Courier-Journal, Dec. 11, 2014, http://tinyurl.com/arkparkfunding. In declining to provide this financing, Secretary Stewart specified that "[t]he Commonwealth has not and does not provide incentives to any company that discriminates on the basis of religion and will not make an exception for Ark Encounter, LLC." Exhibit V [Dkt. # 15-23] at 2; *see also* Compl. ¶¶ 197–98.

Secretary Stewart explained that the decision resulted from concerns about the separation of church and state implicated by taxpayer funding of a religious ministry: "the project has evolved from a tourism attraction to an extension of AIG's ministry that will no longer permit the Commonwealth to grant the project tourism development incentives." Exhibit V [Dkt. # 15-23] at 1; *see also* Compl. ¶ 198. Although "Ark Encounter has every right to change the nature of the project from a tourism attraction to a ministry," Secretary Stewart explained, "state tourism tax

incentives cannot be used to fund religious indoctrination or otherwise be used to advance religion." Exhibit V [Dkt. # 15-23] at 2; *see also* Compl. ¶ 198.

It later became apparent that Plaintiffs had also exaggerated Ark Encounter's economic value to the state. In its application to the Cabinet, Plaintiffs predicted that Ark Encounter would draw nearly 1.6 million visitors during its peak year. *See* Compl. ¶ 41; *see also* Exhibit F [Dkt. # 15-7] at 11. But the independent consultant estimated that Ark Encounter would attract less than half that number. *See* Exhibit T [Dkt. # 15-21] at 10; *see also* Compl. ¶ 195.

C. Plaintiffs Sue to Obtain Tax Subsidies.

Plaintiffs have now filed suit, alleging that Defendants' refusal to provide taxpayer subsidies to Ark Encounter—that is, refusal to subsidize the "expan[sion]" of their "ministry's mission of proclaiming biblical authority and the Gospel of Jesus Christ," Compl. ¶ 29—violates the U.S. Constitution, the Kentucky Constitution, and the Kentucky religious freedom statute. *Id.* ¶¶ 205–48. Plaintiffs also seek a preliminary injunction requiring Defendants to extend the tax subsidies right away. *See id.* ¶ A; *see also* Mot. for Prelim. Inj. [Dkt. # 15-1].

Intervenors are four Kentucky taxpayers who oppose the use of their tax dollars to promote religion. *See* Memorandum in Support of Motion to Intervene at 7–8 (citing Intervenors' declarations). Each Intervenor pays taxes, including sales and income taxes, to the Commonwealth. *See id.* Two are themselves ordained Christian ministers; each believes that "[t]he tax rebates sought for Ark Encounter would effectively compel me, as a Kentucky taxpayer, to subsidize a religious ministry against my will." *Id.*

Argument

I. Plaintiffs' Complaint Fails To State A Claim For Relief.

Plaintiffs complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). A complaint cannot survive a motion to dismiss unless it "contain[s] 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) (quotation marks omitted). And "a plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint that the defendant violated the law." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013).

When evaluating Plaintiffs' allegations, "documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (alteration and quotation marks omitted). And if it is "inconsistent with the allegations of the complaint, the exhibit controls." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 441 (6th Cir. 2012) (quotation marks and alteration omitted). Among other things, the Court may consider the "various pieces of correspondence between the parties" referred to in Plaintiffs' complaint—and appended to their motion for a preliminary injunction—because they "are central to [Plaintiffs'] claim . . ." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431–32 (7th Cir. 1993).

A. Plaintiffs Fail to State a Federal Constitutional Claim.

Both Plaintiffs and Defendants focus on whether tax subsidies to Ark Encounter violate the federal Establishment Clause. Pls.' Mem. in Support of Mot. for Prelim. Inj. [Dkt. # 15-1] at 29–35; Defs.' Mem. in Support of Mot. to Dismiss [Dkt. # 18-1] at 10–17. That is beside the point. Under the Supreme Court's decision in *Locke v. Davey*, the residual "play in the joints" means that Defendants are not required to fund everything that the Establishment Clause does not forbid. *See* 540 U.S. at 719, 724. The Court need not decide whether the Establishment Clause permits Defendants to offer the tax rebates to Plaintiffs because, at a minimum, the Constitution allows Defendants to withhold the funding.

In any event, the Establishment Clause does not permit Defendants to finance Ark Encounter. The Establishment Clause prohibits the diversion of government funds for religious activities except in narrow circumstances, none of which exist here.

In sum, the U.S. Constitution permits and in fact requires Defendants to withhold taxpayer funds from Ark Encounter.

