No. 20A105

In The
Supreme Court of the United States

HIGH PLAINS HARVEST CHURCH AND MARK HOTALING,

Applicants,

– v. –

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

Respondents.

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

Response in Opposition to Emergency Application for Injunction Pending Appellate Review

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PRELIMINARY STATEMENT

Applicants High Plains Harvest Church and Mark Hotaling ("High Plains") ask this Court for "a writ of injunction precluding enforcement of absolute capacity limits imposed by [the State] on 'houses of worship' in designated geographic zones in Colorado." Application at 1. Colorado, earlier this week, amended the challenged Public Health Order to remove capacity limits from all houses of worship at all times in response to this Court's recent decisions. All houses of worship remain categorized as critical businesses in Colorado, they now have no more restrictions than any other critical business in the state, and, indeed, have the maximum degree of flexibility permitted to any organization under Colorado public health law. As such, High Plains already has the relief it seeks.

The house of worship restrictions that existed in Colorado before the amendment of the public health order were not as starkly different from those on other settings as High Plains asserts. Nor were they in any way motivated by any animus toward religion as High Plains claims.

Instead, the restrictions in Colorado were tailored to each type of setting, and to address the risks of disease transmission inherent in those settings. The district court received uncontroverted evidence that closed, indoor environments where people spend a long duration in close contact—such as houses of worship—pose a higher risk of transmission than those settings where people have transient contacts—such as grocery stores. Environments with a similar risk profile based on the state of epidemiological knowledge—such as movie theaters and concert halls—were treated similarly based on risk. Colorado always sought to appropriately categorize houses of worship based on the risk of their setting type while also recognizing the critical protections the Constitution provides. This is why houses of

worship have always had higher occupancy limits than settings with a similar risk profile.

After this Court issued its opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, No. 20A87, 2020 WL 6948354 (Nov. 25, 2020), Colorado reviewed its public health order. After careful consideration and consultation with counsel, Colorado amended its public health order to ensure that it complied with the Court's free exercise framework by removing all numerical capacity restrictions from houses of worship, no matter which level of the public health order dial applies in a particular county. *See* Ex. A, Dir. Ryan, *Third Amended Public Health Order 20-36* (Dec. 7, 2020); Ex. B (same, but with redlining showing changes from previous order). Houses of worship remain categorized as critical businesses in Colorado—but now with no more, or different, restrictions than any other critical business.

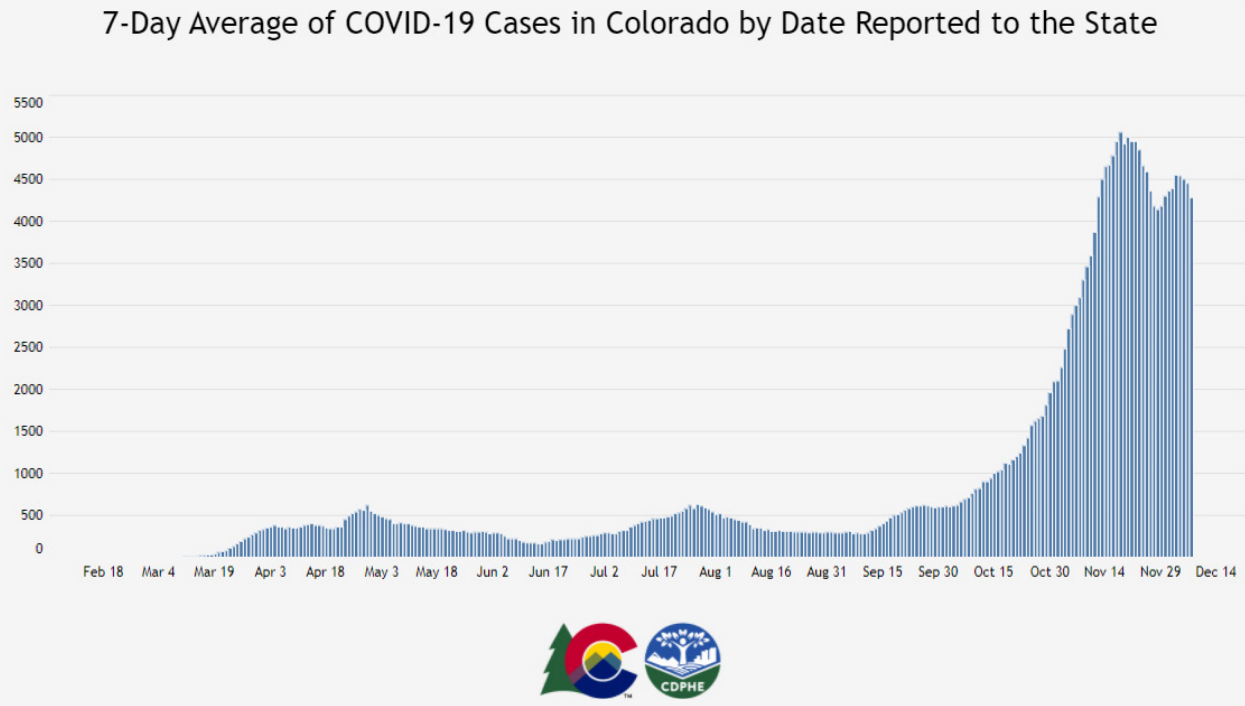
Thus, this application is moot. Even if it were not, High Plains cannot prevail. The current public health order is neutral and generally applicable and satisfies rational basis review. As such, the order does not infringe High Plains' right to free exercise. Nor does the public health order infringe High Plains' right to freedom of speech or expression. The order is content neutral, and it satisfies intermediate scrutiny.

