No. 20A163

In The
Supreme Court of the United States

DENVER BIBLE CHURCH, *et al.*,

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

Response in Opposition to Emergency Application for Injunction Pending Appellate Review

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PRELIMINARY STATEMENT

Applicants Denver Bible Church, Pastor Robert A. Enyart, Community Baptist Church, and Pastor Joey Rhoads ("Denver Bible Church") ask this Court for an "injunction pending appeal to be directed against the issuance or enforcement of any [Colorado Disaster Emergency Act]-based executive or public health orders that in any way prohibit the free exercise of religion." Appl. at 4.

Such extraordinary relief is neither necessary nor warranted. Colorado lifted all numerical capacity limitations from houses of worship last December after this Court's opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). And on April 16, 2021, Colorado converted the prior disease control restrictions—such as distancing requirements—into nonbinding guidance. Such protections are now just "strongly encouraged" for all, including houses of worship. The only remaining general restriction that applies to all establishments, including houses of worship, is facial coverings, but a specific exemption for religious practice permits their temporary removal to participate in religious services.

Denver Bible Church's primary complaint is that earlier social distancing requirements prevent it from hosting as many people in its building as it would like. But Colorado lifted that requirement well before Denver Bible Church filed its application. There is no longer a live controversy about any of these restrictions, and Denver Bible Church has shown no basis for concern that Colorado will reimpose these prior restrictions. Denver Bible Church already has the relief it seeks.

Even if a controversy remained, Denver Bible Church cannot show that the "legal rights at issue" are "indisputably clear," and thus cannot prevail. *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); *Turner Broad. System, Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers). The

Colorado Disaster Emergency Act ("Colorado Disaster Act")—the target of Denver Bible Church's application for injunction pending appeal—does not exempt thousands of residents from its application as Denver Bible Church claims. The Colorado Disaster Act is instead a facially neutral and generally applicable act that is not self-executing. Rather, it grants the governor broad authority to respond to disasters of all kinds—droughts, pandemics, fires, and riots, among others—and limits the governor's authority to interfere with some specific activities necessary to effective disaster response in what Denver Bible Church calls exceptions. None of these so-called exceptions have played any role in any of the orders at issue. The Governor uses executive orders to execute his authority under the Act, and those executive orders treat houses of worship the same or better than secular enterprises. The public health orders, issued under a different act with no analogous exceptions, also treat religious institutions in the same way.

The challenged executive orders and public health orders are neutral and generally applicable and satisfy rational basis review. Thus, the orders do not "indisputably" infringe Denver Bible Church's right to free exercise. The Colorado Disaster Act creates the legal mechanism for the state to respond to a broad range of disaster-emergencies, such as wildfires, floods, earthquakes, drought, and infestation. Invalidating the Act would cause severe hardship to the state.

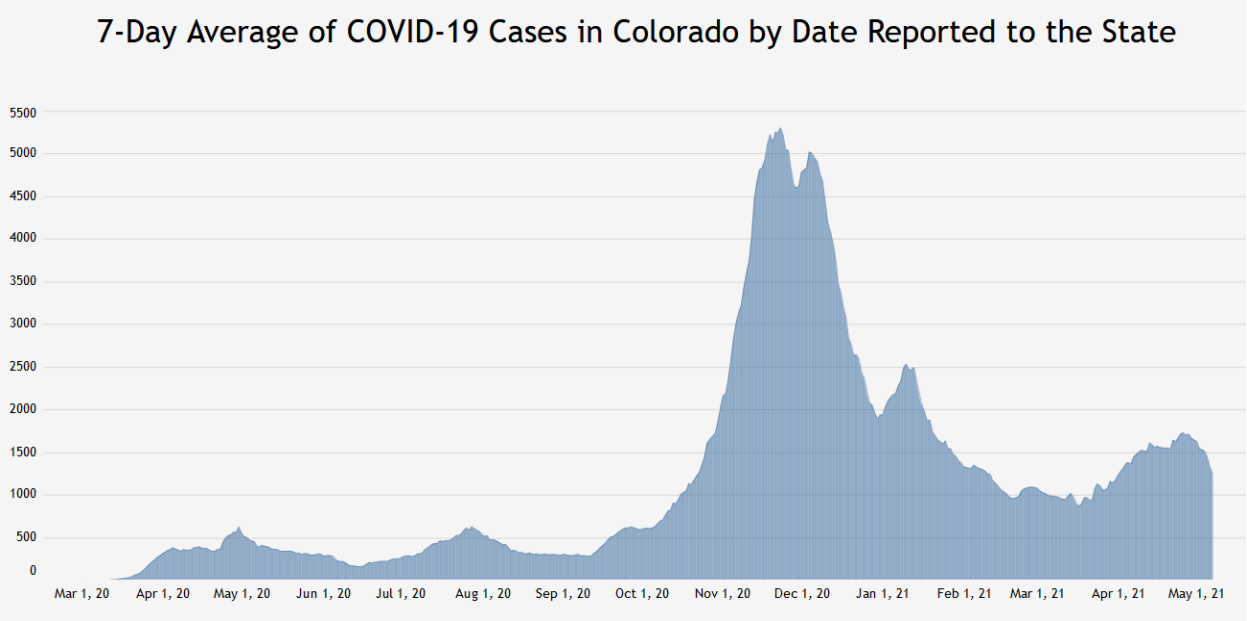
Denver Bible Church has failed to satisfy the demanding requirements for obtaining emergency injunctive relief from this Court. Its application should be denied.

STATEMENT OF THE CASE

I. COVID-19 in Colorado.

Colorado experienced a steady growth of COVID-19 cases through late spring of 2020, which fluctuated until the middle of September. Then, like many other

states, Colorado experienced an exponential growth in cases, which has recently begun to subside as more of our population receive the vaccine as illustrated below:



II. Colorado's Response to COVID-19.

A. Previous public health orders.

Colorado focused its response to the COVID-19 pandemic on preserving hospital capacity. State officials relied on traditional nonpharmaceutical interventions like mask wearing, social distancing, capacity limitations, and sanitization to accomplish this goal. As the district court record reflects, Colorado officials relied on the best scientific and medical expertise available to them to manage the pandemic.

Governor Polis declared a state of disaster emergency under the Colorado Disaster Act because of COVID-19 in March 2020.[1] The Colorado Department of Public Health and Environment ("State Health Department") then issued Public Health Order 20-22, which closed bars, restaurants, gymnasiums, casinos, movie

[1] *See* Gov. Polis, *Exec. Order D 2020 003* (Mar. 11, 2020), https://tinyurl.com/y3ybohjd.

theaters, opera houses, concert halls, and similar establishments where patrons gathered.[2] Order 20-22 did not close or limit capacity at houses of worship.[3] The State Health Department then issued Public Health Order 20-24 a few days later, which implemented a 50% in-person reduction at nonessential businesses and social distancing guidelines, but also did not close houses of worship or limit their capacity.[4]

Governor Polis issued Colorado's first stay at home order on March 25, and the State Health Department amended Public Health Order 20-24 in response.[5] The orders required residents to stay at home whenever possible and to leave only for necessary travel, which included accessing critical businesses.[6] Houses of worship were designated a critical service within the critical business category.[7] This meant that houses of worship, unlike restaurants, bars, movie theaters, concert halls, and gyms, could stay open during the stay at home order and that travel to houses of worship was considered necessary travel.[8] Houses of worship were subject to a 10-person capacity limitation and encouraged to implement electronic platforms to conduct services whenever possible.[9]

In response to decreasing COVID-19 case trends, Governor Polis and the State Health Department then issued a series of orders called Safer at Home.[10] Safer at Home remained in place between the end of April and the middle of

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[2] *See* Dir. Ryan, *Pub. Health Order 20-22* (Mar. 19, 2020), https://tinyurl.com/y7sfrcw7.

