No. 20A105

In The
Supreme Court of the United States

HIGH PLAINS HARVEST CHURCH AND MARK HOTALING,

Applicants,

v.

JARED POLIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF COLORADO; AND
JILL HUNSAKER RYAN, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Respondents.

To the Honorable Neil M. Gorsuch, Associate Justice of the United States Supreme Court And Circuit Justice for the Tenth Circuit

Reply in Support of Emergency Application for Injunction Pending Appellate Review

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PARTIES AND RULE 29.6 STATEMENT

Applicants are High Plains Harvest Church and Mark Hotaling. Applicants are the Plaintiffs in the United States District Court for the District of Colorado and the Appellants in the United States Court of Appeals for the Tenth Circuit. High Plains Harvest Church is a nonprofit corporation organized under Colorado law, and it neither issues stock nor has a parent corporation.

Respondent Jared Polis is the Governor of the State of Colorado. He appears in his official capacity. Respondent Jill Hunsaker Ryan is the Executive Director of the Colorado Department of Public Health and Environment (the "Department"). She appears in her official capacity. Respondents are the Defendants in the United States District Court for the District of Colorado and the Appellees in the United States Court of Appeals for the Tenth Circuit.

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A. Introduction

The State writes: "After this Court issued its opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo* [], Colorado reviewed its public health order. After careful consideration [] Colorado amended its public health order to ensure that it complied with the Court's free exercise framework . . ." Opp. Br. 2.

This statement is technically accurate but somewhat incomplete. The Court entered its order in *Roman Catholic Diocese of Brooklyn* on November 25, 2020. The State did not act to change the challenged order. Applicants served their Application in this matter on the State on December 2, 2020. The State still failed to change its order. On December 4, 2020, Justice Gorsuch ordered the State to respond to the Application by December 9, 2020. Only then did the State finally change its public health order ("PHO") two days before its response to the Application was due.

Although the State now argues the Application is moot, this argument is identical to the mootness argument rejected in *Roman Catholic Diocese of Brooklyn*. In that case, Governor Cuomo changed his order only after the church and the synagogue applied for relief in this Court. *Id*., at *3. The Court held Governor Cuomo's change of his order did not render the case moot, because the governor regularly changed his orders and could do so again with no notice, and therefore the houses of worship remained under a constant threat that the orders would change again. *Id*. The same is true in

this case. The State has changed the PHO literally dozens of times since March. The State remains defiant in the face of this Court's free exercise jurisprudence, and there is absolutely nothing preventing it from changing the PHO tomorrow to reimpose unconstitutional restrictions on the Applicants.

Moreover, there is an important aspect of this case that was not present in *Roman Catholic Diocese of Brooklyn*. Applicants have convincingly demonstrated that the State engaged in content-based discrimination in violation of their right of free expression by enacting a *de facto* exemption to the PHO favoring the speech of protesters over the speech of persons of faith. Since the *de facto* exemption, by its very nature, was never in the PHO to begin with, an amendment to the PHO does not, by definition, moot the free exercise claim.

Accordingly, Applicants respectfully request the Court to enter injunctive relief to vindicate their First Amendment rights that have been trammeled these many months.

B. A Pandemic is Not Grounds to Ignore the First Amendment

The State begins its brief with a lengthy discussion stressing the seriousness of the COVID-19 pandemic. Opp. Br., 3-5. The point of this discussion is unclear. Applicants have never denied the pandemic is a serious public health matter. They have only argued that the State is not

allowed to dispense with constitutional norms in its response to the pandemic. Applicants agree with Justice Kavanaugh:

> To be clear, the COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. . . . In light of the devastating pandemic, I do not doubt the State's authority to impose tailored restrictions – even very strict restrictions – on attendance at religious services and secular gatherings alike.

Roman Catholic Diocese of Brooklyn, *supra*, at *8, Kavanaugh, J. *concurring*. Nevertheless, any such severe restrictions must be consistent with the neutrality principles of this Court's free exercise jurisprudence. *Id*.