Because Colorado's public health order no longer has numerical capacity restrictions for houses of worship—the only specific objection brought by High Plains—High Plains has failed to satisfy the demanding requirements for obtaining emergency injunctive relief from this Court, and its application should be denied.

STATEMENT OF THE CASE

I. COVID-19 in Colorado.

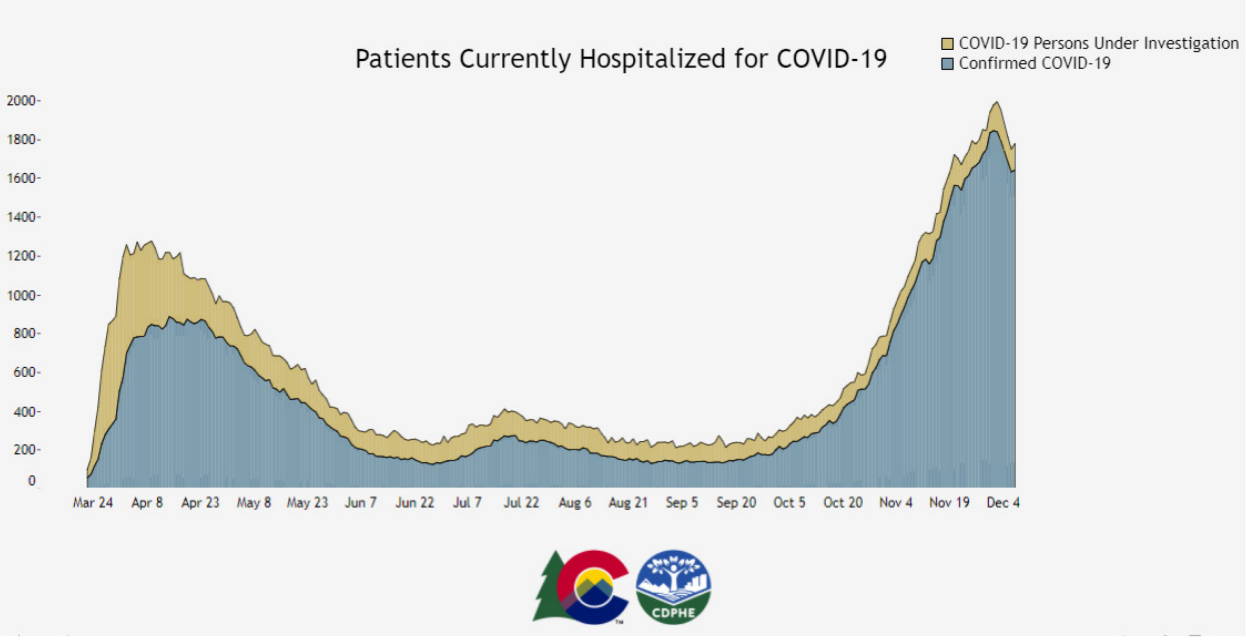
Colorado reported its first confirmed case of COVID-19 in early March.[1] The state experienced a steady growth of COVID-19 cases through late spring, and by May 31, Colorado had 26,763 confirmed cases and 1,564 deaths.[2] Beginning in early summer, Colorado saw an increased growth of cases which fluctuated until the middle of September. By September 15, Colorado had 63,492 confirmed cases and 2,063 deaths. Colorado, like many other states, then experienced an exponential growth in cases, as illustrated below:



[1] Oscar Contreras, *Colorado Reports First Confirmed Cases of COVID-19 in Summit County*, Denver Channel 7 News (Mar. 5, 2020), https://tinyurl.com/y4clw3hv (last updated July 17, 2020) (last accessed on Dec. 12, 2020).

[2] Colorado's COVID-19 data and related graphics are publicly available on CDPHE's website at https://covid19.colorado.gov/data.

Hospitalizations similarly grew at an exponential rate, as illustrated below:



This recent surge in cases and hospitalizations has and continues to put tremendous pressure on Colorado's healthcare system. Many hospitals reached or exceeded capacity during the surge.[3] There is significant concern that recent holiday travel and gatherings will continue this trend of exponential growth and overwhelm Colorado's healthcare system. Recent case trends support this concern.[4]

Since late September, cases have grown at an alarming rate. As of December 9, Colorado has 268,589 confirmed COVID-19 cases and 3,372 deaths among cases.

II. Colorado's Response to COVID-19.

State officials continually rely on experts from a wide array of backgrounds to tailor Colorado's response to COVID-19. The Colorado Department of Public Health

[3] *See* John Daley & Elena Rivera, *Colorado Hospitals Fill Up as Coronavirus Deaths Grow and Cases Stay High*, Colorado Public Radio (Nov. 20, 2020) available at https://tinyurl.com/y5em8qnm (last accessed Dec. 8, 2020).

[4] *See* Andrea Dukakis, *Coronavirus Cases Rise in Colorado After Thanksgiving, Just Like Health Officials Warned*, Colorado Public Radio (Dec. 8, 2020) available at https://tinyurl.com/yxlv96ky (last accessed Dec. 8, 2020).

and Environment has a team of epidemiologists who routinely educate and inform policy decisionmakers. A key factor that drives these decisions is identifying areas that exhibit a high risk of transmission and are most likely to lead to community spread of COVID-19.