1. Plaintiffs' claims are foreclosed by *Locke v. Davey*.

Plaintiffs' federal constitutional arguments mirror those rejected by the U.S. Supreme Court in *Locke v. Davey*. There, the State of Washington had created a college scholarship program for academically gifted students, but prohibited students from using the scholarship "at an institution where they are pursuing a degree in devotional theology." 540 U.S. at 715. The plaintiff, a devotional theology major, challenged this limitation under the Free Exercise Clause, the Establishment

Clause, the Free Speech Clause, and the Equal Protection Clause. *See id.* at 717, 718

In an opinion by Chief Justice Rehnquist, the Supreme Court rejected all of the plaintiff's claims. The exclusion of devotional theology majors from the scholarship program "impose[d] neither criminal nor civil sanctions on any type of religious service or rite. It d[id] not deny to ministers the right to participate in the political affairs of the community. And it d[id] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21 (citations omitted). Instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 721.

The Court, moreover, explained that the government was allowed to exclude certain types of religious instruction from the scholarship program. According to the Court, "training for religious professions and training for secular professions are not fungible." *Id.* at 721. The Court also pointed to unique concerns—grounded in the separation of church and state—that justified the state's refusal to finance certain types of religious training: "[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions." *Id.* at 721. The state's decision to "deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion." *Id.*

The Supreme Court also pointed to the Washington Constitution, which "draws a more stringent line than that drawn by the United States Constitution." *Id.* at 722. Indeed, said the Court, "we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Id.* at 722.

Thus, the Court concluded, even if the Constitution permitted the state to provide scholarships to students majoring in devotional theology, the Constitution did not *require* the state to do so—even as part of a program that otherwise applied generally. The Court concluded: "Given the historic and substantial state interest at issue, we ... cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725.

Locke v. Davey dooms all of Plaintiffs' federal claims. First, Plaintiffs' Free Exercise Clause claim suffers from the same problems as the claims in *Locke*. *See* Compl. ¶¶ 217–22. As in *Locke*, withholding of tax subsidies for Plaintiffs' ministry "imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require [Plaintiffs] to choose between their religious beliefs and receiving a government benefit." 540 U.S. at 720–21 (citations omitted). Rather, "[t]he State has merely chosen not to fund a distinct category of" tourist

attraction. *Id.* at 721. As in *Locke*, this is a "mild[ ]" a form of "disfavor of religion (if it can be called that)" and does not implicate the Free Exercise Clause. *Id.* at 720.

Applying *Locke*, the Sixth Circuit has likewise rejected claims that exclusion of religious programs from government funding violates the Free Exercise Clause. *See, e.g.*, *Bowman v. United States*, 564 F.3d 765, 773–74 (6th Cir. 2008) (military's refusal to award post-service retirement credit for religious work on the same basis as secular work did not violate Free Exercise Clause); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007) (refusal to fund religious programming on the same basis as secular programming does not violate Free Exercise Clause). And the Kentucky Supreme Court has also held that "*Locke v. Davey* firmly supports" the conclusion that refusal to fund religious activity due to state constitutional concerns "does not contravene the Free Exercise Clause." *Pennybacker*, 308 S.W.3d at 680.

Plaintiffs' Establishment Clause claims are foreclosed for the same reasons. As the Court explained in *Locke*: "Although we have sometimes characterized the Establishment Clause as prohibiting the State from disapproving of a particular religion or religion in general ... the State has not impermissibly done so here." 540 U.S. at 725 n.10 (citation, alteration, and quotation marks omitted). Plaintiffs fare no better in alleging that Defendants became impermissibly entangled in religion by determining whether Ark Encounter is "too religious," Compl. ¶ 237; the program at issue in *Locke* excluded only certain types of religious majors (those in devotional theology), but the Court upheld the program and rejected the plaintiff's challenge under the Establishment Clause. *See* 540 U.S. at 724–25 & n.10. Just as the state in

Locke could provide scholarships for some types of religious training but exclude the study of devotional theology, Defendants may decline to subsidize an attraction that proselytizes and discriminates on the basis of religion.

Locke also bars Plaintiffs' bundle of speech and expression claims. For one, Plaintiffs allege that Defendants' refusal to fund religious indoctrination is viewpoint discrimination prohibited by the First Amendment's Speech Clause. *See* Compl. ¶¶ 207(b)–(e), (h), (i); *see also* Mem. in Support of Mot. for Prelim. Inj. [Dkt. # 15-1] at 17–24. In *Locke*, the Supreme Court rejected the argument that refusal to fund religious training on the same basis as secular education unconstitutionally discriminated against religious speech. *See* 540 U.S. at 720 n.3. The First Amendment's requirement of viewpoint neutrality is "simply inapplicable" to funding decisions under programs designed for purposes other than to "encourage a diversity of views from private speakers." *Id.* (citation and quotation marks omitted). The Sixth Circuit has reached the same result: the government's refusal to contract child services to an organization that would proselytize to children did not violate the organization's right to free speech, because "the purpose of contracting for these services [was] to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers of that care." *Udow*, 479 F.3d at 410 (alteration and quotation marks omitted).

