No. 20A 163

IN THE

Supreme Court of the United States

DENVER BIBLE CHURCH, *et al.*,

Applicants,

v.

JARED POLIS, GOVERNOR OF COLORADO, *et al.*,

Respondents.

TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

REPLY ON APPLICATION FOR INJUNCTION PENDING APPEAL

REBECCA R. MESSALL
Counsel of Record
LAW OFFICE OF REBECCA MESSALL
7887 East Belleview Avenue, Suite 1100
Englewood, CO 80111
(303) 228-1685
rm@lawmessall.com

J. BRAD BERGFORD
Counsel of Record
BERGFORD LAW GROUP, LLC
3801 East Florida Avenue, Suite 830
Denver, CO 80210
(720) 980-3989
bergfordlaw.com

Counsel for Applicants

304639

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REPLY TO PRELIMINARY STATEMENT

CDEA is not generally applicable and Respondents have used it to promulgate executive orders and public health orders that are also not generally applicable. The errors prompting this Application are that the lower courts failed to examine CDEA using strict scrutiny, notwithstanding that its facial exemptions allow hundreds of thousands[1] of Coloradans to engage in secular activities comparable to Applicants' religious activities, and notwithstanding CDEA's actual application to Applicants, through ever-changing and numerous EOs and PHOs. The *Response*, for the most part, simply tries to change the subject from strict scrutiny to anything else. Contrary to the *Response*'s arguments:

1. Indisputably Clear Rights. *Tandon* makes Applicants' legal rights "indisputably clear."[2] CDEA is subject to strict scrutiny because, on its face, CDEA is enforceable against people engaged in activities in religious contexts but not when they engage in comparable activities in secular contexts, such as assembling in groups and refraining from mask wearing, sanitization, and social distancing, among other things. As applied to Applicants through hundreds of mandates over the last 14 months, the lack of general applicability, as well as the constant threat of new and amended mandates, make the lack of general applicability all the clearer. This disparity means CDEA, on its face, is not generally applicable, especially in light of the ever-changing nature of the EOs and PHOs. The statute must be evaluated using strict scrutiny under *Tandon v. Newsom*, 593 U.S._ (April 9, 2021) (*per curiam*), slip op.

2. Mootness does not apply. Applicants' claims are not mooted[3] by Respondents' repeated amendments to their EOs and PHOs. The *Response*, p. 1, asserts that an amendment on April 16,

[1] Applicant's *Motion for Injunction Pending Appeal* at 20-22.
[2] *See Response* at 1.
[3] *Id*.

2021, suddenly moots a claim against social distancing litigated since August 2020. On the contrary, Respondents have continually amended[4] the EOs and PHOs despite this litigation,[5] making the orders "a moving target" and the government's strategy one of "catch us if you can." In fact, Respondents amended the EOs and PHOs on precisely the same day, Friday, May 14, 2021,[6] as they filed the *Response* in this case.

"[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." *Tandon, slip op*. at 2. "[L]itigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions." *Id., citing Roman Catholic Diocese v. Cuomo*, 592 U.S. at __(*slip op*., at 6) and *High Plains Harvest Church v. Polis*, 592 U.S. _ (2020).

Applicants "remain entitled" to injunctive relief from CDEA during appeal because as long as CDEA exists in its present form, which permits unlimited orders and amended orders for an indefinite duration, Applicants are under constant threat by government. The just-amended EO and PHO explicitly state they may be changed by further orders. Exh A and B, attached. Previous orders were brazenly named "Dial," describing Respondents' ability to "dial" the law "up and down" without limits. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 U.S. 2012,

[4] As of the March 12, 2021 filing date of Applicants' Opening Brief in the Tenth Circuit, State Defendants had issued approximately 363 EOs and 59 PHOs, amounting to approximately 2,394 pages of single-spaced reading material. The EOs consist of about 921 pages and the PHOs consist of about 1,473 pages, not including internal references to other government websites such as the CDC website. Plaintiffs' *Complaint* and *Motion PI* challenge State Defendants' legal authority to "dial up/dial down" fundamental freedoms by issuing orders *du jour*.

[5] Subsequent to April 16, 2021, the latest versions were issued May 14, 2021, copies attached: EO D 2021 103 (face coverings) and PHO 20-38 Second Amended.

[6] Exhibit A (EO) and B (PHO), attached.

2019, n. 1 (2017) (holding that subsequent events must make it absolutely clear that wrongful conduct could not reasonably be expected to recur).

3. Example legislation should be disregarded here.

The Court is asked to disregard the *Response's* arguments pertaining to "example legislation." First, CDEA is not ambiguous in terms of deciding the issue at hand, namely, that strict scrutiny is required. Second, the "example legislation is not "legislative history." It fails to reveal the minds of the Colorado legislators who adopted the statute or its amendments, the only basis for examining legislative history in confronting an ambiguous law. Third, any argument that CDEA is ambiguous and requires resort to legislative history is also waived by not being asserted below.

In addition, Respondents suddenly seek refuge in Colorado's Communicable Disease Statute as if it affords independent authority to violate the Free Exercise Clause. This argument should be disregarded. First, it is substantively unavailing to argue that a state statute supersedes the First Amendment, a point needing no further explanation. Second, Respondents waived the argument by not asserting it below. Third, the PHOs nearly uniformly cite, as legal authority, the governor's proclamation of a disaster emergency and EOs, which themselves cite CDEA as legal authority for Respondents' self-appointment of authority superior to legislature, Congress and to state and federal constitutions.

Regardless of other states' statutes, CDEA must withstand strict scrutiny[7] based on its own language. But facially and as applied, the statute fails to accomplish its specified aim by narrow tailoring and the least restrictive means in the context of CDEA's own language.

[7] In fact, CDEA contains some of the federal-state funding parameters by which trillions of stimulus dollars incentivized governors to order "lockdowns" based on promised reimbursements

The lower courts failed to analyze CDEA itself under strict scrutiny (as opposed to examining then-operative EOs and PHOs, later amended). Importantly, Respondents, in spite of *Tandon, supra, Lukumi*[8]*, and Smith*,[9] argue that CDEA should be reviewed under a rational basis test. They failed to argue that CDEA would pass strict scrutiny's narrow tailoring and least drastic means tests. Rather, the *Respons*e simply pronounces that CDEA is generally applicable. This argument is refuted primarily by the *Response* itself in spending eleven-pages, *id.* at 21-33, arguing that the exemptions "satisfy rational basis review." *Id*. at 2. If CDEA were generally applicable, there would be no need to explain away the exemptions. By way of comparison, the statue banning narcotics in *Smith* did not exempt hundreds of thousands of people categorized as favored groups. On the contrary, the only "exception" in *Smith* was for "prescription drugs," not for groups of people. *Smith'*s rational basis test does not apply because of CDEA's exemptions. Accordingly, strict scrutiny does apply here.