The evidence presented to the district court shows that Colorado officials impose COVID-19 restrictions based on the best scientific and medical expertise available to them. Closed indoor environments where individuals spend long periods in close contact, like houses of worship, present a higher risk of COVID-19 transmission and subsequent community spread than other types of environments. The district court received uncontroverted expert epidemiological evidence that this type of environment presents unique risks not found in other settings. The public health orders were tailored to address these unique risks.

There is no evidence that any Colorado official expressed animus toward houses of worship or singled out houses of worship for disparate treatment based on religious belief. During the pandemic, the restrictions put on houses of worship were no more restrictive, and often were more favorable, than those put on environments with comparable risk profiles. Far from hostility toward houses of worship, the record shows that Colorado sought to protect the public health of its communities by placing similar restrictions on environments its experts identified as having similar risks of transmission.

A. State of Disaster Emergency.

Governor Polis declared a state of disaster emergency due to the presence of COVID-19 on March 11, 2020.[5] In response, the Department of Public Health and Environment issued Public Health Order 20-22, which closed bars, restaurants, gymnasiums, casinos, movie theaters, opera houses, concert halls, and similar

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

establishments where patrons gathered.[6] Order 20-22 did not close houses of worship or limit capacity at houses of worship.[7] The Department of Public Health and Environment 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.[8]

B. Stay at Home Orders.

Governor Polis issued Colorado's first stay at home order on March 25, and the Department of Public Health and Environment amended Public Health Order 20-24 in response.[9] Coloradans were ordered to stay at home whenever possible and to leave only for necessary travel, which included accessing critical businesses.[10] Houses of worship were designated a critical service within the critical business category.[11] 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.[12] Houses of worship were subject to a 10-person capacity limitation and encouraged to implement electronic platforms to conduct services whenever possible.[13]

C. Safer at Home Orders.

In response to decreasing COVID-19 case trends, Governor Polis then issued the Safer at Home Executive Order, which directed the Department of Public

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[6] *See* Dir. Ryan, *Pub. Health Order 20-22* (Mar. 19, 2020), https://tinyurl.com/y7sfrcw7.
[7] *Id.*
[8] *See* Dir. Ryan, *Pub. Health Order 20-24*, (Mar. 22, 2020), https://tinyurl.com/y6gsn78w.
[9] *See* Gov. Polis, *Exec. Order D 2020 017* (Mar. 11, 2020), https://tinyurl.com/yybgljxc; Dir. Ryan, *Second Updated Pub. Health Order 20-24* (Mar. 27, 2020), https://tinyurl.com/y28gw36l.
[10] *Id.* § I.A.
[11] *Id.* § III.C.5.
[12] *Id.*
[13] *Id.*

Health and Environment to begin reopening Colorado.[14] The Department issued Public Health Order 20-28 in response.[15] Order 20-28 limited all public and private gatherings to no more than ten individuals, except for purposes expressly permitted in the order.[16] Places of public accommodation, like restaurants, bars, gyms, and movie theaters, remained closed to in-person use.[17] The capacity limitations for houses of worship remained the same.[18]

This public health order was the primary order in place between the end of April and middle of September. It was amended several times in response to the changing COVID-19 landscape. In general, each amendment authorized more sectors and increased opening capacity. While certain indoor environments remained closed, houses of worship were opened on June 2 to the lesser of 50% occupancy or 50 people while maintaining social distancing.[19] Outdoor services had no state-imposed capacity limitations as long as non-household members maintained social distancing.[20]

Then in mid-June, "extra large houses of worship" were allowed to operate up to 100 people indoors within their useable space calculated using a social distancing calculator.[21] Smaller churches could elect to use the 50% capacity or 50 persons calculation instead.[22] Houses of worship also could expand capacity into different rooms, so long as the capacity limitations were met in each room.[23] Outdoor

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[14] *See* Gov. Polis, *Exec. Order D 2020 044* (April 26, 2020), https://tinyurl.com/yyal9yzk.
[15] *See* Dir. Ryan, *Public Health Order 20-28* (Apr. 27, 2020), https://tinyurl.com/y6kcg6cg.
[16] *Id.* § I.C.
[17] *Id.* § II.A.
[18] *Id.* at 28, Appendix F.
[19] *See* Dir. Ryan, *Fifth Amend. Public Health Order 20-28* § II.M (June 2, 2020), https://tinyurl.com/y5nzb22r.
[20] *Id.*
[21] *See* Dir. Ryan, *Seventh Amend. Public Health Order 20-28* § II.M (June 18, 2020), https://tinyurl.com/y57kopfg. The Social Distancing Calculator can be found here: https://covid19.colorado.gov/social-distancing-calculator
[22] *Id.*
[23] *Id.*

capacity remained the same.[24] Restaurants were subject to similar capacity limitations.[25] For the first time since the Stay at Home orders, other closed indoor environments, such as theaters, markets, rodeos, and receptions, were allowed to open.[26] Indoor capacity for these other environments was limited to 100 persons using the social distancing calculator, and outdoor capacity was limited to 175 persons using the calculator.[27]

D. The Dial Frameworks.

In mid-September, the Department of Public Health and Environment moved to a dial framework.[28] The dial included levels that counties may qualify for based on specific epidemiological metrics. The restrictions are assigned to a level on the dial, which corresponds to disease transmission levels. In this framework, restrictions are applied to counties based on the specific level of disease transmission occurring in that county.

