No. 20A-

IN THE

Supreme Court of the United States

DENVER BIBLE CHURCH, *et al.*,

Applicants,

v.

GOVERNOR JARED POLIS, *et al.*,

Respondents.

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

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

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QUESTIONS PRESENTED

1. Whether review of a disaster emergency statute that exempts certain non-religious activities but does not exempt closely comparable religious activities requires strict scrutiny under *Tandon.*

2. Whether government met its burden of proof without tendering evidence that secular activities pose less of a statutory danger of "imminent" and "widespread death or injury" than do comparable activities by houses of worship;

3. Whether *Jacobson v. Massachusetts* can be used to foreclose even fundamental rights, including religious exercise or do reasons in history exist to overrule *Jacobson* and *Buck v. Bell*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the church Applicants state that they are Colorado nonprofit corporations with no parent companies or stock.

PARTIES

Applicants are Denver Bible Church, Pastor Robert A. Enyart, Community Baptist Church, and Pastor Joey Rhoads. They are appellants in Tenth Circuit case number 20-1391 and plaintiffs in a case still pending in the United States District Court for the District of Colorado.

Respondents are Jared Polis in his official capacity as governor for Colorado, Jill Hunsaker Ryan in her official capacity as executive director of the Colorado Department of Public Health and Environment ("CDPHE"), together with CDPHE itself ("State Respondents" or "the government"). Respondents are the State Defendants in the district court, and appellees in the Tenth Circuit case, described above.

Not parties to this Application are federal parties who are defendants in the district court and appellees in the Tenth Circuit case, described above.

DECISIONS BELOW

1. Tenth Circuit: 20-1391. An order denying Applicants' motion for injunction pending appeal was entered April 19, 2021, attached as Exhibit E, and a

previous order denying the same relief was entered March 24, 2021, attached as Exhibit C.

2. Tenth Circuit: 20-1377. State Respondents' appeal and motion for injunction pending appeal were both voluntarily dismissed on December 23, 2020. A copy of the order is attached as Exhibit B.

3. District of Colorado: Suit for declaratory and injunctive relief, 1:20-cv-02362-DDD-NRN, is still pending, subject to voluntary stay orders and a pending motion to dismiss by Federal Defendants. An order denying a renewed motion for injunction pending appeal was entered March 28, 2021, copy attached as Exhibit D. An order of preliminary injunction was granted in part and denied in part, October 15, 2020. A copy is attached as Exhibit A.

JURISDICTION

Applicants' interlocutory appeal is pending in the Tenth Circuit pursuant to 28 U.S.C.§1292. This Court has jurisdiction under 28 U.S.C. §1651.

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Associate Justice of the United States Supreme Court and
Circuit Justice for the Tenth Circuit:

With respect to government regulations treating "any comparable secular **activity** more favorably than religious exercise," this Court reiterated the rules in *Tandon v. Newsom*, 593 U.S. __ (April 9, 2021) (*per curiam*) (slip op. at 1, emphasis added). The Ninth Circuit erred in failing to grant an injunction pending appeal and in also failing to apply strict scrutiny to mandates that were not neutral and not generally applicable to both religious and secular activities. "California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny." *Id.* (slip op. at 4).

Likewise, the Tenth Circuit erred[1] by failing to apply strict scrutiny to sweeping exemptions in Colorado's disaster statute, CDEA,[2] under which favored activities are exempt from mandates arising from CDEA but which mandates apply to houses of worship engaging in comparable activities. CDEA's facial exemptions, although arguably neutral as to religion, are not generally applicable and therefore require strict scrutiny. Applicants do not claim that fire fighters or police, exempted

[1] Conceivably the appellate court, due to timing, missed the *Tandon* decision, issued on Friday, April 9, 2021. Even though Applicants submitted a copy of the slip opinion to the panel on Friday April 16, 2021, under Rule 28(j) Fed. R. App. P., the panel's ruling was issued Monday, April 19, 2021, without referring to *Tandon.* The district court's opinion was issued March 28, 2021, prior to *Tandon.*

[2] Colorado Disaster Emergency Act, C.R.S. §24-33.5-701 *et seq.*, portions of which are attached as Exhibit F.

by CDEA, are comparable to churches. Rather, churchgoers and others working in these fields, or in "news and commentary" or involved in "labor disputes," are exempt from mandates up until arriving at the church doors. CDEA's exemptions allow secular groups to gather in any number, refrain from mask requirements, for sanitizing and six-foot distancing, and to cough and sneeze as they wish. The statutory exemptions make no sense in the context of a virus because "[t]he state cannot 'assume the worst when people go to worship but assume the best when people go to work.'" *Tandon* (slip op. at 3).

The Tenth Circuit also erred by upholding less-than-strict-scrutiny for the ever-changing CDEA-based mandates themselves that prohibit Free Exercise rights. These rules impose upon Applicants, as shown in affidavits, a continuing fear of police arresting worshippers/pastors and shutting down the churches. This fear is not lessened by finding some restrictions to be neutral and "seemingly mild"[3] because the heavy hand of enforcement exists even for the mildest mandates.

Strict scrutiny would show, first, that the statutory exemptions, as well as the mandates, are not narrowly tailored with respect to CDEA's "compelling state interest" to avoid "imminent threat of widespread . . . loss of life . . ."[4] and that the

[3] The district court, in looking only at the mandates, upheld "more frequent cleaning and sanitization of high-touch areas" as "neutral and generally applicable restrictions." Ex D at 8.

[4] C.R.S. §24-33.5-703(3) and (3.5).

government failed to meet its burden of proof. "The government has the burden to establish that the challenged law satisfies strict scrutiny." *Tandon* (slip op. at 2).

Strict scrutiny reveals a second problem. Applicants contended[5] that, if the mandates against houses of worship lack authority[6] under the Colorado Constitution's "mode of worship" protection,[7] they lack a compelling interest by lacking any legal interest whatsoever. Applicants cited 28 U.S.C. §1367(a), the *Osborn Doctrine*[8] and *Ex Parte Young*[9] for the district court's jurisdiction inasmuch as the mandates' lack of legal authority under the Colorado Constitution is an issue intertwined with determining a compelling state interest, or lack of it, with respect to the mandates, to CDEA's exemptions, and to Applicants' RFRA claim against federal agencies[10] aiding and abetting Colorado's church lockdowns with billions in aid in support of those lockdowns. *See* 3Apx629[13] *motion* and 6Apx1647-48 *reply*.[11] The district court, however, rejected the claim that the mandates lack legal

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[5] 3Apx648, 652[13] *motion.*

[6] In *Ritchie v. Polis*, 467 P.3d 339, ¶18 (July 1, 2020), the Colorado Supreme Court held that CDEA does not authorize Polis to suspend the Colorado Constitution.

[7] Colo. Const. art. II § 4.

[8] 6 Axp 1647 [106]; *Osbourn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204 (1824).

[9] 209 U.S. 123 (1908); 3 Apx629 [13].

[10] The district court denied injunctive relief against the federal agencies, whose motion to dismiss is fully briefed and awaiting decision by the district court.

[11] Applicants' original motion for preliminary injunction argued: "Under the doctrine of *Ex Parte Young*, the Eleventh Amendment does not bar suits against state officials for prospective equitable relief to end continuing violations of federal law. *Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1232 (10th Cir. 2004) (upholding suit

authority under state law, citing Eleventh Amendment immunity, even though Applicants only seek declaratory and injunctive relief against persons in their official capacities.

A third problem in the lower courts' failure to employ strict scrutiny is that, in Applicants' physically small church facilities, the six-foot distancing mandate prevents members from gathering, as allowed by a separate capacity mandate, at an equal level allowed for physically larger secular groups, namely, the lesser of 50 people or 50% capacity. Despite *Tandon's* clear instruction to apply strict scrutiny to unequal treatment of comparable activity, the lower courts failed to do so.[12]

Applicants respectfully request this Court's injunction pending appeal to be directed against the issuance or enforcement of any CDEA-based executive or public health orders that in any way prohibit the free exercise of religion,[13] and in the alternative, the grant of writ of *certiorari* for the issues raised herein. If CDEA is unconstitutional on its face or as-applied to Applicant, the government's only

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for declaratory and injunctive relief against chancellor and provost in their official capacities). A federal district court errs to dismiss a claim because a state's supreme court has not yet passed on a question. *Doud v. Hodge*, 350 U.S. 485, 487 (1956). Notably, the Colorado Supreme Court has determined that Polis has no authority to violate the Colorado Constitution under CDEA. *Ritchie v. Polis*, 467 P.3d 339, 345 (Colo. 2020).

[12] Ex A at 29, finding as "neutrally applicable" the social distancing mandate.

[13] The district court denied injunctive relief against "neutral and generally applicable restrictions," Ex A at 8, after finding "[CDEA] does not facially discriminate against religious exercise." *Id.* at 4.

remaining argument upon which to uphold church lockdowns is *Jacobson v. Massachusetts*,[14] discussed *infra*.

STATEMENT OF THE CASE

A. Facts Relevant to Questions Presented

1. Likelihood of Success on the Merits

a. CDEA burdens religious exercise. No dispute exists that CDEA, facially and through government-issued EOs and PHOs,[15] burdens Applicants' religious exercise. The issue is whether strict scrutiny or a rational basis test is required to examine the claims at bar. The district court found, generally, that the government's mandates restrict gathering size at churches, require sanitizing high-touch surfaces, require face masks and a six-foot distance between non-household members in certain places. Ex A at 5-6. These mandates' interference with Applicants' religious exercise or mode of worship is expressed in a dozen affidavits, Ex G, *summary*, and briefly highlighted as follows:

Rhoads is the pastor of Community Baptist Church in Brighton, Colorado ("CBC"). 2Apx549[1-36]¶1. CBC's ordinary attendance would be 115 persons or 140 persons for holidays. 6Apx1327[56]¶B2, *resp*. But the six-foot social distancing

[14] 197 U.S. 11 (1905).

[15] Defendant Polis issues executive orders ("EOs"); Defendant Hunsaker-Ryan issues public health orders ("PHOs") on behalf of herself as head of the agency, CDPHE. These orders are sometimes referred to herein as mandates or, only by way of analogy, as regulations.

order limits CBC's attendance to 20-40 people, due to the physical size of the worship space. *Id*.¶A1.Thus, CBC lacks equal protection under the 50-person or 50% capacity orders applicable to secular groups because the social distancing order limits CBC's attendance to 20-40 people rather than so allowed to secular groups. Pastor Rhoads attests that mandatory social distancing also burdens CBC's ability to carry out its meal distribution ministry feeding up to 2400 people per week. The mandate also burdens his pastoral counseling duties and adds to his personal stress level by adding to his responsibilities. 5Apx1340[56-2], Rhoads.

Pastor Enyart, since January 2000, has served in his role at Denver Bible Church in Wheat Ridge, Colorado ("DBC"). Enyart first learned about government mandates concerning the Covid-19 virus through news reports. 2Apx544[1-35]¶1-2. Enyart felt the church was being forced to stop, and it did stop, all in-person worship and fellowship events such as church dinners. *Id.* ¶6. It also stopped all children's ministries and Sunday school, even though children are at minimal risk. *Id.* ¶7

DBC's ordinary Sunday attendance would be 75-80 persons, or 100 persons attending for holidays. 5Apx1337[56-1]¶4, Enyart. But the six-foot social distancing mandate limits DBC's attendance to 24-36 people rather than 50 allowed to secular groups. *Id.* 1336¶2. This limit is due to the physical size of the worship space in conjunction with the six-foot social distancing mandate. Thus, DBC lacks equal protection under the 50-person or 50% capacity mandate applicable secular groups

because the social distancing mandate limits DBC's attendance to 24-36 people. *Id.* 1336¶3.

Affiant Isabel Wagner attends CBC and attests that worship is an "essential part of our family's life." 5Apx1362[56-8¶3. She also attests: "Services with social distancing prevent many components of our pre-shutdown services. including baptisms, praying by the laying on of hands. standing and sitting shoulder-to-shoulder with my fellow worshippers, and receiving holy communion according to our custom." 5Apx 1364[56-8]¶11.

b. CDEA's exempted activities are not subject to mandates/regulations. On its face, CDEA grants broad, undefined exemptions for "news or comment on public affairs,"[16] "labor disputes,"[17] and "police, fire fighters, armed forces of the United States and any personnel thereof when on active duty."[18] The district court did not address the "generally applicable" requirement for avoiding strict scrutiny. Rather, it held: "The statute contains no provision that, on its face, discriminates against religion,"[19] The district court twice considered but rejected[20] Applicants' argument that *Smith's*[21] rational basis test was not controlling

[16] C.R.S. §24-33.5-702(2)(b).
[17] C.R.S. §24-33.5-702(2)(a).
[18] C.R.S. §24-33.5-702(2)(c).
[19] Ex A at 19, *order dtd 10/15/20.*
[20] *Id*., at 6-7.
[21] *Empl. Div. v. Smith*, 492 U.S. 872 (1990).

and that strict scrutiny was required under *Lukumi*,[22] *Cantwell*,[23] and the persuasive reasoning of a Seventh Circuit case.[24] The appellate panel simply held without analysis that Applicants are "not likely to succeed on the merits." Ex E, *order dtd 4/19/21*.

c. As applied through executive and public health orders, the government favors even more groups than CDEA facially exempts. No dispute exists that government regulations in the form of EOs and PHOs favor secular groups and activities, even beyond those facially exempted by CDEA. The government admits it favors "a range of commercial and nonreligious activities" including, for example, "marijuana dispensaries, liquor stores, hardware stores, laundromats, banks, law offices, and accounting offices." [25] In partially granting injunctive relief as to mask mandates and capacity limits, but without using strict scrutiny to review CDEA's broad exemptions from mandates entirely, the district court still recognized that "neither the state nor the court is empowered to declare that [transmission risks allowed for dining out, schools, critical retailers and the like]

[22] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).
[23] *Cantwell v. Connecticut* 310 U.S. 296 (1940).
[24] *Listecki v. Official Committee of Unsecured Cred.*, 780 F.3d 731 (7th Cir. 2015).
[25] The admissions pertained to Governor Polis' order, EO D 2020 044 and Director Ryan's order, PHO 20-28 (Eighth Amended), and were made in *High Plains Harvest Church v. Polis et al*., Case No. 1:20-cv-01480-RM-MEH, 2020 WL 4582720 at *2 (D. Colo. Aug. 10. 2020), *vacated and remanded*, 141 S. Ct. 527 (2020), ECF 25, Defs Resp, p. 17; ECF 48, Defs Resp, p. 8 and p. 2, n.1 (incorporating ECF 39).

are worth taking while the risks associated with Plaintiffs' religious exercise are not."[26]

d. *Tandon* requires strict scrutiny review of CDEA. *Tandon* holds that "comparability" of unequally-restricted activities "must be judged against the asserted government interest that justifies the regulation at issue." *Tandon* (slip op. at 2). The lower courts did not employ strict scrutiny to consider that CDEA leaves "appreciable damage to [its] supposedly vital interest" by granting broad exemptions for labor disputes, news and commentary, fire fighters, police and service members from six-foot distancing and gathering restrictions while Applicants are not exempted.

2. Irreparable harm

The district court found that Plaintiffs are likely suffering from irreparable harm. Ex D at 8, *order dtd 3/28/21*. In further support, Applicants' affidavits attest that members fear punishment while they worship while other members' worship is chilled altogether. 5Apx1352[56-4]¶6. Pastor Enyart attests: "Our fear of persecution for violating the government's orders is very real, considering what was done to my friend, Jack."[27] 2Apx546[1-35]¶13; 4Apx1018[45-2]¶13. DBC's

[26] Ex D at 43, *order dtd 10/15/20*

[27] Jack Phillips, owner of the bakery in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 584 U.S. _, 138 S. Ct. 1719 (2018).

member, Leslie Hanks, testifies: "[T]he fear of being punished just for incorrect social distancing is a continuing source of stress." 2Apx1354[56-5]¶5. CBC's member, Stirling Walker attests: "I attend church while wondering if we will be shut down, fined, or even arrested for violating some aspect of a governmental order having to do with capacity limits, mask wearing, social distancing, cleaning/sanitizing, or any other requirement." 5Apx1358[56-6]¶7.

3. The balance of equities favors Applicants.

The district court suggested that, if Applicants showed that the factors above tip decidedly in their favor, an injunction would be granted. In fact, Applicants have showed that the factors above are undisputed and in their favor. As such, according to the district court, they "need only show that they have raised 'questions so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" Ex D at 7, *citing Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003).

Because the district court failed to examine CDEA and its sweeping exemptions using strict scrutiny, the court failed to apprehend that the statutorily exempted activities encompass the same or comparable activities as Applicants' activities. The district court erred because it only "compared" Applicants' activities with activities of the mandates' list of "critical businesses,'" not the statute's exempted activities. Ex A at 43; 6Apx1448[65], *order*.

4. No evidence exists of harm to the public interest.

Although "[t]he government has the burden to establish that the challenged law satisfied strict scrutiny," *Tandon* (slip op. at 2), in the case at bar, the government has not asserted that "attendance at the applicants' services has resulted in the spread of the disease" nor shown that "public health would be imperiled if less restrictive measures were imposed." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S.__ 141 S. Ct. 63, 68 (2020). Here, "less restrictive" measures requires CDEA to be declared void, at least as to houses of worship. In the case of a virus, no rational basis exists, much less a compelling interest, to allow secular activities more favorable treatment than religious ones. In a similar vein, the district court held: "If the public interest is served by allowing diners to unmask while eating in a restaurant, it is similarly served by allowing Plaintiffs to do the same in church. The public has an interest in preserving constitutional rights." Ex A at 43; 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). By the same reasoning, since CDEA fully exempts first amendment activities like the free press (news and commentary) and free assembly (those involved in labor disputes), those who, like pastors and chaplains, respond to emergencies, the public interest is also served by exempting houses of worship.