4. No hardship to government. Contrary to the *Response's* argument, p. 2, abiding by the First Amendment is not a "severe hardship" to government, but rather, a Constitutional-imperative of government. Requiring that governors and legislatures abide by the limits of their constitutional and statutory authority is the primary function of courts. Respondents' EOs and PHOs, insofar as they apply to religious exercise while CDEA exempts comparable secular activities, must be enjoined and CDEA declared void because it cannot be salvaged as to emergencies declared as

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and other aid. This fusion of federal-state emergency legislation injected a political disaster into American constitutional history because of governments' claim to unbounded emergency authority. Governors touted *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) for their claim to limitless authority.

[8] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993)

[9] *Empl. Div. Dept' of Hum. Res. Of Oregon v. Smith*, 110 S. Ct. 1595, 1600 (1990)

arising from a virus. Colorado is free to adopt new legislation that does not eviscerate the Free Exercise Clause.

5. CDEA was the basis for all EOs and nearly all PHOs. Contrary to the *Response's* argument, *id*.at 2, that CDEA's exemptions played no role in how CDEA has been applied to Applicants, the governor's hundreds of executive orders consistently cite to CDEA as his legal authority. The language in the executive orders says, for example:

> Pursuant to the **authority vested in the Governor** of the State of Colorado, and in particular, Article 4, Section 2 of the Colorado Constitution **and the relevant portions of the Colorado Disaster Emergency Act, §24-33.5-701 *et seq***[10]., I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order…."(emphasis added).

Nearly all of the PHOs cited to the governor's executive orders as authority, which as shown, relied upon CDEA for emergency authority.

Reply to Statement of the Case

I. Reply to Section I - The virus faded soon after the lockdown

The record[11] shows that, by September 2020, "Colorado's epidemic [had] essentially run its course" and "any proposed restrictions [were] no longer needed."[12] Respondents are wrong to say at this time, in May 2021, that Colorado COVID cases have only "recently begun to subside." *Resp.* at 3. That said, this application is not about the status of COVID

[10] Tenth Circuit record on appeal, Case No. 20-1391, 1Apx64, EO D 2020-003 (declaring emergency).
[11] 5Apx1341[56-3] affid Frank.
[12] 5Apx1346[56-3]¶9 affid Frank.

II. Reply to Section II - Colorado Plays Favorites

A. Reply to: previous public health orders

The *Respons*e does not accurately portray the burden that the CDEA-based EOs and PHOs imposed on religious exercise. The exemptions shown below illustrate that the orders themselves have not been generally applicable, but Applicants do not argue, and never have argued, that Free Exercise should be measured by the treatment of secular businesses.

1. A public health order, issued March 20, 2020 (PHO 20-23), limited "mass gatherings to no more than (10) people."[13] The order **specifically applied to "faith-based events**,"[14] and specifically **exempted following**:

- The Colorado State Legislature, legislative bodies of municipal governments, and Colorado state and municipal courts;
- Normal operations at airports, bus and train stations, health care facilities, grocery or retail stores, pharmacies, or other spaces where (10) or more persons may be in transit for essential goods and services;
- As authorized in Public Health Order 20-22, restaurants may continue to offer delivery and take out food service in accord with the requirements contained in that Order;
- Office environments, state, county and municipal government buildings where essential government services are offered, or factories where more than (1) people are present but social distancing measures of maintaining at least 6 feet between individuals is standard; and

[13] 1Apx112[1-20], PHO 20-23.
[14] 1Apx114[1-20],¶I, PHO 20-23.

- Newspaper, television, radio and other media services;
- Child care facilities, except for public preschools operated on public school campuses, which are addressed in Executive Order D 2020 007;
- Homeless shelters; and
- Any emergency facilities necessary for the response to these events.

2. An executive order, issued March 22, 2020 (D 2020 013)[15] cited CDEA and exempted "critical businesses" and "critical government functions" from a fifty-percent reduction-in-force order issued to "all employers," but did not exempt houses of worship.

3. A public health order, issued March 22, 2020 (PHO 20-24),[16] required "all Colorado employers" to reduce in-person staff by fifty-percent. The exempted entities, however, did not list houses of worship. Exemptions listed in six and half, single-spaced, pages were, in broad categories, the following:

- Healthcare Operations,
- Critical Infrastructure,
- Critical Manufacturing,
- Critical Retail,
- Critical Services,
- News Media,
- Financial Institutions,

[15] *Id*., at 1Apx69-70[1-10], EO D2020-013 (ordering reduction of in-person workforce and that a PHO define "critical emergency personnel, infrastructure, government functions, and **other activities that are exempt from the directives in this Executive Order**") (emphasis added).
[16] *Id.* at 1Apx118-123[1-21], PHO 20-24 (implementing fifty-percent reduction in non-essential in-person work and extreme social distancing).

- Providers of Necessities,
- Construction,
- Defense, intelligence related operations, aerospace operations (including military operations and personnel),
- Critical Services (law enforcement, fire department, EMS, building code, building cleaners, automotive repair, disinfection, snow removal),
- Vendors that Provide Critical Service/Products (logistics, tech support for online and phone, child care, government owned/leased buildings) and
- Critical Government Functions (police, fire, rescue, correctional, emergency vehicle/equipment storage, emergency response, judicial branch, including attorneys, emergency medical, emergency shelters, communications, *i.e*. telephone, broadcasting equipment for cable systems, satellite dish systems, cellular systems, television, radio, and other emergency warning systems, public utility plant facilities, *i.e*. hubs, treatment plants, substations; transportation lifelines, i.e. public transportation, transportation infrastructure; airports (municipal and larger), helicopter pads, aviation control towers, air traffic control centers, emergency equipment aircraft hangars, critical road construction and maintenance;; hazardous material safety; services to at-risk individuals and Vulnerable Individuals and any government service required for the public health and safety, government functionality, or vital to restoring normal services, pumping substations,

4. On March 25, 2020, the governor, in EO D 2020 017, ordered "all Coloradans to **stay at home**, subject to limited exceptions…." and ordered all businesses to "close temporarily" **other than** "Critical Businesses," which were listed in PHO 20-24. In fact, "Critical Businesses"

were "encouraged to remain open." Houses of Worship were not listed as exempt nor were religious activities, and they were not permitted, let alone encouraged, to remain open.[17]

5. Respondents publicly admit that many past and current exemptions[18] were granted in favor of secular groups as to stay at home orders and restrictions on "mass gatherings," as were exemptions for "a range of commercial and nonreligious activities" including, for example, "marijuana dispensaries, liquor stores, hardware stores, laundromats, banks, law offices, and accounting offices."

6. Respondents' claim that a single order out of hundreds, PHO 20-22, did not limit capacity at houses of worship, is tone-deaf to the district court's order upholding as "generally applicable," a 50-person/fifty percent **capacity limit subject-to-social-distancing.** This was despite Applicants' testimony and arguments then and now that, as applied to them, the social distancing mandate infringes upon their Free Exercise Rights, in part, because Applicants cannot equally enjoy the capacity order as do larger secular venues.

7. Respondents tout their December 7, 2020 removal of capacity limits. However, the district court had already granted partial relief on October 15, 2020, leaving partial infringement, which is raised here as part, but not the entire, as-applied claim. The point is, Respondents have not taken steps to abide by the First Amendment without litigation and an actual or impending court order.