C. The State's "Animus" Arguments are Irrelevant

Respondents argue Applicants have not shown they were motivated by animus toward people of faith. Opp. Br., 1. This argument is irrelevant to the resolution of this matter, because while a showing of animus is certainly sufficient to subject a regulation to strict scrutiny, it is not necessary. *See Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 165 (2015) (in free expression context, content-based regulation is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus); and *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (in free exercise context, constitution requires government neutrality, not just governmental avoidance of bigotry).

In *Denver Bible Church v. Azar*, 2020 WL 6128994 (D. Colo. Oct. 15, 2020), Judge Domenico rejected an identical argument from the State of

Colorado. The court in that case enjoined the State's unconstitutional capacity limits on houses of worship even though it believed the State had acted in good faith. The court wrote:

> There is no evidence that Colorado, in treating houses of worship differently than other businesses, was motivated by religious animus or bigotry. To the contrary, the court is convinced that all the Defendants have acted in good faith. More likely this is a manifestation of a legal culture that, as Judge Pryor has noted in a different context, 'often struggles to understand religious practice or to take religious perspectives seriously.' *United States v. Brown*, 947 F.3d 655, 706 (11th Cir. 2020) (William Pryor, J., *dissenting*) (citing Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993); Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (1984)).

Id. at *12, n. 22.

D. This Matter is Not Moot

1. The State Continues to Insist Houses of Worship are Uniquely Dangerous to Public Health

In *Roman Catholic Diocese of Brooklyn*, the Court based its holding that the New York public health orders failed the neutrality requirement in part on the fact that the orders allowed hundreds of shoppers in a store while houses of worship were capped. *Id*. at *2. In this case, the State has asserted that it has modified its orders to comply with the Court's holding in *Roman Catholic Diocese of Brooklyn*. Opp. Br., 2. Nevertheless, the State believes the Court's holding in that case was profoundly wrong, writing:

> The State Defendants contend that the prior orders were generally applicable under *Lukumi*. The epidemiological evidence shows that houses of worship present unique risks that are not present in liquor stores or bicycle repair stores, such as extended

> duration of contacts, singing, and significant mixing with vulnerable populations. Houses of worship 'endanger' the State's interest in curtailing COVID-19 more than dissimilar critical retailers.

Opp. Br., 21, n.38.

Prior to December 7, the State's PHO imposed draconian occupancy limits on houses of worship while allowing hundreds of shoppers to roam around freely in stores. This Court has held that regulations like these fail the neutrality requirements of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). *Roman Catholic Diocese of Brooklyn*, *supra*, at *2. The State has grudgingly amended its PHO to bring it into compliance with the Court's decision, but it remains defiant and continues to insist that houses of worship pose unique public health risks and that they even "endanger" the State's interest in fighting COVID-19.

This is not an idle observation. In its mootness arguments the State assures the Court that houses of worship no longer have anything to worry about in Colorado. In light of the State's continued assertions that houses of worship are uniquely risky and that they even "endanger" public health, this assurance rings somewhat hollow, and Applicants have good reason to be skeptical of the State's assurances. After all, if the State truly believes houses of worship are uniquely risky and dangerous, one would expect renewed efforts at suppression given the slightest opportunity.

2. The PHO Has Been Amended Dozens of Times

On pages 5 through 10 of its Opposition Brief, the State summarizes some of the frequent and numerous amendments to the PHO that have been enacted since March. Indeed, the Department maintains a list of all current and past public health orders issued in response to COVID-19 to keep track of them. The list is available at https://covid19.colorado.gov/public-health-executive-orders. There are 51 orders and amendments to orders on the list. The first one was entered on March 19, 2020. The last was entered on December 7, 2020. Thus, in the 37 weeks between March 19 and December 7, Director Ryan amended the PHO an average of 1.3 times per week. To be sure, some of the amendments were major (including amendments that effected a wholesale restructuring of the regulatory system) and some were relatively minor. But the point is that the State has demonstrated a practice of amending the PHO frequently with little notice, and there is nothing to stop the State from continuing this practice in the future. It is no wonder that Judge Domenico characterized the PHO as a "moving target." *Denver Bible Church* at *3 n. 8.

3. General Mootness Principles

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. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "[A] defendant claiming that its voluntary compliance moots a case bears the

formidable burden of showing that it is **absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 190 (2000) (emphasis added).

The State assures the Court that it will not reimpose the unconstitutional burden on houses of worship. But even presuming the State's assurances are made in good faith does not overcome a court's wariness of applying mootness under just-in-time protestations of repentance and reform. *United States v. W.T. Grant Co*., 345 U.S. 629, 632 n. 5, (1953), *quoting United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

While a statutory change is usually enough to render a case moot, an executive action that is not governed by any clear or codified procedures cannot moot a claim. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (citation and quotation marks omitted). And the ease with which an order can be changed "counsels against a finding of mootness." *Id*. Finally, a challenge is not moot when the challenged action is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right To Life, Inc*., 551 U.S. 449, 462 (2007).

All of these factors are present in this case. The State has, for now, voluntarily (if however reluctantly) stopped imposing draconian occupancy caps on houses of worship. There is, however, no guarantee it will not

recommence imposing the caps tomorrow. Surely, given the fact that the State continues to assert that houses of worship are uniquely risky and dangerous, it cannot be said that it has met is burden of showing that it is "absolutely certain" that it will not again impose an unconstitutional burden on them.

The challenged action in this case is completely a matter of executive discretion, and that discretion is unfettered in that it is not moored to any codified procedure. Moreover, the ease with which the PHO can be (and frequently has been) changed counsels against mootness. With respect to the "action that is capable of repetition yet evading review" factor, a PHO that has previously been modified on average 1.3 times per week seems to be the epitome of such an action.

4. The State's Mootness Argument is Foreclosed by *Roman Catholic Diocese of Brooklyn*

Just as the State has done in this case, in *Roman Catholic Diocese of Brooklyn*, Governor Cuomo changed his public health order imposing draconian occupancy limits on houses of worship only after the church and the synagogue applied for relief in this Court. *Id*., at *3. Also as the State has done this case, Governor Cuomo then argued that the case was moot because the houses of worship had obtained the relief they sought. This Court rejected Governor Cuomo's argument, and it should reject the State of Colorado's argument for the same reason. The Court held:

> There is no justification for [withholding relief because the relevant circumstances have now changed]. It is clear that this matter is not moot. *See Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). The Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained.

Id.

This case presents identical circumstances. Injunctive relief is still appropriate because the State continues to insist that houses of worship are uniquely risky and even "endanger" the public health. Given that it believes houses of worship are uniquely dangerous, despite sudden assurances to the contrary, there is little doubt it would again impose draconian occupancy limits if it perceives the slightest opportunity to do so. The State regularly changes the PHO with little or no notice, and if that happens again the applicants will be impacted before judicial relief can be obtained. In this regard, Justice Gorsuch's concurrence is especially relevant.

> It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions**. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant**. So if we dismissed this case, nothing would prevent the Governor from reinstating the

> challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again.

Id., *6, Gorsuch, J., *concurring* (emphasis added).

Justice Gorsuch went on to note that Governor Cuomo had fought the houses of worship "every step of the way," and that it would be unfair to turn away their claims "just because the Governor decided to hit the 'off ' switch in the shadow of [the Court's] review." *Id.* The same is true in this case. Applicants filed their complaint on May 25, 2020 and have now been fighting to vindicate their constitutional rights for over six months. The State has opposed them vigorously at every turn. Now in the shadow of the Court's review, the State has lifted the unconstitutional occupancy limits even as it continues to insist the limits are vitally necessary because houses of worship are uniquely risky and even dangerous. Applicants should not be turned away under these circumstances.

5. The State's Attempt to Distinguish *Roman Catholic Diocese of Brooklyn* Fails

The State argues that this case is different from *Roman Catholic Diocese of Brooklyn* because it changed the PHO in a different way than did Governor Cuomo. Opp. Br., 14-15. The State notes that in his order Governor Cuomo lifted the unconstitutional restriction by turning the dial, but in this case the State lifted the unconstitutional restriction by modifying the dial. *Id.* This is a distinction that makes no difference. In *Roman Catholic Diocese of Brooklyn*, the Court identified the following factors that

influenced its decision regarding mootness: (1) the public health orders could be changed with little or no notice; (2) the governor had a history of changing the orders frequently; (3) there was nothing to prevent the governor from changing the orders back the very next day; (4) if the orders were changed the houses of worship would not have an opportunity to obtain judicial relief before they were flipped back; and (5) the governor insisted that imposing the limits might still be necessary. As discussed in detail above, all of these factors are present in this case.

The State's argument elevates form over substance. The relevant consideration is not the formal action the State would have to take to reimpose the caps (i.e., putting Applicants back on the dial as opposed to turning the dial). The relevant considerations are that the State has shown a proclivity to change the PHO frequently over the last 37 weeks, it really believes the unconstitutional caps are necessary to protect the public health, and there is nothing to stop the State from reimposing the caps at any time.

Finally, as Justice Kavanaugh noted in his concurrence, if the State really intends to follow through on its assurance that it will not reimpose the unconstitutional caps, it would not be harmed if the Court were to issue the requested injunction. *Id.*, at *9, Kavanaugh, J., *concurring*. If the State does not reimpose the unconstitutional caps, an injunction would impose no harm on its response to COVID-19, and if it did the free exercise rights of the

houses of worship would be protected. *Id*. Moreover, issuing the injunction would provide needed clarity to the State and religious organizations. *Id*.

E. The State's Unconstitutional *de Facto* Exemption is an Independent Ground for Relief that is Unaffected by the Amended PHO

As discussed at length in the Application, the State enacted a *de facto* exemption to the PHO, and the exemption is an unconstitutional content-based regulation because it favors the speech of certain protesters over the speech of people of faith in houses of worship. The State responds by citing the holding of the lower court that there is "no evidence" that the *de facto* exemption exists. Opp. Br., 20-21. It is true that the lower court held that. To which Applicants respond:

Ex. E, p. 4 ¶ 10. If thousands of densely packed protestors gathering day after day right outside the Governor's office while he sings their praises and assures them he understands it is impossible for them not to gather and that

he has no intention of stopping them is not evidence that the State created a *de facto* exception to the PHO provision banning mass gatherings, it is difficult to know what would count as evidence.

In addition to the Governor's actions, Executive Director Ryan went so far as to issue "Guidance" for protesters that she knew would be gathering in "large groups," and she told the protesters that it was "important for people to demonstrate," and that she wanted the protesters to "use [their] voice for issues that are important to [them]." The Respondents plainly permitted and encouraged the protesters. Thus, the lower court's determination that there was "no evidence" to support Applicants' claim that a *de facto* exemption exists is at odds with the record.

In a First Amendment speech case, the Court must make an independent review of the record to ensure that the judgment does not constitute a forbidden intrusion on free expression. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). This rule has even more force in this case, because the trial court denied Applicants' request for a hearing and decided the matter entirely on written submissions. *See* page 4 of Ex. D to Application (June 6, 2020 order). This is not a case in which the district court made any determination regarding witness credibility, so there is no reason for this Court to defer to the lower courts' review of the written record.

The State also argues that the Protests stopped, but the State does not cite to anywhere in the record to support its assertion. Indeed, in the district

court the State admitted that the Protests have "continued." Ex .K to Application, p. 2.

The State also asserts that it has not infringed Applicants' First Amendment rights of free expression because the text of the PHOs has always been facially neutral with respect to expressive activities. Opp. Br., 22-23. Applicants do not dispute that the text of the PHOs has been facially neutral (in this regard if not others). That is why they referred to the exemption in favor of the Protests as a "*de facto*" exemption rather than an "express" exemption. But a *de facto* regulation that violates a party's First Amendment right to free expression is just as unconstitutional as an express exemption. *Soos v. Cuomo*, 2020 WL 3488742, *12 (N.D.N.Y. 2020).

Finally, Respondents assert that the basis of Applicants' free expression claim is "not entirely clear" and speculate that the basis of the claim might be founded on the doctrine of "underinclusivity." Opp. Br., 26. This is not accurate. Applicants argued the State has engaged in "content-based" discrimination when it enacted the *de facto* exemption, and such discrimination is presumptively unconstitutional and subject to strict scrutiny. Application, 27-28, *citing Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

CONCLUSION

For all the foregoing reasons, Applicants respectfully request that the Circuit Justice grant this Application or refer it to the full Court. Applicants request that an injunction issue as soon as practicable and that it remain in effect until such time as the PHO's absolute capacity caps are invalidated.

Dated December 11, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2020, I emailed a true and correct copy of the foregoing to the following:

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