B. Relevant procedural history.

Suit for declaratory and injunctive relief was filed August 9, 2020, arising from Colorado's disaster emergency statute, CDEA. The complaint challenges the statute, facially and as applied by mandates to houses of worship through the executive and public health orders, and includes RFRA and Stafford Act claims against federal agencies who, through federal aid, knowingly aid and abet State Respondents' wrongful actions.

The district court granted and denied partial injunctive relief. Ex A. Applicants and State Respondents appealed. State Respondents obtained a temporary administrative stay of the district court's partial injunction. Applicants unsuccessfully sought "forthwith relief from stay" both in the appellate court and in an application to this Court (not docketed). The appellate panel ordered further briefing and oral argument regarding State Respondents' motion for injunction pending appeal. After this Court's ruling in *Roman Catholic Diocese of Brooklyn*, November 25, 2020, State Respondents sought and obtained voluntary dismissal of their appeal on December 23, 2020. Ex B.

After the conclusion of the government's motion and appeal, Applicants sought their own injunction pending appeal in the district court on January 2, 2021, incorporating by reference the arguments in their original motion. In filing their Opening Brief on March 10, 2021, Applicants sought the appellate court's injunction

pending appeal for lack of a ruling by the district court. A panel denied the motion March 24, 2021, to allow more time for the district court's ruling. Ex C. On March 28, the district court entered an order denying injunctive relief pending appeal, specifically denying the facial claim against CDEA as unlikely to succeed. Ex D. On April 2, 2021, Applicants again asked the appellate court for an injunction pending appeal, specifically as to the facial claim against CDEA.

On April 9, 2021, this Court decided *Tandon v. Newsom* on issues relevant to this Application, particularly on the issue of applying strict scrutiny.

On April 19, 2021, an appellate panel denied Applicants' motion without reference to *Tandon* regarding both as-applied and facial claims against CDEA, simply stating the claims were unlikely to succeed on the merits.

REASONS FOR GRANTING THE APPLICATION

A. 28 U.S.C. §1651(a) – All Writs Act Standard of Review.

An individual justice or the full Court has authority to issue an injunction under the All Writs Act, 28 U.S.C. § 1651(a) when circumstances are "critical and exigent," the legal rights at issue are "indisputably clear," and injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). A circuit justice or the full Court may also grant

injunctive relief "[i]f there is a 'significant possibility' that the Court would grant certiorari 'and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted.'" *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal).

A "fair prospect" exists in the case at bar case by virtue of the Court's decisions in substantially similar cases. *Tandon, supra*, and *Roman Catholic Diocese of Brooklyn, supra*. The matter is critical and exigent because Applicants have been denied their First Amendment right of free exercise even though they have diligently sought relief from CDEA since August 2020, but achieved only partial relief from the district court. In addition, Applicants have met the standard for preliminary injunction cited by the lower courts, *Winter v. Nat. Res. Def. Counsel, Inc*., 555 U.S. 7, 20 (1987), requiring (1) likelihood of success on the merits, (2) likelihood of irreparable harm, (3) a balance of equities in favor of Applicants, and (4) an injunction is in the public interest.

B. A disaster emergency statute that exempts certain non-religious activities but does not exempt closely comparable religious activities requires strict scrutiny under *Tandon.*

1. On its face, CDEA is not generally applicable

The district court's description of the mandates as being a "moving target"[28] emphasizes the importance of reviewing CDEA, facially, under strict scrutiny. The mandates themselves arise from CDEA. They shift geographically from one political subdivision to the next and grant more favorable treatment, beyond CDEA's exemptions, to those situated in different counties. The district court considered only mandates "currently in effect." [29] They were, thus, not the same mandates as when suit was filed nor when the district court issued its two rulings several months apart. Still, the mandates are based upon the statute and are subordinate to its plain language in carrying out the government's draconian lockdown strategy.

Facially, CDEA exempts many tens of thousands of Coloradans in broadly-described groups while punishing religious exercise. *Tandon* holds that "comparability" of unequally-restricted activities "must be judged against the asserted government interest that justifies the regulation at issue." Slip op. at 2 (emphasis added). Whatever the government interest, it is negated by CDEA's

[28] Ex A at 6, fn 8, *order.*
[29] *Id.*

exemption for large swaths of the population. The statute's exemptions for certain activites become the "comparator" for reviewing mandates that apply to those engaged in religious exercise.

"A law burdening religious practice that is either not neutral or is not of general application must undergo the most rigorous scrutiny. To satisfy the command of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order,' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (holding that laws targeting religion will rarely survive strict scrutiny). Although, CDEA's language does not "target" religion in violation of the test of "neutrality," as did the ordinance in *Lukumi,* a second test exists: the test of general application. CDEA fails the test of "general application" because it facially classifies hundreds of thousands of Coloradans as being exempt.

A law need not single out religion nor exhibit a hostile animus to violate the Free Exercise Clause. "The First Amendment does not refer to the purposes for which legislators enact laws, but to the **effect of the laws** enacted[.]" *Lukumi,* 508 U.S. at 558 (emphasis added) (Scalia, J. and Rehnquist, C.J., concurring). "[T]he fact that allegedly harmful conduct falls outside the statute's scope belies a government assertion that it has genuinely pursued an interest 'of the highest order.'" *Id.* at 578 (Blackmun, J. and O'Connor, J., concurring). A compelling government

interest may not be described in "very broad terms, such as promoting the 'public health' and 'gender equality.'" *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 726 (2014). Instead, the government is required to demonstrate "that the compelling interest test is satisfied through application of the challenged law 'to the person' – **the particular claimant** whose sincere exercise of religion is being substantially burdened." *Id.* (emphasis added). Furthermore, the "least-restrictive-means standard is exceptionally demanding." *Id.*at 728. CDEA's nebulous exemptions negate any supposed compelling interest to violate the rights of these particular two hundred or so Applicants. "The absence of narrow tailoring suffices to establish the invalidity of [CDEA]." *Lukumi*, 508 U.S. at 546.

2. The government failed to meet its burden of proof requiring a preponderance of evidence that secular activities pose less of a statutory danger of "imminent" and "widespread death or injury" than do comparable activities by houses of worship.

The lower courts violated *Tandon*'s burden of proof requiring a preponderance of evidence that the "religious exercise at issue is more dangerous than those [exempted] activities even when the same precautions are applied." *Id.* at 2. This quote from *Tandon* sparks the question: "more dangerous in causing what?" The answer is: in causing or exacerbating a "disaster emergency." The statute defines many terms. A "disaster" means "the occurrence or imminent threat of

widespread or severe damage, injury or loss of life or property."[30] Decisional law defines "imminent" to mean an impending injury requiring immediate action.[31] CDEA defines "emergency" as requiring an "unexpected event" and an "immediate response"[32] in an "emergency epidemic" involving a "highly fatal infectious agent."[33]

In short, the government's "compelling state interest" is contained in CDEA's tightly-written text, It is not the district court's highly generalized view to "limit the spread of COVID-19," Ex D at 8, *order dtd 3/28/21*. Rather, the statute's language states a much narrower aim regarding an "unexpected event" requiring "immediate action" due to "imminent threat" of "widespread injury or loss of life" from a "highly fatal infectious agent." The district court failed to find that CDEA's exemptions for activities comparable to, or the same as, Applicants' activities are both narrowly tailored and the least drastic means to accomplish CDEA's carefully-crafted aims. Instead, the lower courts resorted to a "high level of generality"[34] to uphold the

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[30] C.R.S. §24-33.5-703 (3).

[31] *See People v. Brante,* 232 P.3d 204, 14-15 (Colo. App. 2009) (speculative fears did not rise to the level of an impending injury requiring immediate action to prevent the occurrence of an "imminently impending injury*"); see also People v. Handy,* 603 P. 2d 941, 943 (1979) ("The threats must be shown to be definite, specific and imminent; mere speculation is not enough").

[32] C.R.S. §24-33.5-703(3.5).

[33] C.R.S. §24-33.5-703(4).

[34] Similarly, under *White v. Pauly*, 137 S. Ct. 548, 552 (2017), a claimant cannot overcome qualified immunity by asserting at a "high level of generality" the existence of "clearly established law."

statute's facial discrimination against houses of worship despite CDEA's lack of general applicability to all persons.

The factual basis for a government-declared emergency is subject to judicial review. *See Chastleton Corp. v. Sinclair,* 264 U.S. 543, 548 (1964) ("In our opinion it is open to inquiry whether the exigency still exists upon which the continued operation of the law depended"); *see also Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 442 (1934) ("[W]hile the declaration by the legislature as to the existence of the emergency was entitled to great respect, **it was not conclusive [and] a law 'depending upon the existence of an emergency** or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.'" (emphasis added), *citing Chastleton*. Notably, in Colorado, the legislature did not declare the emergency at issue here.

Inasmuch as CDEA is not generally applicable, the district court's key error was in failing to review CDEA under strict scrutiny.[35] By comparison, an across-the-board criminal statute prohibiting non-prescription narcotics **is** a law of general

[35] In the case at bar, CDEA was enacted in a way that not only burdens religion, but also violates Applicants' rights of speech, assembly, association and due process. The *Motion PI* reserved for trial, 4Apx968[45]*resp*, these other claims under the First Amendment. *See* 1Apx15[1]¶2*cmpl* (gathering, speaking, praying, baptizing, displaying facial expressions of human emotions, singing, standing, embracing, shaking hands, conducting marriages, funerals, ordination and communion services) and ¶¶28a, 28c, 50, 54, 55a, 66, 66b, 66c, 107,108, 144 and 146.

application inasmuch as it does not exempt certain groups of people. *See Employment Div. v. Smith,* 494 U.S. 872 (1990).

CDEA classifies the rights of hundreds of thousands of Coloradans as superior to freedom of religious exercise. Inasmuch as First Amendment rights are fundamental rights, "classifications in terms of the ability to exercise those rights are subject to strict judicial scrutiny." Ronald D. Rotunda and John E. Nowak, 4 Treatise on Constitutional Law §18.40 (Westlaw 2020). The authors cite the case of an ordinance classifying some groups as approved for school picketing while disapproving others. "[I]n this case the Court specifically found that where statutory classifications affected conduct within the protection of First Amendment rights, it would be inappropriate to review them under traditional rational basis standards of the equal protection guarantee." *Id., citing Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972).

Ironically, the district court excused the exemption for "news or comment on public affairs"[36] based on the First Amendment's Free Speech Clause. 6Apx1424[65] *opin.* The district court's rationale is error because it elevates news groups' First Amendment rights over churches' First Amendment rights and does not meet strict scrutiny in the context of a virus. The exemption is nebulous due to untold thousands of arm-chair commentators on social media[37] and large numbers

[36] C.R.S. §24-33.5-702(2)(b).
[37] *See* column titled "Dozens of New Websites Claiming to Be Colorado Newspapers Pop Up On line."

of people encompassed by CDEA's loosely described "news and comment" exemption. C.R.S. §24-33.5-702(2)(b). Illustrating the size of the exemption is the website for the Colorado Press Association, "a collective of more than 150 community newspapers, online news sites, and nonprofit news outlets."[38]

Likewise, the district court erred in upholding CDEA with its exemption for "labor disputes,"[39] finding that CDEA makes it inapplicable to "actions necessary to forestall or mitigate imminent or existing danger to public health or safety." 6Apx1424[65] *opin.* But notably, the word "dispute" is undefined in CDEA and does not require a formal "strike." CDEA imbues the governor with unbridled authority to decide which labor "disputes" are exempt. The governor has no such discretion regarding churches. By itself, union membership is estimated at 237,000 in Colorado.[40] Broadly construed, the exemption includes untold numbers of the opponents in any "dispute," together with both parties' employees, contractors, corporate board members, officers, attorneys, staff, etc. Labor disputes involving

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https://www.thedenverchannel.com/news/politics/dozens-of-new-websites-claiming-to-be-newspapers-pop-up-in-colorado. Last visited 2/20/21.

[38] https://coloradopressassociation.com/ Last visited February 26, 2021.

[39] C.R.S. §24-33.5-702(2)(a).

[40] "Colorado had 237,000 union members in 2019. In addition to these, another 22,000 wage and salary workers in Colorado were represented by a union on their main job or covered by an employee association or contract[.]" https://www.bls.gov/regions/mountain-plains/news-release/2020/pdf/unionmembership_colorado_20200131.pdf Last visited 2/20/21.

large groups such as a teachers' union might involve an enormous number of persons and extend for months and yet are exempted from CDEA's mandates.

Finally, the district court erred in failing to use strict scrutiny to review CDEA due to its exemptions for "police, fire fighters, armed forces of the United States and any personnel thereof when on active duty." C.R.S. §24-33.5-702(2)(c). The district court erred in ruling that the governor does not "come to control law enforcement or armed forces not within his purview," Ex A at 25; 6Apx1425[65] *opin*, inasmuch as the governor also lacks any legal "purview" over Applicants' mode of worship by reason of the Free Exercise Clause and the Colorado Constitution. Moreover, the combination of these exemptions represents an enormous number of persons statewide. Police forces are estimated at 12,069 persons.[41] Fire-fighting forces are estimated at 11,500.[42] Armed forces are estimated at 47,636.[43]

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[41] "According to the US Bureau of Justice Statistics' 2008 *Census of State and Local Law Enforcement Agencies*, the state had 246 law enforcement agencies employing 12,069 sworn police officers, about 245 for each 100,000 residents." https://en.wikipedia.org/wiki/List_of_law_enforcement_agencies_in_Colorado#:~:text=This%20is%20a%20list%20of,245%20for%20each%20100%2C000%20residents. Last visited 2/20/21.

[42] In 2016, the state had "about 11,500 firefighters…" https://www.9news.com/article/news/local/next/how-many-firefighters-live-in-colorado/7364266911#:~:text=According%20to%20the%20state's%20department,certified%20to%20fight%20wildland%20fires. Last visited 2/20/21.

[43] "As of 2017, Colorado had 47,636 active and reserve members of the military." https://www.governing.com/archive/military-civilian-active-duty-employee-workforce-numbers-by-state.html. Last visited 2/20/21.

"The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Mosley,* 408 U.S. at 101. CDEA is not narrowly tailored nor of general applicability because its broad exemptions for undefined secular groups easily total more than 300,000 Coloradans.[44] These sweeping facial exemptions negate any argument that CDEA is generally applicable. The statute's supposed secular purpose is irrelevant to the fact that, facially, it blatantly disfavors religion and requires strict scrutiny.[45] Under Fed. R. Evid. 201(f), the Court is asked to take judicial notice of the footnoted information showing that the loosely described groups exempted by CDEA amount to thousands of people. "Under the Constitution, the government may not discriminate against religion generally or against particular denominations." *Morris Cnty Bd. v. Freedom From Religion Fdn.*, 139 S. Ct. 909 (2019) (Kavanaugh, J., Alito, J., and Gorsuch, J., dissenting), c*iting Larsen v. Valente,* 456 U.S. 228, 244 (1982).

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[44] See 3Apx644¶6 *mtn PI*: "The fact that CDEA exempts thousands of people statewide within favored categories, while not exempting churches, negates the purported reasons for oppressing churches."

[45] In contrast to the need for strict scrutiny of CDEA's sweeping exemptions, a zoning ordinance "both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *See Grace United Methodist v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir. 2006) (upholding the absence of exemptions in a city zoning ordinance). CDEA does not fall into the category of generally applicable zoning ordinances and unemployment claims, where "systems" exist for "individualized exemptions." In such cases, plaintiffs must show that individualized decisions apply unequally or are improperly motivated. *Grace United,* 451 F.3d at 651.

CDEA is demonstrably flawed and should be enjoined and declared void because it remains a future threat. Under no set of circumstances can its classification system be valid in favoring hundreds of thousands of Coloradans over religious exercise.

3. CDEA, as applied, is not neutral as to Applicants.

"A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wis. v. Yoder*, 406 U.S. 205, 220 (1972). Any infringement upon a fundamental right requires strict scrutiny. *Cantwell v. Conn.*, 310 U.S. 296 (1940). In *Lukumi*, Justice Souter's concurrence pointed out that even a law "neutral on its face," under *Smith*, may nevertheless offend the Free Exercise Clause's requirement for government neutrality if the free exercise of religion is unduly burdened." *Lukumi, supra* at 565. The district court erred in failing to find that CDEA, with broad secular exemptions, as applied, violates the First Amendment in terms of social distancing requirements, orders to stay at home and sanitize. Specifically it also erred in upholding CDEA, as applied to Applicants, by finding that "the six-foot distancing requirement for non-household members in public

indoor spaces applies to houses of worship and secular institutions alike." 6Apx1426[65]*opin*.[46]

Applicants' normal attendance is drastically reduced by the six-foot social distancing order when CDEA is applied to them, due to the small size of their worship spaces. 6Apx1336¶4, 1337¶5, Enyart; 2Apx549¶1, 6Apx1339¶3. Justice Souter explained: "A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism." *Lukumi, supra* at 561 (emphasis added). "[If] the Free Exercise Clause…. safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality." 508 U.S. at 562. This Court has held: "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment, and thus beyond the power of the State to Control, even under regulations of general applicability." *Yoder*, 406 U.S. at 220.

[46] The district court incorrectly questioned whether Applicants had challenged the social distancing order. However, Applicants not only claim CDEA itself and State Defendants' orders are void as to religious freedom, but in lieu of a hearing on their *Motion PI*, 5Apx1196*minute order*, Applicants presented specific evidence against the burdens imposed by the social distancing order. 5Apx1326*resp*;1335, Enyart,1338, Rhoads.