[17] *Id*. at 1Apx72-73 [1-11], EO D 2020 017.

[18] The admissions pertain to EO D 2020 044 and PHO 20-28, as amended, and were made in *High Plains Harvest Church v. Polis et al*., Case No. 1:20-cv-01480-RM (D. Colo.), ECF 25, Defs Resp, p. 17; ECF 48, Defs Resp, p. 8 and p. 2, n.1 (incorporating ECF 39).

B. Reply - May 14, 2021 Vaccine passport order discriminates under CDEA

The case at bar was filed in August 2020. At no time in the litigation have Respondents argued that Applicants are exempt from anything other than as ordered by the district court. Now, however, the *Response* incorrectly contends that Applicants were exempted as a "critical service" in the "critical business" category "from the first orders" through April 15, 2021, "when Colorado abolished its prior framework." *Resp.* at 6. This is wrong. Respondents have never argued this position. Applicants were not exempted from the orders in March 2020, as the quoted language shows, *supra*. They were not exempted from mandates requiring masks and limiting occupancy to the lesser of 50 people or 50 percent of capacity (PHO 20-28, as amended, April 26, May 4, 8, 14, 26, June 2, 5, 18, 30). The *Response* inaccurately implies that CDEA was repealed on April 15, 2021, saying that "Colorado abolished its prior framework." *Resp*. at 6. On the contrary, Respondents can continue issuing EOs and PHOs *ad infinitum.* Under CDEA, the exemptions will always favor comparable secular activities over comparable religious activities.

Notably, in the district court and in Respondents' Tenth Circuit motion for injunction pending appeal, filed October 29, 2020, Respondents invoked this Court's ruling in *Jacobson v. Massachusetts*, and extolled "a chorus of courts" that had denied injunctive relief on Free Exercise grounds.[19]

Then on May 14, 2021, the filing date of the *Response* in this case, Respondents created a "vaccine passport" program.[20] In EO D2021-103 "all Coloradans must abide by the CDC's Order, which can be viewed here: https://www.cdc.gov/quaranatine/masks/mask-travel-guidance.htmll." *Id*. at 3. The May 14, 2021, EO "amends, restates, and extends the prior Executive Orders relating

[19] 3Apx700[41], *resp.*
[20] See attached, Exhibits A and B.

to face coverings to align guidance in Colorado with new CDC guidelines." *Id.* at 2. The EO is issued pursuant to CDEA. *Id*. at 1. The EO parrots the district court's order in the case at bar, exempting "individuals who are officiating or participating in a life rite or religious service where the temporary removal of a face covering is necessary to complete or participate in the life rite or religious service." *Id.* at 3.

Respondents' May 14, 2021 EO and PHO, obviously, do not change CDEA's exemptions, which still favor media, labor unions, law enforcement and service members. But under the EO issued May 14, 2021, Respondents, not surprisingly, in light of *Jacobson,* divide Colorado into two categories: vaccinated and unvaccinated. More specifically, individuals are deemed to be 'fully vaccinated' by only three approved companies Pfizer, Moderna or Johnson & Johnson. *Id.* at 3. Respondents authorize "any business or service" to discriminate between vaccinated and unvaccinated, "as allowed by state law," *id.,* although the EO says it "shall be applied in a manner consistent with" anti-discrimination laws. *Id.* "Activities" are exempted, persons are not exempted for whom vaccination is medically contraindicated, nor are persons previously vaccinated by an unapproved company, nor are persons with conscientious or religious objections, nor are persons with natural immunity to COVID-19. Applicants have members who will likely object to Respondents' orders issued five days ago, May 14, 2021, as being additional incursions into Free Exercise under CDEA.

III. Reply - Colorado statutory authority

A. The Example from 1972 should be disregarded

Respondents provided an appendix that includes a 216-page report ("Report"). The Report is neither part of the record nor has it been provided previously to Applicants. Furthermore, the

entire Report is irrelevant to the subject at issue.[21] By including volumes of background, Respondents suggest that legislative history should be considered in assessing CDEA. This type of approach has not been presented until now. Moreover, legislative history can never defeat statutory text. *See e.g.*, *Bostock v. Clayton Cty, Georgia*, 140 S. Ct. 1731, 1750 (2020) (quotation omitted). Moreover, what Respondents present is not legislative history. In fact, it excludes legislative history.

1. Section 2: Purposes

The section of the Report titled, Purposes, offers nothing meaningful on the plain meaning of CDEA.

2. Section 3: Limitations

In this section, the *Response* rehashes points asserted by Applicants, namely that CDEA includes carve-outs for secular groups. The Report is almost entirely unconcerned with constitutionality. It states the reasons for the carve-outs, but does not offer constitutional analysis.

3. Section 5: Governor's authority

Respondents rely upon the Report to support an argument that they acted under color of Colorado of law. This point is not in dispute at this stage of the case. The point does not address the issue at bar, *i.e.,* that strict scrutiny was required in the lower courts.

[21] Respondents have repeatedly attempted to redirect this case away from strict scrutiny and into a discussion of COVID-19. In that context, statutorily, CDEA does not authorize the governor to declare an emergency to "preserve hospital capacity," as Applicants pleaded in their *Complaint* and argued in briefs.

B. CDEA

This section does not address the issue at bar. Respondents mention only that CDEA was enacted, repealed and amended.

C. Other state emergency management acts

Respondents contend that other states' disaster statutes followed the draft version offered in the *Response*. This argument is not in the record below and is waived here. Moreover, statutes from other states are not before the Court in this case. Suffice it to say, those statutes vary widely, as is quickly shown by websites collecting those fifty states' statutes.

D. Communicable Disease Act

This section of the *Response* should be disregarded because Respondents have not previously argued that their EOs and PHOs arise from the communicable disease statute rather than from CDEA. In any event, a state statute does not prevail over the First Amendment as applied in this case. CDEA or another statute would both require strict scrutiny in this context.

Reply to Procedural History

I. The District Court

Applicants sued Colorado and federal officials as well as associated agencies. The district court enjoined Respondents from enforcing a mask mandate and a numerical occupancy limitation, but left intact other mandates requiring social distancing and sanitization, and importantly, left CDEA unexamined under strict scrutiny. The district court denied relief on claims asserting procedural due process rights and Respondents' lack of legal authority under the Colorado Constitution, the Colorado Administrative Procedure Act and CDEA's own statutory requirements. The district court denied injunctive relief against federal defendants who aid and

abet Respondents in violation of RFRA and the Stafford Act. A motion to dismiss is pending in the district court by those defendants.