[3] *Id.*

[4] *See* Dir. Ryan, *Pub. Health Order 20-24*, (Mar. 22, 2020), https://tinyurl.com/y6gsn78w.

[5] *See* Gov. Polis, *Exec. Order D 2020 017* (Mar. 11, 2020), https://tinyurl.com/yybgljxc; Dir. Ryan, *2d Updated Pub. Health Order 20-24* (Mar. 27, 2020), https://tinyurl.com/y28gw36l.

[6] *Id.* § I.A.

[7] *Id.* § III.C.5.

[8] *Id.*

[9] *Id.*

[10] *See* Gov. Polis, *Exec. Order D 2020 044* (April 26, 2020), https://tinyurl.com/yyal9yzk; *see* Dir. Ryan, *Public Health Order 20-28* (Apr. 27, 2020), https://tinyurl.com/y6kcg6cg.

September. It was amended several times in response to the changing COVID-19 landscape. In general, each amendment opened more sectors and increased capacity.

In mid-September, the State Health Department moved to a dial framework that adjusts restrictions in each county based on county-level epidemiological metrics.[11] Minor changes occurred until this Court issued its decision in *Roman Catholic Diocese*, when Colorado officials reviewed the public health orders to determine whether they continued to comply with this Court's free-exercise framework. On December 7, the State Health Department amended its public health order to remove numeric capacity limitations from houses of worship in all levels of the COVID-19 dial.[12]

B. Current public health orders.

On April 15, 2021, the State Health Department issued Public Health Order 20-38, Limited COVID-19 Restrictions. Resp. App'x at 312. State officials issued the order in response to stable hospital capacity, decreasing or stable case counts, and an increase in vaccination in Colorado communities. The current public health order is Amended Public Health Order 20-38.[13] *Id.* at 319.

Public Health Order 20-38 lifted most state-imposed restrictions in Colorado related to the COVID-19 pandemic. Nonbinding guidance replaced the previous restrictions. Instead of restrictions, Colorado now strongly encourages disease mitigation practices for all businesses and government entities. § I.B.3. The current

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[11] *See* Dir. Ryan, *Public Health Order 20-35*, (Sept. 15, 2020), https://tinyurl.com/y66ysnox.

[12] *See* Dir. Ryan, *3d Amend. Public Health Order 20-36,* (Dec. 7, 2020), https://tinyurl.com/2rnz7pp2.

[13] The current public health order is set to expire by its own terms on May 15, 2021. Based on guidance from the Centers and Disease Control and Prevention ("CDC") issued just yesterday indicating that fully vaccinated individuals can largely go without masks, Colorado is currently reviewing its facemask rules and public health order. New orders or guidance will be issued to address the new CDC guidance. Colorado's executive orders and public health orders can be found at https://tinyurl.com/asn599x8.

order still requires face coverings in several sectors, and more broadly if a county's disease transmission rate exceeds a certain threshold. § I.A. Finally, some requirements remain for indoor gatherings where a large number of unvaccinated individuals convene, but the order excludes places of worship and associated ceremonies. § I.C.

Houses of worship in Colorado remained a critical service in the critical business category—as they were from the first orders—through April 15, 2021, when Colorado abolished its prior framework. Colorado no longer has a list of critical or noncritical businesses in the public health orders.

As of April 16, 2021, when the new orders took effect, houses of worship have no capacity limitations, social distancing, or sanitization requirements. The mass indoor gatherings requirements specifically do not apply to houses of worship and associated ceremonies. § I.C.2.a. The only requirement that still applies to a house of worship is the facial covering requirement in counties that exceed the threshold infection rate. But the face covering requirement does not apply while people officiate or participate in a life rite or religious ceremony where the temporary removal of a face covering is necessary to complete or participate in the life rite or religious service. § I.A.3.c; EO D 2021 079.[14]

III. Colorado statutory authority for the executive and public health orders.

Two independent statutory sources provide authority for Colorado's COVID-19 public health measures: (1) the Colorado Disaster Act; and (2) the State Health Department's communicable disease statutes. The Governor and the State

[14] The facial covering requirements were relocated to section II.I in D 2021 079, which is cited here. https://tinyurl.com/48kmethf. The current executive order is D 2021 095. https://tinyurl.com/rt244n6h.

Health Department issued the challenged executive orders and public health orders under these authorities.

A. The Example State Disaster Act of 1972.

The Colorado Disaster Act is not a new statutory framework. It was modeled after an example disaster act that was circulated and widely adopted by several states and territories almost 50 years ago. In 1971, the Federal Office of Emergency Preparedness contracted with the Council of State Governments to prepare a model state disaster act. Office of Emergency Preparedness, *Report to Congress*, *Disaster Preparedness*, Vol. I (Jan. 1972) ("OEP Disaster Preparedness Report").[15] Resp. App'x at 61. The office found that "State and local governments are often not as well prepared to cope with natural disasters as they could be." *Id.* at 88. The model act accordingly "emphasizes the need for State preparedness actions and leadership, as well as for continuing and strengthening the authority of the Governor to respond to disaster emergencies." *Id.* at 90.

In 1972, the Disaster Project and the Committee on Suggested State Legislation, a committee of the Council of State Governments, released the Example State Disaster Act of 1972 ("Example Disaster Act"). The Example Disaster Act is in Volume II of the OEP Disaster Preparedness Report. *Id.* at 280. The Act was released "as an aid to State Officials in considering possible legislative action to strengthen their disaster legislation to meet our growing vulnerability to the impact of such events." *Id.* at 284. The drafters note that the Example Disaster Act was prepared "to deal more directly with the problems of nonmilitary disasters, while not excluding civil defense, and to meet the rising disaster threat[.]" *Id.* at 286.

[15] Respondents' Appendix contains copies of Volumes I and II, which are held at the University of Michigan Law Library and the Library of the University of Illinois-Urbana Champaign. Google digitalized these copies, and all three volumes are available online here: Vol. I https://tinyurl.com/enurw4y3; Vol. II https://tinyurl.com/trzewz9f; and Vol. III https://tinyurl.com/22yvxjhp.

The Example Disaster Act is broken into 16 sections, but only the second, third, and fifth sections are relevant to the matters at issue.

1. Section 2: Purposes.

Section two lists the purposes of the Act, which include reducing the vulnerability of people and communities to damage, injury, and loss of life and property resulting from disasters and to clarify and strengthen the roles of state governors, agencies, and local governments in prevention of, preparation for, response to, and recovery from disasters. *Id*. at 289.

The drafters note that this section "sets forth briefly the major objectives and intent of the legislation." *Id*. They point out that the listed purposes "emphasize the several phases of the disaster problem…starting with planning, preparedness, and prevention, as well as actual operations during and after disasters." *Id*. Because responding to disasters "cannot be undertaken in the hours or minutes that constitute the normal maximum warning time[,]" the drafters emphasize that "it is the intent of the statute to provide the means of doing the necessary work in timely fashion." *Id*.