The affidavits show that CDEA causes Applicants to have fear of punishment while they worship, and the orders deter others from worshipping altogether. 5Apx1352[56-4]¶6, Enyart, N. Pastor Enyart attests: "Our fear of persecution for violating the government's orders is very real, considering what was done to my friend, Jack."[47] 2Apx546[1-35]¶13; 4Apx1018[45-2]¶13. Leslie Hanks testifies: "[T]he fear of being punished just for incorrect social distancing is a continuing source of stress." 2Apx1354[56-5]¶5. Walker attests: "I attend church while wondering if we will be shut down, fined, or even arrested for violating some aspect of a governmental order having to do with capacity limits, mask wearing, social distancing, cleaning/sanitizing, or any other requirement." 5Apx1358[56-6]¶7.

C. *Jacobson v. Massachusetts* does not foreclose fundamental rights such as religious exercise and current and historical misuse of the opinion are reasons to overrule it and *Buck v. Bell*.

Other than CDEA, the primary legal authority for the challenged orders is the old vaccine statute upheld in the due process case, *Jacobson*. State and federal courts around the nation have upheld draconian lockdowns, citing *Jacobso*n as one-stop authority even though this Court limited *Jacobson's* reach in *per curiam* opinions. Heightened racial concerns at this time and governments' exploitation of *Jacobson*

[47] Jack Phillips, owner of the bakery in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 584 U.S. _, 138 S. Ct. 1719 (2018).

in case after case make it prudent to reconsider *Jacobson*, a source of mischief today and in the past. It was the direct source of authority for one of the eugenics movement's most notorious accomplishments, *Buck v. Bell,* 274 U.S. 200 (1927). "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Mass.*, 197 U.S. 11. Three generations of imbeciles are enough." *Buck v. Bell,* 274 U.S. 200, 208 (1927). Recent government and judicial reliance on *Jacobson* is been more than alarming because *Jacobson* so closely influenced, via *Buck*, Germany's 1933 forcible sterilization law. Germany's law was based upon United States laws,[48] making *Buck* effectively the gateway, and *Jacobson* the key, to Germany's gas chambers.[49] Heretofore, just as *Buck v. Bell* extrapolated from *Jacobson* a governmental police power to force sterilizations, it was tacitly argued that the "same principle that is broad enough to require vaccinations" is broad enough to prohibit the Free Exercise of Religion.

That parties across the country have not informed courts about *Jacobson's* history is a disturbing fact. *Jacobson* was also *Buck's* source of authority for the forcible sterilization of more than 60,000 Americans deemed to be feebleminded or

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[48] *See generally* Stefan Kuhl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism*, p. 25 (Oxford University Press 1994); Edwin Black, *The War Against the Weak: Eugenics and America's Campaign to Create a Master Race*, p. 7 (Four Walls Eight Window 2003).

[49] *See generally* Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide, p.* 26-27 (Basic Books 1986).

unfit.[50] Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History,* 72 Geo. Wash. L. Rev. 862 (Apr. 2004). At least seven states issued apologies to the many victims. Katherine A. West, *Following in North Carolina's Footsteps: California's Challenge in Compensating its Victims of Compulsory Sterilization*, 53 Santa Clara L. Rev. 301 (2013).

An incendiary quotation has been invoked at times from a decision that itself relies on *Jacobson* for *dicta* that the "right to practice religion freely does not include liberty to expose the community…to communicable disease." *Prince v. Mass.*, 321 U.S. 158, 166-67, n. 12 (1944)]. Notably, Applicants are not accused of having a communicable disease. Furthermore, *Prince* did not involve a communicable disease, but rather concerned a generally applicable statute prohibiting all children below a certain age from distributing literature on public streets. The protection of children was a lawful category. The quoted *Prince* language referencing *Jacobson* was unfortunate *dicta*. Broad language which is unnecessary to a court's decision cannot be considered to be binding precedent. *Kastigar v. United States*, 406 U.S. 441, 454-455 (1972). Dicta are "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved, nor essential to, a

[50] The United States' very sad leadership in German eugenics and forcible sterilization was referenced in Applicants original *Motion* 3Apx 642 [13] *motion.*

determination of the case in hand." *Rohrbaugh v. Celotex Corp*., 53 F.3d 1181, 1184 (10th Cir. 1995), *citing* Black's Law Dictionary 454 (6th ed. 1990).

The dissent in *Prince* invoked the burden of proof: "The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect." *Prince*, 321 U.S. at 174 "[H]uman freedoms enumerated in the First Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms **is prima facie invalid**. It follows that any restriction or prohibition **must be justified by those who deny that the freedoms have been unlawfully invaded**." *Id*. at 173 (emphasis added).

The district court, Ex A at 15, 6Apx1420[65], held: "The judiciary's role may, in fact, be all the more important in [a national emergency]. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history and --- to be clear --- 'has no place in law under the Constitution.'" (*quoting Koretmatsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)). In the case at bar, the Court is asked to overrule *Jacobson* and *Buck* with similar clarity.

D. Applicants are suffering irreparable harm.

The testimony in the record is undisputed with respect to Applicants' irreparable harm. The district court already held, as earlier mentioned, that Applicants are likely suffering irreparable harm, even as it denied an injunction pending appeal against CDEA's facial and as-applied defects. This Court recognizes that the deprivation of Frist Amendment freedoms, even for minimal periods, unquestionably constitutes irreparable harm. *Elrod v. Burns*, 427 U.S.347, 373 (1976).

E. The balance of equities favors Applicants inasmuch as lockdowns prohibiting Free Exercise of Religion raise serious, substantial, difficult and doubtful questions.

Nationwide government lockdowns, as in Colorado, directly challenge the strength of the First Amendment's Free Exercise Clause, a point this Court knows too well from the cases brought before it. The case at bar challenges the statute claimed to authorize the lockdowns, as well as the ever-changing rules emanating from it against houses of worship. To say that the issues raised here are serious, substantial, difficult and doubtful is an understatement. Having shown a likelihood of success on the merits as well as undisputed irreparable harm, the balance of equities definitely tips in favor of Applicants.

F. The public interest is served by preserving constitutional rights where no evidence exists against Applicants themselves.

As the district court held: **"**The public has an interest in preserving constitutional rights." Ex A at 43; 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). 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 or in the alternative, striking down CDEA as void because as written, it cannot be salvaged in the case of an emergency declared for a virus.

CONCLUSION

Applicants respectfully request this Court to issue an injunction pending appellate review against State Respondents, prohibiting them from issuing future CDEA-based executive or public health orders against houses of worship and from enforcing or threatening to enforce against Applicants any CDEA-based executive orders and public health orders issued on or subsequent to March 11, 2020, until further court order; and that such injunctions also bind the agents, servants, employees and attorneys of State Respondents and others included by Fed R. Civ. P.; and that the Applicants be granted such other and further relief that the Court deems just and proper.

Dated: May 3, 2021

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:20-cv-02362-DDD-NRN

DENVER BIBLE CHURCH;
ROBERT A. ENYART;
COMMUNITY BAPTIST CHURCH; and
JOEY RHOADS,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as Secretary, United States Department of Health and Human Services;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
CHAD W. WOLF, in his official capacity as Acting Secretary, United States Department of Homeland Security;
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
STEVEN T. MNUCHIN, in his official capacity as Secretary, United States Department of the Treasury;
UNITED STATES DEPARTMENT OF THE TREASURY;
GOVERNOR JARED POLIS, in his official capacity as Governor, State of Colorado;
JILL HUNSAKER RYAN, in her official capacity as Executive Director, Colorado Department of Health and Environment; and
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Defendants.

ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs in this case are two Colorado churches and their pastors. Presently before the court is their motion for a preliminary injunction [Doc. 13], in which they ask the court, among other things, to enjoin

enforcement of certain orders the State of Colorado has put in place in response to the COVID-19 pandemic.

The State rightly argues that during a public-health emergency, courts must be particularly mindful of the complex interaction between constantly evolving scientific understanding and policymaking, and the court recognizes that the decisions being made by the State Defendants here are truly matters of life and death. For the most part, the court, like Plaintiffs and the rest of Colorado's citizenry, must and does defer to State policymakers' weighing of the costs and benefits of various restrictions imposed to minimize the spread of COVID-19.

But the existence of an emergency, even one as serious as this one, does not mean that the courts have no role to play, or that the Constitution is any less important or enforceable. And while the religious, like the irreligious or agnostic, must comply with neutral, generally applicable restrictions, the First Amendment does not allow government officials, whether in the executive or judicial branch, to treat religious worship as any less critical or essential than other human endeavors. Nor does it allow the government to determine what is a necessary part of a house of worship's religious exercise. Those fundamental principles, which involve no balancing or second-guessing of public health officials' scientific analysis or policy judgments, require the court to grant Plaintiffs' motion, in relatively narrow part.

In addition to other neutral and generally applicable restrictions, Colorado currently imposes capacity limits on houses of worship that are more severe than those that apply to other so-called critical businesses whose settings pose a similar risk of COVID-19 transmission, and the State allows a variety of exceptions to its facial-covering requirement where it recognizes that removing a mask is necessary to carry out a

particular activity. The court does not doubt that the State made these decisions in good faith, in an effort to balance the benefits of more public interaction against the added risk that inheres in it. But the Constitution does not allow the State to tell a congregation how large it can be when comparable secular gatherings are not so limited, or to tell a congregation that its reason for wishing to remove facial coverings is less important than a restaurant's or spa's.

Although Plaintiffs have not demonstrated a likelihood of success on the merits of most of their asserted claims, they have demonstrated a likelihood of success on their First Amendment free exercise claim against the State Defendants. Plaintiffs have also shown that the other preliminary-injunction factors weigh in their favor as to their free exercise claim. The court therefore grants Plaintiffs' motion for a preliminary injunction in part. The State Defendants are enjoined from enforcing their Executive Orders and Public Health Orders against Plaintiffs, to the extent those orders treat houses of worship differently from comparable secular institutions. Specifically, the State Defendants are enjoined from enforcing the additional numerical occupancy limitations for worship services, and the requirement that congregants wear face masks at all times during worship services.

PROCEDURAL HISTORY

Plaintiffs' motion for a preliminary injunction seeks (1) to enjoin the State Defendants from enforcing certain orders they have issued in response to the ongoing COVID-19 pandemic; and (2) to enjoin the Federal Defendants from providing further COVID-19 disaster relief to the State

so long as the State's allegedly unlawful orders remain in effect.[1] [Pls.' Mot., Doc. 13.] Defendants have filed responses opposing the requested preliminary injunction. [State Defs.' Resp., Doc. 41; Fed. Defs.' Resp., Doc. 43.] Plaintiffs have filed replies. [Reply to State Defs.' Resp., Doc. 44; Reply to Fed. Defs.' Resp., Doc. 45.] After examining the parties' briefs, the court requested supplemental information from the parties, which they provided. [*See* Order, Doc. 49; State Defs.' Suppl. Br., Doc. 50; Minute Order, Doc. 51; Resp. to State Defs.' Suppl. Br., Doc. 56.] The court has determined that it is not necessary to hold a hearing on Plaintiffs' motion.[2]

FACTUAL BACKGROUND

On January 21, 2020, the first confirmed case of COVID-19 in the United States was diagnosed.[3] On January 31, Defendant Azar, the Secretary of Defendant U.S. Department of Health and Human Services,

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[1] For purposes of this Order, "State Defendants" means Defendants Jared Polis, Jill Hunsaker Ryan, and the Colorado Department of Public Health and Environment ("CDPHE"). "Federal Defendants" means Defendants Alex M. Azar II, the United States Department of Health and Human Services, Chad W. Wolf, the United States Department of Homeland Security, Steven T. Mnuchin, and the United States Department of the Treasury.

[2] Federal Rule of Civil Procedure 65(a) does not explicitly require that a hearing be held on a preliminary-injunction motion, and whether a hearing should be held is a matter for the court's discretion. *Carbajal v. Warner*, 561 F. App'x 759, 764 (10th Cir. 2014); *see also Reynolds & Reynolds Co. v. Eaves*, 149 F.3d 1191, 1998 WL 339465, at *3 (10th Cir. 1998) (unpublished table decision) (no 10th Cir. authority requires court to hold evidentiary hearing prior to granting or denying preliminary injunction); Local Civ. R. 7.1(h) (motion may be decided without oral argument at court's discretion).

[3] Press Release, Ctrs. for Disease Control & Prevention, *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CDC Newsroom (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html.

declared a public-health emergency in response to COVID-19 pursuant to the Public Health Service Act, 42 U.S.C. § 247d. [Azar Determination, Ex. 6 to Compl., Doc. 1-6.] On March 5, the first presumptive cases of COVID-19 were identified in Colorado.[4] On March 10, Defendant Polis, the Colorado Governor, declared a state of disaster emergency in the State pursuant to the Colorado Disaster Emergency Act ("CDEA"), Colo. Rev. Stat. §§ 24-33.5-701 to 717.[5] [EO D 2020 003, Ex. 9 to Compl., Doc. 1-9 at 2.] On March 13, President Donald Trump declared pursuant to the National Emergencies Act, 50 U.S.C. §§ 1601-51, that the COVID-19 outbreak in the United States constitutes a national emergency that had begun on March 1. [Trump Proclamation, Ex. 8 to Compl., Doc. 1-8.]

Since that time, Governor Polis and Defendant Ryan, the Executive Director of Defendant CDPHE, have issued numerous Executive Orders and Public Health Orders to slow the spread of COVID-19 in Colorado.[6] Among other things, these orders have temporarily closed certain businesses, then permitted them to reopen with precautions in place; restricted gathering sizes at numerous facilities, including churches and other houses of worship; required businesses to implement measures like cleaning and disinfecting high-touch surfaces and ensuring proper ventilation; first required, then encouraged individuals to stay at home

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[4] Press Release, Colo. Governor, *Updated Information on COVID-19*, Colo. Off. State Web Portal (Mar. 5, 2020), https://www.colorado.gov/governor/news/updated-information-covid-19.

[5] The duration of this declaration has since been extended numerous times. The most recent extension remains in effect until October 31, 2020. *See* EO D 2020 205 (Oct. 1, 2020), https://drive.google.com/file/d/1XGqnQjqwojo8QiDHchKcMQFyFWj3ynzw/view.

[6] *See* CDPHE, *All Public Health & Executive Orders*, Colo. COVID-19 Updates, https://covid19.colorado.gov/prepare-protect-yourself/prevent-the-spread/public-health-executive-orders (last visited Oct. 14, 2020).

or outdoors as much as possible, except to perform necessary activities; required individuals to wear face masks in public indoor spaces, with certain exceptions; and required individuals to maintain a six-foot distance from non-household members in certain public spaces.

Primarily at issue in this motion is Public Health Order 20-35,[7] which is the CDPHE's current implementation of the Governor's "Safer at Home" directives in Executive Order D 2020 091.[8] In Executive Order D 2020 091,[9] the Governor directed implementation of a set of protective measures dubbed Safer at Home, and eased some of the protective measures previously imposed under his "Stay at Home" Executive

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[7] 2d Am. PHO 20-35 (Oct. 8, 2020), https://drive.google.com/file/d/1wRxIxSUPE7NSQKf0wnr5P7BB2PAl9h_k/view.

[8] At the time Plaintiffs' Complaint and motion for preliminary injunction were filed, the operative CDPHE order was the Ninth Amended version of Public Health Order 20-28, issued on July 30, 2020. [Ex. 41 to Compl., Doc. 1-41.] Public Health Order 20-35 issued on September 15, 2020, and supersedes and replaces Public Health Order 20-28. [*See* State Defs.' Notice of Suppl. Auths., Doc. 55.] Public Health Order 20-35 has since been amended, and the Second Amended version is the currently operative CDPHE Safer at Home order at the time of this writing. The State Defendants have, commendably, continued to update and amend their Executive Orders and Public Health Orders as new information about the SARS-CoV-2 virus and the COVID-19 disease becomes available, and as infection rates fluctuate in the State's communities. This, however, presents Plaintiffs and the court with somewhat of a moving target. At least for purposes of assessing Plaintiffs' requested preliminary injunctive relief, the court will consider the Executive Orders and Public Health Orders that are currently in effect.

[9] EO D 2020 091 (June 1, 2020), https://drive.google.com/file/d/1gzySbpk2MWLAHzfMaABcHGTKpxxqsHw0/view; *see also* EO D 2020 199 (Sept. 19, 2020), https://drive.google.com/file/d/1j0DZnQbKvU12H_soGI0SgXyB9kUxVZON/view (extending EO D 2020 091 to Oct. 19, 2020).

Order.[10] Also at issue here is Executive Order D 2020 138 [Ex. 15 to Compl., Doc. 1-15],[11] which is incorporated by reference in Public Health Order 20-35, and generally requires individuals to wear face masks in public indoor spaces.

The Federal Defendants, for their part, have provided COVID-19 disaster relief to the State pursuant to the Stafford Act, 42 U.S.C. §§ 5121-5207, and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020). On March 25, 2020, Governor Polis requested that President Trump declare a "Major Disaster" for the State of Colorado pursuant to the Stafford Act. [Polis Letter, Ex. 37 to Compl., Doc. 1-37.] On March 28, the President granted that request. Colorado; Major Disaster and Related Determinations, 85 Fed. Reg. 31,541-02 (Mar. 28, 2020). The President's national emergency declaration and Major Disaster declaration for Colorado had the effect of authorizing the Federal Emergency Management Agency ("FEMA") to provide various forms of federal assistance to the State under the Stafford Act. *See* 42 U.S.C. §§ 5170-93. Under the CARES Act, Defendant U.S. Department of the Treasury has overseen disbursements to the State from the Coronavirus Relief Fund. *See* 42 U.S.C. § 801.

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[10] Although not applicable to the Plaintiffs in this case, some communities in Colorado are now subject to an even less restrictive set of protective measures dubbed "Protect Our Neighbors." *See* EO D 2020 127 (July 9, 2020), https://drive.google.com/file/d/16ELxn5fkAPQBlr4GX2Jf24HVuCWaPcvn/view; EO D 2020 207 (Oct. 4, 2020), https://drive.google.com/file/d/1jbrvv3M4cYi3UlSKiKe9Q9A2_348gLqs/view (extending EO D 2020 127 to Nov. 3, 2020).