II. The Tenth Circuit

Respondents appealed. They incorrectly assert that Applicants opposed their effort to voluntarily dismiss their appeal. In reality, Applicants opposed Respondents' rationale for dismissal, specifically saying so in a heading to this point: "Argument Objecting to the Motion's Rationale, While not Objecting to a Rule 42(b) Dismissal." Applicants opposed various arguments for dismissal, including the argument that *Roman Catholic Diocese of Brooklyn v. Cuomo*[22] had "significantly change[d] the state of the law." Applicants also opposed Respondents' argument that, by amending certain executive and public health orders, mootness applied. This was a transparent trojan horse. Such a ruling, even upon voluntary dismissal, would be used against Applicants' case. Applicants opposed the proffered rationales, particularly in light of the fact that under Rule 42, dismissal could be effectuated administratively and without reference to the proffered reasons.

As *Tandon* makes clear, "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." Slip op. at 2. "[L]itigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions." *Id.* Applicants "remain entitled" to injunctive relief from CDEA during this appeal because as long as CDEA exists in its present form, Applicants are under constant threat by the State of Colorado. Indeed, as the *Response* admits, restrictions on free exercise still apply to houses of worship.

[22] 141 S. Ct. 63 (2020)

ARGUMENT

Importantly, the district court already found irreparable harm, even without the benefit of *Tandon*, which was decided later. *Tandon* is "indisputably clear," not only that CDEA requires review under strict scrutiny, but also, that Respondents bear the burden of proving that the statute is narrowly tailored and uses the least restrictive means to avert "imminent" death or injury. The record and law, using the test in *Winter*,[23] also show that the balance of equities favor Applicants, Enjoining CDEA as to Applicants and even as to other Houses of Worship has no impact on the public, inasmuch as CDEA already exempts hundreds of thousands of Coloradans. Moreover, an injunction is in the public interest because protecting the First Amendment is always in the public interest.

I. Reply - CDEA's facial invalidity is not cured by changes to EOs and PHOs

The *Response* argues at length that, when EOs and PHOs are changed to comply with court orders. CDEA itself becomes constitutional on its face. *Resp*. at 17-21. This is incorrect and misapprehends the difference between facial and as-applied claims, both of which are asserted here.

CDEA's facial defect is that it exempts activities that Applicants can freely engage in prior to entering a House of Worship but which CDEA allows to be forbidden once inside. When Applicants are in the role of the exempted groups, they can gather in any number, refrain from masks and social distancing, share books and personal items, and cough and sneeze in the manner they choose. But once Applicants go to church, Respondents contend that all these activities can be forbidden. And yet, people accused of being "spreaders" when they go to a house of worship are also "spreaders" when they engage in comparable secular activities. Penalizing religious

[23] *See Response* at 15, *citing Winter v. Nat'l Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)

exercise while allowing the same conduct in secular settings is not a narrowly tailored or least restrictive way to accomplish the statute's aims to avert, *i.e.* "imminent" and "widespread" death or injury from an "infectious agent." When the statute is examined under strict scrutiny **according to the statute's express language**, CDEA cannot be salvaged under any circumstance involving a virus or an "infectious agent." A fireman, when he or she is at church, is no more likely to cause "widespread" death or injury than when he or she is at the firehouse. The EOs and PHOs do not amend CDEA's discriminatory exemptions. Therefore, the statute requires strict scrutiny.

The district court itself determined that Respondents' constant amendments to CDEA-based orders CDEA make challenges "a moving target."[24] Respondents argue at length that they have no track record of "moving the goalposts." *Resp.* at 18-21.[25] On the contrary, as Applicants pointed out to the Tenth Circuit, State Defendants had issued, as of March 10, 2021, approximately 363 EOs and 59 PHOs, amounting to approximately 2,394 pages of single-spaced reading material. The EOs consist of about 921 pages and the PHOs consist of about 1,473 pages, not including internal references to other government websites such as the CDC website. Plaintiffs' *Complaint* and *Motion PI* challenge State Defendants' legal authority to "dial up/dial down" fundamental freedoms by issuing orders *du jour*. "Dial" is Respondents' self-description of the framework they use to move the goalposts at will. Respondents do indeed "move the goalposts," as their May 14, 2021, orders vividly demonstrate.

II Reply – under strict scrutiny, CDEA facially violates the First Amendment

The *Response* contends that Applicants have "identified no comparable secular enterprise that Colorado treats more favorably than religious exercise." *Resp.* at 22. This is incorrect.

[24] 6Apx1410[65]fn7*opin*

[25] The *Response*'s graph at p. 19 is a misleading summary of Respondents' blizzard of orders, often reaching 40, 50, 60 and nearly 70 pages each.

Applicants have shown that all of the activities forbidden to them by the EOs and PHOs are wholly exempted for the secular groups listed on the face of CDEA. This fact cannot be explained away. CDEA requires strict scrutiny because any orders issued against houses of worship favor the same activities by the exempted, secular groups. Respondents have indisputably burdened Applicants' Free Exercise rights by invoking CDEA's emergency powers as the grounds. CDEA requires strict scrutiny and here, an injunction pending appeal. But once so scrutinized, CDEA cannot be salvaged as written for infectious agents, and must be voided.

A. Reply – CDEA burdens religious practice on its face by exempting comparable activities

The record includes a dozen affidavits from Applicants' church members who attest to the myriad ways Respondents have deprived them of religious freedom. The *Response* does not pretend to dispute these affidavits. CDEA is the basis, other than *Jacobson,* for every EO and PHO since March 2020. The *Response* incorrectly argues that "not a single provision" of CDEA burdens religious practice, *id.* at 23, an argument showing that Respondents misapprehend the difference between the claim in the case at bar, *i.e.,* that CDEA lacks "general applicability" as opposed to a law's lack of "neutrality," as in the *Response's* cited cases, *id.* at 24. These cases are treated in the *Application* and need no further distinction in this *Reply.*

B. Applicants have never claimed that CDEA lacks neutrality but it lacks general applicability

This *Application* seeks an injunction pending appeal because CDEA is not "generally applicable" and the lower courts failed to examine it under strict scrutiny.The *Response* argues that CDEA is neutral, and that Applicants "waived" any claim that it is not neutral. However, "waiver" does not apply because Applicants have never claimed CDEA lacks neutrality. The

*Respons*e itself recognizes this fact.[26] To reiterate, Applicants contend that CDEA is not "generally applicable," that the lower courts were required to review it under a strict scrutiny standard, and that under *Tandon,* Applicants are entitled to an injunction pending appeal.

C. Applicants claim that CDEA is not generally applicable

The *Response*, at 26, addresses a non-existent argument, *i.e.,* that CDEA somehow selectively targets conduct motived by religious beliefs like the ordinance in *Lukumi* targeted the killing of animals in religious contexts but not in secular contexts. The Court is asked to disregard the *Response's* argument. Applicants do not claim that CDEA was enacted with a malevolent motive or that it targets religion like the ordinance in *Lukumi*. But CDEA does exempt secular groups from the same activities it allows the governor to forbid to churches. Notably, an absence of subjective hostility is not relevant to the issue of whether the government has violated the First Amendment. *Hassan v. City of New York*, 804, F.3d 277, 307-09 (2nd Cir. 2015).

Respondents contend the listed groups are not "exceptions," but that CDEA simply limits the governor's authority to "interfere with specified activities necessary to effective disaster response." In the first place, the Court is asked to disregard this argument because it misstates the statutory language Secondly, the statute requires strict scrutiny to see if the argument could somehow be true anyway.