In early November, the Department of Public Health and Environment introduced the COVID-19 Dial in Public Health Order 20-36.[29] The purpose of the new dial was to incorporate all the levels into one central public health order.[30] Instead of safer at home levels, the COVID-19 Dial uses color-coded levels: green (least restrictive), blue (cautious), yellow (concern), orange (high risk), and red (severe risk).[31] These levels follow similar COVID-19 metrics as the safer at home

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[24] *Id.*
[25] *Id.* § II.C.1.
[26] *Id.* § I.H.4.
[27] *Id.* § I.H.4.a–b.
[28] *See* Dir. Ryan, *Public Health Order 20-35*, (Sept. 15, 2020), https://tinyurl.com/y66ysnox.
[29] *See* Dir. Ryan, *Public Health Order 20-36* (Nov. 2, 2020), https://tinyurl.com/y5boa9gt.
[30] *Id.* at 2.
[31] *Id.* §§ II.B–F.

levels.[32] The COVID-19 Dial was amended on November 17 to add a new level: purple (extreme risk).[33]

	House of Worship	Indoor Event	Restaurant
Green	50% capacity or 500 people	50% capacity or 500 people	50% capacity or 500 people
Blue	50% capacity or 175 people	50% capacity or 175 people	50% capacity or 175 people
Yellow	50% capacity or 50 people (100 with calculator)	50% capacity or 50 people (100 with calculator)	50% capacity or 50 people (100 with calculator)
Orange	25% capacity or 50 people	25% capacity or 50 people	25% capacity or 50 people
Red	25% capacity or 50 people	Closed	Indoor dining closed. Take out, curbside, delivery, or to go.
Purple	10 people per room, with remote, virtual service, or outdoor strongly encouraged.	Closed	Indoor dining closed. Take out, curbside, delivery, or to go.

E. The Amended Order 20-36.

After this Court issued its decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, Colorado officials reviewed their public health orders to determine whether they continued to comply with this Court's free exercise framework. On December 7, the Department of Public Health and Environment amended the current public health order to remove numeric capacity limitations from houses of worship in all levels of the COVID-19 dial. *See* Ex. A, Dir. Ryan, *Third Amend. Public Health*

[32] *Id.*
[33] *See* Dir. Ryan, *First Amend. Public Health Order 20-36* § II.G (Nov. 17, 2020), https://tinyurl.com/y3pbn3sr.

Order 20-36 (Dec. 7, 2020) (Amended Public Health Order).[34] Houses of worship remain a critical service within the critical business category—as they have been categorized from the first orders—but are no longer subject to specific numeric capacity limitations. *See id.*, App'x A, at 36. Houses of worship are instead subject to the same limitations as other non-retail critical businesses: social distancing, sanitizing, etc., with no capacity caps. *Id*. Critical retail, such a grocery stores, gas stations, hardware stores, and convenience stores, may not exceed 50% of posted occupancy under all dial levels. *Id*.

PROCEDURAL HISTORY

I. Proceedings in the District Court.

High Plains sued in May, challenging Colorado's Stay at Home orders and 10-person capacity limitation on First Amendment grounds. High Plains contemporaneously filed a motion for temporary restraining order and preliminary injunction. After briefing, but before the district court ruled, High Plains withdrew its request for injunctive relief in light of *South Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020).

After protests arising from George Floyd's death, High Plains then filed an amended complaint and a renewed motion for temporary restraining order and preliminary injunction. High Plains argued that because, in its view, Colorado leaders encouraged mass protests that erupted after George Floyd's death, they created a de facto exception to the public health orders and therefore, the orders are not generally or neutrally applicable.

The district court denied High Plains' renewed request for a temporary restraining order, holding "there is no evidence in the record that would support a

[34] Attached as Exhibit B is a redline comparison to the previous, Second Amended Public Health Order 20-36.

finding that the outdoor protests are 'comparable secular gatherings' to the indoor, in-person church services Plaintiffs seek to provide." *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 3263902, at *2 (D. Colo. June 16, 2020). The court similarly rejected High Plains' "conclusory assertion" that protests are more dangerous than religious services. *Id*. However, the court allowed High Plains to file supplemental materials in support of its motion for preliminary injunction. *Id*.

After supplemental briefing concluded, the district court denied High Plains' request for preliminary injunction. *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 4582720 (D. Colo. Aug. 10, 2020). The court observed that High Plains "initially sought the right to conduct religious services involving up to fifty persons while following CDC guidelines" and noted that indoor worship gatherings in groups of 50 "is permissible under the latest Executive Order." *Id*. at *2. As to the protests, the court found a "myriad of differences between the protests and Plaintiffs' desired services." *Id*. The court further determined the record evidence "does not establish that the state encouraged protests or created de facto exemptions." *Id*. The court denied High Plains' request for a preliminary injunction, having "little trouble finding" that High Plains failed to meet its burden. *Id*.

II. Proceedings in the Tenth Circuit Court of Appeals.

High Plains then appealed to the Tenth Circuit where it filed a motion for injunction pending appeal. High Plains raised substantively the same arguments it made before the district court.

The Tenth Circuit denied High Plains' motion. *High Plains Harvest Church v. Polis*, No. 20-1280, 2020 WL 6749073 (10th Cir. Nov. 12, 2020). The court held that High Plains did not show "error in the district court's factual finding that Defendants did not create a de facto exemption from the Orders for the Protests."

Id. at *2. The court also held that Governor Polis' "statements did not nullify the otherwise neutral and generally applicable Orders" and that High Plains pointed "to no evidence of an affirmative state action creating an exemption for the Orders applicable to the Protests." *Id*. Thus, the court held that High Plains failed "to show that the Orders are subject to strict scrutiny" and to show a likelihood of success on the merits of its appeal. *Id*.