[11] *See also* EO D 2020 219 (Oct. 11, 2020), https://drive.google.com/file/d/181os29EMCdptXc-XqqDAkUgTW-NvNTFv/view (extending EO D 2020 138 to Nov. 10, 2020).

Plaintiffs contend that the State Defendants issued their Executive Orders and Public Health Orders without legal authority and in violation of Plaintiffs' rights under the United States Constitution, the Colorado Constitution, the CDEA, and the Colorado Administrative Procedure Act ("APA"), Colo. Rev. Stat. §§ 24-4-101 to 204. They also contend that the State Defendants requested disaster relief funds from the federal government in violation of the Stafford Act. Finally, they contend that the Federal Defendants provided financial assistance to the State in violation of the Stafford Act and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb to 2000bb-4.

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019). One may be granted "only when the movant's right to relief is clear and unequivocal." *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018).

To succeed on a motion for preliminary injunction, the moving party must show: (1) that it is "substantially likely to succeed on the merits"; (2) that it will "suffer irreparable injury" if the court denies the injunction; (3) that its "threatened injury" without the injunction outweighs the opposing party's under the injunction; and (4) that the injunction is not "adverse to the public interest." *Mrs. Fields*, 941 F.3d at 1232; *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The third and fourth preliminary-injunction factors "merge" when the government is the party opposing the injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

If the injunction sought is of a "disfavored" type, the moving party faces a heavier burden and must make a "strong showing" that the first

and third factors weigh in its favor. *Mrs. Fields*, 941 F.3d at 1232. A disfavored preliminary injunction is one that: (1) mandates action (rather than prohibiting it); (2) changes the status quo; or (3) grants all the relief that the moving party could expect from a trial win. *Id.* Plaintiffs here seek a preliminary injunction of the third disfavored type. Their complaint seeks only declaratory and injunctive relief, and issuing their requested preliminary injunction would essentially grant them all the relief they could expect to win at trial. [*See* Compl., Doc. 1 at 34-35.] Plaintiffs must, therefore, make a strong showing on the likelihood-of-success-on-the-merits and balance-of-harms factors to succeed on their preliminary-injunction motion.[12]

DISCUSSION

I. Likelihood of Success on the Merits

Plaintiffs seek a preliminary injunction based on nine of the eleven substantive causes of action alleged in their Complaint:

> (1) the Federal Defendants' implementation of the Stafford Act and the CARES Act violates RFRA (Claim 1);
>
> (2) the State Defendants' request for and the Federal Defendants' distribution of disaster relief funds to the State violates the Stafford Act's nondiscrimination mandate, 42 U.S.C. § 5151 (Claim 2);
>
> (3) the CDEA, both facially and as applied by the State Defendants through their Executive Orders and Public Health Orders, violates the Free Exercise Clause of the First Amendment to the federal Constitution (Claim 3);

[12] The Federal Defendants argue that the requested preliminary injunction is also disfavored because it would change the status quo. [Fed. Defs.' Resp., Doc. 43 at 8.] Having already found that the heightened disfavored-injunction standard applies, the court need not address that argument here.

(4) Governor Polis's Executive Orders violate the Free Exercise Clause of the First Amendment to the Colorado Constitution (Claim 4);

(5) Governor Polis issued his Executive Orders without making the disaster finding required by the CDEA (Claim 5);

(6) Governor Polis's Executive Orders exceed the scope of his authority under the CDEA (Claim 6);

(7) Governor Polis's Executive Orders are void for vagueness under the Fourteenth Amendment to the federal Constitution (Claim 9);

(8) Director Ryan's Public Health Orders are void for vagueness under the Fourteenth Amendment to the federal Constitution (Claim 10); and

(9) Director Ryan issued her Public Health Orders in violation of the Colorado APA and the Due Process Clause of the Fourteenth Amendment to the federal Constitution (Claim 11).

Of these claims, only the federal free exercise claim presents significant substantive issues. The court therefore addresses that claim first, followed by Plaintiffs' other federal constitutional claims, Plaintiffs' claims asserted under Colorado law, and finally Plaintiffs' federal statutory claims.

A. First Amendment Free Exercise Claim Against State Defendants

Plaintiffs argue that Colorado has violated their constitutional right to free exercise of religion in two ways. First, they claim that the CDEA facially discriminates against religion. [Pls.' Mot., Doc. 13 at 17-19.]

Second, they contend that Public Health Order 20-35[13] discriminates against religious exercise by exempting certain secular organizations—but not houses of worship—from some of its requirements. [*Id.* at 19-20.] In this section, the court first addresses the framework for evaluating constitutional claims during an emergency like the ongoing pandemic. It then addresses the constitutionality of the CDEA and Public Health Order 20-35.

1. Free Exercise in an Emergency

a.

The First Amendment to the Constitution, which has been incorporated against the states by the Fourteenth Amendment, guarantees, among other things, the free exercise of religion. U.S. Const. amend I; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). A state can violate this promise in a number of ways.

In the most obvious cases, a state violates the Free Exercise Clause by expressly discriminating against religion. This kind of discrimination is "odious to our Constitution" and calls for review under the "strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019, 2025 (2017). A law that discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons must pass strict scrutiny review—*i.e.*, the law is invalid unless it is narrowly tailored to accomplish a compelling

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[13] As noted above, *see supra* note 7, the Safer at Home order that was in place at the time Plaintiffs' motion was filed has since been replaced by Public Health Order 20-35. Both the earlier order and Public Health Order 20-35 contain similar restrictions on houses of worship and similar exemptions for certain secular institutions and activities. The orders do not differ meaningfully as they pertain to the court's analysis here.

interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993).

At the other end of the spectrum, there are neutral laws of general application that treat religious and secular institutions the same. A generally applicable law need not be narrowly tailored or justified by a compelling governmental interest, even if it has the incidental effect of burdening a particular religion or religious practice. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878-82 (1990). A neutral law triggers strict scrutiny only if it burdens religious exercise and is motivated by animus toward religion. *Lukumi Babalu Aye*, 508 U.S. at 534, 546.

More subtly, a law might place certain categories of secular activities or institutions in a favored category, while placing religious activities or institutions in a less favorable category, such as by denying them exemptions or excluding them from beneficial treatment. *Id.* at 537, 542-46; *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 650 (10th Cir. 2006) ("When a law has secular exemptions, a challenge by a religious group becomes possible."). When a state begins exempting secular activities from an otherwise generally applicable regulation, it can only decline to exempt religious activities if it has a "compelling reason" and thus satisfies strict scrutiny. *Smith*, 494 U.S. at 884.

b.

The wrinkle in this case, of course, is that it does not arise in "normal" times, but in the midst of a global pandemic. Emergencies like this one raise an age-old question. When confronting an emergency, to what extent can the government curtail civil rights? And what is the proper scope of judicial review of actions taken by state or federal governments in response to the emergency? Justice Jackson was surely correct that

the Bill of Rights is not a suicide pact—the Constitution doesn't kneecap a state's pandemic response. *See Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). But the existence of a crisis does not mean that the inalienable rights recognized in the Constitution become unenforceable. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."). The question, then, is where to draw the line. How, if at all, does the normal analysis courts use to evaluate alleged constitutional violations change when the challenged government action was taken to combat a pandemic or other emergency threatening public health or safety?

The analysis changes in a number of ways. For one thing, there is no question that the State here has a compelling interest in protecting its citizens from the SARS-CoV-2 virus. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("The police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."). For another thing, a state's actions during a public-health emergency, like Colorado's here, are often taken against a backdrop "fraught with medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974). It isn't the job of the judiciary to second-guess the "wisdom, need, or appropriateness" of the measures taken by a state to protect the health of its people during a pandemic. *Edwards v. California*, 314 U.S. 160, 173 (1941); *see also Jacobson*, 197 U.S. at 28, 30-35 ("It is no part of the function of a court . . . to determine [what is] likely to be the most effective for the protection of the public against disease.").

Colorado argues, however, that the Supreme Court's 115-year-old decision in *Jacobson* doesn't simply fit within the normal constitutional analysis or merely modify it to account for emergency circumstances. Colorado instead argues that this court's analysis begins and *essentially ends* with *Jacobson*. In *Jacobson*, the Supreme Court rejected a challenge to a mandatory vaccination law, holding that states have broad authority to implement emergency measures to protect "the safety and the health of the people," so long as those measures have some "real or substantial relation" to that objective and are not "beyond all question, a plain, palpable invasion of rights secured by the" Constitution. 197 U.S. at 31, 38. According to Colorado, the import of *Jacobson* is that courts should only intervene against state emergency action in "extreme cases," without applying modern constitutional doctrine. Essentially, the State's view is that, like the suspension of the writ of habeas corpus permitted by the Constitution in times of "Rebellion or Invasion," U.S. Const. art. I, § 9, cl. 2, normal constitutional review of state action is suspended when that action is taken to stop or slow a pandemic or other crisis. *See* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil*

Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 Harv. L. Rev. F. 179, 182 (2020).[14]

The court cannot accept the position that the Constitution and the rights it protects are somehow less important, or that the judicial branch should be less vigilant in enforcing them, simply because the government is responding to a national emergency. The judiciary's role may, in fact, be all the more important in such circumstances. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))). *Jacobson*, while an important and instructive case, isn't a "blank check for the exercise of governmental power." *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1181 (11th Cir. 2020); *see also Calvary Chapel*, 140 S. Ct at 2605 (Alito, J., dissenting) ("[A] public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists."). Indeed, *Jacobson* itself says that "no rule prescribed by a state, nor any regulation adopted

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[14] Colorado argues that the Supreme Court recently affirmed this reading of *Jacobson* when the Court denied applications for injunctive relief from public-health orders issued by California and Nevada. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.). But those decisions aren't precedential. *Cty. of Butler v. Wolf*, — F. Supp. 3d —, No. 2:20-CV-677, 2020 WL 5510690, at *7 n.9 (W.D. Pa. Sept. 14, 2020). And Colorado overlooks the fact that the Supreme Court applies a heightened standard when evaluating a request for injunctive relief that was denied at the District Court level. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (Court "grants judicial intervention that has been withheld by lower courts" only "where the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances" (internal quotation marks omitted)).

by a local governmental agency acting under the sanction of state legislation" to safeguard public health and safety may "contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. "A local enactment or regulation, even if based on the acknowledged police powers of a state, *must always* yield in case of conflict . . . with any right [the Constitution] gives or secures." *Id.* (emphasis added). And so, while the State can and must take action to respond to an emergency, it must do so within the confines of the Constitution.[15] In other words, while an emergency might provide justification to curtail certain civil rights, that justification must fit within the framework courts use to evaluate constitutional claims in non-emergent times.

c.

So the better view is thus that *Jacobson* fits within existing constitutional doctrine. First, *Jacobson* means that most state and local public-health orders that don't implicate fundamental rights will be analyzed under what is now known as the rational basis test. And they will, as this court previously held, generally be upheld. *See Lawrence v.*

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[15] *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) (enjoining ban on drive-in church services); *Robinson*, 957 F.3d at 1181 (denying motion to stay district court's preliminary injunction of abortion restrictions); *Butler*, 2020 WL 5510690, at *8, *31 (applying traditional canons of constitutional review and declaring Pennsylvania's lockdown orders unconstitutional); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-CV-00033-GFVT, 2020 WL 2305307, at *4 (E.D. Ky. May 8, 2020) (enjoining prohibition on in-person religious services); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020) (enjoining ten-person limit on church services); *see also Bayley's Campground Inc. v. Mills*, No. 2:20-CV-00176-LEW, 2020 WL 2791797, at *10 (D. Me. May 29, 2020) (analyzing right-to-travel claim challenging Maine's fourteen-day quarantine under strict scrutiny).

Colorado, 455 F. Supp. 3d 1063, 1070-71, 1076-78 (D. Colo. 2020); *but see Butler*, 2020 WL 5510690, at *2 (declaring Pennsylvania's lockdown orders unconstitutional). Second, as noted above, even where heightened scrutiny does apply, *Jacobson* stands for the undeniable proposition that fighting a pandemic is a compelling state interest.

Third, and perhaps less obviously, *Jacobson*'s emphasis, in conjunction with cases like *Marshall* and *Edwards*, on the need for judicial deference to policymakers' analysis of evolving scientific and medical knowledge helps explain why, as "emergency" restrictions extend beyond the short-term into weeks and now months, courts may become more stringent in their review. In the court's view, this admonition comes into play in the "tailoring" prong of current constitutional doctrine. Where fundamental rights are implicated, this requires assessing whether the government's action is the least restrictive means available.

In the earliest days of a pandemic or other true emergency, what may be the least restrictive or invasive means of furthering a state's compelling interest in public health will be particularly uncertain, and thus judicial intervention should be rare. But as time passes, scientific uncertainty may decrease,[16] and officials' ability to tailor their restrictions more carefully will increase. *See Calvary Chapel*, 140 S. Ct at 2605 (Alito, J., dissenting) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."); Michael W. McConnell & Max Raskin, Opinion, *If Liquor Stores Are Essential, Why Isn't Church?*, N.Y. Times

[16] *See, e.g.*, Media Statement, Ctrs. for Disease Control & Prevention, *CDC Updates "How COVID is Spread" Webpage*, CDC Newsroom (Oct. 5, 2020), https://www.cdc.gov/media/releases/2020/s1005-how-spread-covd.html.

(Apr. 21, 2020), https://www.nytimes.com/2020/04/21/opinion/first-amendment-church-coronavirus.html ("In the early weeks of the crisis, it made sense to enforce sweeping closure rules against all public gatherings—no exceptions."). What may have been permissible at one point given exigencies and realistic alternatives in the face of those exigencies may not remain permissible in the long term. *Cf.* Wiley & Vladeck, *supra*, at 182 ("The suspension principle is inextricably linked with the idea that a crisis is of finite—and brief—duration. To that end, the principle is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves.").

Applying normal constitutional scrutiny—even strict scrutiny, where appropriate—does not mean that the majority of actions taken by the State in response to the COVID-19 pandemic will be found invalid. As the remainder of this Order shows, "[m]any, probably even most, emergency measures will be upheld even under ordinary judicial review." Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, Reason.com: The Volokh Conspiracy (Apr. 15, 2020), https://reason.com/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies); *see also Butler*, 2020 WL 5510690, at *10 ("Using the normal levels of constitutional scrutiny in emergency circumstances does not prevent governments from taking extraordinary actions to face extraordinary situations. Indeed, an element of each level of scrutiny is assessing and weighing the purpose and circumstances of the government's act."). In light of "the severity of the threat, [emergency measures] can pass even a high level of scrutiny." Somin, *supra*. "But maintaining normal judicial review reduces the risk of pretextual policies, and helps ensure that even well-intentioned ones do not overreach." *Id.*; *see also Maryville Baptist Church*, 957 F.3d at 614-15 ("We don't doubt the Governor's sincerity in trying to do his level best to

lessen the spread of the virus or his authority to protect the Commonwealth's citizens."). A pandemic is, in other words, a context where constitutional scrutiny might be strict in theory, but not fatal in fact. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

2. Colorado Disaster Emergency Act

The CDEA does not facially discriminate against religion. The CDEA was enacted to "reduce vulnerability of people and communities of [Colorado] to damage, injury, and loss of life and property resulting from all-hazards, including natural catastrophes" such as epidemics. Colo. Rev. Stat. § 24-33.5-702(1)(a). To that end, the CDEA empowers the Colorado Governor to declare a disaster emergency and issue executive orders to combat natural and man-made disasters. *Id.* § 24-33.5-702(4). The statute contains no provision that, on its face, discriminates against religion.

Plaintiffs, pointing to Section 24-33.5-702(2)(a)-(c), argue that the CDEA exempts certain secular institutions from its mandates and thus favors those institutions over religious institutions. [Pls.' Mot., Doc. 13 at 18.] The court disagrees. Section 24-33.5-702(2)(a) says that "nothing" in the Act "shall be construed to interfere with the course or conduct of a labor dispute." But that section expressly does not apply to actions "necessary to forestall or mitigate imminent or existing danger to public health or safety." *Id.* So the kind of actions at issue in this case aren't implicated by subsection (2)(a). Section 24-33.5-702(2)(b) says that "nothing" in the Act "shall be construed to interfere with dissemination of news or comment on public affairs." But this provision simply gives effect to the First Amendment's Free Speech Clause, which prohibits laws that infringe the right to speak. And section 24-33.5-702(2)(c) says that "nothing" in the Act "shall be construed to affect the jurisdiction or responsibilities of police forces, fire-fighting forces, or units of the armed

forces of the United States, or of any personnel thereof, when on active duty." But this, too, isn't an exemption from mandates of the Act, as much as an acknowledgement that, through the Act, the Governor doesn't come to control law enforcement or armed forces not within his purview.

Certainly, "a secular exemption [does not] automatically create[] a claim for a religious exemption." *Grace United*, 451 F.3d at 651. Rather, a fact-specific inquiry is required to determine whether the exemptions at issue, on their face or in practice, place religious exercise at a disadvantage. *Id.*; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-98 (10th Cir. 2004). The CDEA's exemptions do not do so, and so Plaintiffs are unlikely to succeed on the merits of their claim that the Act is facially unconstitutional.

3. Public Health Order 20-35

Public Health Order 20-35 is a different matter. While the order designates houses of worship as "critical," in practice it treats them differently from other "critical" businesses and activities, even those that pose a comparable risk of COVID-19 transmission. Plaintiffs highlight two restrictions in the order that, they contend, are unconstitutionally applied to houses of worship and burden their right to free exercise: occupancy caps for indoor worship services, and the requirement that worshippers wear a face mask for indoor services.