Plaintiffs' argument here suffers from the same problem: the tourism program is meant to stimulate economic growth, not private speech. The Kentucky Tourism Development Act aims to "reliev[e] unemployment" and to "preserv[e] and creat[e]

sources of tax revenues." KRS 148.853(1)(b). Even Plaintiffs acknowledge that "the sole and undisputed purposes [of the Act] have been simply to enhance economic development and increase tourism in the state." Mem. in Support of Mot. for Prelim Inj. [Dkt. # 15-1] at 31.

If anything, the Tourism Development Act is even less about speech promotion than the scholarship program upheld in *Locke*. Although higher education requires the free exchange of ideas, no similar expressive purpose accompanies most tourist attractions. It is difficult, for instance, to find a message conveyed by applicants such as lodging companies and the Kentucky Speedway. *See* Compl. ¶ 65. The Commonwealth's tourism program reflects that the government does not "recognize a forum for private expression with regard to each of its fiscal decisions," nor does "[t]he First Amendment ... require the government to purchase services from every vendor that asserts it possesses a diverse point of view for fear of violating the vendor's right to free speech." *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 980 (W.D. Wis. 2002), *on reconsideration in part*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). Plaintiffs would turn every category of government funding—from prisons to hospitals to public housing—into a public forum and would strip the government of discretion over how it spends its money.

Plaintiffs' related argument—that the lack of subsidy violates their Free Speech rights by leaving Plaintiffs with less money to pay for speech—is even weaker. *See* Compl. ¶¶ 207(f), (g). Plaintiffs allege that they will have trouble

completing their project without "receiving approximately $18 million dollars in tourism/sales tax rebate incentives under the KDA Act program." *Id.* ¶ 201. But the Supreme Court has long "reject[ed] the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan v. Taxation with Representation of Wash.*, 461 US 540, 546 (1983). Just as the government's refusal to pay for ink and paper doesn't violate the free-speech rights of newspapers, Defendants' failure to subsidize Ark Encounter's proselytizing messages doesn't impair the free speech rights of Plaintiffs.

Plaintiffs also cannot complain that Defendants' criteria for deciding which tourist attractions to subsidize are "vague and overbroad." Compl. ¶ 207(a). The flexibility of the standard reflects the program's goal of economic development rather than a creation of a public forum for free expression. The Commonwealth may use its policy judgment to determine which tourist venues deserve taxpayer support, just as it may exercise that discretion when choosing vendors to furnish state buildings or print state signs.

Plaintiffs' expressive association claim falls for the same reason as its other speech claims. *See id.* ¶¶ 210–16; *see also* Mem. in Support of Mot. for Prelim Inj. [Dkt # 15-1] at 24–25. Defendants' decision not to subsidize Plaintiffs' ministry does not inhibit Plaintiffs' ability to organize for expressive purposes within the meaning of the First Amendment. *See Locke*, 540 U.S. at 720 n.3; *Regan*, 461 US at 546. Plaintiffs would not be entitled to taxpayer subsidies even if they were permitted under state and federal law "to give ... employment preference to adherents of their

own religion." Mot. for Prelim Inj. [Dkt. # 15-1] at 25–29. The ministerial exception to which Plaintiffs allude is a defense to claims of employment discrimination, *see Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015), not an affirmative obligation for taxpayers to subsidize entities that choose to discriminate.

Finally, Plaintiffs' claims under the Equal Protection Clause and Due Process Clause, *see* Compl. ¶¶ 223–31, merely restate their free speech arguments. Plaintiffs repeat their previous allegations that Defendants denied them "use of a forum" for speech, Mem. in Support of Mot. for Prelim Inj. [Dkt. # No. 15-1] at 36 (quotation marks omitted), and that the Act impermissibly discriminates on the basis of viewpoint. Neither argument is any stronger under a new heading.

To the extent that Plaintiffs conflate their First Amendment argument with a due process claim under the vagueness doctrine, *see* Mem. in Support of Mot. for Prelim Inj. [Dkt. # 15-1] at 36, the Act neither "forbids [n]or requires the doing of an act" on pain of deprivation of Plaintiffs' rights. *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Rather, the Act establishes a competitive process for entities to obtain selective financial benefits. Plaintiffs have no more due process rights here than does a student applying for admission to the University of Kentucky. *Cf. Tobin v. Univ. of Maine Sys.*, 59 F. Supp. 2d 87, 90, 92 (D. Me. 1999) (citing cases for proposition that denial of admission to public universities does not implicate Due Process Clause).