2. Section 3: Limitations.

The next section includes four limitations on the reach of the governor's authority under the Example Disaster Act. *Id*. at 290. The drafters recognized that there is a "large number of normal governmental activities which have some relationship to disaster prevention, preparedness, or response or which involve resources that in the time of need can be devoted to the problems of disaster." *Id*. The Example Disaster Act "does not attempt to provide for these activities or to replace them." *Id*. And the drafters note that while the effect of the Act on these activities and other matters is clear, "there are some respects in which a special marking out of the limits of the Act is appropriate." *Id*. The drafters thus included

the four limitations to address this concern. Denver Bible Church only challenges the first three limitations, each of which is addressed below.

Labor Disputes

The first limitation states:

> Nothing in this Act shall be construed to: interfere with the course or conduct of a labor dispute, except that actions otherwise authorized by this Act or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety[.]

Id.

The drafters state that the purpose of this limitation is to make "clear that the Act is not intended for emergencies that are produced by strikes." *Id*. They recognize, however, that "work stoppages when a disaster has occurred or is imminent can cause or increase danger." *Id*. To "strike a proper balance" between these competing interests, they included language to allow interference with a labor dispute "when necessary to forestall or mitigate imminent or existing danger to the public health[.]" *Id*.

Dissemination of News

The second limitation states:

> Nothing in this Act shall be construed to: interfere with dissemination of news or comment on public affairs; but any communications facility or organization (including but not limited to radio and television stations, wire services, and newspapers) may be required to transmit or print public service messages furnishing information or instructions in connection with a disaster emergency[.]

Id.

The drafters note that "[c]ommunications are vital in time of disaster." *Id*. Given this importance, they included specific language to "assure that the communications media will be available to carry information and instructions needed by the public." *Id*.

Armed Forces

The third limitation states:

> Nothing in this Act shall be construed to: affect the jurisdiction or responsibilities of police forces, fire fighting forces, units of the armed forces of the United States, or of any personnel thereof, when on active duty; but State, local, and interjurisdictional disaster emergency plans shall place reliance upon the forces available for performance of functions related to disaster emergencies[.]

Id.

With this third limitation, the drafters note that even without disaster legislation, these forces "plan, train, and function to meet emergencies." *Id*. The purpose of the third limitation was "to assure that these organizations and their personnel will not be interfered with in the conduct of their normal roles." *Id*.

3. Section 5: The Governor and Disaster Emergencies.

Section five authorizes state governors to issue executive orders to respond to disaster emergencies. It first makes governors "responsible for meeting the dangers to the State and people presented by disasters." *Id*. at 292. It then provides that, through the Example Disaster Act, "the Governor may issue executive orders, proclamations, and regulations and amend or rescind them." *Id*. The Act then empowers these orders, proclamations, and regulations with "the force and effect of law." *Id*.

Later in the section, there is a non-exhaustive list of powers governors may use to respond to disaster emergencies. Examples include the authority to "utilize all available resources of the State Government as reasonably necessary to cope with the disaster emergency and of each political subdivision of the State" and "direct and compel the evacuation of all or part of the population from any stricken or threatened area within the State if he deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery." *Id*. at 293.

Most relevant here, the Example Disaster Act grants state governors the authority to "control ingress and egress to and from a disaster area, the movement of persons within the area, and *the occupancy of premises therein*[.]" *Id*. (emphasis added).

The Example Disaster Act is not, however, a self-executing statute. To exercise these emergency powers, the Act requires governors to declare a state of disaster emergency, which may continue for no longer than thirty days unless it is renewed due to a continuing disaster. *Id*. at 292. The authority to control the occupancy of premises within a disaster area does not activate until the governor declares a state of disaster emergency and then issues executive orders.

The Example Disaster Act also does not specify the manner or extent to which governors may control the occupancy of premises. This lack of specificity is by design. Disaster emergencies vary based on many circumstances. It is not reasonable for any state legislature to predict the scope and impact of future disaster emergencies. This broad grant of emergency authority vests governors with sufficient flexibility to tailor emergency responses to the unique circumstances each disaster presents.

As a counterbalance to these emergency powers, "[t]he Legislature by concurrent resolution may terminate a state of disaster emergency at any time." *Id*. Upon the resolution taking effect, "the Governor shall issue an executive order or proclamation ending the state of disaster emergency." *Id*. The drafters note that these provisions "are included because the powers to be exercised during a disaster emergency are extraordinary ones and so should be confined to the periods intended by law." *Id*.

Finally, nothing in section five, or any other section of the Example Disaster Act, limits or prohibits religious practice during a disaster emergency. There is no reference in the Act to the exercise of one's religion. There is no prohibition of practicing one's faith during a disaster emergency. Nor is there any limitation on

how people may exercise their First Amendment free exercise rights during a disaster emergency. The Example Disaster Act is simply a source of authority through which state governors may respond to the unique threats that emergency disasters present.

B. The Colorado Disaster Emergency Act.

In 1973, the Colorado General Assembly enacted the "Colorado Disaster Emergency Act of 1973." Committee hearings reveal it was modeled largely off the Example Disaster Act.

The Colorado Disaster Act was repealed, reenacted, and amended many times throughout its history. But the relevant provisions, including the Governor's authority to issue executive orders in response to disaster emergencies and the three limitations challenged here, remain virtually unchanged today. *See* Colo. Rev. Stat. §§ 24-33.5-702(2)(a)–(d); 24-33.5-704, *et seq*.

C. Other state emergency management acts.

Many other states have emergency management acts that mirror the Example Disaster Act.

At least 20 other states and territories have emergency management acts with limitations on the governor's emergency authority like those in the Example Disaster Act and the Colorado Disaster Act.[16] Some states like Pennsylvania and North Carolina have fewer limitations than the Colorado Disaster Act. *See* 35 Pa. Stat. and Cons. Stat. Ann. § 7104 (only labor disputes and armed forces limitations);

[16] Alaska Stat. Ann. § 26.23.200; Am. Samoa Code Ann. § 26.0103; Ark. Code Ann. § 12-75-104; Cal. Gov. Code §§ 8572-74; Fla. Sat. Ann. § 252.33; Idaho Code Ann. § 46-1007; 20 Ill. Comp. Stat. Ann. 3305/3; Ind. Code Ann. § 10-14-3-8; Kan. Stat. Ann. § 48-923; Mich. Comp. Laws Ann. § 30.417; Mont. Code Ann. § 10-3-102; N.C. Gen. Stat. Ann. § 166A-19.2; N.D. Cent. Code Ann. § 37-17.1-03; Neb. Rev. Stat. Ann. § 81-829.38; 35 Pa. Stat. and Cons. Stat. Ann. § 7104; 30 R.I. Gen. Laws Ann. § 30-15-4; Tenn. Code Ann. § 58-2-105; Tex. Gov't Code Ann. § 418.003; Va. Code Ann. § 44-146.15; 23 V.I.C. § 1003.

N.C. Gen. Stat. Ann. § 166A-19.2 (only dissemination of news limitation). Other states, like Virginia, include additional limitations on their governor's emergency authority. *See* Va. Code Ann. § 44-146.15 (limits interference with the right to bear arms).

D. Colorado's communicable disease statutes.

As Colorado's public health agency, the State Health Department has the express power and duty to investigate and control the causes of epidemic and communicable diseases affecting the public health. Colo. Rev. Stat. § 25-1.5-102(1)(a)(I). The State Health Department can "establish, maintain, and enforce isolation and quarantine" and, for that purpose, "exercise such physical control over property and the persons of the people within [Colorado] as the department may find necessary for the protection of the public health." Colo. Rev. Stat. § 25-1.5-102(1)(c). It may also "abate nuisances when necessary for the purpose of eliminating sources of epidemic and communicable diseases." *Id*. at (1)(d). And it can "close theaters, schools, and other public places, and … forbid gatherings of people when necessary to protect the public health." Colo. Rev. Stat. § 25-1.5-101(1)(a). It implements these statutes through its public health orders.

The State Health Department's communicable disease authority is independent from the Governor's Colorado Disaster Act authority. While the Governor may direct the State Health Department to issue public health orders under the Colorado Disaster Act, the State Health Department may also act on its own accord to control the causes of epidemics and communicable diseases. In such instances, the State Health Department relies on its independent statutory authority, not on the Colorado Disaster Act, to protect public health.

PROCEDURAL HISTORY

I. Proceedings in the District Court.

Denver Bible Church sued Colorado state officials and the federal Secretaries of Health and Human Services, Homeland Security, and the Treasury, in August 2020, on a broad array of claims. Those included allegations that the executive orders and public health orders violated the First Amendment. Denver Bible Church filed a motion for a temporary restraining order and preliminary injunction eight days later.

The district court denied the request for a temporary restraining order and set a briefing schedule for the motion for preliminary injunction. After reviewing the briefing and records, the district court determined that a hearing was not necessary. It asked the parties to provide briefing on supplemental questions.

On October 15, 2020, the district court issued its order partially granting Denver Bible Church's motion for preliminary injunction. The district court enjoined the state defendants from enforcing indoor occupancy limitations against Denver Bible Church. *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 843–44 (D. Colo. 2020). It also enjoined the face covering requirement "where the temporary removal of a face covering is necessary for [Denver Bible Church] or their employees, volunteers, or congregants to carry out their religious exercise." *Id.* at 844.

II. Proceedings in the Tenth Circuit.

The state defendants sought interlocutory review in the Tenth Circuit. Denver Bible Church also cross-appealed, challenging the district court's refusal to grant it a more expansive preliminary injunction.

In November, this Court issued *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). In response, Colorado officials reviewed their public

health orders to ensure compliance with the Court's ruling. Following that review, Colorado amended the orders to remove numerical capacity limitations from houses of worship at all levels of the public health orders, effective December 7, 2020. The Governor had previously amended the facial covering executive order to add an exception for individuals to temporarily remove their facial coverings to participate in a religious practice.[17]

These amendments rendered moot the state defendants appeal of the district court's preliminary injunction. The state defendants therefore sought to voluntarily dismiss their appeal challenging the preliminary injunction. Denver Bible Church opposed that request. After full briefing on a motion to dismiss, the Tenth Circuit dismissed the state defendants' appeal. *Denver Bible Church v. Polis*, No. 20-1377, 2020 WL 9257251 (10th Cir. Dec. 23, 2020).

Denver Bible Church then filed an emergency motion for injunction pending appeal in the district court in January—almost three months after the district court entered its preliminary injunction. On March 12, Denver Bible Church then filed its first Tenth Circuit emergency motion for injunction pending appeal. The Tenth Circuit denied that motion on March 24 because the district court had not yet ruled on the motion pending before it. *See* Fed. R. App. P. 8(a). On March 28, the district court denied the emergency motion, finding that Denver Bible Church had not made the required strong showing that it would likely succeed on the merits of its appeal. *Denver Bible Church v. Becerra*, No. 1:20-cv-02362-DDD-NRN, 2021 WL 1220758 at *3 (D. Colo. Mar. 28, 2021).

On April 2, Denver Bible Church filed its second emergency motion for injunction pending appeal with the Tenth Circuit. In that motion, it abandoned its argument that the Colorado Disaster Act was unconstitutional as applied to Denver

[17] *See* Gov. Polis, *Exec. Order D 2020 281* (Dec. 14, 2020), https://tinyurl.com/f2nexred.

Bible Church, and instead relied exclusively on its facial challenge. The Tenth Circuit found that Denver Bible Church "failed to demonstrate a likelihood of success on the merits of their claim that the Colorado Disaster Emergency Act, Colo. Rev. Stat. §§ 24-33.5-701 to -717, violates the First Amendment of the United States Constitution, either as applied to plaintiffs or on its face." The court denied the motion on April 19, 2021.

Briefing on Denver Bible Church's cross-appeal remains in progress in the Tenth Circuit. Denver Bible Church filed its application with this Court on May 3, 2021.

ARGUMENT

An injunction from this Court is "extraordinary relief" that "'demands a significantly higher justification' [even] than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). The authority to issue a writ "is to be used 'sparingly and only in the most critical and exigent circumstances.'" *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (quoting *Ohio Citizens for Responsible Energy,* 479 U.S. at 1313 (Scalia, J., in chambers)). To obtain such relief, the applicant must show that the "legal rights at issue" in the dispute are "indisputably clear" in its favor. *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers) (quotations omitted). The applicant must also satisfy all of the remaining factors relevant for such relief, namely "that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Denver Bible Church fails to show that the "legal rights at issue" in the dispute are "indisputably clear" in its favor. *Lux,* 561 U.S. at 1307. As a result, the Court should deny the Application.

I. Colorado removed or exempted houses of worship from all of the challenged limitations and the case is therefore moot.

A case may become moot at any stage of the proceedings. "Article III's 'case-or-controversy requirement subsists through all stages of federal judicial proceedings…. [I]t is not enough that a dispute was very much alive when suit was filed.'" *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 461–62 (2007) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). This Court has allowed suits for prospective relief to move forward after the underlying injury has been abated only in "exceptional situations" and only when certain circumstances are satisfied. *Lewis*, 494 U.S. at 481 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). The Court "dispose[s] of moot cases in the manner 'most consonant to justice' … in view of the nature and character of the conditions which have caused the case to become moot.'" *U.S. Bancorp Morg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477–78 (1916)).

A change in a challenged statute or regulation can itself render a case moot. This is so because the case will have "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (quotations omitted); *see also Massachusetts v. Oakes*, 491 U.S. 576, 576 (1989). Further, the Court "appl[ies] the law as it is now, not as it stood below." *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977). Thus, the enactment of a new statute may moot the claims of its challenger. *Id.* at 129. When a challenged statute is repealed, declaratory and

injunctive relief "is, of course, inappropriate." *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972).

There are two exceptions to this general rule, but neither applies here. First, where "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration." *Lewis*, 494 U.S. at 481. Second, where "'there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). Denver Bible Church does not claim either exception applies in this case.

This Court's recent COVID-19 cases have also addressed mootness. In *Roman Catholic Diocese*, the Court found that the matter was not moot because the applicants there remained "under a constant threat that the area in question [would] be reclassified as red or orange." *Roman Catholic Diocese*, 141 S. Ct. at 68. In that case, reclassification under the New York governor's order would change the restrictions that applied to houses of worship. *Id.* Members of the Court also observed that the orders containing the restrictions had not been withdrawn or amended. *Id.* at 74 (Kavanaugh, J., concurring).

The Court more recently held that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). In determining whether a case is moot in those circumstances, the question is whether "the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (citing *Roman Catholic Diocese*, 141 S. Ct. at 68; *High Plains Harvest Church*, 141 S. Ct. 527 (2020)). In support of its analysis, the Court observed that the challenged restrictions remained in place for a time, and that the state officials had "a track record of 'moving the goalposts.'" *Id.*

Unlike the concerns raised in *Tandon*, there is no history of Colorado officials moving the goalposts in an unpredictable way. Colorado's COVID-19 restrictions—including those applying to houses of worship—have steadily decreased throughout the pandemic.

Date	Order	Effect	Houses of Worship
March 25, 2020	Stay at Home	Most businesses closed	Open, 10 person limit
April 27, 2020	Safer at Home	Most closed indoor environments closed	Open, 10 person limit
June 2, 2020	Safer at Home	Most closed indoor environments closed	50% occupancy or 50 people indoors
June 18, 2020	Safer at Home	Most closed indoor environments reopened up to 100 people indoors	50% occupancy or 50 people indoors, larger venues up to 100 people indoors
September 15, 2020	Safer at Home Dial	Restrictions vary by level based on disease transmission	Varied from 25% capacity or 50 people up to 50% capacity or 175 people depending on level of county
November 2, 2020	COVID-19 Dial	Restrictions vary by level based on disease transmission, now includes stay at home level	Varied from 25% capacity or 50 people up to 50% capacity or 175 people depending on level of county; encouraged to implement 10 person limit at stay at home
December 7, 2020	COVID-19 Dial	Removed capacity limits from houses of worship	No numerical capacity limitations for houses of worship; cleaning, social distancing, and facial coverings remain

Date	Order	Effect	Houses of Worship
April 16, 2021	Limited COVID-19 Restrictions	Removed most remaining restrictions except in large gatherings	No state restrictions remaining on houses of worship except for facial coverings in some circumstances

The resolution of *High Plains Harvest Church*, 141 S. Ct. 527 (2020), reflects this predictable trend. High Plains Harvest Church filed a stay application with this Court on December 4, 2020. On December 7, Colorado completed its review of its orders after *Roman Catholic Diocese v. Cuomo* and modified its orders. On December 15, this Court vacated the district court's ruling and remanded for further consideration in light of the *Roman Catholic Diocese* opinion. 141 S. Ct. 63. On remand, High Plains sought no further changes to Colorado's orders and the district court dismissed the case after plaintiffs filed a stipulation of dismissal. Stipulation to Dismiss with Prejudice, *High Plains Harvest Church v. Polis*, No. 20-cv-1480-RM-MEH (D. Colo. Feb. 12, 2021). Colorado has listened to this Court and focused on ensuring that its restrictions follow this Court's requirements and enable its residents to practice their beliefs at houses of worship as much as safely possible.

Colorado has categorized houses of worship as critical businesses from its first public health orders during the pandemic, and they have remained open throughout the pandemic response. The orders have progressively increased capacity for houses of worship. After this Court issued *Roman Catholic Diocese*, Colorado officials removed all remaining capacity limitations from houses of worship on December 7, 2020. At that time, houses of worship were subject only to six-foot social distancing, cleaning requirements, and facial coverings. These are all measures identified by members of this Court as accomplishing public health goals without violating free exercise when applied across the board. *S. Bay Pentecostal*

Church v. Newsom, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J. concurring); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2606 (2020) (Alito, J., dissenting); *Roman Cath. Diocese*, 141 S. Ct. at 68 (Gorsuch, J. concurring); *Id.* at 73 (Kavanaugh, J. concurring).

Denver Bible Church's complaint to this Court mainly focuses on the six-foot social distancing requirement, and, to a lesser extent, on facial coverings and sanitization. App. at 25–26. But their discussion omits that Colorado lifted all of these requirements except facial coverings nearly three weeks before their application to this Court. Resp. App'x at 312. The April 15, 2021 order recommends, but does not mandate, disease control measures. Social distancing only applies to large gatherings, but specifically exempts houses of worship from those requirements. *Id.*

The only remaining restriction that applies to houses of worship (as well as secular activities) requires facial coverings unless an individual is officiating or participating in a life rite or religious service. EO D 2021 079 § II.I.7.

As the voluntary dismissal without additional changes by High Plains Harvest Church shows, Colorado has not moved the goalposts and Denver Bible Church is not under constant threat that the orders will be reinstated. Colorado officials have predictably and consistently increased capacity limitations. The State has complied with this Court's directives in good faith. An injunction pending appeal is unnecessary, and Colorado respectfully requests that the Court deny the application.

II. The Colorado Disaster Act does not facially violate the First Amendment.

Even if this Court does not deny relief based on mootness, Denver Bible Church has not stated a claim for relief. The Colorado Disaster Act is neutral and generally applicable. Neither it, nor its limitations on the governor's authority to

interfere with certain necessary disaster response activities, burdens religious practice. Rational basis scrutiny therefore applies and is satisfied because the Colorado Disaster Act on its face rationally furthers Colorado's interest in responding to disaster emergencies.

The First Amendment to the United States Constitution, as incorporated to the states, provides that states "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. If a law burdens religious practice with the object "to infringe upon or restrict practices because of their religious motivation," it is "not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). If the law intended to further governmental interests burdens "conduct motivated by religious belief," but "fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree," it is "not of general application." *Id.* at 543. A law that burdens religious practice must satisfy strict scrutiny if it is not neutral or generally applicable. *Id.* at 545. But if a law is neutral and generally applicable, rational basis review applies even if it has the "incidental effect" of burdening one's free exercise of religion. *Employment Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 878 (1990).

In *Tandon v. Newsom*, the Court held that government regulations are not neutral and generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* Denver Bible Church identifies no comparable secular enterprise that Colorado treats more favorably than religious exercise and so its request for extraordinary relief must fail.

Because the Colorado Disaster Act is neutral and of general applicability, rational basis, not strict scrutiny, applies.

A. The Colorado Disaster Act does not burden religious practice

Denver Bible Church fails to show how the Colorado Disaster Act burdens its religious practice. This alone is enough to deny its application. *Turner Broad. System*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers) (declining injunction pending appeal where it was not "indisputably clear" that presumptively constitutional statute violated First Amendment); *Respect Maine PAC,* 562 U.S. 996 (2010) (Kennedy, J., in chambers) (denying "injunction against enforcement of a presumptively constitutional state legislative act.").

The Colorado Disaster Act is not a self-executing statute. The Act empowers the Governor to declare a state of disaster emergency and respond to disaster emergencies. While it grants the Governor authority to control the occupancy of premises within a disaster area, it does not specify how to do so. The Colorado Disaster Act simply provides emergency response authority and the Governor exercises that authority as necessary to respond to the unique risks presented by each disaster emergency.

Although Denver Bible Church argues "that the [Colorado Disaster Act] facially…burdens Applicants' religious exercise[,]" Appl. at 5, it does not identify a single provision in the Colorado Disaster Act that burdens its religious practice. In fact, it concedes that the "[Colorado Disaster Act]'s language does not 'target' religion[.]" Appl. at 15. And nor could it. The Colorado Disaster Act has no language requiring houses of worship to maintain six-foot social distancing among their congregations, sanitize church pews between services, or impose mask-wearing during worship services. It does not set capacity limits or other required public health measures that trigger when a state of disaster emergency is declared.

Neither does it establish criminal or civil penalties, nor prescribe or punish any religious act. As the district court found, "[t]he Statute contains no provision that, on its face, discriminates against religion." App. App'x A at 19.

This makes the Colorado Disaster Act distinguishable from, for example, a municipal ordinance that bans the sacrificing of animals "for any type of ritual," *Lukumi*, 508 U.S. at 528, or a constitutional provision that restricts using public funding for religious institutions, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017), or a constitutional provision prohibiting aid to religious schools. *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2252 (2020).

Rather than focusing on the text of the Colorado Disaster Act, Denver Bible Church instead challenges the social distancing, sanitizing, and masking requirements in Colorado's executive and public health orders. In other words, it objects to the Governor's exercise of Colorado Disaster Act authority. But in bringing a facial Free Exercise Clause challenge to the Colorado Disaster Act, Denver Bible Church points to no way in which the Act itself burdens religious exercise. For this reason, the Act on its face triggers no Free Exercise Clause scrutiny.

B. The Colorado Disaster Act is neutral.

Even if the Act did burden religious practice, *Smith* makes clear that rational basis scrutiny applies so long as the Act is neutral and generally applicable. Denver Bible Church concedes that the Colorado Disaster Act is neutral. It states the "[Colorado Disaster Act]'s language does not 'target' religion in violation of the test of 'neutrality,' as did the ordinance in *Lukumi*[.]" Appl. at 16. Denver Bible Church instead focuses solely on the "general application" prong of the *Smith* test. *Id.* This Court should therefore find the Colorado Disaster Act to be neutral and decline to

reach any claims waived by Denver Bible Church as to the neutrality of the Colorado Disaster Act. *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (state's concession of standing "bars our consideration of it here.").

But even if the Court does not find a waiver has occurred, the Colorado Disaster Act is neutral. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. "To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

Neutrality does not rest solely on a law's text, however. *Id.* at 534 ("The Free Exercise Clause…extends beyond facial discrimination."). The object of a law may be determined from "the effect of a law in its real operation" and from both direct and circumstantial evidence, "includ[ing], among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 536, 540.

The object of the Colorado Disaster Act is readily determined from the law's text and context. The purposes of the Act are, among other things, to "[r]educe vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from [disaster emergencies]" and to "[c]larify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, response to, and recovery from disasters[.]" Colo. Rev. Stat. § 24-33.5-702(1)(a), (d). There is no language in the Colorado Disaster Act, as Denver Bible Church concedes, that refers to, much less targets, religious practice. Appl. at 15. The Colorado Disaster Act in no way facially "single[s] out

houses of worship for especially harsh treatment." *Roman Catholic Diocese*, 141 S. Ct. at 66.

There is also no evidence from the development of the Example Disaster Act and subsequent enactment of the Colorado Disaster Act that restricting religious practice was the object of the statutes. *Compare id.* ("[S]tatements made in connection with the challenged rules can be viewed as targeting the 'ultra-Orthodox Jewish community.'") (citations omitted). All the evidence supports the conclusion that preparing for, responding to, and recovering from disaster emergencies is the sole object of the Colorado Disaster Act. Indeed, the Office of Emergency Preparedness contracted with the Council of State Governments to develop the Example Disaster Act after recognizing that "State and local governments are often not as well prepared to cope with natural disasters as they could be." Resp. App'x at 86. The OEP put heavy emphasis on "the need for State preparedness actions and leadership, as well as for continuing and strengthening the authority of the Governor to respond to disaster emergencies." *Id.* at 88. The Colorado Disaster Act is neutral and Denver Bible Church does not claim otherwise.

C. The Colorado Disaster Act is generally applicable.

"[L]aws burdening religious practice must be of general applicability." *Lukumi*, at 508 U.S. at 542 (citing *Smith*, 494 U.S. at 879–81). "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* "[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id* at 542–43. (internal citations omitted). To that end, "the government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543.

As further explained in *Tandon*, government regulations are not generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. "Comparability is concerned with the risks various activities pose[.]" *Id*.

The Colorado Disaster Act does not, "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 542. Again, it imposes no burden on religious practice. *See* district court order, App. App'x A at 19 (The Colorado Disaster Act "contains no provision that, on its face, discriminates against religion.").

Denver Bible Church instead argues that what it calls "exceptions" in the Colorado Disaster Act make the statute not generally applicable. As explained below, these are not exceptions; instead, they limit the governor's authority to interfere with specified activities necessary to effective disaster response. In any event, this Court has never held that a secular exemption automatically makes an otherwise neutral statute unconstitutional. *Smith*, 494 U.S. at 888 ("The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind…The First Amendment's protection of religious liberty does not require this."); *see also Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 303 (1985) (citations omitted) ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights.").

Even prior to *Smith*, the Court upheld the enforcement of statutes with secular exemptions. In *United States v. Lee*, the Court upheld the assessment of

social security taxes against persons who objected on religious grounds to receipt of public insurance benefits, even though others were statutorily exempted from paying similar taxes. 455 U.S. 252, 254 (1982). And in *Tony & Susan Alamo Foundation*, the Court upheld application of the Fair Labor Standards Act's minimum wage requirements to a religious foundation's commercial enterprises, despite the FLSA being riddled with secular exemptions. 471 U.S. at 298.[18]

Instead, the Court has held that when a state has a system of individualized exemptions to a statute, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). But the challenged limitations in the Colorado Disaster Act do not present such a system. The Colorado Disaster Act has no such individualized system of "good cause" exemptions. The limitations constrain the governor's authority to interfere with certain entities and activities necessary to respond to disaster emergencies: first responders, open communication to the public, and a stable labor force. A system of individualized exemptions would defeat the purpose of an act designed to protect the public at large.

The challenged limitations, which are addressed in turn below, do not alter the Colorado Disaster Act's general applicability. The district court correctly found that these limitations do not place religious exercise at a disadvantage. App. App'x A at 20.

1. Labor Disputes.

Mimicking the Example Disaster Act, the Colorado Disaster Act states that nothing in the Act shall:

[18] The FLSA at the time exempted numerous secular activities from the FLSA minimum wage requirements, including shellfish harvesters, switchboard operators, and amusement park employees, but there was no exemption for employees of commercial businesses operated by religious organizations. *See* 29 U.S.C. § 213(a)(3), (5), (10).

> Interfere with the course or conduct of a labor dispute; except that actions otherwise authorized by this part 7 or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety[.]

Colo. Rev. Stat. § 24-33.5-702(2)(a).

This language also mirrors the Federal Labor Management Relations Act, which permits a court to enjoin a strike if it would imperil the national health or safety. 29 U.S.C. § 178(a)(ii); *see also United Steelworkers of Am. v. United States*, 361 U.S. 39, 43 (1959) ("The statute imposes upon the courts the duty of finding, upon the evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health or safety."). Based on the text alone, the Colorado Disaster Act does not treat labor disputes more favorably than religious exercise; indeed, it specifically permits the Governor to intervene in a labor dispute when necessary to mitigate a danger to the public health, such as during a global pandemic. It does not, as Denver Bible Church contends, exempt from the Colorado Disaster Act's mandate a labor dispute that "might involve an enormous number of persons and extend for months[.]" Appl. at 22.[19] If the Colorado Disaster Act included a parallel position for houses of worship, Denver Bible Church—like those in the midst of a labor dispute—would remain subject to the Governor's Colorado Disaster Act authority and COVID-19 executive orders. The district court agreed and found that the "kinds of actions at issue in this case [i.e. the challenged COVID-19 restrictions] are not implicated by subsection (2)(a)." App. App'x A at 19.

Furthermore, the labor dispute limitation exists for good reason. The drafters of the Example Disaster Act recognized the importance of maintaining a stable

[19] Denver Bible Church takes issue with the lack of a statutory definition for what is considered a "dispute." Appl. at 21. It contends that this "imbues the governor with unbridled authority to decide which labor 'disputes' are exempt." *Id*. But again, the purpose of the Colorado Disaster Act is to grant the Governor with sufficient authority to respond to the unique risks each disaster emergency presents. This discretion does not alter the Colorado Disaster Act's facial constitutionality.

workforce during a disaster emergency because work stoppages "when a disaster has occurred or is imminent can cause or increase danger." Resp. App'x at 290. Indeed, a hospital or transportation strike during the COVID-19 pandemic would cause grave consequences. The sick would not be treated, leading to even more infections and deaths. Vaccines and medicine would not be transported to hospitals around the country, leading to fewer vaccinated persons and more infections. Maintaining a stable workforce is justified when weighed against the government's interest in curtailing the spread of a global pandemic, as it is when the state faces other types of disaster requiring a coordinated response.

But the drafters also recognized that the Example Disaster Act was not intended for emergencies created by a labor strike itself. This Court has acknowledged the inappropriate use of executive powers to forestall a labor dispute. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (holding that President Truman lacked executive authority to seize possession of privately owned steel mills to settle labor dispute). The labor dispute limitation was thus drafted to achieve balance between maintaining a stable labor force during a disaster emergency and preventing state governors from using the Example Disaster Act as a source of authority to forestall labor disputes during normal times. Resp. App'x at 290.

Finally, it is important to note that in applying the Colorado Disaster Act, the Governor and the State Health Department have never exempted labor disputes from any of Colorado's COVID-19 executive or public health orders. Such disputes were subject to the same public gathering restrictions as everyone else.

Accordingly, the labor dispute limitation does not disfavor religious practice. Labor disputes are subject to the same Colorado Disaster Act authority as houses of worship during disaster emergencies.

2. Dissemination of News.

The next limitation in the Colorado Disaster Act states that nothing in the Act shall:

> Interfere with dissemination of news or comment on public affairs; except that any communications facility or organization, including but not limited to radio and television stations, wire services, and newspapers, may be required to transmit or print public service messages furnishing information or instructions in connection with a disaster emergency[.]

Colo. Rev. Stat. § 24-33.5-702(2)(b).

Contrary to Denver Bible Church's assertion that the limitation exempts "thousands of arm-chair commentators on social media and large numbers of people[,]" Appl. at 21, this limitation only applies to the actual dissemination of news or comment on public affairs. It does not exempt from the Governor's Colorado Disaster Act authority "commentators on social media" or "community newspapers, online news sites, and nonprofit news outlets." *Id*. The dissemination of news is also not wholly exempt from the Governor's Colorado Disaster Act authority. The Governor may require any communications facility to transmit service messages furnishing information in connection with a disaster emergency. Colo. Rev. Stat. § 24-33.5-702(2)(b). Similarly, though the Governor must permit the dissemination of news, he is not limited in imposing other restrictions on news facilities or operations as long as they can accomplish those goals.

Indeed, as Denver Bible Church recognized in its briefing at the district court, newspapers, television, radio, and other media services fall under the Governor's Colorado Disaster Act authority. *See* Motion for Injunction Pending Appeal at Resp. App'x at 41. "News Media," like "Newspapers, Television, Radio, [and] Other media services" were classified as "Critical Businesses" under Public Health Order 20-36, putting them in the same category as houses of worship and

making them subject to the same social distancing, sanitization, and facial covering requirements.[20]

Finally, "[c]ommunications are vital in time of disaster." Resp. App'x at 290. The Office of Emergency Preparedness emphasizes that "[p]ublic awareness of the threats posed by the various natural disasters is essential to preparing for them and reducing their destructive effects." *Id*. at 81. "This awareness can be achieved by making information about disasters—and what to do if one occurs—readily available and easily understood." *Id*. The Office further "found that the public respond most readily to those sources of information that are used routinely and frequently, such as radio, television, newspapers, and the telephone book." *Id*. The dissemination of news limitation assures "that the communications media will be available to carry information and instructions needed by the public." *Id*. at 290.

The dissemination of news continues to play a crucial role during the COVID-19 pandemic. The media has helped educate the public on how COVID-19 spreads, where outbreaks have occurred, how to obtain testing and vaccine information, and where to schedule vaccine appointments. Without the free-flowing dissemination of news, people would not have learned how to protect themselves from a novel coronavirus. This would have certainly curtailed the state's compelling interest in slowing the spread of COVID-19.

3. Armed Forces.

The final limitation Denver Bible Church challenges states that nothing in the Act shall:

> Affect the jurisdiction or responsibilities of police forces, fire-fighting forces, or units of the armed forces of the United States, or of any personnel thereof, when on active duty; except that state, local, and interjurisdictional disaster emergency plans shall place reliance upon

[20] *See* Dir. Ryan, *3d Amend. Public Health Order 20-36,* (Dec. 7, 2020), https://tinyurl.com/2rnz7pp2.

> the forces available for performance of functions related to disaster emergencies[.]

Colo. Rev. Stat. § 24-33.5-702(2)(c).

The district court correctly found that this limitation "isn't an exemption from mandates of the Act, as much as an acknowledgement that, through the Act, the Governor doesn't come to control law enforcement or armed forces not within his purview." App. App'x A at 19–20. The drafters of the Example Disaster Act similarly note that the purpose of this limitation was to assure that governors do not interfere with the normal operations of these organizations, which play a pivotal role in responding to disaster emergencies. Resp. App'x at 290.

In sum, the challenged limitations further the purpose of the Colorado Disaster Act in preventing, responding to, and recovering from disaster emergencies. Each limitation provides clarity on the application of the Act to activities that are crucial to effective disaster response. There are compelling reasons why these limitations were included in the Colorado Disaster Act and others were not; every disaster requires first responders, open communication, and a stable labor force.

The Colorado Disaster Act is therefore neutral and generally applicable.

D. The Colorado Disaster Act satisfies rational basis scrutiny.

Because the Colorado Disaster Act is neutral and generally applicable, it is subject to rational basis scrutiny. *Smith*, 494 U.S. at 879. The Colorado Disaster Act satisfies rational basis so long as it rationally furthers a legitimate governmental interest. *Id*.

The Colorado Disaster Act is rationally related to the government's legitimate and compelling interest in preventing, responding to, and recovering from disaster emergencies. It provides the Governor with the necessary tools to respond to the unique threats each disaster emergency presents. The challenged

limitations are also rationally related to this compelling interest in protecting activities that are necessary in responding to emergencies.

The Colorado Disaster Act satisfies rational basis and is thus constitutional. This Court should deny relief based on Denver Bible Church's facial challenge to the Act.

III. The Colorado Disaster Act, as applied through executive orders and public health orders, does not violate the First Amendment.

Next, Denver Bible Church argues that the Colorado Disaster Act, though neutral on its face, unduly burdens its free exercise rights as applied through Colorado's public health orders. Appl. at 24–26. For example, Denver Bible Church relies on Justice Souter's concurrence in *Lukumi* to assert that the six-foot social distancing requirement that applies to religious and secular institutions alike "drastically reduce[s]" its normal attendance and therefore "disproportionately burden[s]" its members' religious practice. Appl. at 25 (quoting *Lukumi*, 508 U.S. at 561 (Souter, J., concurring)). According to Denver Bible Church, *any* burden on its fundamental rights requires strict scrutiny, even if the burden is the product of a government regulation that is neutral and generally applicable. Appl. at 24 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

Denver Bible Church's as-applied argument should be rejected for three reasons. *First*, this Court has not adopted Denver Bible Church's "undue burden" framework when reviewing COVID-related restrictions under the Free Exercise clause. Instead, this Court asks whether the government's public health order discriminates against religion by "treating religious exercises worse than comparable secular activities." *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) (citing *Lukumi,* 508 U.S. at 546). As the district court correctly explained, Justice Souter's separate concurrence in *Lukumi* (which Denver Bible

Church relies on as support for its proposed "undue burden" test) is "not controlling authority." App. App'x D at 6. And because Colorado's now-expired social distancing requirement treated religious and secular activities the same, it easily satisfied free exercise scrutiny. Members of this Court have recognized as much, explaining that states can "insist that congregants adhere to social-distancing and other health requirements" that are imposed on "comparable secular activities." *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

Denver Bible Church's reliance on *Cantwell* and *Yoder* suffers the same problem as Justice Souter's *Lukumi* concurrence—they do not reflect this Court's approach when reviewing Free Exercise challenges to COVID-related restrictions. Indeed, *none* of this Court's recent free exercise decisions granting houses of worship relief from public health orders even mentions *Cantwell* or *Yoder*.[21] *See Tandon*, 141 S. Ct. 1294; *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021); *S. Bay United Pentecostal Church*, 141 S. Ct. 716; *High Plains Harvest Church v. Polis*, 141 S. Ct. 527; *Roman Catholic Diocese*, 141 S. Ct. 63.

Second, Colorado now has no statewide social distancing requirement. It and most other restrictions were lifted on April 16, 2021. PHO 20-38 (requirements are still in place for nursing homes, and regarding laboratory and vaccine data reporting). Colorado has no plan to renew social distancing requirements. *See Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527, 527 (2020) (denying application to vacate stay of preliminary injunction where Kentucky's temporary

[21] Nor do these cases bear the weight placed on them by Denver Bible Church. The Court in *Cantwell*, for example, recognized that "the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury." 310 U.S. 296, 306 (1940); *see also McDaniel v. Paty*, 435 U.S. 618, 643 n.* (1978) (Stewart, J., concurring) (analyzing *Cantwell* and reiterating that "acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired.").

school closure order was scheduled to expire "this week" and "there is no indication that it will be renewed"). The *only* statewide restriction still in place in Colorado that affects anything other than a small subset of sectors is a facemask requirement for certain public indoor spaces where less than 80 percent of the individuals in the space are vaccinated.[22] But even that restriction does not apply to Denver Bible Church because Colorado exempts places of worship. Following the district court's October 15, 2020 order, Colorado amended its facemask order to allow persons "who are officiating or participating in a life rite or religious service" to remove their masks where the "temporary removal of a face covering is necessary to complete or participate in the life rite or religious service."[23] This accommodation, which is still in place today, more than complies with the Free Exercise clause. *See Calvary Chapel Dayton Valley*, 140 S. Ct. at 2606 (Alito, J., dissenting) ("Worshippers can be required to wear masks throughout the service or for all but a very brief time."). In short, Colorado's single remaining statewide public health requirement fully respects Denver Bible Church's free exercise rights.

Third, Denver Bible Church did not raise its urged undue-burden framework before the district court in its preliminary injunction motion. Resp. App'x at 1–36. It instead relied on *Smith* and its progeny as "the authority controlling the free exercise analysis." App. App'x D at 7. "A motion for injunction pending appeal should not be used to raise new arguments that could have been made at the outset in the preliminary-injunction motion." *Id.* (collecting cases); *see also Danville Christian Academy, Inc.*, 141 S. Ct. at 528 (denying application to vacate stay of preliminary injunction where applicants did not raise their "alternative *Smith* argument" below). The district court properly denied Denver Bible Church's request

[22] *See* Gov. Polis, *Exec. Order D 2021 095* (May 2, 2021), https://tinyurl.com/rt244n6h.

[23] *See* Gov. Polis, *Exec. Order D 2020 237* (Nov. 2, 2020), https://tinyurl.com/hefu99fm.

for an injunction pending appeal, stating "[n]owhere did Plaintiffs cite *Cantwell* or argue that a neutral and generally applicable restriction that 'unduly burdens' religious practice should be subject to strict scrutiny." App. App'x D at 7. Accordingly, Denver Bible Church's waiver forecloses relief from this Court. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

IV. The *Jacobson* and *Buck* arguments are irrelevant to this case.

Denver Bible Church argues that this Court should overrule *Jacobson v. Massachusetts* and *Buck v. Bell*. Colorado has not relied on *Jacobson* since this Court issued *Roman Catholic Diocese*, and it has never relied on *Buck v. Bell* in the COVID-19 context. Similarly, neither the district court nor the Tenth Circuit relied on either case in reaching their decisions below. This Court has already made clear that traditional tiered scrutiny applies when conducting a Free Exercise analysis in connection with public health regulations. *Roman Catholic Diocese*, 141 S. Ct. at 67. Further, Justice Gorsuch was explicit in his concurrence that *Jacobson* does not alter the traditional tiered scrutiny that must apply. *Id.* at 70–71 (Gorsuch, J., concurring). There is no lack of clarity on this point that needs correcting.

V. The remaining factors do not warrant relief.

Denver Bible Church also fails to meet its burden as to the remaining factors required for granting the extraordinary relief it seeks from this Court. The balance of the equities and the public interest factors, required before injunctive relief can be awarded, merge when a court is asked to enjoin government action. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Denver Bible Church neglects to show how either factor, at a time when it faces no real restrictions, favors relief.

Although the loss of First Amendment freedoms, even for minimal periods, constitute irreparable harm, such harm must still be balanced against the harm suffered if the injunction were granted. Denver Bible Church here simply fails to

consider any harms other than its own. Appl. at 30. Yet, the outcome it seeks—a declaration that the Colorado Disaster Act is unconstitutional, both facially and as applied, and a "prohibition from issuing future Colorado Disaster Act-based executive or public health orders"—would have devastating, far-reaching effects to the State and to the public at large. *Id.* at 31.

As previously discussed, the Colorado Disaster Act, modeled after the Example Disaster Act, is just one of 21 disaster emergency acts across the nation that could be invalidated if this Court were to entertain Denver Bible Church's request. At this critical time, when states still face many pandemic-related challenges, the wholesale invalidation of this important legal authority would dramatically undermine many states' ability to effectively respond to disaster-emergencies. And this concern is not limited only to the pandemic response. The Colorado Disaster Act and many other state emergency acts are the legal mechanism for responding to a broad range of disaster-emergencies, such as wildfires, floods, earthquakes, storms, hazardous substances, oil spills, water contamination, air pollution, drought, or infestation. *See* Colo. Rev. Stat. § 24-33.5-703(3).[24]

To highlight just how severe the impacts can be, one need only consider the upcoming wildfire season in Colorado. Wildfires in Colorado pose an enormous threat of harm to the State and to the public. The State of Colorado Division of Fire Prevention and Control forecasts an earlier than normal start to the core fire season and expects above normal large fire potential this summer.[25] The public faces significant risk of harm due to wildfires, but this risk increases if the State cannot respond effectively to assist in preparation, mitigation, and recovery efforts under

[24] *See also* Gov. Hickenlooper, *Exec. Order D 2013 026* (Sept. 13, 2013), https://tinyurl.com/xvfn62d3; Gov. Polis, *Exec. Order D 2020 193* (Sept. 16, 2020), https://tinyurl.com/4bes5873.

[25] 2021 Fire Preparedness Plan, Colo. Dept. of Pub. Safety, Div. of Fire Prevention & Control, https://dfpc.colorado.gov/2021-wildfire-preparedness-plan.

the authority granted to it by the Colorado Disaster Act. The balance of equities and the public interest heavily favor the State under these circumstances. The Court should deny the Application or, at least, consider the issues raised by the stay application in the ordinary course with full opportunity for briefing, amicus participation, and argument.

CONCLUSION

Denver Bible Church's application for a writ of injunction should be denied.

Respectfully submitted,

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May 14, 2021