As a preliminary matter, Plaintiffs have asserted that they have bona fide religious reasons for seeking to operate without additional capacity limits and for permitting worshippers to remove masks during services. The State has not challenged the sufficiency of Plaintiffs' showing in that regard, and so the court accepts as true that Plaintiffs' request for injunctive relief is driven by their religious rather than social

or other secular needs. Accordingly, the questions the court must consider are whether the secular exemptions in Public Health Order 20-35 are, in fact, discriminatory, and, if so, whether the State has a compelling reason for them.

a.

Many, if not most, of the mandates in Public Health Order 20-35 are neutral and generally applicable. For example, the six-foot distancing requirement for non-household members in public indoor spaces applies to houses of worship and secular institutions alike. It is not clear from Plaintiffs' motion whether they are challenging the six-foot distancing requirement or any of the other neutral and generally applicable parts of Public Health Order 20-35 under the federal Constitution. Plaintiffs argue that the six-foot distancing requirement violates their right to free exercise under the Colorado Constitution because it hinders their "preferred mode of worship," but nowhere in their motion do they make this argument with respect to the federal Constitution. [*Compare* Pls.' Mot., Doc. 13 at 22, *with id.* at 19-20.] Even assuming Plaintiffs do challenge the distancing requirement as part of their federal free exercise claim, that challenge would likely fail because the distancing requirement is neutral and generally applicable, and thus likely constitutional under *Smith*.

Other parts of Public Health Order 20-35, by contrast, are not generally applicable—namely the occupancy limits imposed on houses of worship and the face-mask mandate challenged by Plaintiffs.

Under the current Public Health Order, at Level 1 of the Safer at Home Levels, houses of worship "may operate at 50% of the posted occupancy limit indoors not to exceed 175 people." 2d Am. PHO 20-35, *supra* note 7, § II(B)(2)(j), at 5. At Level 2, houses of worship "may operate

at 50% of the posted occupancy limit indoors not to exceed 50 people." *Id.* § II(C)(2)(j), at 7. And at Level 3, they "may operate at 25% of the posted occupancy limit indoors not to exceed 50 people." *Id.* § II(D)(2)(j), at 9. Even though many secular institutions designated as "non-critical" are also required to comply with the same or similar occupancy limitations, Public Health Order 20-35 creates exemptions for a wide swath of secular institutions deemed "critical," including: meat-packing plants, distribution warehouses, P-12 schools, grocery stores, liquor stores, marijuana dispensaries, and firearms stores. *Id.* app. A at 27-31. In other words, the JBS meat-packing plant in Greeley, the Amazon warehouses in Colorado Springs and Thornton, and your local Home Depot, Walmart, King Soopers, and marijuana shop are not under any additional occupancy limitation other than the six-foot distancing requirement. Denver Bible Church and Community Baptist Church, by contrast, must comply with numerical occupancy caps, no matter how many people their sanctuaries might accommodate while maintaining six feet of distance between non-household members.[17]

Consider as well the face-mask mandate in Executive Order D 2020 138, which is incorporated by reference into to Public Health Order 20-35. It generally requires persons older than ten to wear a face covering when inside a Public Indoor Space, which includes houses of worship. [*See* EO D 2020 138, Doc. 1-15 at 2, 4.] Yet, for example,

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[17] Under Public Health Order 20-35, it isn't clear that eliminating the current numerical occupancy caps will have an effect on Plaintiffs' ability to welcome more worshippers so long as the neutral and generally applicable social-distancing rule stays in place. [*See* Resp. to State Defs.' Suppl. Br., Doc. 56 at 2.] But given the facially disparate capacity limitations applied to houses of worship and the constantly changing nature of the Public Health Orders, Plaintiffs are under a legitimate threat of discriminatory treatment should the State reduce the occupancy caps in a future order or amendment.

"individuals who are seated at a food service establishment" are exempt from the face-mask requirement. [*Id.* at 3.] "Individuals who are receiving a personal service where the temporary removal of the face covering is necessary to perform the service" are also exempt, as are "Individuals who are exercising alone or with others from the individual's household and a face covering would interfere with the activity." [*Id.*] Executive Order D 2020 138 contains a total of eight exemptions, none of which apply to worship services. [*Id.*]

By the orders' terms and in effect, what this system of limitations and exemptions has done is to both ease restrictions on what the State deems critical, and to some extent noncritical, activities, and to remove particular restraints, like the face-mask requirement, when those restraints would interfere with what the State considers a "necessary" part of the activity. The State may have the power in general to decide what activities are and are not critical to ensure the health and safety of individuals and their households, and what tasks are necessary to carry out secular activities. But it does not have the power to decide what tasks are a necessary part of an individual's religious worship. And while religious exercise is subject to truly neutral and generally applicable regulations, once the State begins creating exceptions for secular activities as it deems necessary, then it is obligated to treat religious activities no less favorably, absent a compelling reason.

The State Defendants argue that these exemptions aren't actually treating houses of worship less favorably than secular institutions. But the fact is that Public Health Order 20-35 explicitly imposes on houses of worship limits that do not apply to other so-called "critical" businesses. And Executive Order D 2020 138 likewise provides various exemptions from the face-mask requirement that do not apply to houses of worship, even those who might view removing a mask as necessary to

their religious practice. So it is clear that the State's orders treat religious institutions less favorably than some secular institutions.

b.

The State Defendants offer three reasons for their disparate treatment of houses of worship. None is compelling.

Colorado first justifies its discriminatory treatment of houses of worship on the ground that contact tracing is easier in houses of worship than in the kinds of retail settings that are exempt from the more onerous occupancy limits in Public Health Order 20-35: "It is also practically impossible to perform contact tracing between strangers who have anonymous interactions in a critical retail setting." [Suppl. Herlihy Decl., Doc. 50-1 at ¶ 72.] Far from helping Colorado, this argument cuts strongly against it. That it is easier to use contact tracing in houses of worship than in other settings doesn't justify worse treatment of houses of worship—just the opposite. If anything, the relative ease of contact tracing at houses of worship justifies fewer restrictions, and concomitantly more restrictions on institutions where contact tracing is more difficult.

Next, Colorado says that its decision not to impose occupancy restrictions on schools reflects its respect for the principle of local control of school districts enshrined in Colorado's Constitution. [State Defs.' Suppl. Br., Doc. 50 at 5 (citing Colo. Const. art. IX, §§ 1, 15).] This respect is well-placed. Local control is indeed an important concept in Colorado's Constitution. But it is not more important than the principles enshrined in the First Amendment to the United States Constitution. And if Colorado is willing to run additional risks out of respect for local school districts' autonomy, the First Amendment requires it to do the same out of respect for religious congregations' autonomy. *See Trinity*

Lutheran, 137 S. Ct. at 2025 (differential treatment of religious institutions is "odious" to the Constitution).

The State's strongest reason for treating houses of worship differently is that, in most of the secular institutions exempted from the occupancy and other limitations, indoor person-to-person contact is "transient," whereas person-to-person contact in a church setting is generally prolonged. [State Defs.' Suppl. Br., Doc. 50 at 4.] The State Epidemiologist, Dr. Rachel Herlihy, testified that "in closed-indoor environments, respiratory droplets are more likely to linger on surfaces and/or be recirculated through the indoor space due to either poor ventilation or large numbers of people in the indoor space." [Suppl. Herlihy Decl., Doc. 50-1 at ¶ 31.] According to Dr. Herlihy, "short, transient interactions" indoors are much less likely to transmit COVID-19 than extended indoor contact is. [*Id.* at ¶¶ 30, 71.]

While the court accepts these facts as true, Colorado's transient-versus-prolonged approach to differential treatment of houses of worship is flawed. The State's evidence regarding what constitutes a "close"—and thus dangerous—contact requires both a proximity *and* a duration component. According to Dr. Herlihy, "data are insufficient to precisely define the duration of exposure that constitutes prolonged exposure and thus a close contact. However, a close contact is defined as being within 6 feet for at least a period of 15 minutes to 30 minutes or more depending upon the exposure." [*Id.* at ¶ 26.] So according to the State's own evidence, for a contact to be "close" and thus significantly riskier, it must (1) be within six feet *and* (2) last for more than fifteen minutes. If so, a limit on either proximity or duration is adequate to avoid risky close contacts. And under the Distancing Requirements of Public Health Order 20-35, no entity open to the public, including houses of worship, may allow non-household person-to-person contact indoors within six feet. So

even without an occupancy restriction, Plaintiffs are subject to a regulation that prevents one of the two necessary components of a risky close contact. That, according to the State's own evidence, ought to be enough. And, for most other critical businesses, it is: warehouses, schools, critical manufacturing, groceries, pharmacies, liquor stores, and others are allowed to operate at full capacity for presumably full shifts of well over an hour, on the assumption that the distancing restrictions will be adequate to protect against virus transmission.[18]

The more serious problem is that Public Health Order 20-35 exempts secular settings that pose similar threats of prolonged exposure from the occupancy limitations and face-mask requirements imposed on houses of worship. What is the meaningful difference between, say, a warehouse, a restaurant, or an elementary school—where employees, diners, and students spend long periods in a closed-indoor setting—and a house of worship? The best answer Colorado has is that "singing or speaking loudly propels respiratory droplets farther," and that this kind of activity happens in houses of worship but not in those other settings. [*Id.* at ¶¶ 29, 38.] Dr. Herlihy likewise generalizes that "customs in houses of worship may also result in increased contact. For example, shaking hands, observing Eucharist, passing a basket, or showing a sign of the peace may all place people in closer contact th[a]n they would be in other settings." [Herlihy Decl., Doc. 41-1 at ¶ 57.] Perhaps. But shaking hands, passing items around, and showing a sign of peace have secular

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[18] To the extent that the six-foot distancing requirement is contested here, *see supra* Discussion, Section 0(A)(3)(a), p. 21, Plaintiffs and their congregants must abide by it, to the greatest extent possible, as must all Critical Businesses. So long as they do, the additional occupancy limits imposed on houses of worship don't serve to combat the kind of prolonged, close exposure that, according to the State's own evidence, is most dangerous.

equivalents in many places of business or social settings. And as Dr. Herlihy admits, schools "also frequently have singing or loud, excited speaking." [Suppl. Herlihy Decl., Doc. 50-1 at ¶ 44.] Indeed, most outbreaks in Colorado have occurred at workplaces, schools, and businesses, not churches.[19] The largest outbreaks in the State have been at colleges and prisons.[20] And the State's own data show that, of the nearly 900 active and resolved outbreaks Colorado has seen to date, only fifteen of those (less than 2%) occurred at a religious facility.[21] In the end, though, the court does not doubt the science underlying Colorado's decisions. It accepts that the best available evidence says transmission of COVID-19 is more likely indoors when people are together for long periods of time.

But the orders reveal that in practice the State treats some activities as necessary, but those Plaintiffs seek to engage in as less so. This reflects the view that, as one court put it, it is practically impossible to restrict people from working together in person in places like schools, food-processing facilities, restaurants, and warehouses, but "churches can feed the spirit in other ways." *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020) (Easterbrook, J.). That may be true for many religious individuals and institutions, but it is not for Plaintiffs. And with due respect for both the State and the

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[19] DJ Summers, *Colorado's Outbreaks Come More from the Workplace than Elsewhere*, FOX31 Denver & Colorado's Own Channel 2 News (Oct. 9, 2020), https://kdvr.com/news/coronavirus/colorados-outbreaks-come-more-from-the-workplace-than-elsewhere.

[20] Meg Wingerter, *State Has 274 Active Outbreaks*, Denver Post, Oct. 15, 2020, at 2A, https://www.denverpost.com/2020/10/15/colorado-covid-outbreaks-record.

[21] CDPHE, *Outbreak Data: COVID-19 OB Weekly Report 10 14 2020 (rev2)*, Colo. COVID-19 Updates (Oct. 14, 2020), https://drive.google.com/drive/u/0/folders/1ELmTGWgtj-xPhcTXy-k-526G7l9fC1vs.

Seventh Circuit, this court does not believe government officials in any branch have the power to tell churches and congregants what is necessary to feed their spiritual needs.[22] *See Maryville Baptist Church*, 957 F.3d at 615 (state is not entitled to decide whether reduced, masked congregation or online services are "an adequate substitute for what it means when 'two or three gather in my Name.'" (quoting Matthew 18:20)).

c.

Plaintiffs are likely to succeed on the merits of their free exercise claim for a simple reason. Having decided that the risk of allowing various activities to be exempt from the strictest Safer at Home rules is justified on the basis that those activities are critical and necessary, the State cannot decide for Plaintiffs what is critical and necessary to their religious exercise. With each exception Colorado makes for secular institutions, the failure to make the same exemption for houses of worship becomes increasingly problematic. As time passes, and Colorado learns more about the science of COVID-19, its public-health officials have made carefully tuned risk assessments about what activities they deem sufficiently important to warrant full-capacity reopening. These choices clarify what activities they believe serve societal interests of the highest

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

order—primary and secondary education, convenient access to food and home supplies, and certain kinds of manufacturing. These *are* important interests—critical and necessary even. But the People, through the Constitution, have resolved that the free exercise of religion is at least as critical and necessary. So Colorado's failure to offer a compelling reason why houses of worship are subject to greater restrictions than warehouses, schools, and restaurants violates the First Amendment's guarantee of the free exercise of religion. Plaintiffs have thus made a strong showing that they are likely to succeed on the merits of their as-applied free exercise claim.

Note well that the implications of this conclusion aren't as broad as some might hope or others might fear. Plaintiffs will still be subject to the neutrally applicable rules and prohibitions in Public Health Order 20-35. They will, for example, have to enforce sanitization requirements, maintain social distancing between individuals, and not permit shaking hands. *See, e.g.*, 2d Am. PHO 20-35, *supra* note 7, § IV(D), at 21. All in all, based on their bona fide religious need to do so, Plaintiffs will be allowed to open their sanctuaries subject to the same capacity, social distancing, and masking rules that are applicable to other critical businesses, and will be able to permit congregants to remove their masks if and when it is necessary to carry out their religious exercise.

B. Fourteenth Amendment Vagueness Claims Against Governor Polis and Director Ryan

Plaintiffs contend that Governor Polis's Executive Orders and Director Ryan's Public Health Orders are unconstitutionally vague. [Pls.' Mot., Doc. 13 at 27-31.] The court is sympathetic to Plaintiffs' frustration at the number of Executive Orders and Public Health Orders that have been issued since the pandemic began, and at the density and length of those orders. And as noted above, the frequent issuance of amendments

and superseding orders can create a moving target when attempting to determine which restrictions are or were in effect at a given moment in time. On the other hand, the court recognizes that the frequent amendments and updates to the orders reflect the State Defendants' efforts to refine the orders as new information becomes available regarding the ways in which COVID-19 spreads and as infection rates fluctuate throughout the State. Ultimately, Plaintiffs have not identified any aspect or provision of the various Executive Orders and Public Health Orders that would cause a person of ordinary intelligence, after a careful and thorough reading of the orders, to be unable to discern what behavior is mandated or prohibited. Plaintiffs are therefore unlikely to succeed on the merits of their vagueness claims.

A law is impermissibly vague if "a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated." *Mini Spas, Inc. v. S. Salt Lake City Corp.*, 810 F.2d 939, 942 (10th Cir. 1987). But "perfect clarity and precise guidance" are not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty in our language.")). A law is not vague merely because it "requires a person to conform his conduct to an imprecise but comprehensible normative standard"; but it is unconstitutionally vague if "no standard of conduct is specified at all." *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

1. Governor Polis's Executive Orders

Plaintiffs assert that Governor Polis's Executive Orders are "inherently unclear." [Pls.' Mot., Doc. 13 at 28.] But other than criticizing the number and length of the orders and the frequency with which they have been issued and amended, Plaintiffs identify only two alleged

deficiencies in the Executive Orders: (1) the orders cross-reference other Executive Orders and Public Health Orders "that are currently in effect" without specifying which Executive Orders and Public Health Orders are currently in effect; and (2) Executive Order D 2020 138 [Doc. 1-15], which orders individuals to wear face masks, does not define the term "appropriate under industry standards." [Pls.' Mot., Doc. 13 at 28.]

The fact that the Executive Orders incorporate other Executive Orders and Public Health Orders by reference may make it difficult to follow the entirety of the State's restrictions, but that is hardly unique in modern law, and it does not render the orders unconstitutionally vague. *United States v. Collins*, 461 F. App'x 807, 809 (10th Cir. 2012) (citing *Hines v. Baker*, 422 F.2d 1002, 1005 (10th Cir. 1970) ("[I]ncorporation by reference to other defined offenses is not impermissibly vague.")). And, as the State Defendants point out, each of their Executive Orders and Public Health Orders clearly states its effective period. *See, e.g.*, [EO D 2020 138, Doc. 1-15 at 4 ("Executive Order D 2020 039 . . . as amended and extended by . . . this Executive Order, shall expire thirty (30) days from July 16, 2020, unless extended further by Executive Order.")]; 2d Am. PHO 20-35, *supra* note 7, § VIII, at 26 ("This Order shall become effective on Thursday, October 8, 2020 and will expire 30 days from October 6, 2020, unless extended, rescinded, superseded, or amended in writing."). This then, is not a basis for finding the Executive Orders unconstitutionally vague, as a person of ordinary intelligence can, with a little effort, discern the effective dates of the various orders.

As to Plaintiffs' second objection, the phrase "appropriate under industry standards" in Executive Order D 2020 138 is, in context, comprehensible to a person of ordinary intelligence. Executive Order D 2020 138 requires Coloradans to wear a non-medical face covering

over their nose and mouth, subject to certain exceptions, and further provides that "Nothing in this Executive Order should be construed to prevent individuals from wearing a surgical-grade mask or other, more protective face covering to cover the nose and mouth if that type of mask or more protective face covering is *appropriate under industry standards*." [Doc. 1-15 at 2, 3 (emphasis added).] A person of ordinary intelligence would understand that the phrase "appropriate under industry standards" is meant to clarify that the Executive Order's general mandate to wear a non-medical face covering does not prevent those working in industries where a more protective covering is necessary from wearing the type of face covering that is appropriate for their industry, *e.g.*, health-care workers may wear medical-grade masks. *See Coates*, 402 U.S. at 614 ("comprehensible normative standard[s]" are not impermissibly vague); *Boos v. Barry*, 485 U.S. 312, 332 (1988) (undefined word or phrase does not render law vague when its meaning is ascertainable in context).