Locke's holding—that the government may decline to fund religious exercise, even when it funds secular activity as part of the same program—reflects the more fundamental point that the "decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan*, 461 U.S. at 549. Plaintiffs have every right to zealously disseminate their religious messages in Kentucky and elsewhere, but they have no right to do so on the government's dime.

2. The Establishment Clause prohibits the Commonwealth from Funding Ark Encounter

Because Plaintiffs failed to cite *Locke v. Davey* in their preliminary injunction motion, it is unclear how they intend to address that case's effect on their claims. Even if Plaintiffs could somehow escape the holding of *Locke*, government funding of Ark Encounter would be affirmatively prohibited by the Establishment Clause.

Plaintiffs are asking for money that would be used to finance the expansion of their religious ministry. The funds would come from sales taxes that are remitted to the Commonwealth monthly and, once remitted, become "state funds." *See* KRS 139.540, 446.010(41). And the Establishment Clause prohibits the use of government money "to fund religious activities." *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) (controlling concurrence of O'Connor, J.).

Because Plaintiffs want money that will have already landed in the Commonwealth's coffers, they are in a different position than the houses of worship whose tax exemptions were upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1970). In *Walz*, the Supreme Court held that the Establishment Clause does permit religious organizations to receive tax exemptions—that is, exemptions that are

assessed before any taxes are paid—that would lessen the degree of entanglement between church and state. *See* 397 U.S. at 674–75 ("Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes"). Here, however, Plaintiffs seek a rebate on taxes that the Commonwealth will have already received; an award of money already in the Commonwealth's coffers would impermissibly produce "a relationship pregnant with [state] involvement." *Id.* at 675. When "the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011).

Plaintiffs want more than "generally available benefits" designed to fund services lacking "inherently religious content." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 291, 293 (6th Cir. 2009). For one, the Act's subsidies are highly selective, not "generally available." In *Detroit Downtown Development Authority*, "[a]nyone who owned or leased property within the program area ... could apply for a grant, so long as the applicant was current on its state and local taxes and initially could fund the project on its own." 567 F.3d at 283. Nor was the program especially selective: the government received 204 applications, 189 were deemed eligible, and the agency approved 123 of them. *See id.* According to the Sixth Circuit, "[t]he broad sweep of the program" alleviated any concerns that the government would be seen to endorse the message conveyed by any particular

recipient. *See id.* at 294; *see also id.* at 299 ("Detroit's program applies to a far wider circle of beneficiaries—namely, anyone with a downtown building—not just educational buildings"). The program upheld in *Walz* was even broader, covering "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." 397 U.S. at 673.

Here, the Commonwealth has more discretion and the program is more limited. *Cf. City of Detroit Downtown Dev. Auth.*, 567 F.3d at 291 ("Nor does [plaintiff] argue that the program grants administrative discretion to the agency that could be used—or has been used—to skew benefits in favor of religious entities"). According to the most recent publicly available information, only twelve tourist attractions have been approved in the last five years. *See* Kentucky Department of Travel & Tourism, *July 2009 through June 2012 Approved Kentucky Tourism Development Act Applicants/Incentives Awarded*, http://tinyurl.com/kygrants.

Second, the nature of Ark Encounter guarantees that any aid to Plaintiffs' project will directly advance their religious mission. Ark Encounter will be "inherently religious," and is meant as "a sign to the world that the Bible is true and that its message of salvation is to be heeded." Compl. ¶ 32; *see also id.* ¶¶ 31–34. Any aid to build Ark Encounter would necessarily constitute impermissible "diversion of secular government aid to religious indoctrination." *Mitchell*, 530 U.S. at 840 (controlling concurrence of O'Connor, J.).

In *Detroit Downtown Development Authority*, conversely, the funding was limited to "the costs of refurbishing the exteriors of downtown buildings and parking lots." 567 F.3d at 281. And "the vast majority of the reimbursed repairs—the renovation of exterior lights, pieces of masonry and brickwork, outdoor planters, exterior doors, concrete ramps, entrance ways, overhangs, building trims, gutters, fencing, curbs, shrubbery and irrigation systems—lack[ed] any content at all, much less a religious content." *Id.* at 292. In these circumstances, "the record rebut[ted] the presumption they will use the aid to engage in proselytization." *Id.* at 296. But here, Plaintiffs have insisted that they can and will use Ark Encounter to evangelize and proselytize. *See* Compl. ¶¶ 159, 165.