Respondents address another non-existent argument, *i.e.*, that "a secular exemption automatically makes an otherwise neutral statute unconstitutional." *Resp*. at 27. The Court is asked to disregard this argument because it is not the basis of the claim here. The district court found irreparable harm for the deprivation of Applicants' religious freedoms by CDEA-based EOs and

[26] *Response* at 24.

PHOs. Mostly, these same groups, as shown, *supra,* were also exempted in EOs and PHOs. For this reason, the statute requires strict scrutiny.

The *Response* relies on a case involving a statute lacking any exemption for minimum wage requirements for non-profit religious groups. *Id*. at 28. The non-profit's mode of worship was not infringed. Rather, it was engaged in a "business enterprise." On that basis, the statute was upheld. Here, however, Applicants are not engaged in a "business enterprise." The record is undisputed that Applicants' mode of worship is infringed while secular groups, on the face of the statute, can engage in similar activities because they are exempted. Thus, CDEA requires strict scrutiny.

1. Labor

Respondents contend that the exemption for "labor disputes" (or the "limitation," as the *Response* calls it) is "for good reason." This argument misapprehends the difference between strict scrutiny and a rational basis review. The issue on strict scrutiny is not whether labor disputes should be protected, but whether Applicants' First Amendment rights should be prohibited in the same context in which labor disputes are protected.

2. News and Commentary

The *Response* incorrectly contends that CDEA's protection for the "dissemination of news or comment on public affairs" only applies to the "actual" dissemination of news or comment on public affairs. The Court is asked to disregard this argument because it incorrectly suggests that CDEA applies only to "official" or "state approved" news and comment. This is baseless because there is no such thing. The Court is also asked to disregard this argument because it misstates the language of the statute, which does not contain the word "actual." The reality is that, under CDEA's loose language, anyone with a computer, cell phone or copy machine, who "disseminates news or comment on public affairs," is exempt from CDEA. Strict scrutiny is not required to

determine whether this is a rational idea. Rather, strict scrutiny is required to determine whether forbidding Applicants' religious liberty is a narrowly tailored, least restrictive means to avert "imminent" death or injury from an "infectious agent," yet protecting the "dissemination of news or comment on public affairs."

The *Respons*e incorrectly argues that Applicants "recognized" that "media services" fall under the "Governor's Colorado Disaster Act authority." *Resp.* at 31. The Court is asked to disregard this argument, considering the fact that CDEA's language expressly exempts the "dissemination of news or comment on public affairs," regardless of the classifications contained in the hundreds of EOs and PHOs various iterations. Moreover, Applicants in no way "recognized" that "media services" are not exempt.

Specifically, the Court is asked to note that Applicants asserted a deprivation of due process due the moving target of Respondents' orders suddenly categorizing Houses of Worship as comparable to "trash, compost, recycling collection, processing and disposal, self-serve laundromats, garment and cleaning services." Respondents had some dark fun making these activities comparable to religious exercise by labelling them together with Houses of Worship as "Critical Services." Resp's Appx at 41, motion for injunction pending appeal. At the same time, for unknown reasons, News Media was not categorized with trash disposal, composting and laundromats. Rather, News Media, as a category, consisted of similar news activities: newspaper, radio, television and "other media services." In making these activities comparable, to religious exercise, Respondents reveal hostility to religion.

Finally, it might be a good idea to provide communications in a disaster. But the issue for strict scrutiny is not whether it is rational to exempt the dissemination of news and comment, but whether Applicants' First Amendment rights can be prohibited in the same context under the test

for narrow tailoring and least restrictive means. Here, the loose description of "news" and "comment on public affairs" makes it apparent that CDEA cannot survive strict scrutiny.

3. Police, Fire and Armed Services

The *Response* adopts the district court's conclusion that the governor does not control "law enforcement or armed forces not within his purview." Under strict scrutiny in the context of an "infectious agent," and CDEA's aim to avert "imminent" widespread death or injury, the issue is whether churches' mode of worship is within the governor's "purview." Either yes or no, the issue is not whether exempting a huge swath of the population who are "not within the governor's purview," while punishing Applicants.

Rather, insofar as thousands of people are outside of the governor's "purview," the government has no compelling interest to lock down churches because such action does not stop "imminent" death or injury from an infectious agent that freely wafts about the hundreds of thousands of exempted Coloradans.

Furthermore, strict scrutiny would reveal that the governor has no "purview" over churches modes of worship under the Colorado Constitution, art. II, §4, as Applicants pleaded in the *Complaint* and have argued since then. The argument here is that strict scrutiny should have been applied by the lower courts, and at the point, the orders' invalidity under the Colorado Constitution could be considered if the case is not otherwise resolved by the strict scrutiny elements.

D. The rational basis test is inapplicable in this case

The *Response i*ncorrectly argues that CDEA is "neutral and generally applicable," and subject to rational basis review. *Resp*. at 33. The Court is asked to disregard this argument for the reasons set forth hereinabove and below.

III. CDEA violates the First Amendment as applied

The *Response* misstates Applicants' argument concerning social distancing in the context of their small worship facilities. The as-applied claim encompasses all of the EOs and PHOs that infringe upon Applicants' Free Exercise rights, not just the orders operative at the time of a ruling or appeal. However, the district court incorrectly upheld the particular social distancing order as "generally applicable," which was error because the district court did not take into account the testimony that Applicants' size excluded them from an order allowing "gatherings" of at least 50% capacity or 50 people, **subject to social distancing**. When coupled with the 6-foot social distancing order, Applicants could not seat the allowed 50 people or the allowed 50% of capacity. The social distancing order, as to these Applicants, was not "equally applicable," nor was the 50% capacity/50 people order. Those "orders *du jour*," however, were among the many unconstitutionally applied during the long course of the continuing emergency. As such, CDEA requires strict scrutiny. It is of no moment that Respondents lifted orders for social distancing on April 16, 2021 (three days before the Tenth Circuit's ruling in the case at bar). The fact that Respondents issued new orders on May 14, 2021, the same day they filed the *Response*, shows that Applicants' deprivations under CDEA will never end until ended by judicial decree.

The *Response* incorrectly contends that Applicants relied on *Smith* as "authority controlling the free exercise analysis." *Resp* at. 6, and that Applicants did not argue that a "generally applicable restriction" was an "undue burden" and thus any claim is "waived" that the orders, as applied, are subject to "strict scrutiny." *Resp*. at 37. The Court is asked to disregard this argument of "waiver" because the "as applied" is asserted in the *Complaint*,[27] the motion for temporary restraining

[27] 1Apx44[1]¶¶131-135, First Claim for Relief

order,[28] the motion for injunction pending appeal in the district court,[29] and was fully briefed in the Tenth Circuit in at least one of the two motions. The Tenth Circuit denied both the facial and as applied claims.

Applicants have consistently claimed that strict scrutiny applies to the facial and as applied claims in this case and that *Smith's* rational-basis-standard is incorrect for the claims here in. Accordingly, Applicants have not "waived" their claims that the EOs and PHOs in this case require strict scrutiny.