Since Plaintiffs have not identified any other specific deficiencies in the Executive Orders,[23] they are not likely to succeed on the merits of their vagueness claim against Governor Polis.

[23] Plaintiffs argue for the first time in their reply brief that certain provisions of Executive Order D 2020 017 [Ex. 11 to Compl., Doc. 1-11] are impermissibly vague. [*See* Pls.' Reply to State Defs.' Resp., Doc. 45 at 8-9.] The court need not consider arguments raised for the first time in a reply brief. *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1143 (10th Cir. 1994). The court has, nonetheless, reviewed the identified provisions of Executive Order D 2020 017 and similarly finds that the order sufficiently apprises a person of ordinary intelligence as to what behavior is mandated and prohibited.

2. Director Ryan's Public Health Orders

In addition to their general complaint about the number, length, and frequency of issuance of Director Ryan's Public Health Orders, Plaintiffs identify several specific deficiencies that they contend render the orders void for vagueness. [*See* Pls.' Mot., Doc. 13 at 28-31.] None of these alleged deficiencies renders the orders insufficiently comprehensible to a person of ordinary intelligence.

Plaintiffs first contend that the numbering of Public Health Order 20-28 [9th Am. PHO 20-28, Doc. 1-41] and other Public Health Orders is misleading because Director Ryan often issues "Amended" Public Health Orders with the same number rather than a superseding Public Health Order with a new number. This fact does not render the orders unconstitutionally confusing. Each amendment to Public Health Order 20-28 clearly identifies the number of the amendment and the date it issued. [*See* PHO 20-28, Ex. 26 to Compl., Doc. 1-26; Am. PHO 20-28, Ex. 27 to Compl., Doc. 1-27; 2d Am. PHO 20-28, Ex. 28 to Compl., Doc. 1-28; 3d Am. PHO 20-28, Ex. 29 to Compl., Doc. 1-29; 4th Am. PHO 20-28, Ex. 30 to Compl., Doc. 1-30; 5th Am. PHO 20-28, Ex. 31 to Compl., Doc. 1-31; 6th Am. PHO 20-28, Ex. 32 to Compl., Doc. 1-32; 7th Am. PHO 20-28, Ex. 33 to Compl., Doc. 1-33; 8th Am. PHO 20-28, Ex. 34 to Compl., Doc. 1-34; 9th Am. PHO 20-28, Doc. 1-41; 10th Am. PHO 20-28, Ex. 8 to Pls.' Reply to State Defs.' Resp., Doc. 45-8.] While it might be helpful if each amended version of the various Public Health Orders highlighted the specific provisions that were amended in that version, it is not constitutionally required.

Plaintiffs next contend that the titles of Public Health Order 20-23 [Am. PHO 20-23, Ex. 20 to Compl., Doc. 1-20] and Public Health Order 20-28 [6th Am. PHO 20-28, Doc. 1-32] do not fairly describe the

orders' content. But Plaintiffs cite to no authority in support of the proposition that the title of a law alone can render it unconstitutionally vague where the actual substance of the law is sufficiently comprehensible to a person of ordinary intelligence. And even if that were the case, the title of Public Health Order 20-23, *i.e.*, "Implementing Social Distancing Measures," is directly related to the order's content, which limits the number of people who may gather socially in one space. Likewise, the title of Public Health Order 20-28, *i.e.*, "Safer at Home and in the Vast, Great, Outdoors," is directly related to the order's content, which implements the set of protective measures directed by Governor Polis's Safer at Home Executive Order.

As to the substance of Director Ryan's orders, Plaintiffs argue that Public Health Order 20-23 [Doc. 1-20] is vague because it does not define the phrases "the community hosting the event" or "strain the planning and response resources" in the context of defining what constitutes a "mass gathering." Public Health Order 20-23 limits "mass gatherings" to no more than ten people. [*Id.* at 1.] The order notes that the CDC defines a "mass gathering" as "a planned or spontaneous event with a large number of people in attendance that *could strain the planning and response resources* of the *community hosting the event*, such as a concert, festival, conference, or sporting event." [*Id.* at 2 (emphasis added).] The order further specifies that

> Gatherings subject to this Order include, but are not limited to, community, civic, public, leisure, faith-based events, sporting events with spectators, concerts, conventions, fundraisers, parades, fairs, festivals, and any similar event or activity that brings together (10) or more persons in a single room or space at the same time in a venue such as an auditorium, stadium, arena, large conference room, meeting hall, private club, or any other confined indoor or outdoor space.

[*Id.* at 3.] Though the order does not define the phrase "strain the planning and response resources of the community hosting the event," the court is of the opinion that this phrase is understandable to an ordinary person. And in any case, the order is sufficiently detailed that an ordinary person can understand what conduct is prohibited—namely, gatherings that "bring[] together (10) or more persons in a single . . . confined indoor or outdoor space."

Plaintiffs argue that the substance of Public Health Order 20-28 [6th Am. PHO 20-28, Doc. 1-32; 8th Am. PHO 20-28, Doc. 1-34] is vague because (1) the order contains a confusing mix of mandatory and permissive language; (2) the order incorporates additional CDPHE guidelines by reference via hyperlink; and (3) the order does not define the "appropriate local authority" from which houses of worship must obtain approval to hold outdoor services. The mix of mandatory and permissive language does not make Public Health Order 20-28 impermissibly vague. It is not difficult for a person of ordinary intelligence to understand that certain behavior, *e.g.*, implementing electronic platforms to conduct worship services, is encouraged but not required, while other behavior, *e.g.*, maintaining six feet of distance between non-household members, is required. Nor does the incorporation by reference of other permissive guidelines render the order vague. *Collins*, 461 F. App'x at 809. And finally, the fact that the order does not define the phrase "appropriate local authority" does not make the order vague. A person of ordinary intelligence would understand that the various local municipalities throughout the State may each have their own requirements and procedures for obtaining permission to hold outdoor worship

services.[24] Public Health Order 20-28 is sufficiently clear that an ordinary person can understand what conduct is mandated and prohibited.[25]

Plaintiffs are not likely to succeed on the merits of their vagueness claim against Director Ryan.

C. Fourteenth Amendment Due Process Claim Against Director Ryan

Plaintiffs contend that the Fourteenth Amendment entitled them to procedural due process—notice and a hearing—before Director Ryan issued her Public Health Orders. [Pls.' Mot., Doc. 13 at 31.] But procedural due process in the form of individual notice and hearing is typically not required for the government to implement a generally applicable rule that affects the public at large, rather than a specific individual or a small group. *See Onyx Props. LLC v. Bd. of Cty. Comm'rs of Elbert Cty.*, 838 F.3d 1039, 1044-49 (10th Cir. 2016). Even if it normally were required, summary action, without notice and a hearing, may be justified

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[24] Plaintiffs also argue that Public Health Order 20-28 gives local authorities "unbridled discretion" to approve, or not, any request by Plaintiffs to hold outdoor services. [Pls.' Mot., Doc. 13 at 30.] But the order does not purport to give those local entities any authority they don't already have by virtue of state or local law; it simply allows them to exercise that authority in these circumstances. To the extent that any Colorado municipality requires a permit to hold outdoor worship services without adequately defining the standards by which such permits are granted or denied, Plaintiffs must address that complaint to the municipality at issue, not to Director Ryan.

[25] Plaintiffs argue for the first time in their reply brief that certain provisions of Public Health Order 20-24 [4th Am. PHO 20-24, Ex. 25 to Compl., Doc. 1-25] are impermissibly vague. [*See* Pls.' Reply to State Defs.' Resp., Doc. 45 at 8-9.] As noted, the court need not consider arguments raised for the first time in a reply brief. *Sadeghi*, 40 F.3d at 1143. But the court has reviewed the identified provisions, and finds that Public Health Order 20-24 sufficiently apprises a person of ordinary intelligence as to what behavior is mandated and prohibited.

in emergency situations, and "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies" such action. *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 299-301 (1981). This procedural argument is more aptly addressed under the Colorado APA, but any violation of state procedural requirements, to the extent one occurred, does not in itself amount to a denial of federal constitutional due process.[26] *Onyx Props.*, 838 F.3d at 1044.

For these reasons, Plaintiffs are not likely to succeed on the merits of their Fourteenth Amendment procedural due process claim.

D. State Law Claims Against State Defendants

Plaintiffs' claims that Governor Polis issued his Executive Orders in violation of the Colorado Constitution and the CDEA, and that Director Ryan issued her Public Health Orders in violation of the Colorado APA are likely barred by the Eleventh Amendment to the federal Constitution.

The Eleventh Amendment provides that the power of federal courts "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. The Eleventh Amendment bars suits in federal court against a State brought not only by "Citizens of another State" but also by the State's own citizens. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (citing *Ex parte New York No. 1*, 256 U.S. 490, 497 (1921)). Where a plaintiff nominally sues only state officials, the Eleventh Amendment bars suit if the State "is the real,

[26] As noted below, the Eleventh Amendment bars this court from adjudicating Plaintiffs' claim that Director Ryan violated the Colorado APA. *See infra* Discussion, Section 0(D), pp. 37-38.

substantial party in interest" and "regardless of whether the suit seeks damages or injunctive relief." *Id.* at 101-02. An exception to the application of Eleventh Amendment immunity to suits against state officials applies to suits seeking prospective relief for violations of federal law. *Id.* at 102 (citing *Ex parte Young*, 209 U.S. 123, 160 (1908)). But this exception does not extend to suits against state officials seeking prospective relief for state-law violations:

> In such a case the entire basis for the doctrine of *Young* . . . disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id.

Here, Plaintiffs bring several claims seeking declaratory and injunctive relief against the State Defendants for alleged violations of state law—the Colorado Constitution, the CDEA, and the Colorado APA. Plaintiffs appear to argue that these claims are asserted against State officials rather than the State itself, in an attempt to invoke the *Young* exception. [*See* Pls.' Mot., Doc. 13 at 2-3; Pls.' Reply to State Defs.' Resp., Doc. 45 at 5; Compl., Doc. 1 at 1-2.] But even if that were so, it is irrelevant under the federalism principles described in *Pennhurst*, which bar federal courts from enjoining state officials' actions under state law. 465 U.S. at 102 (noting that the "entire basis" for the *Young* exception "disappears" in that context). The Eleventh Amendment thus likely precludes this court's adjudication of Plaintiffs' claims alleging violations of state law, making Plaintiffs unlikely to succeed on the merits of those claims.

E. Federal Statutory Claims Against Federal Defendants

Plaintiffs contend that the Federal Defendants violated RFRA by distributing disaster relief to the State pursuant to the CARES Act and the Stafford Act. [Pls.' Mot., Doc. 13 at 9-13.] They further contend that the Federal Defendants, by distributing aid under the Stafford Act, violated the Stafford Act itself. [*Id.* at 13-17.]

RFRA prohibits the federal government from substantially burdening a person's exercise of religion—even if the burden results from a neutral law of general applicability—except in furtherance of a compelling governmental interest that is the least restrictive means of furthering that interest. 42 U.S.C. §§ 2000bb-1, 2000bb-3. The Stafford Act provides a framework by which the President can declare national emergencies and major disasters, thereby authorizing FEMA to provide federal assistance to the affected regions. *See* 42 U.S.C. §§ 5121-5207. The Stafford Act requires that "the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the ground[] of . . . religion." 42 U.S.C. § 5151(a); *see also* 44 C.F.R. § 206.11.

Plaintiffs' claims appear to be that the Federal Defendants violated both RFRA's prohibition on burdening free exercise and the Stafford Act's nondiscrimination mandate by distributing Stafford Act and/or CARES Act funds to a state that had issued emergency orders that discriminate on the basis of religion. Plaintiffs seek injunctive relief prohibiting the Federal Defendants from providing future aid to the State under the Stafford Act, the CARES Act, "or similar federal law" so long

as the State's discriminatory orders remain in effect.[27] [Compl., Doc. 1 at 35.] The Federal Defendants respond that Plaintiffs lack standing to bring these claims. [Fed. Defs.' Resp., Doc. 43 at 10-15.] The court agrees.

To invoke the court's jurisdiction, a plaintiff must demonstrate, at an "irreducible minimum," that: (1) he has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; (2) the injury is traceable to the challenged conduct; and (3) the injury is likely to be redressed if the requested relief is granted. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

For purposes of this preliminary-injunction motion, the Federal Defendants appear to concede that the Plaintiffs have alleged an injury in fact. [Fed. Defs.' Resp., Doc. 43 at 10.] But they argue that (1) Plaintiffs' injuries are not traceable to the Federal Defendants' conduct, and (2) the remedy Plaintiffs seek would not redress their injuries.

Plaintiffs' alleged injury is the deprivation of their ability to freely practice their religion due to the restrictions imposed by the State Defendants' Executive Orders and Public Health Orders. On traceability, Plaintiffs argue that "State Defendants would not have deprived

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[27] Plaintiffs also contend that the State Defendants violated the Stafford Act by requesting federal aid under that Act, but Plaintiffs do not appear to seek preliminary injunctive relief against the State Defendants on the basis of this claim. The court therefore addresses Plaintiffs' federal statutory claims here only as against the Federal Defendants. In any case, Plaintiffs likely lack standing to pursue a Stafford Act claim seeking injunctive relief against the State Defendants for similar reasons discussed in this section with respect to their claims against the Federal Defendants. Namely, barring the State from receiving federal aid would not directly redress Plaintiffs' alleged injuries.

Plaintiffs of their rights absent approval and assistance by Federal Defendants." [Compl., Doc. 1 at ¶ 124.] But nothing in the record indicates that any action by the Federal Defendants caused or induced the State Defendants to issue the challenged public-health orders. The State Defendants issued several Executive Orders and Public Health Orders *before* receiving any federal disaster funds; the preliminary-injunction evidence does not show that the Federal Defendants conditioned their approval or distribution of aid on the issuance of orders that mandate limits on gatherings, mask wearing, or social distancing; nor does the evidence show that the State's receipt of federal funds prompted Governor Polis or Director Ryan to issue or keep in place such orders. Because Plaintiffs have failed to establish a non-tenuous connection between their injuries and the Federal Defendants' conduct, they likely cannot establish traceability.

Plaintiffs fare no better on redressability. The Federal Defendants argue persuasively that the relief Plaintiffs seek—an injunction against future federal aid—would not cure Plaintiffs' injuries. [*See* Fed. Defs.' Resp., Doc. 43 at 14-15.] Plaintiffs have not shown that an injunction against future federal aid would lead Colorado to rescind any unlawful Executive Orders or Public Health Orders—the direct cause of Plaintiffs' injuries. To be sure, if future aid was conditioned on rescission of the discriminatory aspects of the challenged public-health orders, the State may well be persuaded to comply. But only the State Defendants—not the Federal Defendants—can actually rescind or amend those orders. Because enjoining the Federal Defendants from distributing aid would not itself cure Plaintiffs' injuries, Plaintiffs likely cannot establish redressability.

Because Plaintiffs likely do not have standing with respect to their statutory claims for injunctive relief against the Federal Defendants, they are unlikely to succeed on the merits of those claims.

II. Irreparable Injury

Plaintiffs have established irreparable harm. Where, as here, a movant demonstrates he is likely to establish a violation of his right to free exercise, he has necessarily established irreparable harm. *See Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). That there was a slight delay by Plaintiffs in filing this suit doesn't change this conclusion. "It is true that 'delay in seeking preliminary relief cuts against finding irreparable injury.'" *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016). But "delay is only one factor to be considered among others, and there is no categorical rule that delay bars the issuance of an injunction." *Id.* (citation omitted). And here, Plaintiffs' delay in seeking relief more likely reflects the principle discussed above that what the Constitution requires was less demanding at the outset of the pandemic.

III. Balance of Harms and the Public Interest

The court must balance the harm to Plaintiffs of not granting the injunction against the State's harm if the injunction is granted. *See Fish*, 840 F.3d at 755-56. And where, as here, the government is the opposing party, the balance-of-harms factor merges with the fourth preliminary-injunction factor, which requires that the injunction not be adverse to the public interest. *See Nken*, 556 U.S. at 435.

Plaintiffs have made a strong showing that these factors favor granting an injunction. Any unconstitutional infringement of Plaintiffs' free exercise right is significant, and outweighs any marginal impact on the State's ability to fight the pandemic. Plaintiffs' relatively small congregations will now be governed by the same rules as other, non-religious institutions such as schools, warehouses, distribution centers, and grocery stores. To be sure, and as the court has already recognized, the threat of communicable disease is serious, and the State has a compelling interest in retarding its spread. To the extent this order hinders that effort, that is a potential harm to the public interest and is not to be taken lightly.

But fighting COVID-19 is not the sum total of the "public interest," as the State itself has recognized. The State's decision to exempt certain secular activities from certain of the restrictions imposed in its public-health orders reflects its judgment that some level of risk of transmission is justified for dining out, schools, critical retailers, and the like. Neither the State nor the court is empowered to declare that those risks are worth taking while the risks associated with Plaintiffs' free religious exercise are not. Viewed this way, the harm to the public interest by granting an injunction is narrow—all the injunction will do is bring the State's chosen balance between combatting the virus and allowing some semblance of communal life to continue inline as to secular and religious institutions. If the public interest is served by allowing diners to unmask while eating in a restaurant, it is similarly served by allowing Plaintiffs to do the same in church. The public has an interest in preserving constitutional rights. *Hobby Lobby*, 723 F.3d at 1145.

CONCLUSION

It is ORDERED that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction [Doc. 13] is GRANTED IN PART.

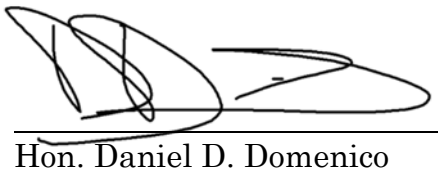
It is FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 65(a), the State Defendants, their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them are preliminarily enjoined from enforcing against Plaintiffs Denver Bible Church, Robert A. Enyart, Community Baptist Church, and Joey Rhoads:

(1) the indoor occupancy limitations set forth in Sections II(B)(2)(j), II(C)(2)(j), and II(D)(2)(j) of Public Health Order 20-35, as amended and extended; and

(2) the face-covering requirement set forth in Executive Order D 2020 138, as amended and extended, and in Sections I(B), III(C)(1), III(C)(4)(g), and III(C)(5)(c), of Public Health Order 20-35, as amended and extended, where the temporary removal of a face covering is necessary for Plaintiffs or their employees, volunteers, or congregants to carry out their religious exercise.

DATED: October 15, 2020

BY THE COURT:



Hon. Daniel D. Domenico

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

December 23, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENVER BIBLE CHURCH; ROBERT A. ENYART; COMMUNITY BAPTIST CHURCH; JOEY RHOADS,

Plaintiffs - Appellees,

v.

GOVERNOR JARED POLIS, in his official capacity as Governor, State of Colorado; JILL HUNSAKER RYAN, in her official capacity as Executive Director of the Colorado Department of Public Health and Environment; COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Defendants - Appellants,

and

ALEX M. AZAR, II, in his official capacity as Secretary, United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; CHAD W. WOLF, in his official capacity as Acting Secretary, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; STEVEN T. MNUCHIN, in his official capacity as Secretary, United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

No. 20-1377
(D.C. No. 1:20-CV-02362-DDD-NRN)
(D. Colo.)

ORDER

Before **HARTZ**, **MATHESON**, and **EID**, Circuit Judges.

This matter comes before the court on the State Defendants' Motion to Dismiss Pending Appeal. Appellees have filed a response and the State Defendants have filed a reply. The State Defendants appealed a district court order enjoining them from enforcing certain pandemic-related requirements applicable to houses of worship concerning both the wearing of face coverings in indoor public spaces and the allowable occupancy limits. In their motion to dismiss, the State Defendants contend, among other things, that changes to both the face-covering requirements and the occupancy restrictions brought about, in part, by the Supreme Court's recent decision in *Roman Catholic Diocese v. Cuomo*,___ S. Ct. ___, No. 20A87, 2020 WL 6948354 (2020) (per curiam), have mooted their appeal. They seek to dismiss their appeal voluntarily under Fed. R. App. P. 42(b), or, in the alternative, as moot under 10th Cir. R. 27.3(a)(1)(B). Appellees agree to the dismissal under Rule 42(b), though they do not agree that the appeal is moot.

As the State Defendants seek to voluntarily dismiss their own appeal, we need not decide whether the appeal would also be subject to dismissal as moot. The State

Defendants' Motion to Dismiss Pending Appeal is granted, and the temporary stay entered by this court on October 22, 2020, is vacated. The mandate shall issue forthwith.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

March 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENVER BIBLE CHURCH; ROBERT A. ENYART; COMMUNITY BAPTIST CHURCH; JOEY RHOADS,

Plaintiffs - Appellants,

v.

GOVERNOR JARED POLIS, in his official capacity as Governor, State of Colorado; JILL HUNSAKER RYAN, in her official capacity as Executive Director of the Colorado Department of Public Health and Environment; COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; ALEX M. AZAR, II, in his official capacity as Secretary, United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; CHAD W. WOLF, in his official capacity as Acting Secretary, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; STEVEN T. MNUCHIN, in his official capacity as Secretary, United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants - Appellees.

No. 20-1391
(D.C. No. 1:20-CV-02362-DDD-NRN)
(D. Colo.)

ORDER

Before **HARTZ** and **McHUGH**, Circuit Judges.

Appellants have filed an emergency motion for injunction pending appeal (Mar. 12, 2021). A motion requesting the same relief is currently pending before the district court.

A motion for injunction pending appeal "must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2)(A). The pending motion in the district court establishes that "moving first in the district court" would not be "impracticable." *Id.* 8(a)(2)(A)(i). And we cannot say on this record that the district court's delay in ruling on the motion presently amounts to a "fail[ure] to afford the relief requested." *Id.* 8(a)(2)(A)(ii). We therefore deny the motion without prejudice.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:20-cv-02362-DDD-NRN

DENVER BIBLE CHURCH;
ROBERT A. ENYART;
COMMUNITY BAPTIST CHURCH; and
JOEY RHOADS,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary, United States Department of Health and Human Services;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
ALEJANDRO MAYORKAS, in his official capacity as Secretary, United States Department of Homeland Security;
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
JANET YELLEN, in her official capacity as Secretary, United States Department of the Treasury;
UNITED STATES DEPARTMENT OF THE TREASURY;
GOVERNOR JARED POLIS, in his official capacity as Governor, State of Colorado;
JILL HUNSAKER RYAN, in her official capacity as Executive Director, Colorado Department of Health and Environment; and
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Defendants.[1]

ORDER DENYING PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Xavier Becerra is automatically substituted for Alex M. Azar II, Alejandro Mayorkas is automatically substituted for Chad W. Wolf, and Janet Yellen is automatically substituted for Steven T. Mnuchin.

Before the court is Plaintiffs' motion for entry of an injunction pending interlocutory appeal of the court's order denying in part their request for a preliminary injunction. (Doc. 98.) The motion is denied.

BACKGROUND

On October 15, 2020, the court issued an order granting in part Plaintiffs' motion for a preliminary injunction related to the public-health orders issued by the State of Colorado in response to the COVID-19 pandemic. (Doc. 65.) Plaintiffs had sought (1) to enjoin the State Defendants from enforcing against them any and all restrictions imposed by the State's public-health orders; and (2) to enjoin the Federal Defendants from providing any further COVID-19 disaster relief funds to the State so long as the State's allegedly unlawful public-health orders remained in effect.[2] (Doc. 13.) The court granted Plaintiffs' request to enjoin the State Defendants from enforcing: (1) the indoor occupancy limitations set forth in Public Health Order 20-35; and (2) the face-covering requirement set forth in Executive Order D 2020 138 and Public Health Order 20-35, where the temporary removal of a face covering is necessary to carry out religious exercise. The court denied Plaintiffs' request to enjoin any other restriction imposed by the State's public-health orders, and also denied Plaintiffs' request to enjoin the Federal Defendants from distributing disaster relief funds to the State.

[2] For purposes of this Order, "State Defendants" means Defendants Jared Polis, Jill Hunsaker Ryan, and the Colorado Department of Public Health and Environment ("CDPHE"). "Federal Defendants" means Defendants Xavier Becerra, the United States Department of Health and Human Services, Alejandro Mayorkas, the United States Department of Homeland Security, Janet Yellen, and the United States Department of the Treasury.

Both the State Defendants and Plaintiffs appealed the court's order on Plaintiffs' preliminary-injunction motion. (Doc. 66; Doc. 74.) The Tenth Circuit temporarily stayed the court's preliminary injunction (Doc. 73), but ultimately dismissed the State Defendants' appeal and vacated its stay order (Doc. 96). Plaintiffs' interlocutory appeal remains pending, and Plaintiffs have filed the instant motion requesting that, pending resolution of their appeal, the court impose the injunctive relief that it previously denied. (Doc. 98.)

APPLICABLE LAW

While an appeal is pending from an interlocutory order that refuses an injunction, the court may "grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d); *see also* Fed. R. App. P. 8(a)(1)(C). In evaluating a motion for entry of an injunction pending appeal, the court must consider: (1) whether the movants have made a strong showing that they are likely to prevail on the merits of their appeal; (2) whether the movants will be irreparably injured if the injunction is not granted; (3) whether granting the injunction will substantially harm the opposing parties; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *accord Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); 10th Cir. R. 8.1(B)-(E); *Evans v. Bd. of Cnty. Comm'rs of Boulder, Colo.*, 772 F. Supp. 1178, 1181 (D. Colo. 1991). "There is substantial overlap between these and the factors governing preliminary injunctions [set forth in *Winter*,] not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

DISCUSSION

Plaintiffs' merits arguments in their motion for injunction pending appeal are largely those made in their original motion for entry of a preliminary injunction. For the same reasons the court held that Plaintiffs are unlikely to succeed on the merits of many of their claims before this court, they are unlikely to prevail on the merits of their appeal. Namely, it is likely to be determined that: (1) the Colorado Disaster Emergency Act ("CDEA") does not facially discriminate against religious exercise;[3] (2) most of the restrictions imposed by the State Defendants' public-health orders are neutral and generally applicable and satisfy rational-basis review; (3) the State Defendants' public-health orders are sufficiently comprehensible to a person of ordinary intelligence and not unconstitutionally vague; (4) individual notice and opportunity to be heard were not constitutionally required before the State Defendants issued their public-health orders; (5) Plaintiffs' claims alleging violations of the Colorado Constitution, the CDEA, and the Colorado Administrative Procedure Act ("APA") are barred by the Eleventh Amendment to the federal Constitution; and (6) Plaintiffs lack standing to bring their Religious Freedom Restoration Act and Stafford Act claims against the Federal Defendants. (Doc. 65.) The court is not persuaded that its determinations on these points are likely to be reversed on appeal. *See Parish Oil Co. v. Dillon Cos., Inc.*, No. 05-cv-00081-REB-PAC, 2007 WL 1063527, at *1 (D. Colo. Apr. 6, 2007) (movant that "merely rehashed

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[3] Plaintiffs appear to assert that the court previously failed to address their "as-applied" challenge to the CDEA. (*See* Doc. 98 at 10 & n.15, 11.) To the contrary, it was Plaintiffs' likelihood of success on a portion of this claim that warranted the preliminary injunctive relief granted by the court. (*See* Doc. 65 at 20-29 (evaluating Plaintiffs' likelihood of success on merits of claim that State Defendants' application of CDEA via issuance of public-health orders violates Free Exercise Clause).)

arguments" court previously rejected had not shown it was likely to prevail on merits of appeal).

Two of Plaintiffs' arguments merit further discussion. First, Plaintiffs contend that the court must adjudicate their claim that the State Defendants lacked authority under state law to issue the disputed public-health orders. Plaintiffs assert that their claims alleging violations of the Colorado Constitution, the CDEA, and the Colorado APA are "predicate issue[s]" that the court must decide before it can proceed to analyze whether the public-health orders violate any federal constitutional provision. (Doc. 106 at 8-10.) Not so. As explained in the court's previous order, whether the State Defendants' orders "are void under state law" as Plaintiffs contend is not for this court to decide because the Eleventh Amendment likely precludes the court from adjudicating Plaintiffs' claims alleging violations of state law. (Doc. 65 at 37-38.) Plaintiffs cite *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), in support of their argument that the court is required to decide "intertwined state law issues." (Doc. 106 at 9.) The Supreme Court held in *Osborn* that when a federal court has subject-matter jurisdiction over a federal claim, it also has so-called "pendent jurisdiction" to adjudicate related state-law claims over which it otherwise would not have jurisdiction. But "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment," even if the result is that pendent state-law claims must be split off and brought in state court. *Id.* at 121-22. Plaintiffs are not likely to prevail on their "*ultra vires*" argument on appeal because of Eleventh Amendment immunity.

Second, Plaintiffs argue that even if some restrictions in the State Defendants' public-health orders are neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), such restrictions are nonetheless subject to strict scrutiny because (1) they unduly burden Plaintiffs' free exercise, and (2) *Cantwell v. Connecticut*, 310 U.S. 296 (1940), not *Smith*, controls the analysis here. In support of their first point, Plaintiffs cite Justice Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and the Seventh Circuit's decision in *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015). But whatever their merits, the cited concurrence and out-of-circuit opinion are not controlling authority.[4] The majority opinion in *Lukumi* and subsequent Tenth Circuit decisions hold that a neutral law of general applicability "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 508 U.S. at 531; *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002) (even law that "substantially" burdens religious practice not subject to strict scrutiny if neutral and generally applicable).

In support of their second point, Plaintiffs note that the *Smith* Court characterized *Cantwell* and other prior decisions that had applied strict scrutiny to neutral and generally applicable laws as distinguishable because they "involved not the Free Exercise Clause alone, but the Free

[4] Indeed, it is questionable whether *Listecki* is even controlling authority in the Seventh Circuit with respect to the "subsequent [undue burden] step after the *Smith* test" applied in that case. *See Nat'l Inst. of Family & Life Advocs. v. Schneider*, 484 F. Supp. 3d 596, 624 n.27 (N.D. Ill. 2020) (noting that *Listecki* appears to be a lone outlier and other Seventh Circuit and Supreme Court decisions make no reference to this "subsequent step" after the *Smith* analysis).

Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. Plaintiffs argue that this case falls into that category because the disputed public-health orders violate both their free exercise and due process rights. (Doc. 106 at 2-3.) But the court has held that the orders likely comply with due process. (*See* Doc. 65 at 29-37.) What is more, Plaintiffs did not make this argument in their original motion for entry of a preliminary injunction. There, they cited *Smith* and its progeny as the authority controlling the free exercise analysis, and argued that the disputed public-health orders should be subject to strict scrutiny because they are not neutral and generally applicable. (*See* Doc. 13 at 17-20.) Nowhere did Plaintiffs cite *Cantwell* or argue that a neutral and generally applicable restriction that "unduly burdens" religious practice should be subject to strict scrutiny. (*See id.*) A motion for injunction pending appeal should not be used to raise new arguments that could have been made at the outset in the preliminary-injunction motion; the Tenth Circuit likely will not consider such arguments on appeal. *United States v. Power Eng'g Co.*, 10 F. Supp. 2d 1165, 1170 (D. Colo. 1998); *O'Donnell v. Harris Cnty.*, 260 F. Supp. 3d 810, 815 (S.D. Tex. 2017). Plaintiffs are unlikely to prevail on appeal on their argument that *all* of the restrictions in the State Defendants' public-health orders are subject to strict scrutiny.

The merits factor is "critical" to the analysis of whether to issue an injunction pending appeal. *Nken*, 556 U.S. at 434. But if Plaintiffs were to show that the three "harm" factors "tip decidedly" in their favor, the showing required on the merits factor would be "somewhat relaxed"—they need only show that they have raised "questions so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). That

is not the case here. There is certainly harm to the Plaintiffs in being prevented from worshipping in the more intimate manner they desire—standing and sitting next to each other, shaking and holding hands, embracing, and engaging in other communal worship activities that involve close contact. The court sympathizes with these desires, and this harm to Plaintiffs likely is irreparable. But the court has determined that the State Defendants' prohibition on such activities likely does not violate Plaintiffs' free exercise rights under the circumstances. And the court cannot say that the harm to Plaintiffs tips the balance "decidedly" in their favor when it is weighed against the potential harm to the public if the State Defendants' compelling interest in limiting the spread of COVID-19 were hindered by a blanket prohibition on enforcement of *any and all* public-health restrictions—including those neutral and generally applicable restrictions as seemingly mild as requiring more frequent cleaning and sanitization of high-touch areas. Likewise, the public could be substantially harmed if the Federal Defendants were barred from distributing necessary disaster relief funds to the State. Because the balance of harms does not tip decidedly in Plaintiffs' favor, a strong showing on the merits factor is required.

CONCLUSION

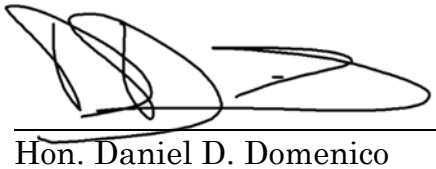
Plaintiffs have not made the required strong showing that they will likely succeed on the merits of their appeal, and their Motion for Injunction Pending Appeal (Doc. 98) is therefore DENIED.

Plaintiffs' motions (Doc. 99; Doc. 105) to file briefs that exceed the word limitations in the court's Practice Standards are DENIED AS MOOT. The court notes, however, that the number of words used by Plaintiffs in their briefs does not appear to have been necessary.

Plaintiffs are encouraged to make their arguments more focused and concise in the future.

DATED: March 28, 2021

BY THE COURT:



Hon. Daniel D. Domenico

APPENDIX E

FILED
United States Court of Appeals
Tenth Circuit

April 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENVER BIBLE CHURCH; ROBERT A. ENYART; COMMUNITY BAPTIST CHURCH; JOEY RHOADS,

Plaintiffs - Appellants,

v.

GOVERNOR JARED POLIS, in his official capacity as Governor, State of Colorado; JILL HUNSAKER RYAN, in her official capacity as Executive Director of the Colorado Department of Public Health and Environment; COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; XAVIER BECERRA, in his official capacity as Secretary, United States Department of Health and Human Services;* UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEJANDRO MAYORKAS, in his official capacity as Secretary, United States Department of Homeland Security;** UNITED STATES DEPARTMENT OF HOMELAND SECURITY; JANET L. YELLIN, in her official capacity as Secretary, United States

No. 20-1391
(D.C. No. 1:20-CV-02362-DDD-NRN)
(D. Colo.)

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* On March 18, 2021, Xavier Becerra became Secretary of the United States Department of Health and Human Services. Consequently, his name has been substituted for Alex M. Azar, II, as Defendant-Appellee, per Fed. R. App. P. 43(c)(2).

** On February 2, 2021, Alejandro Mayorkas became Secretary of the United States Department of Homeland Security. Consequently, his name has been substituted for Chad W. Wolf, as Defendant-Appellee, per Fed. R. App. P. 43(c)(2).

Department of the Treasury;*** UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants - Appellees.

ORDER

Before **MATHESON** and **KELLY**, Circuit Judges.

Plaintiffs have filed an Emergency Motion for Injunction Pending Appeal (Apr. 2, 2021). Defendants Polis, Ryan, and the Colorado Department of Public Health and Environment have filed a response in opposition.

We evaluate a motion for an injunction pending appeal under Federal Rule of Appellate Procedure 8(a)(2) using the preliminary injunction standard. *See Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). Thus, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

We have considered plaintiffs' motion in light of these standards. Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claim that the Colorado Disaster Emergency Act, Colo. Rev. Stat. §§ 24-33.5-701 to -717, violates the

*** On January 25, 2021, Janet L. Yellen became Secretary of the United States Department of Treasury. Consequently, her name has been substituted for Steven T. Mnuchin, as Defendant-Appellee, per Fed. R. App. P. 43(c)(2).

First Amendment of the United States Constitution, either as applied to plaintiffs or on its face. Plaintiffs' motion is therefore denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F

Colorado Statutes

Title 24. GOVERNMENT - STATE

PRINCIPAL DEPARTMENTS

Article 33.5. Public Safety

Part 7. EMERGENCY MANAGEMENT

Current through Chapter 107 of the 2020 Legislative Session

§ 24-33.5-701. Short title

The short title of this part 7 is the "Colorado Disaster Emergency Act".

Cite as C.R.S. § 24-33.5-701

History. Amended by 2018 Ch. 234, §1, eff. 8/8/2018.

L. 2012: Entire part RC&RE with relocations, (HB 12-1283), ch. 240, p. 1070, § 10, effective July 1. L. 2018: Entire section amended, (HB 18-1394), ch. 234, p. 1458, § 1, effective August 8.

Editor's Note:

This section is similar to former §24-32-2101 as it existed prior to 2012.

Colorado Statutes

Title 24. GOVERNMENT - STATE

PRINCIPAL DEPARTMENTS

Article 33.5. Public Safety

Part 7. EMERGENCY MANAGEMENT

Current through Chapter 107 of the 2020 Legislative Session

§ 24-33.5-702. Purposes and limitations

(1)

The purposes of this part 7 are to:

(a)

Reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from all-hazards, including natural catastrophes or catastrophes of human origin, civil disturbance, or hostile military or paramilitary action;

(b)

Prepare for prompt and efficient search, rescue, recovery, care, and treatment of persons lost, entrapped, victimized, or threatened by disasters or emergencies;

(c)

Provide a setting conducive to the rapid and orderly recovery, restoration, and rehabilitation of persons and property affected by disasters;

(d)

Clarify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, response to, and recovery from disasters;

(e)

Authorize and provide for cooperation in disaster prevention, preparedness, response, and recovery;

(f)

Authorize and provide for coordination of activities relating to disaster prevention, preparedness, response, and recovery by agencies and officers of this state and similar state-local, interstate, federal-state, and foreign activities in which the state and its political subdivisions may participate;

(g)

Provide a disaster and emergency management system embodying all aspects of pre-disaster and pre-emergency preparedness, prevention, mitigation, and post-disaster and post-emergency response and recovery; and

(h)

Assist in prevention of disasters caused or aggravated by inadequate planning for regulation of public and private facilities and land use.

(2)

Nothing in this part 7 shall be construed to:

(a)

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

(b)

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

(c)

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

(d)

Limit, modify, or abridge the authority of the governor to proclaim martial law or exercise any other powers vested in the governor under the constitution, statutes, or common law of this state independent of, or in conjunction with, any

provision of this part 7.

Cite as C.R.S. § 24-33.5-702

History. Amended by 2018 Ch. 234, §2, eff. 8/8/2018.

L. 2012: Entire part RC&RE with relocations, (HB 12-1283), ch. 240, p. 1070, § 10, effective July 1. L. 2018: (1)(a), (1)(c), and (1)(g) amended, (HB 18-1394), ch. 234, p. 1458, § 2, effective August 8.

Editor's Note:

This section is similar to former §24-32-2102 as it existed prior to 2012.

Colorado Statutes

Title 24. GOVERNMENT - STATE

PRINCIPAL DEPARTMENTS

Article 33.5. Public Safety

Part 7. EMERGENCY MANAGEMENT

Current through Chapter 107 of the 2020 Legislative Session

§ 24-33.5-703. Definitions

As used in this part 7, unless the context otherwise requires:

(1)

"Bioterrorism" means the intentional use of microorganisms or toxins of biological origin to cause death or disease among humans or animals.

(2)

"Committee" means the governor's expert emergency epidemic response committee created in section 24-33.5-704.5.

(3)

"Disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin, including but not limited to fire, flood, earthquake, wind, storm, wave action, hazardous substance incident, oil spill or other water contamination requiring emergency action to avert danger or damage, volcanic activity, epidemic, air pollution, blight, drought, infestation, explosion, civil disturbance, hostile military or paramilitary action, or a condition of riot, insurrection, or invasion existing in the state or in any county, city, town, or district in the state.

(3.5)

"Emergency" means an unexpected event that places life or property in danger and requires an immediate response through the use of state and community resources and procedures.

(4)

"Emergency epidemic" means cases of an illness or condition, communicable or noncommunicable, caused by bioterrorism, pandemic influenza, or novel and highly fatal infectious agents or biological toxins.

(4.3)

"Emergency management" means the actions taken to prepare for, respond to, and recover from emergencies and disasters and mitigate against current and future risk.

(4.5)

"Mitigation" means the sustained action to reduce or eliminate risk to people and property from hazards and their effects.

(5)

"Pandemic influenza" means a widespread epidemic of influenza caused by a highly virulent strain of the influenza virus.

(6)

"Political subdivision" means any county, city and county, city, or town and may include any other agency designated by law as a political subdivision of the state.

(7)

(a)

"Publicly funded safety net program" means a program that is administered by a state department and that:

(I)

Is funded wholly or in part with state, federal, or a combination of state and federal funds; and

(II)

Provides or facilitates the provision of medical services to vulnerable populations, including children, disabled individuals, and the elderly.

(b)

The term includes a program of medical assistance, as defined in section 25.5-1-103(5), C.R.S.

(7.3)

"Recovery" means the short, intermediate, and long-term actions taken to restore community functions, services, vital resources, facilities, programs, continuity of local government services and functions, and infrastructure to the

affected area.

(7.5)

"Resiliency" means the ability of communities to rebound, positively adapt to, or thrive amidst changing conditions or challenges, including human-caused and natural disasters, and to maintain quality of life, healthy growth, durable systems, economic vitality, and conservation of resources for present and future generations.

(7.7)

"Response" means the actions taken directly following the onset of an emergency or disaster to provide immediate assistance to maintain life, improve health, protect property, restore essential functions, and ensure the security of the affected population.

(8)

"Search and rescue" means the employment, coordination, and utilization of available resources and personnel in locating, relieving distress and preserving life of, and removing survivors from the site of a disaster, emergency, or hazard to a place of safety in case of lost, stranded, entrapped, or injured persons.

Cite as C.R.S. § 24-33.5-703

History. Amended by 2018 Ch. 234, §3, eff. 8/8/2018.

L. 2012: Entire part RC&RE with relocations, (HB 12-1283), ch. 240, p. 1071, § 10, effective July 1. L. 2018: (2) amended and (3.5), (4.3), (4.5), (7.3), (7.5), and (7.7) added, (HB 18-1394), ch. 234, p. 1459, § 3, effective August 8.

Editor's Note:

This section is similar to former §24-32-2103 as it existed prior to 2012.

Colorado Statutes

Title 24. GOVERNMENT - STATE

PRINCIPAL DEPARTMENTS

Article 33.5. Public Safety

Part 7. EMERGENCY MANAGEMENT

Current through Chapter 107 of the 2020 Legislative Session

§ 24-33.5-704. The governor and disaster emergencies - response - duties and limitations

(1)

The governor is responsible for meeting the dangers to the state and people presented by disasters.

(2)

Under this part 7, the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.

(3)

Repealed.

(4)

A disaster emergency shall be declared by executive order or proclamation of the governor if the governor finds a disaster has occurred or that this occurrence or the threat thereof is imminent. The state of disaster emergency shall continue until the governor finds that the threat of danger has passed or that the disaster has been dealt with to the extent that emergency conditions no longer exist and the governor terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty days unless renewed by the governor. The general assembly, by joint resolution, may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency. All executive orders or proclamations issued under this subsection (4) shall indicate the nature of the disaster, the area threatened, and the conditions that brought it about or that make possible termination of the state of disaster emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent or impede, shall be promptly filed with the office of emergency management in the division of homeland security and emergency management, the secretary of state, the county clerk and recorder, and emergency management agencies in the area to which it applies.

(5)

An executive order or proclamation of a state of disaster emergency shall activate the disaster response and recovery aspects of the state, local, and interjurisdictional disaster emergency plans applicable to the political subdivision or area in question and shall be authority for the deployment and use of any forces to which the plans apply and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available pursuant to this part 7 or any other provision of law relating to disaster emergencies.

(6)

During the continuance of any state of disaster emergency, the governor is commander-in-chief of the organized and unorganized militia and of all other forces available for emergency duty. To the greatest extent practicable, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or regulations, but nothing in this section restricts the governor's authority to do so by orders issued at the time of the disaster emergency.

(6.5)

(a)

During the response to or recovery from any state of disaster emergency, the governor may convene a disaster policy group if needed to effectively and efficiently coordinate policy-level decision-making and to advise the governor on the response to and recovery from the event. The policy group must include a representative from the department of local affairs and appropriate state agencies involved in the response and recovery effort.

(b)

If the governor convenes a disaster policy group pursuant to subsection (6.5)(a) of this section, the governor shall appoint a chair and shall delegate to the chair the authority to manage cross-departmental and interjurisdictional coordination for recovery efforts.

(7)

In addition to any other powers conferred upon the governor by law, the governor may:

(a)

Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency;

(b)

Utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;

(c)

Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;

(d)

Subject to any applicable requirements for compensation under section 24-33.5-711, commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency;

(e)

Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(f)

Prescribe routes, modes of transportation, and destinations in connection with evacuation;

(g)

Control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises therein;

(h)

Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, or combustibles;

(i)

Make provision for the availability and use of temporary emergency housing; and

(j)

Determine the percentage at which the state and a local government will contribute moneys to cover the nonfederal cost share required by the federal "Robert T. Stafford Disaster Relief and Emergency Assistance Act", as amended, 42 U.S.C. sec. 5121 et seq., required by the federal highway administration pursuant to 23 U.S.C. sec. 125, or required by any other federal law in order to receive federal disaster relief funds. After making such a determination, the governor may amend the percentage at which the state and local government will contribute moneys to the nonfederal cost share based on the needs of the individual local governments. As soon as practicable after making or amending such a determination, the governor shall notify the joint budget committee of the source and amount of state moneys that will be contributed to cover a nonfederal cost share pursuant to this paragraph (j).

(8) and (9)

Repealed.

Cite as C.R.S. § 24-33.5-704

History. Amended by 2018 Ch. 234, §21, eff. 8/8/2018.

Amended by 2018 Ch. 234, §4, eff. 8/8/2018.

Amended by 2014 Ch. 54, §1, eff. 3/21/2014.

Amended by 2014 Ch. 11, §2, eff. 2/27/2014.

L. 2012: Entire part RC&RE with relocations, (HB 12-1283), ch. 240, p. 1072, § 10, effective July 1. L. 2014: (3) and (8)(a)(III) repealed and (8)(a)(I), (8)(a)(II), and (8)(b)(IV) amended, (HB 14-1004), ch. 11, p. 102, § 2, effective February 27; (7)(j) added, (SB 14-121), ch. 54, p. 250, § 1, effective March 21. L. 2018: (4) amended, (6.5) added, and (8) and (9) repealed, (HB 18-1394), ch. 234, pp. 1459, 1473, §§ 4, 21, effective August 8.

Editor's Note:

(1) This section is similar to former §24-32-2104 as it existed prior to 2012.

(2) Subsections (8) and (9) were relocated to § 24-33.5-704.5 in 2018.

APPENDIX G

EXHIBIT 1
EXCERPTS OF AFFIDAVITS FROM THE RECORD

Pastors Enyart and Rhoads both testify that, due to the size of their churches' worship spaces, the 6-foot **social distancing** requirement limits attendance to **significantly less than 50%** of normal. This fact makes the social distancing dictate harsher, **as applied,** than the 50% capacity limit enjoined heretofore. ECF 56-1, ¶¶2-5 (Enyart, R. 2nd); 56-2, ¶¶ 2-3 (Rhoads 2nd). Rhoads also testifies that the social distancing dictate severely burdens himself, his family, and his church's **food bank ministry**. ECF 56-2, ¶¶ 4 ("[W]e have had to double the number of needed volunteers from 9 to 18… My own family and my associate pastor are carrying the load for this disparity. The **constant** upkeep of changing executive and health orders and requirements **takes its toll** on our families and on the other duties of my church ministry, now requiring me to **work seven days per week with no days off.** The time for individual counseling and prayer is significantly reduced.") (emphasis added).

Pastor Rhoads testifies: Our mode of worship and faith is to gather as members for worshipping God, prayer and for fellowship with each other on Sundays and during the week. Furthermore, our mode of worship and faith involves gatherings of parents and children for Sunday school to instruct children in the faith. Our mode of worship also includes gatherings in the form of meetings of adults on Sundays and during the week for Sunday school, Bible study, and other gatherings in the form of church dinners, funerals, weddings and many other similar events. At these in-person gatherings we express our worship and praise by speaking out loud to God and each other, reading the Holy Scripture, praying out loud, singing praise and worship hymns to God, playing instruments, shaking hands, holding hands, embracing, using common hymnals and Bibles, smiling, and observing each others' faces in order to share in expressions of thoughts and emotions such as joy, love, grief and sadness because the Bible instructs us to bear one other's

burdens and because the Bible tells us that our countenances sharpen (improve) one another's countenances. ECF 45-3, ¶¶2-5.

Affiant Leslie Hanks testifies: "Our church community is suffering irreparable harm from government orders to hold on-line services, limit the size of our gatherings, wear masks and **social distance….**" ECF 56-5, ¶ 2. "The situation is **stressful** to me because I have read that Colorado businesses are being threatened **criminally** for failing to comply with mask orders. I am concerned I could be **arrested or bring punishment** to Denver Bible Church simply because of how I choose to **worship and protect my own health**. Once we started having services, I assumed we were alright if we socially distanced, but the **fear of being punished just for incorrect social distancing is a continuing source of stress**." *Id.*, 56-5, ¶5 (emphasis added).

Affiant Nathanial Enyart testifies: "It almost seems that an effort is being made to make some version of the shutdown last forever." ECF 56-4, ¶2. "The **government's uncertain orders** made a concern about the virus **much worse** than concern about the virus alone. *Id.*, 56-4, ¶5 (emphasis added). "Definitely, some members have not returned to our church because of the mask orders and **social distancing orders**…. The **orders are unclear**, but we know the government has clearly said that violations of the orders carry **criminal penalties**." *Id.*, 56-4 ¶6 (emphasis added).

Affiant Isabel Wagner testifies: "Services with **social distancing** prevent many components of our pre-shutdown services, including **baptisms, praying by the laying on of hands, standing and sitting shoulder-to-shoulder with my fellow worshippers, and receiving holy communion according to our custom**." ECF 56-8, ¶ 11 (emphasis added).

Affiant Stirling Walker testifies to immediate **safety concerns** caused by meeting outdoors, ECF 56-6, ¶¶3-5, the **interference** that holding on-line services causes to religious practices including **baptism, communion and corporate worship**, *id.*, ¶3, and the separate worship areas

required by **social distancing**, *id.*, ¶6. Walker testifies that the "government orders are confusing, voluminous, and appear to be conflicting – all at once." *Id.,* ¶8. Walker also expresses his worry about punishment: "On top of all this, I attend church while wondering if we will be **shut down, fined, or even arrested for violating** some aspect of a governmental order having to do with capacity limits, mask wearing, **social distancing, cleaning/sanitizing, or any other requirement.**" *Id.,* ¶7 (emphasis added).

Affiant Deacon Jason Troyer testifies: "The loss to our church community is incalculable and irreparable due to government orders that we convert to on-line services, limit the size of our gatherings, wear masks and **social distance**…." ECF 45-11, ¶2. **"**Being ordered by the government not to gather in person or to severely limit our gathering as a group, is a **huge infringement** upon our church's religious ministry and my ministry as a deacon." *Id.*, ¶3. "The government's orders have **caused uncertainty** in every aspect of our ministry and worship. Id., ¶5. "The **irreparable harm** our church has experienced is that the rights of our congregation and my personal religious freedom have been **taken away by the government.** Those moments in time to gather together can never be recaptured." *Id.* ¶8.

Affiant Beau Ballentine testifies particularly to the impact the government's orders have had on his wife and himself as parents and on their children. Normally, Sunday morning "is a time of rest from the stress of work and to have fellowship and prayer as a church community." ECF 45-9, ¶2. "When we had to stop going to church due to the government's orders, our family was **severely impacted in a negative way**. It was a **big loss** for our children not to see their friends at church because my wife homeschools our children." *Id.,* ¶3 (emphasis added). "The kids and my wife **became shut-ins**." *Id.* "The other men at church give me strength and a better frame of mind because we share a faith. It was a **great loss** to me to be denied the ability to gather with other

fathers." *Id.*, ¶4. "From the beginning I have felt that the government's **rules are very arbitrary**. I stay up-to-date with the news. But the **laws change every day** as to what is allowed and what is not. How does any person to keep up with changes like that? *Id.* ¶5.

Affiant James Craddock testifies: "Being separated from our church community was difficult and **traumatic** due to family issues we were going though. For such times of stress, we normally rely on church worship and gathering in faith and fellowship. The emotional increase in stress and pain from being separated has caused **irreparable damage to our family and church community**. The church put out a link to hear the sermons on-line, but that's not the same as gathering to worship together. **We were isolated from our church community by the government's orders.**" ECF 45-10, ¶4.