Finally, if the funding were provided to Plaintiffs, other circumstances would suggest that the Commonwealth endorses Ark Encounter's religious message. *See Detroit Downtown Dev. Auth.*, 567 F.3d at 290 ("Not just an overt objective of furthering religion will undermine a program, so too will other proof of an impermissible objective, including ... its context and its history."). In the course of granting initial approval for Ark Encounter's tax incentives, Governor Beshear and Plaintiff Answers in Genesis held a joint press conference announcing their collaboration. Compl. ¶ 110. After the Governor spoke, "[Answers in Genesis] representatives confirmed the religious aspect of the project, describing the project as an opportunity to present biblical information," and emphasizing that Ark Encounter "would encompass a Gospel message." *Id.* ¶ 112; *cf. Hewett v. City of King*, 29 F. Supp. 3d 584, 634–36 (M.D.N.C. 2014) (mayor's participation in ceremonies

including religious content conveyed government endorsement of religion). The Governor's participation in Plaintiffs' press conference undermines any conclusion that Ark Encounter was a mere participant in a neutral program or that the Commonwealth was agnostic about Ark Encounter's religious message.

B. Plaintiffs' State Law Claims Are Foreclosed By The Eleventh Amendment And Section 5 Of The Kentucky Constitution.

Plaintiffs further contend that both Section 5 of the Kentucky Constitution and the Kentucky religious liberty statute, KRS 446.350, require Defendants to subsidize the expansion of Plaintiffs' ministry. *See* Compl. ¶¶ 29, 239–48; *see also* Mem. in Support of Mot. for Prelim Inj. [Dkt. #15-1] at 37–38. Plaintiffs' state law claims are barred by the Eleventh Amendment. But these claims would fail even if they could be asserted in federal court, because the Kentucky Constitution affirmatively prohibits the distribution of taxpayer funds for the expansion of a religious ministry.

1. Plaintiffs' claims are barred by the Eleventh Amendment.

As Defendants explain in their motion to dismiss, Plaintiffs' state law claims are barred by the Eleventh Amendment. No matter what relief is sought, "when a State or state official is sued in federal court in a lawsuit filed under state law, sovereign immunity bars the lawsuit." *Ernst v. Rising*, 427 F.3d 351, 365 (6th Cir. 2005) (en banc). Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

2. Plaintiffs' state law claims fail on the merits.

Even if the state-law claims were properly before the Court, Plaintiffs have failed to state any claims under Kentucky law. Nothing in Kentucky law requires taxpayers to finance Plaintiffs' religious ministry, and Section 5 of the Kentucky Constitution affirmatively prohibits Defendants from extending the subsidy that Plaintiffs seek.

a. Kentucky Constitution

Plaintiffs contend that Defendants violated provisions of Section 5 of the Kentucky Constitution providing that "the civil rights, privileges, or capacities of no person shall be taken away, or in anywise diminished ... on account of his belief or disbelief of any religious tenet, dogma or teaching" and that "[n]o human authority shall, in any case whatever, control or interfere with the rights of conscience." Compl. ¶¶ 239–42. But Plaintiffs' quotation of Section 5 omits its preceding command: "No preference shall ever be given by law to any religious sect, society or denomination, ... nor shall any person be compelled ... to contribute to the erection or maintenance of any [place of worship], or to the salary or support of any minister of religion." Ky. Const. § 5. Far from requiring Defendants to direct taxpayer funds to Plaintiffs' religious ministry, Section 5 of the Kentucky Constitution forbids them from doing so.

This prohibition against the funding of religious ministries is rooted in Kentucky's constitutional tradition. Kentucky's 1891 constitutional convention featured heated debate about whether allowing even a limited tax exemption for church property was consistent with the values underlying Section 5. *See, e.g.*, 1

Convention Record of the Kentucky Constitutional Convention, no. 86, at 27 (1891), *available at* http://tinyurl.com/kyconvention. Many delegates opposed allowing any exemption for churches, because in other countries the government's funding of religion had "resulted either in forcible or violent revolution, or in the subjection of the State to clerical authority." *Id.* at 10. Other delegates opposed going quite that far; the result of the debate was a narrow exemption for church property that Kentucky's highest court has strictly construed to circumscribe tax exemptions that would support religious activity. *See City of Ashland v. Calvary Protestant Episcopal Church of Ashland*, 278 S.W.2d 708, 711 (Ky. 1955); *Commonwealth v. Thomas*, 83 S.W. 572, 573 (Ky. 1904).