IV. *Jacobson* and *Buck* are still relevant to this case

Respondents contend that because they have not sought relief based on *Jacobson* since this Court's December, 2020, decision in *Roman Catholic Diocese of Brooklyn*[30] the Court should not overrule *Jacobson* here. However, overruling *Jacobson* is important to jurisprudence. Around the nation, after the president's declaration of emergency, state governments uniformly implemented the historically unprecedented, politically dangerous "lockdowns." This was done during an election year, and just as uniformly, governors touted *Jacobson* as superior to all Constitutional and statutory laws.

After *Jacobson* was decided in 1905, whether it was badly pleaded or badly applied, the opinion rendered extreme results, even if *Buck v. Bell* was *Jacobson's* only progeny. The fact that dozens of governors cited *Jacobson* for the proposition that they have absolute power, simply by declaring an emergency is reason to clarify the law regarding both *Jacobson* and *Buck* at this moment in history. The fact that Respondents, five days ago, issued orders on the subject of

[28] 3Apx643,645[13]
[29] 6Apx 1493-1501[98]
[30] 141 S. Ct. __

"vaccine passports" under CDEA, on the same day as filing the *Response*, gives further urgency to overruling *Jacobson* and *Buck.*

V. All remaining factors warrant relief

As the district court held: **"**The public has an interest in preserving constitutional rights."[31] By the same token, inasmuch as CDEA fully exempts news and commentary, labor disputes, fire fighters, police and service members, the public interest is also served by exempting Houses of Worship.

CONCLUSION

The *Response* does not change the reality that CDEA exempts hundreds of thousands of Coloradans for no compelling reason in the context of this emergency involving a virus. Applicants respectfully request this Court to issue an injunction pending appellate review against Respondents, as prayed for in their Application.

Dated: May 19, 2021

Respectfully submitted,

MESSALL LAW FIRM, LLC
Rebecca R. Messall, CO Bar no. 16567
7887 E. Belleview Avenue, Suite 1100
Englewood, CO 80111
Phone 303.228.1685
Email: rm@lawmessall.com

Counsel of Record

BERGFORD LAW GROUP, LLC
J. Brad Bergford, CO Bar no. 42942
7887 E. Belleview, Suite 1100
Denver, CO 80111
Phone: 303.228.2241
Email: brad@lawillumine.com
Attorneys for Applicants

[31] 6Apx1448[65], *order, citing Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013, *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

EXHIBIT A

JARED POLIS
GOVERNOR

136 STATE CAPITOL
DENVER, COLORADO 80203

TEL 303-866-2471
FAX 303-866-2003

D 2021 103

EXECUTIVE ORDER

Amending, Restating, and Extending Executive Orders D 2020 039, D 2020 067, D 2020 092, D 2020 110, D 2020 138, D 2020 164, D 2020 190, D 2020 219, D 2020 237, D 2020 245, D 2020 276, D 2020 281, D 2021 007, D 2021 035, D 2021 056, D 2021 079, and D 2021 095 Ordering Individuals in Colorado to Wear Face Coverings in Certain Settings

Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701 *et seq.*, I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order amending, restating, and extending Executive Orders D 2020 039, D 2020 067, D 2020 092, D 2020 110, D 2020 138, D 2020 164, D 2020 190, D 2020 219, D 2020 237, D 2020 245, D 2020 276, D 2020 281, D 2021 007, D 2021 035, D 2021 056, D 2021 079, and D 2021 095, ordering individuals in Colorado to wear a medical or non-medical face covering in certain settings due to the presence of coronavirus-2019 (COVID-19) in Colorado.

I. Background and Purpose

On March 5, 2020, the Colorado Department of Public Health and Environment's (CDPHE) public health laboratory confirmed the first presumptive positive COVID-19 test result in Colorado. Since then, the number of confirmed cases has continued to climb, and we have evidence of widespread community spread throughout the State. I verbally declared a disaster emergency on March 10, 2020, and on March 11, 2020, I issued the corresponding Executive Order D 2020 003, as amended and extended by Executive Orders D 2020 018, D 2020 032, D 2020 058, D 2020 076, D 2020 109, D 2020 125, D 2020 152, D 2020 176, D 2020 205, D 2020 234, D 2020 258, D 2020 264, D 2020 268, D 2020 284, D 2020 290, D 2020 296, D 2021 009, D 2021 022, D 2021 028, D 2021 045, D 2021 061, D 2021 068, D 2021 087, and D 2021 102. On March 25, 2020, I requested that the President of the United States declare a Major Disaster for the State of Colorado, pursuant to the Stafford Act. The President approved that request on March 28, 2020.

My administration, along with other State, local, and federal authorities, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health care resources.

Coloradans started to access the COVID-19 vaccine on December 14, 2020, and the general population of the State of Colorado became eligible to receive the COVID-19 vaccines on April 2, 2021. As more and more individuals are vaccinated in Colorado and throughout the

globe, evidence is growing that those who are fully vaccinated can safely resume their normal activities without fear of contracting or spreading COVID-19. On May 13, 2021, the Centers for Disease Control and Prevention (CDC) outlined new mask guidance for vaccinated and unvaccinated individuals. In accordance with this guidance, we must continue to take measures to facilitate reopening the economy while protecting public health by incorporating best practices to protect individuals from infection.

Executive Order D 2021 079 amended, restated, and extended the prior Executive Orders relating to face coverings. Executive Order D 2021 095 amended and extended Executive Order D 2021 079. This Executive Order amends, restates, and extends the prior Executive Orders relating to face coverings to align guidance in Colorado with the new CDC guidance.

II. Directives

A. Any individual, age eleven (11) and older, who is not fully vaccinated, is encouraged to wear a medical or non-medical cloth face covering that covers the nose and mouth when entering or within an indoor space where members of different households are present.

B. Any fully vaccinated individual may go without any type of face covering in any setting, subject to the exceptions in this Executive Order.

C. Notwithstanding Sections II.A and II.B above, certain individuals, age eleven (11) and older, must wear a medical or non-medical cloth face covering that covers the nose and mouth in the following settings:

1. Preschool through grade 12 schools (including extracurricular activities) and child care centers and services; ***however***, fully vaccinated individuals, including vaccinated children ages 16-18, in a classroom, cohort, or other group of children may remove masks where the teacher(s), caregiver(s), or other staff whose primary responsibility is education or childcare have provided proof of fully completed vaccination to their employer;

2. Unvaccinated or not fully vaccinated staff of Colorado Division of Motor Vehicle offices;

3. Unvaccinated or not fully vaccinated residents, staff, and visitors to congregate care facilities, including nursing facilities, assisted living residences, intermediate care facilities, and group homes; except in situations where removal is authorized by the Centers for Medicare & Medicaid Services;

4. Unvaccinated or not fully vaccinated residents, staff, and visitors to Prisons;

5. Unvaccinated or not fully vaccinated residents, staff, and visitors to Jails;

6. Unvaccinated or not fully vaccinated personnel in emergency medical and other healthcare settings (including hospitals, ambulance service centers, urgent care centers, non-ambulatory surgical structures, clinics, doctors' offices, and non-urgent care medical structures).

D. As allowed under state law, owners, operators, and managers of any business or service may, at their discretion, continue to require individuals entering or within their locations to wear face coverings or show proof of full vaccination.

E. For purposes of this Executive Order, an individual is "fully vaccinated" two (2) weeks after their second dose in a two-dose series of the COVID-19 vaccine, such as the Pfizer or Moderna vaccine, or two (2) weeks after their single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

F. The following individuals are exempt from the requirements of this Executive Order:

1. Individuals ten (10) years old and younger; and

2. Individuals who cannot medically tolerate a face covering.

G. Individuals performing the following activities are exempt from the requirements of Section II.C of this Executive Order while the activity is being performed:

1. Individuals who are hearing impaired or otherwise disabled or who are communicating with someone who is hearing impaired or otherwise disabled and where the ability to see the mouth is essential to communication;

2. Individuals who enter a business or receive services and are asked to temporarily remove a face covering for identification purposes;

3. Individuals who are actively engaged in a public safety role, such as law enforcement officers, firefighters, or emergency medical personnel;

4. Individuals who are officiating or participating in a life rite or religious service where the temporary removal of a face covering is necessary to complete or participate in the life rite or religious service.

H. These directives shall be applied in a manner consistent with the American with Disabilities Act (42 U.S.C. § 12101 *et seq*.), Title VII of the Civil Rights Act (42 U.S.C. § 2000e *et seq*.), the Colorado Anti-Discrimination Act (C.R.S. § 24-34-401 *et seq*.), and any other relevant federal or State law.

I. Nothing in this Executive Order changes or abrogates the CDC's Order on January 29, 2021, requiring the wearing of masks by travelers to prevent the spread of COVID-19. All Coloradans must abide by the CDC's Order, which can be viewed here: https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html

III. Duration

Executive Order D 2020 039, as amended and extended by Executive Orders D 2020 067, D 2020 092, D 2020 110, D 2020 138, D 2020 164, D 2020 190, D 2020 219, D 2020 237, D 2020 245, D 2020 276, D 2020 281, D 2021 007, D 2021 035, D 2021 056, D 2021 079, D 2021 095, and as amended, restated, and extended by this Executive Order, shall go into effect on May 15, 2021 and will expire on June 1, 2021, unless extended further by Executive Order. In all other respects, Executive Order D 2020 039, as amended and extended by Executive Orders D 2020 067, D 2020 092, D 2020 110, D 2020 138, D 2020 164, D 2020 190, D 2020 219, D 2020 237, D 2020 245, D 2020 276, D 2020 281, D 2021 007, D 2021 035, D 2021 056, D 2021 079, and D 2021 095, shall remain in full force and effect as originally promulgated.

GIVEN under my hand and the Executive Seal of the State of Colorado, this fourteenth day of May, 2021.

Jared Polis
Governor

EXHIBIT B

COLORADO
Department of Public Health & Environment

SECOND AMENDED PUBLIC HEALTH ORDER 20-38
LIMITED COVID-19 RESTRICTIONS
May 14, 2021

PURPOSE OF THE ORDER

I am issuing this Public Health Order (PHO or Order) in response to the existence of thousands of confirmed and presumptive cases of Coronavirus disease 2019 (COVID-19) and related deaths across the State of Colorado. This Order supersedes PHO 20-36 COVID-19 Dial and PHO 20-29 Voluntary and Elective Surgeries and Procedures, and implements reduced restrictions for individuals, businesses and activities, as well as reporting requirements for hospitals, to prevent the spread of COVID-19 further in Colorado.

FINDINGS

1. Governor Polis issued **Executive Order D 2020 003** on March 11, 2020, declaring a disaster emergency in Colorado due to the presence of COVID-19. Since that time, the Governor has taken numerous steps to implement measures to mitigate the spread of disease within Colorado, and has further required that several public health orders be issued to implement his orders.

2. I have issued public health orders pertaining to the limitation of visitors and nonessential individuals in skilled nursing facilities, intermediate care facilities, and assisted living residences; defining the terms of the Governor's **Stay at Home, Safer at Home,** and **Protect our Neighbors** requirements as well as **Critical Business** designations; requiring hospitals to report information relevant to the COVID-19 response; and requiring the wearing of face coverings in the workplace and urging their use in public. These measures all act in concert to reduce the exposure of individuals to disease, and are necessary steps to protect the health and welfare of the public. Additionally, in reducing the spread of disease, these requirements help to preserve the medical resources needed for those in our communities who fall ill and require medical treatment, thus protecting both the ill patients and the healthcare workers who courageously continue to treat patients.

3. As of May 13, 2021, there have been 524,190 known cases of COVID-19 in Colorado, 29,062 Coloradans have been hospitalized and 6,556 Coloradans have died from COVID-19. Multiple sources of data show that COVID-19 transmission and the use of the hospital system due to COVID-19 have leveled off in Colorado.

4. With the rescission of PHO 20-36 COVID-19 Dial, but the pandemic ongoing, it remains critical for individuals, communities, businesses, and governments to remain vigilant regarding the spread of COVID-19. Individuals are encouraged to remain at least 6 feet away from non-household contacts, wash their hands, and wear a face covering to reduce the likelihood of disease transmission. As we continue to combat COVID-19 in our communities, continuing some limited requirements to mitigate disease spread remain appropriate.

5. The following additional public health orders remain in effect:

   a. PHO 20-20 Requirements For Colorado Skilled Nursing Facilities, Assisted Living Residences, Intermediate Care Facilities, And Group Homes For COVID-19 Prevention And Response;
   b. PHO 20-33 Laboratory Data Reporting for COVID-19; and
   c. PHO 20-37 Vaccine Access And Data Reporting For COVID-19.

INTENT

This Order includes limited requirements for individuals and businesses to mitigate the spread of COVID-19 in Colorado. The Order incorporates the requirements of **Executive Order D 2020 138,** as amended and extended by **Executive Order D 2020 164, D 2020 190**, **D 2020 219**, **D 2020 237**,**D 2020 245, D 2020 276, D 2020 281, D 2021 007, D 2021 035, D 2021 056**, and **D 2021 079** concerning face coverings. Additionally, the Order maintains some restrictions on certain activities while we continue to take steps to limit the spread of COVID-19 in Colorado, and includes a provision that authorizes CDPHE to require a county to comply with additional restrictions should certain metrics be met. The Order also includes hospital reporting requirements regarding bed capacity to provide the State with critical information to assess the status of the COVID-19 pandemic relative to the statewide capacity to provide necessary medical care and services to Coloradans.

ORDER

This Order supersedes and replaces Public Health Orders 20-29 and 20-36, as amended, effective at 12:01 AM on Saturday, May 15, 2021.