Briefing before the Tenth Circuit concluded on November 17. The court has yet to schedule oral arguments. On December 2, High Plains filed the at-issue Emergency Application for Injunction Pending Appellate Review (Application).

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)). To obtain such relief, the applicant must show that the "legal rights at issue" in the dispute are "indisputably clear" in its favor. *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (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. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

High Plains 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. This case is moot because Colorado houses of worship are no longer subject to capacity limitations.

A case may become moot at any stage of the proceedings. Indeed, "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 "permitted suits for prospective relief to go forward despite the abatement of the underlying injury only in the 'exceptional situations.'" *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 Partnership*, 513 U.S. 18, 24 (1994) (quoting *United States v. Hamburg-Amerikanishe Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477–78 (1916)). High Plains' only specific claim for relief focused on the capacity limits under the old public health orders. Colorado's revision of the challenged order to remove the numeric capacity limits for all houses of worship moots this case.

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. In the case 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, neither of which 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. High Plains does not make this claim here. 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)).

Colorado has amended the public health order at issue—removing all numeric capacity limitations from all houses of worship. This is not a case in which Colorado has kept the existing framework in place but, using discretion or other criteria, claimed that at this point, it will not enforce the rules against a particular party. Rather, Colorado has removed the only challenged restriction—capacity caps—across the board from all houses of worship. There is no reasonable expectation that High Plains would be subject to capacity limits again, because the capacity limits no longer exist. Thus, there is no longer a present, live controversy between the parties.

To fit within this second exception to mootness, the inquiry focuses on whether the allegedly wrongful behavior reasonably can be expected to recur. The recent *Roman Catholic Diocese* case highlights these concerns, where, "just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant." *Roman Catholic Diocese*, at 6, 20A87 (Gorsuch, J., concurring).

But the changes in Colorado are markedly different from those the Court reviewed in *Roman Catholic Diocese*. There, New York had created a three-tiered system with different capacity limitations on churches in each tier.

During the case, New York notified the Court that the churches at issue would move into different tiers with different capacity limitations. But New York did not modify the challenged executive order and it made clear that the churches could find themselves subject to the original, challenged limitations based on changes in disease transmission. It then implied, if not stated, that the case should not be heard because the claim for relief was moot. The Diocese objected on the grounds that, at any time, the restrictions could change on houses of worship if the case counts changed. This Court observed that the applicants remained under a constant threat of reclassification, and an attendant increase in restrictions. *Roman Catholic Diocese*, 6. As such, the Court found that the case was not moot and that an injunction was still warranted. *Id.*

Colorado presents a very different set of circumstances. After this Court issued its decision in *Roman Catholic Diocese*, Colorado reviewed its orders to ensure that they complied with this Court's framework. On December 7, after careful review and consultation with counsel, the Executive Director of the Department of Public Health and Environment issued a new public health order to ensure that was the case.

The new order is the Third Amended Public Health Order 20-36. Under Critical Services, it includes "Houses of Worship and associated ceremonies such as weddings, funerals and baptisms (religious or secular)." Ex. A, App'x A at 28. It eliminates any more restrictive limitation on houses of worship as compared to other critical businesses and removes capacity limitations for houses of worship altogether regardless of the level in which a particular county finds itself: "Critical Businesses and Critical Government Functions may continue to operate without capacity limitations, … but must follow the requirements in Section III.B and C" of the Order. Ex. A at II.B.2.a. Section III.B states that Critical Businesses, including Houses of Worship, "may continue to operate" and must comply with standard

distancing requirements, defined on page 30. Section III.C sets forth disease prevention protocols applicable to all "Business and Government Functions," explained on pages 19–21.

Before the recent amendments, houses of worship were categorized as "critical services" within the list of critical businesses. There were, however, limits that were placed on houses of worship. These limits attempted to place restrictions on similar environments based on the risk of disease transmission in the environment. Houses of worship were categorized with other environments where people spend an extended period of time indoors, such as movie theaters and concert halls. Recognizing their societal value and constitutional protections, however, the restrictions never closed houses of worship, unlike the environments with which they were grouped.

After reviewing this Court's *Roman Catholic Diocese* opinion, Colorado has determined that houses of worship should remain as "critical services" within the "critical businesses" list but with the capacity restrictions directed at indoor environments removed. It did this by removing, at each level of the dial, the specific capacity restrictions that applied to houses of worship. Ex. A §§ II.C.2.j, D.2.j, E.2.j, F.2.j, G.2.j. It also struck the cross-referencing language in the "critical businesses" list. *Id.*, App'x A, § 5. As a result of these changes, houses of worship in Colorado are critical businesses with no unique restrictions or limitations. As each level of the dial shows, "Critical Businesses" and "Critical Government Functions" may continue to operate without capacity limitations. Ex. A §§ II.C.2.r, D.2.r, E.2.r, F.2.r, G.2.r.

Thus, in Colorado, houses of worship have exactly the same designation as every other non-retail critical business in the state.[35] In each color coded level,

[35] Although critical retail is a critical business, it has a capacity limitation of 50%.

houses of worship are defined as a critical business and may continue to operate without capacity limitations. There are still requirements that apply to all critical businesses, including houses of worship, such as social distancing and cleaning requirements. Those requirements apply across the board to all of the critical businesses in the same way.