This approach reflects the framers' belief that "it is not within the province ... of the state to teach or disseminate religion"; Section 5 ensures that church and state "were forever separated by affirmative provision in the fundamental law of the land." *Thomas*, 83 S.W. at 573. And although the Kentucky Supreme Court has at times suggested that Section 5 is in some respects coextensive with the federal Establishment Clause, *see Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 618 n.78 (Ky. 2014), the Court has also explained that when it comes to taxpayer financing of religion, Section 5 "mandate[s] a much stricter interpretation than [its] Federal counterpart." *Neal v. Fiscal Court*, 986 S.W.2d 907, 909–10 (Ky. 1999) [1]

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[1] At a minimum, Defendants had the discretion to decline to provide taxpayer funding to Ark Encounter in order to vindicate concerns about public financing of a religious ministry, even if such aid were not affirmatively prohibited. The free exercise provisions of the Kentucky Constitution are coextensive with those of the federal Free Exercise Clause. *See Gingerich v. Kentucky*, 382 S.W.3d 835, 839 (Ky.

In addition, the Kentucky Supreme Court has rejected a formalistic approach to enforcing the state Constitution: the Kentucky Constitution reaches "legislation which, though not in terms trespassing on the letter," seeks to evade these limitations "in substance and effect." *Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983) (quoting *Commonwealth v. O'Harrah*, 262 S.W.2d 385, 389 (Ky. 1953)). Thus, Section 5's prohibition on compelled taxpayer support for religious ministries applies whether the support comes from direct spending or, as here, through tax refunds. As Kentucky's highest court has explained, "every exemption is indirectly an additional tax upon the property owners not enjoying a like benefaction." *City of Ashland*, 278 S.W.2d at 711 (quoting *Thomas*, 83 S.W. at 573).

Ark Encounter is a religious ministry that falls within the meaning of Section 5 and outside of its narrow allowance of tax exemption for churches. *See Thomas*, 83 S.W. at 573–74; *see also Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 541–42, 557–59 (Vt. 1999) (purpose Vermont constitutional provision, stating that "no person ... can be compelled to attend any religious worship, or erect or support any place of worship," can be effectuated only by a broad definition of "place of

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2012) (citations omitted) ("While we have recognized that the Kentucky Constitution may afford greater protection of individual rights than those prescribed by the United States Supreme Court, this Court has often stated regarding particular sections of the Kentucky Constitution that our state constitution offers no more protection than the same or similar section of the federal constitution. We now state that this principle is also true of the free-exercise-of-religion protections in Section 1 and Section 5 of the Kentucky Constitution."). Because the federal Free Exercise Clause permits the government to withhold taxpayer support from religious programs, *see* Section I.A. above, the Kentucky Free Exercise Clause provides Defendants with the same latitude to prevent the use of taxpayer dollars to finance religious ministries.

worship"). Plaintiffs admit as much in their complaint, which describes Ark Encounter as:

- "a means of expanding [Answers in Genesis's] ministry's mission of proclaiming biblical authority and the Gospel of Jesus Christ," Compl. ¶ 29;
- "a unique and powerful reminder of God's judgment of sin and His wonderful gift of salvation," *id.* ¶ 31;
- "a sign to the world that the Bible is true and that its message of salvation is to be heeded," *id.* ¶ 32;
- "an evangelistic opportunity to outreach for [Answers in Genesis's] ministry, enabling [Answers in Genesis] to teach the world about the Bible and the message of salvation," *id.* ¶ 33; and
- a "symbol[ ] [of] eternal salvation through the metaphorical door of Jesus Christ," *id.* ¶ 34.

Plaintiffs also intend to reserve Ark Encounter's best and most lucrative jobs for those who share their religious beliefs. *Id.* ¶ 148. Indeed, Plaintiffs have stated that "work at Ark Encounter is not just a job, it is also a ministry" that entails "edifying believers and evangelizing the lost." Exhibit Q [Dkt. # 15-18] at 7.

Kentucky law has never allowed taxpayer aid to an institution at which religion is taught and "one sect [is] given preference over another." *Pennybacker*, 308 S.W.3d at 674 (quoting *Ky. Building Comm'n v. Effron*, 220 S.W.2d 836, 838 (Ky. 1949)). That Plaintiffs' ministry is financed by tax refunds rather than direct expenditures matters not; as discussed above, Section 5 contemplates that "every

exemption is indirectly an additional tax upon the property owners not enjoying a like benefaction." *City of Ashland*, 278 S.W.2d at 711 (quoting *Thomas*, 83 S.W. at 573).

Defendants did not subject the Commonwealth to liability under Section 5 of the Constitution by refusing to provide taxpayer support for Ark Encounter. On the contrary, Section 5 prohibited Defendants from offering public aid to Plaintiffs' ministry.

b. Kentucky Religious Freedom Statute

Plaintiffs also fail to state a claim under Kentucky's religious freedom statute. *See* Compl. ¶¶ 243–48. That statute is based on the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, and provides that the Commonwealth may "not substantially burden a person's freedom of religion ... unless the government ... has a compelling governmental interest ... and has used the least restrictive means to further that interest." KRS 446.350.