I. COVID-19 RESTRICTIONS

A. FACE COVERINGS

1. Face coverings are required pursuant to **Executive Order D 2021 103** for certain individuals, age eleven (11) and older, in the following settings:
   a. Preschool through grade 12 schools (including extracurricular activities)

and child care centers and services; ***however***, fully vaccinated individuals, including vaccinated children ages 16-18, in a classroom, cohort, or other group of children may remove masks where the teacher(s), caregiver(s), or other staff whose primary responsibility is education or childcare have provided proof of fully completed vaccination to their employer;

b. Unvaccinated or not fully vaccinated staff of Colorado Department of Motor Vehicle offices;

c. Unvaccinated or not fully vaccinated residents, staff, and visitors to congregate care facilities, including nursing facilities, assisted living residences, intermediate care facilities, and group homes, except in situations where removal is authorized by the Centers for Medicare and Medicaid Services;

d. Unvaccinated or not fully vaccinated residents, staff, and visitors to Prisons;

e. Unvaccinated or not fully vaccinated residents, staff, and visitors to Jails;

f. Unvaccinated or not fully vaccinated personnel in emergency medical and other healthcare settings (including hospitals, ambulance service centers, urgent care centers, non-ambulatory surgical structures, clinics, doctors' offices, and non-urgent care medical structures);

3. Exceptions to the face covering requirements include
   a. individuals 10 years of age or younger,
   b. individuals who cannot medically tolerate a face covering, and
   c. individuals participating in one of the activities described in Section II.G of **Executive Order D 2021 103**.

4. Face coverings of unvaccinated or not fully vaccinated individuals may be removed in a school classroom setting for the limited purpose of playing an instrument that cannot otherwise be played while wearing a face covering.

5. Nothing in this Order changes or abrogates the Centers for Disease Control and Prevention's (CDC) Order on January 29, 2021, requiring the wearing of masks by travelers to prevent the spread of COVID-19. All Coloradans must abide by the CDC's Order, which can be found at https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html.

B. ALL BUSINESSES AND GOVERNMENT ENTITIES. All businesses and government entities shall comply with the requirements in this Section I.B.

1. Work Accommodations. Employers are strongly encouraged to provide reasonable work accommodations, including accommodations under the Americans with Disabilities Act (ADA) for individuals who cannot obtain access to COVID-19 vaccine or who for medical or other legal reasons cannot take a COVID-19 vaccine.

2. Face coverings. All employers must implement the face covering requirements in **Executive Order D 2021 103** as applicable.

3. Disease mitigation practices. Employers and sole proprietors are strongly encouraged to follow the best practices for disease mitigation found in CDPHE Guidance.

C. MASS INDOOR GATHERINGS

1. In addition to the requirements in Section I.B of this Order, the requirements in this Section I.C apply to **Mass Indoor Gatherings.**

2. a. When more than 100 people are gathered in a room in a **Public Indoor Space**, the setting may operate at 100% capacity not to exceed 500 people, with 6 feet distancing required between parties of unvaccinated people or when vaccination status is unknown. Existing approved variances remain in effect, including 5 Star Program approvals granted by a county. Venues may apply to their local public health agency for a variance to exceed 500 people, to be finally approved by CDPHE. These requirements do not apply to the following sectors:
    i. Places of worship and associated ceremonies,
    ii. Retail services,
    iii. Restaurants that have sit-down dining and do not have unseated areas where 100 or more people could gather (such as dance floors or common gathering areas), and

iv. School proms and graduations that wish to exceed these thresholds shall be subject to review and approval by local public health agencies in accordance with CDPHE prom and graduation guidance.

D. SCHOOLS AND CHILD CARE

1. **Schools** and child care shall work with their local public health agencies as COVID-19 cases occur, and shall follow the CDPHE guidance for Cases and Outbreaks in Schools and Child Care.
2. **Schools** that are entirely remote learning due to ongoing COVID-19 cases and outbreaks shall not have in-person extracurricular activities; except that outdoor graduations may be approved by the local public health agency.

F. ADDITIONAL COUNTY RESTRICTIONS

1. CDPHE may require counties whose resident hospitalizations threaten to exceed 85% of hospital or hospital system capacity to implement additional restrictions to mitigate disease transmission.

G. NON-CONGREGATE SHELTERING

1. Governmental and other entities are strongly urged to make shelter available to people experiencing homelessness whenever possible and to the maximum extent practicable, and are authorized to take all reasonable steps necessary to provide non-congregate sheltering along with necessary support services to members of the public in their jurisdiction as necessary to protect all members of the community.

II. HOSPITAL FACILITY REPORTING

A. COVID-19 Case Reporting. All Colorado hospitals shall report to CDPHE in a form and format determined by CDPHE, certain information for all suspected (pending laboratory test) and confirmed (positive laboratory test) cases of COVID-19, including but not limited to:

1. race and ethnicity;
2. numbers of suspected and confirmed cases who are hospitalized, who are hospitalized and using a ventilator, or who are in the emergency department waiting for an inpatient bed;
3. numbers of suspected and confirmed cases who are discharged and in recovery;
4. deaths due to COVID-19; and
5. medical equipment and supply information, including but not limited to total bed and intensive care unit (ICU) bed capacity and occupancy, ventilator availability and utilization, and availability of N95 masks.

Reporting by hospitals shall be done in CDPHE's EMResource reporting system on a daily basis or as otherwise required by this Order.

B. Hospital Bed Capacity Reporting. All Colorado hospitals shall report to CDPHE the following in EMResource daily at 10:00 a.m.:

1. The daily maximum number of beds that are currently or can be made available within 24 hours for patients in need of ICU level care; and
2. The daily maximum number of all staffed acute care beds, including ICU beds, available for patients in need of non-ICU hospitalization.

III. DEFINITIONS

A. Fully Vaccinated means two (2) weeks after a second dose in a two dose-series of the COVID-19 vaccine, such as the Pfizer or Moderna vaccine, or two (2) weeks after the single-dose vaccine ,such as Johnson & Johnson's Janssen vaccine.

B. Mass Indoor Gathering is any indoor space where more than 100 unvaccinated individuals or individuals with unknown vaccination status are gathered in a room.

C. Public Indoor Space means any enclosed indoor area that is publicly or privately owned, managed, or operated to which individuals have access by right or by invitation, expressed or implied, and that is accessible to the public, serves as a place of employment, or is an entity providing services. **Public Indoor Space** does not mean a person's residence, including a room in a motel or hotel or a residential room for students at an educational facility.

D. School means pre-kindergarten through 12th grade. A school includes all grade levels contained in a building or multiple buildings on a campus.

IV. ENFORCEMENT

This Order will be enforced by all appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance. Failure to comply with this order could result in penalties, including jail time, and fines, and may also be subject to discipline on a professional license based upon the applicable practice act.

V. SEVERABILITY

If any provision of this Order or the application thereof to any person or circumstance is held to be invalid, the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.

VI. DURATION

This Order shall become effective on Saturday, May 15, 2021 and will expire on June 1, 2021 unless extended, rescinded, superseded, or amended in writing.

Jill Hunsaker Ryan, MPH
Executive Director

5/14/2021
Date