Colorado has not changed its order to *evade* Supreme Court review; rather, it has done so to *comply* with Supreme Court directives. This Court expressed concern in its per curiam opinion that there is no reason why the applicants should bear the risk of suffering irreparable harm if New York made another reclassification. *Roman Catholic Diocese*, at 7. But notably, New York did not change its orders—it reclassified the geographic area in which the churches were located. By contrast, Colorado changed its order to remove capacity limits, and ensure that houses of worship have the same classification as every other critical business in the state. This means that no matter if disease transmission increases or decreases, houses of worship will not be affected differently. As with all other critical businesses, they remain open without numerical capacity limitations.

Colorado represents that the change in the public health orders to classify houses of worship as critical businesses without specific capacity limitations is not temporary. The amendments were issued after review of, and in response to, this Court's decision in *Roman Catholic Diocese*, and they are the policy of the State. Absent further clarification from this Court, the State will not change course on this point.

Colorado has engaged in a good-faith effort to ensure that its public health order passes constitutional muster and complies with judicial decisions, including those of this Court. Those amendments reflect an enduring change in the categorization of houses of worship. There is no longer a live case or controversy, the

case is moot, there are no equitable reasons to render an opinion despite that mootness, and the requested relief should be denied.

II. The Amended Public Health Order does not violate High Plains' First Amendment Free Exercise or Free Speech rights.

Even if this Court does not deny relief based on mootness, High Plains cannot prevail. The Amended Public Health Order is neutral and generally applicable and complies with the Court's free exercise framework in *Roman Catholic Diocese*. The Amended Public Health Order treats houses of worship the same or better than secular establishments. Because the Order is neutral and generally applicable, rational basis scrutiny applies, which the Order satisfies in that it rationally furthers Colorado's interest in curtailing the spread of COVID-19.

The Amended Public Health Order is also content neutral. All of the public health orders were issued to slow the spread of COVID-19. There is no evidence that the orders were tailored to restrict any party's message, let alone High Plains' religious speech. Nor is there any evidence that Colorado officials created a de facto exemption to the public health orders in their response to the spontaneous June protests. Even if there were, High Plains fails to show how Colorado's response to outdoor protests in June affects public health restrictions in December. The Amended Public Health Order is instead a constitutional time, place, and manner restriction.

A. The Amended Public Health Order does not violate High Plains' Free Exercise Rights.

The First Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, provides that states "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. 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 Human Res. of Ore. v. Smith*, 494 U.S. 872, 878 (1990). If the law's object is "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 is neither neutral nor generally applicable must satisfy strict scrutiny. *Id.* at 545.

Rational basis scrutiny applies because the Amended Public Health Order is both neutral and generally applicable. The Order satisfies that test because it furthers Colorado's interests in curtailing the spread of COVID-19.

1. The Amended Public Health Order is neutral.

There is no evidence that Colorado officials' object in issuing the Amended Public Health Order is "to infringe upon or restrict practices because of their religious motivation[.]" *Church of the Lukumi*, 508 U.S. at 533. Courts may determine a decisionmaker's "object from both direct and circumstantial evidence." *Id.* at 540. "Relevant evidence includes, 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.*

High Plains has presented no evidence, and presents none here, that Colorado issued the Amended Public Health Order because of its (or any house of worship's) religious motivation. *Compare Church of the Lukumi*, 508 U.S. at 540–41 ("That the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice, is revealed by" the events and statements

of public officials preceding the ordinances enactment.). Rather, the continuing persistence of COVID-19 in Colorado and the language of the Amended Public Health Order support that its object is to curtail the spread of COVID-19.[36] *See* Ex. A at 2 ("As we continue to combat COVID-19 in our communities, continuing restrictions *to mitigate disease spread* remain appropriate…Workplace restrictions remain necessary to implement standard Distancing Requirements, cleaning standards, and other items necessary *to reduce the possibility of disease spread*.") (emphasis added).

The structure of the Amended Public Health Order further supports its neutrality. Houses of worship are treated the same, if not better, than secular establishments. *Compare Roman Catholic Diocese*, 2020 WL 6948354 at *1 (holding that "[New York's COVID-19] regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."). There is no disparate treatment of houses of worship in the Amended Public Health Order which would support that the purpose is to restrict religious practice.[37] *Id*.

High Plains goes to great length arguing that the prior orders are not neutral because Colorado leaders encouraged and failed to stop the spontaneous protests after George Floyd's death. First, the State's reaction to the June protests has no bearing on later orders enacted months later. Second, and as explained in more detail below, the evidence does not support that Colorado officials encouraged the protest to create a de facto exemption to the orders. *High Plains Harvest Church v.*

[36] There is no evidence (and High Plains fails to present any) prior to the enactment of Public Health Order 20-28 or 20-35 that suggests that the object of the prior orders was to restrict Coloradan's religious practice either.

[37] Colorado contends that there was no such evidence of disparate treatment in the prior orders either. Those orders addressed the State's interest in curtailing the spread of COVID-19 and treated houses of worship the same as establishments that posed a similar risk of viral transmission, such as movie theaters, concert halls, restaurants, bars, and other indoor establishments where the public gathers for extended periods of time.

Polis, No. 20-1280, 2020 WL 6749073, at *2 (10th Cir. Nov. 12, 2020) ("Plaintiffs point to no evidence of an affirmative state action creating such an exemption from the Orders applicable to the Protests."). Finally, large indoor gatherings present far more risk of transmission than large outdoor gatherings, including the protests. From an epidemiological perspective the two settings are not comparable.

2. The Amended Public Health Order is generally applicable.

There is no plausible argument that the Amended Public Health Order "fail[s] to prohibit nonreligious conduct that endangers [COVID-19 interests] in a similar or greater degree[.]" *Church of the Lukumi*, 508 U.S. at 543.[38]

Houses of worship in the Amended Public Health Order are subject to the same public health restrictions, such as social distancing and sanitizing, as all other critical services and critical businesses. *See* Ex. A at App'x A at 28. Unlike critical retailers, such as hardware stores, liquor stores, and bicycle shops, which are subject to a flat 50% cap, *id*. at __, and movie theaters, concert halls, restaurants, and gyms, which are subject to a variety of capacity limitations, houses of worship are no longer subject to any capacity limitation. *See id*. at __. Secular establishments in the Amended Public Health Order are subject to the same, or more restrictive, public health restrictions as compared to houses of worship.

3. The Amended Public Health Order satisfies rational basis scrutiny.

Because the Amended Public Health Order is neutral and generally applicable, it is subject to rational basis scrutiny. *Employment Div. v. Smith*, 494

[38] The State Defendants contend that the prior orders were generally applicable under *Lukumi*. The epidemiological evidence shows that houses of worship present unique risks that are not present in liquor stores or bicycle repair stores, such as extended duration of contacts, singing, and significant mixing with vulnerable populations. Houses of worship "endanger" the State's interest in curtailing COVID-19 more than dissimilar critical retailers.

U.S. at 879. The Order satisfies rational basis so long as it rationally furthers a legitimate governmental interest. *Id.*

Until a vaccine is mass produced and made available to the public, nonpharmaceutical interventions such as social distancing, wearing masks, and sanitizing remain the most effective—and indeed the only—tools available to curtail the spread of COVID-19. The Amended Public Health Order requires houses of worship to comply with certain public health restrictions like social distancing and sanitizing. *See* Ex. A at App'x A at 28. Given that these restrictions are rationally related to curtailing the spread of COVID-19, which is undoubtedly a legitimate governmental interest, the Amended Public Health Order satisfies rational basis scrutiny.

B. The Amended Order does not violate High Plains' freedom of speech or expression rights.

The First Amendment also "prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Under that Clause, a government…'has no power to restrict expression *because of* its message, its ideas, its subject matter, or its content.'" *Id.* (emphasis added). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* "Content-neutral" laws that amount to a time, place, or manner regulation of speech will be upheld as long as "they are narrowly tailored to serve a significant governmental interest, and [] leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

High Plains fails to show that any of Colorado's public health orders, let alone the Amended Public Health Order, are content-based laws subject to strict

scrutiny. If anything, the Amended Public Health Order is a content neutral time, place, or manner restriction that satisfies intermediate scrutiny.

1. The Amended Public Health Order is content neutral.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Courts should first consider whether a regulation of speech "'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. If a law is facially content based, the analysis ends and the law is subject to strict scrutiny. *Id.* at 163–64. A law may also be facially neutral, but a content based regulation of speech if the law "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message the speech conveys.'" *Reed*, 576 U.S. at 164 (citing *Ward*, 491 U.S. at 791).

High Plains presents no evidence that any of Colorado's public health orders, let alone the Amended Public Health Order, were enacted because of disagreement with the message religious speech conveys. High Plains cites no public statements in which Colorado public officials target or blame houses of worship for the spread of COVID-19. *Compare Roman Catholic Dioceses*, 2020 WL 6948354, at *1 ("As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the 'ultra-Orthodox [Jewish] community.'").

High Plains also presents no evidence that the orders facially draw distinctions based on the message an establishment presents. The limitations in the orders as applied to indoor events, outdoor events, houses of worship, and restaurants do not change based on the message the establishment conveys. The

limitations apply to all settings without distinction based on speech. Thus, the public health orders are not facially content based.

The orders are also not facially neutral, content based regulations of speech. The orders are readily justified with no reference to the content of speech. *Reed*, 576 U.S. at 164 (citing *Ward*, 491 U.S. at 791). One of the purposes of the orders is to limit gathering sizes in public establishments where Coloradans congregate for extended periods of time. This is true regardless of the establishment's message.. Limiting gathering sizes to slow the spread of a virus that is mainly transmitted via respiratory droplets from person to person is easily justified without reference to the content of any speech.

Finally, and as noted above, there is no evidence that Colorado officials adopted the orders "because of disagreement with the message" religious speech conveys. *Id*. And, indeed, they did not.

2. The Amended Public Health Order satisfies intermediate scrutiny.

The Amended Public Health Order is a constitutional time, place, and manner restriction because it is "narrowly tailored to serve a significant governmental interest, and [] leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. 781, 791 (1989).

"So long as the means chosen are not substantially broader than necessary to achieve the government's interest…the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id*. at 798.

The restrictions placed on houses of worship in the Amended Public Health Order satisfy the narrowly tailoring prong.[39] First, curtailing the spread of COVID-19 would be achieved less effectively if houses of worship were not subject to social distancing or sanitizing requirements. Documented outbreaks have occurred in houses of worship, and it is highly likely that more would occur if they are not subject to any public health restrictions. Second, the Amended Public Health Order is not substantially broader than necessary. Houses of worship are subject to fewer public health restrictions than those for movie theaters, concert halls, and restaurants, which remain subject to explicit capacity limitations. Moreover, High Plains effectively conceded that measures like social distancing and sanitizing are not overly broad when it swore in its verified complaint that it would comply with them. Applicants' Ex. E at ¶ 43.

The Amended Public Health Order also leaves open alternative channels for communication. In addition to in-person services with social distancing, the Amended Public Health Order permits houses of worship to hold online services, drive-in services, or outdoor services. Colorado officials do not suggest that these alternative channels of communication are one-size-fits-all. Every Coloradan exercises their religious practices differently, and some Coloradans may not have access to a car for a drive-in service or a computer and internet for an online service. Some Coloradans might not consider an online service to be an ample alternative to in-person services. But, in fact, the Amended Public Health Order allows for a number of alternatives that houses of worship may use in addition to or in lieu of in-person services.

[39] State Defendants contend that the prior orders would satisfy the narrowly tailoring prong as well. Without the capacity limitations in the previous orders, curtailing the spread of COVID-19 would be achieved less effectively. The restrictions were also not broader than necessary given the unique risks of transmission houses of worship present.

3. Colorado did not create a *de facto* exception for protests.

High Plains next argues that Colorado violated its rights of free expression when it either encouraged, or failed to disperse, the June protests over the death of George Floyd. Although not entirely clear, High Plains' First Amendment argument appears to be an underinclusivity argument based on its invocation of *Soos v. Cuomo*.[40] No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020).

"Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (emphasis in original). "Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Id*. "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Id*. The Court has "accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id*.

High Plains' underinclusivity argument fails for many reasons. First, High Plains fails to explain how outdoor protests affected Colorado's interest in curtailing the spread of COVID-19 in a comparable way to indoor gatherings. Colorado's State Epidemiologist presented uncontroverted evidence to the district court that risk of transmission is over 18 times more likely in indoor environments than outdoor environments. *See* Applicants' Ex. G at ¶¶ 36-42. The district court correctly held

[40] In *Soos*, the district court held that a law is subject to strict scrutiny if it is substantially underinclusive such that it regulates religious conduct while carving out an exception for and failing to regulate secular conduct like protests. 2020 WL 3488742 at *9–10. After the protests subsided, the *Soos* court upheld New York's revised COVID-19 executive orders as constitutional. *Soos v. Cuomo*, No. 120CV651GLSDJS, 2020 WL 6384683 (N.D.N.Y. Oct. 30, 2020). The protests did not factor into that decision. *Id*.

that "there is no evidence in the record that would support a finding that the outdoor protests are 'comparable secular gatherings' to the indoor, in-person church services Plaintiffs seek to provide." *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 3263902, at *2 (D. Colo. June 16, 2020). And it correctly held that there is a "myriad of differences between the protests and Plaintiffs' desired services (including indoor vs. outdoor, emergency vs. less exigent circumstances being faced by law enforcement, and other distinctions)." *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 4582720, at *2 (D. Colo. Aug. 10, 2020).

Second, High Plains fails to present evidence that the public statements of Colorado officials encouraged the protests in a manner that changed the language of the public health orders in any way. The prior orders limited all public and private gatherings to no more than ten individuals except for purposes expressly permitted in the orders themselves. Spontaneous mass protests were not expressly permitted in the previous orders and are not expressly permitted in the Amended Public Health Order. The Tenth Circuit correctly recognized that public statements expressing sympathy for protests do not change the language of the orders or create an exemption to the orders:

> [High Plains'] contention rests on public comments by Governor Polis and a guidance document issued by CDPHE regarding the Protests. But the Governor's statements did not nullify the otherwise neutral and generally applicable Orders. *See Ill. Republican Party v. Pritzker*, 973 F.3d 760, 770 (7th Cir. 2020) (holding that a governor's "press release expressing sympathy for the protests[,] ... untethered to any legislative or executive rule-making process, cannot change the law"). Plaintiffs point to no evidence of an affirmative state action creating such an exemption from the Orders applicable to the Protests.

High Plains Harvest Church v. Polis, No. 20-1280, 2020 WL 6749073, at *2 (10th Cir. Nov. 12, 2020).

Finally, it is unclear how Colorado's response to protests in June, under now-expired and superseded public health orders, affects its ability to enforce its current orders today. High Plains makes no connection between the June protests and the current state of the COVID-19 landscape.

Therefore, because the Amended Public Health Order is content neutral, a constitutional time, place, and manner restriction, and the State did not create a de facto exemption, High Plains fails to show it is indisputably clear that it is likely to succeed on the merits of its First Amendment free speech or expression claims.

III. The remaining factors do not warrant relief.

As High Plains recognizes, whether to grant an injunction in constitutional cases often turns on the merits factor. Because High Plains has not shown 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), the Court need not address any of the remaining injunctive factors. But even if the Court does, High Plains fails to satisfy its burden.

A. High Plains does not face irreparable harm under the Amended Public Health Order.

Under the Amended Public Health Order, High Plains will not face a deprivation of any First Amendment freedoms. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). High Plains is not subject to any capacity limitation and it may hold in-person services without fear of prosecution for violating a capacity limitation. High Plains has also conceded in its Verified Complaint that it will comply with the social distancing and sanitizing requirements. It can suffer no irreparable harm from actions it swore it would voluntarily comply with.

B. The balance of equities and public interest factors favor denying the application.

The third and fourth factors, balance of equities and public interest, merge when the application seeks to enjoin governmental action. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Colorado amended the public health order at issue to comply with this Court's directive in *Roman Catholic Diocese* and to remove doubt from how Colorado houses of worship should operate in response to this Court's decision. Enjoining the State from enforcing now superseded orders will not provide any benefit to High Plains or the public interest. It may even muddy the waters when houses of worship look to see which restrictions apply. Moreover, Colorado is acting in good faith to ensure its orders comply with the constitutional requirements articulated by this Court. It should be permitted to do so.

CONCLUSION

High Plains' application for a writ of injunction should be denied.

Respectfully submitted,

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