Although the law is new and Kentucky courts have yet to interpret it, Plaintiffs' proposed reading of the statute would require Defendants to violate the Kentucky Constitution. Under Kentucky law, "every doubt and presumption will be resolved in favor of the constitutionality of an act of the legislature." *Jefferson Cnty. ex rel. Grauman v. Jefferson Cnty. Fiscal Court*, 117 S.W.2d 918, 920 (Ky. 1938). Courts have universally concluded that the government has a compelling interest in avoiding a violation of the Establishment Clause. *See, e.g.*, *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 166 (3d Cir. 2008); *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 475 (2d Cir. 1999); *Smith v. Cnty. of Albemarle*, 895

F.2d 953, 959–60 (4th Cir. 1990). Because Defendants' interest in complying with an even stricter state counterpart is just as compelling, Plaintiffs' statutory claim is barred by the doctrine of constitutional avoidance.

Defendants' interest is stronger yet, because Plaintiffs are asking taxpayers to finance an operation that will discriminate on the basis of religion when hiring. The August 2014 job listing by Answers in Genesis for Ark Encounter stated that any applicant would be required to submit a "[c]reation belief statement," as well as "[c]onfirmation of [their] agreement with the AiG Statement of Faith." Exhibit Q [Dkt. #15-18] at 7–8. According to the required Statement of Faith, applicants were required to profess, among other things, that homosexuality is a sin on par with bestiality and incest, that the earth is only 6,000 years old, and that the Bible is literally true. *See id.* at 10–11. The government's interest in combating employment discrimination on the basis of religion—and in declining to provide financial support to entities that discriminate on that basis—is "equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 (9th Cir. 1988) (citations and quotation marks omitted).[2]

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[2] *See also, e.g.*, *See Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (government has "substantial, indeed compelling, interest in prohibiting, ... religious discrimination"); *Christian Legal Soc'y v. Kane*, No. 04-04484, 2006 WL 997217, at *9 (N.D. Cal. Apr. 17, 2006) ("States have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of religion..."), *aff'd*, 319 F. App'x 645 (9th Cir. 2009), *aff'd* 561 U.S. 661 (2010); *E.E.O.C. v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002) (government has compelling interest in "eradication of employment discrimination based on ... religion"); *Presbytery of N.J.*

Kentucky law reflects what the Supreme Court recognized in *Locke v. Davey*: when taxpayers would be compelled to support a religious ministry, state "antiestablishment interests" are paramount. 540 U.S. at 722. Compelled taxpayer support of a religious ministry has long been viewed as a "hallmark[ ] of an 'established' religion," and has prompted "popular uprisings" since "the founding of our country." *Id.* Kentucky law permits and in fact requires Defendants to vindicate these interests, and thus prohibits taxpayer support of Plaintiffs' religious ministry.

II. Plaintiffs Are Not Entitled to a Preliminary Injunction.

To obtain a preliminary injunction, "the plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Court*, 769 F.3d 447, 453 (6th Cir. 2014) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Injunctions are "'extraordinary and drastic remed[ies]'" that are "'never awarded as of right,'" especially where, as here, an injunction will "necessarily disrupt the state-law status quo before each side has had full opportunity to make its case before the district court." *Id.* (alteration in original) (quoting *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)).

Here, Plaintiffs are not entitled to a preliminary injunction because "there is simply no likelihood of success on the merits." *Mich. State AFL-CIO v. Miller*, 103

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of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 521 (D.N.J. 1995) (state has compelling interest in "prohibit[ing] aiding and abetting discrimination" on the basis of "creed"), *aff'd* 99 F.3d 101 (3d Cir. 1996).

F.3d 1240, 1249 (6th Cir. 1997). Because they fail to state a claim for relief, *see* Section I, Plaintiffs are necessarily unable to obtain a preliminary injunction.

Plaintiffs would not be entitled to a preliminary injunction even if they could demonstrate a likelihood of success on any of their claims. Even if their application were approved, Plaintiffs would not receive any tax rebates until after their project was finished in the summer of 2016—over a year from now. *See* KRS 148.853(3)(b)(1); 139.536. As a result, Plaintiffs have not proven that they will suffer any harm before the Court issues a final decision on the merits. *See Winter*, 555 U.S. at 22 (citing 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)). They certainly have not proven that they will "suffer *immediate* and irreparable harm" or that the harm is "actual and *imminent*." *Abney v. Amgen, Inc.*, 443 F.3d 540, 551–52 (6th Cir. 2006) (emphasis added, quotation marks omitted).

Nor would an immediate injunction remove the "uncertainty" that Plaintiffs allege is currently clouding Ark Encounter's future. Compl. ¶¶ 200, 202. No rational accountant or investor would think that a preliminary injunction guarantees future government subsidies, because such an injunction "is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).

Even if Plaintiffs did face imminent harm that could be redressed by interim relief, the preliminary injunction that they seek—an award of $18 million—would

thwart "the court's ability to render a meaningful decision on the merits." *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). Plaintiffs have already had trouble collecting sufficient funds to build and operate Ark Encounter, they claim to "rel[y] upon the receipt of the incentives to supply critical cash flow for debt retirement," and they allege that the loss of tax rebates "greatly impacts [Ark Encounter's] projected cash-flow." Compl. ¶¶ 135, 153, 200. These circumstances suggest that Plaintiffs would be unable to repay the money after a final judgment against them, and they reinforce that "a preliminary injunction generally should not require that one party turn over money to another." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969).[3]

Plaintiffs also failed to act with the haste that would be expected if their need for a funding guarantee were urgent. Their motion for a preliminary injunction came over three months after the application was rejected. *See* Compl. ¶ 197 (application formally rejected on December 10, 2014). There is little explanation for this delay; Plaintiffs' counsel was retained nearly a year ago, and had previously sent Defendants a detailed legal memo—much of which Plaintiffs' motion repeats verbatim. *See* Exhibit J [Dkt. # 15-11]. Indeed, Plaintiffs' plan to build Ark

[3] *See also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to constitute an irreparable injury) (citation and quotation marks omitted); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1145 (3d Cir. 1982) ("a preliminary injunction which order[s] the payment of monies where the underlying contract is disputed, misconceives the equitable nature and purpose of an injunctive proceeding").

Encounter with or without the aid of the Commonwealth's taxpayers. *See* Compl. ¶ 199.

Plaintiffs incorrectly insist that they automatically meet the irreparable injury requirement if they have a strong likelihood of success on the merits. *See* Mem. in Support of Mot. for Prelim. Inj. [Dkt. #15-1] at 38-39. Nothing about the "'extraordinary and drastic remed[y]'" of a preliminary injunction is automatic or "'awarded as of right'" *Platt*, 769 F.3d at 453 (quoting *Munaf*, 553 U.S. at 689–90). Rather, a Court must have good reason to "disrupt the state-law status quo before each side has had full opportunity to make its case before the district court." *Id.*

A preliminary injunction would also disserve the public interest. Plaintiffs claim that without a preliminary injunction, Kentucky will lose "a giant tourist venue." Mem. in Support of Mot. for Prelim. Inj. [Dkt. #15-1] at 39. But it is Kentucky's elected officials, not the federal courts, who are entitled to determine which projects will best expand the state's economy. A preliminary injunction would upend their judgment and usurp their policymaking authority.

As to the balance of harms, Plaintiffs state baldly that granting the injunction "will cause no harm to Defendants or to any third parties." Mem. in Support of Mot for Prelim. Inj. [Dkt. #15-1] at 39. But Plaintiffs overlook the public's strong antiestablishment interests that a preliminary injunction would undermine. When it comes to taxpayer funding of religious ministries, there are "few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to

support church leaders, which was one of the hallmarks of an 'established' religion." *Locke*, 540 U.S. at 722. Whatever modest economic gains eventually might (or might not) result from Ark Encounter, the public interest in avoiding religious establishments should prevail.

Conclusion

For the preceding reasons, the Court should deny Plaintiffs' motion for a preliminary injunction and dismiss Plaintiffs' complaint.

Respectfully submitted,

/s/ David Tachau

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

ARK ENCOUNTER, LLC, et al.,
Plaintiffs,

v.

BOB STEWART, individually, and in his official capacity as Secretary of the Kentucky Tourism, Arts and Heritage Cabinet, et al.,
Defendants.

No. 3:15-cv-00013-GFVT

[Proposed] Order Granting Motion to Dismiss

Before the Court is Intervenors' Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). The Court concludes that Plaintiffs have failed to state any claims for relief, and orders that:

1. The Motion to Dismiss is granted; and,

2. Plaintiffs' complaint is dismissed with prejudice.

Gregory F. Van Tatenhove
U.S. District Judge

Date:

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Defendants.

No. 3:15-cv-00013-GFVT

[Proposed] Order Denying Motion for Preliminary Injunction

Before the Court is Plaintiffs' Motion for a Preliminary Injunction, along with oppositions filed by Defendants and Defendants-Intervenors.

Plaintiffs have failed to demonstrate that they are entitled to the extraordinary remedy of a preliminary injunction. The motion is denied.

Gregory F. Van Tatenhove
U.S. District Judge

Date: