No. 24-

IN THE

Supreme Court of the United States

GRACE BIBLE FELLOWSHIP AND JOEY RHOADS,

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

REBECCA R. MESSALL
Counsel of Record
MESSALL LAW FIRM, LLC
11670 Fountains Drive, Suite 200
Maple Grove, MN 55364
(612) 471-5800
rm@lawmessall.com

Counsel for Petitioners

331291

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

QUESTION PRESENTED

Whether plaintiffs seeking only declaratory relief, without alleging an "ongoing" or "imminent" or "continuing" deprivation of constitutional rights, lack an Article III controversy such that, despite actual injuries, they lack standing and fail to state a claim.

PARTIES TO THE PROCEEDINGS

The parties are those listed in the caption.

CORPORATE DISCLOSURE

Not applicable

RELATED PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit, No. 23-1148, *Grace Bible Fellowship v. Polis,*

- Order, entered April 26, 2024, denying Petition for Rehearing *En Banc*
- Order and Judgment upholding dismissal, entered March 29, 2024

U.S. District Court for the District of Colorado, No. 1:20-cv-02362, *Grace Bible Fellowship v. Polis,*

- Amended Final Judgment, entered April 7, 2023
- Order Granting Motions to Dismiss, entered March 22, 2023

United States Supreme Court, *Community Baptist Church v. Polis*, No. 21-1328, May 31, 2022, denying Petition for Writ of *Certiorari*.

U.S. Court of Appeals for the Tenth Circuit, No. 20- 1391, *Denver Bible Church v. Polis*,

- Order denying motion for stay of mandate, entered March 1, 2022
- Order denying Petition for Rehearing *En Banc*, entered February 22, 2022
- Order and Judgment entered January 24, 2022

U.S. Court of Appeals for the Tenth Circuit, No. 20-1377, Order Granting Motion to Dismiss State Defendants' Appeal, entered December 22, 2020.

U.S. District Court for the District of Colorado, No. 1:20-cv-02362, *Denver Bible Church v. Polis,* Order granting partial injunctive relief, entered October 15, 2020, and Order denying emergency injunction pending appeal, March 28, 2021.

TABLE OF CONTENTS

Table of Contents

Table of Contents

Page

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Cited Authorities

Page

Statutes

Rules

Other Authorities

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

Grace Bible Fellowship v. Polis, Order Denying Petition for Rehearing En Banc, No. 23-1148, (10th Cir. Apr. 26, 2024), App. 42a - 43a

Grace Bible Fellowship v Polis, 2024 WL 1340201 (10th Cir. Mar. 29, 2024) (not reported in Fed. Rptr.), App. 1a - 13a

Grace Bible Fellowship v Polis, 694 F. Supp. 3d 1338 (D. Colo. Mar. 22, 2023), App. 14a - 41a

Church v. Polis, No. 20-1391, 2022 WL 200661 (10th Cir. Jan. 24, 2022), *cert. denied sub nom Cmty. Baptist Church v. Polis,* 142 S. Ct. 2753 (2022).

Denver Bible Church v. Azar, 494 F. Supp.3d 816 (D. Colo. 2020), aff'd in part, dismissed in part *sub nom Church v. Polis*, No. 20-1391, 2022 WL 200661 (10th Cir. Jan. 24, 2022)

Denver Bible Church v. Becerra, 2021 WL 1220758 (D. Colo. Mar. 28, 2021)

Church v. Polis, 2020 WL 9257251 (10th Cir. Dec. 23, 2020)

Denver Bible Church v. Azar, 494 F. Supp. 3d 816 (D. Colo. 2020)

STATEMENT OF JURISDICTION

On April 26, 2024, the Tenth Circuit denied a Petition for Rehearing *en Banc.* Based on a timely application, this Court granted an extension of time until Saturday, August 24, 2024, to file this petition, which is timely filed on Monday, August 26, 2024.

The statute conferring this Court's jurisdiction is 28 U.S.C. § 1254(1). Notifications are not required under Rule 29.4.

CONSTITUTIONAL PROVISIONS

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend I.

Fourteenth Amendment:

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; no shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELATED STATUTES

Other relevant portions of the Colorado Disaster Emergency Act appear at App. 41 - 52a.

C.R.S. § 24-33.5-704 (7) In addition to any other powers conferred upon the governor by law, the governor may:

(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).

I. STATEMENT OF THE CASE

A. Legal background

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions upon power granted or reserved." *United States v. Bishop,* 555 F.2d 771, 777 (10th Cir. 1977), *citing Home Building & Loan Assn v. Blaisdell*, 290 U.S. 398, 425 (1934).

B. Factual and procedural background

1. Original Complaint

Executive and public health mandates, first issued in March 2020, were continually reissued for a period much longer than "15 days to flatten the curve," causing Pastor Rhoads and his congregation[1] to file an original complaint and motion for preliminary injunction in August 2020, based on more than a dozen affidavits from Rhoads and church members describing the multiple injuries they were then suffering.

One claim sought relief, as-applied and facially, for free exercise violations caused by Colorado's emergency statute. C.R.S. §25-33.5-701 *et seq.* ("CDEA"). Most of

1. Petitioner Grace Bible Fellowship, at the time of the original complaint, was then known as Community Baptist Church. During this litigation, the church disaffiliated from the Baptist denomination to become an independent congregation, as explained in an unopposed motion to substitute, granted July 27, 2022. ECF 33-34, *Denver Bible Church v. Azar*, 1:20-cv-02362-DDD-NRN (D. Colo).

the claims were based on specific mandates issued under CDEA's and the public health statutes' alleged authority. Other claims were against federal agencies participating in what was revealed to be a coordinated national "lockdown," facilitated by federal funding channeled through state statutes similar to CDEA.

In October 2020, the district court granted partial injunctive relief from a capacity limit (from which, due to their small facility, Plaintiffs obtained no practical relief due to a social distancing mandate) and a face-covering requirement as necessary to "carry out their religious exercise." *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 844 (D. Colo. 2020). However, the district court expressly held that Plaintiffs remained subject to a mandate that required sanitization, prohibited shaking hands, and required 6-foot social distancing. *Id.* at 836. The latter limited Plaintiffs' indoor worship attendance to 20-35 people in space that allowed 251 people. *See* Rhoads affidavit, ECF 56-2, *Denver Bible Church v. Azar*, 1:20-cv-02362-DDD-NRN (D. Colo.).

Posted on a government website, the mandates changed in content in rapid succession and, nearly each time, the content increased, up to 60 pages in length. The district court agreed the mandates presented "somewhat of a moving target." 494 F. Supp. 3d at 836 and fn. 7. As weeks passed, new mandates contained provisions warning that they carried criminal penalties enforceable by different levels of authority, including county district attorneys.

The governor and the public health director ("State Defendants") obtained an administrative stay in

conjunction with their appeal to the Tenth Circuit from the district court's partial preliminary injunction. At the same time, Plaintiffs filed a cross appeal in the Tenth Circuit, and, in this Court, sought an emergency injunction pending appeal (undocketed).

State Defendants withdrew their Tenth Circuit appeal, while Plaintiffs sought an injunction pending appeal, denied by both the district court, the Tenth Circuit and, on June 1, 2021, by this Court (not referred).

In a response brief in the Tenth Circuit, filed June 11, 2021, State Defendants advised that all mandates had been allowed to expire on June 1, 2021. Brief at 22, *Denver Bible Church v. Polis*, No. 20-1391. After oral argument in November 2021, a panel denied and vacated, as moot, Plaintiffs' appeal from the district court's denial of broader preliminary injunctive relief, and also ruled that the facial free exercise claim was unlikely to succeed on the merits. *Grace Bible Fellowship v. Polis*, No. 23-1148, 2024 WL 134201 *1 (10th Cir., Mar. 29, 2024) (unpublished), *citing Cmty Baptist Church v. Polis,* No. 20-1391, 2022 WL20061, at *7 (10th Cir. Jan. 24, 2022) (unpublished). On remand, the district court granted interim attorneys fees, dismissed the original complaint, and granted leave to amend.

2. First Amended Complaint

In one way, the first amended complaint ("FAC") significantly differed from the original complaint by altogether dropping claims against the mandates. But in another way, FAC merely expanded upon the original complaint's constitutional challenge to CDEA by adding,

along with free exercise, claims for the violation of equal protection, and for the deprivation of speech and expressive conduct by reason of overbreadth and vagueness. Also new in FAC were these same claims regarding the public health statutes, though not including free exercise. *Grace Bible Fellowship v. Polis*, No. 23-1148 (10th Cir.), Opening Brief at 2-6; App. Vol. I 34, ¶¶46-49; 35, ¶¶52-59. Plaintiffs' overarching claim remained the same as to State Defendants' position that Colorado's statutes give government officials superior legal authority over individual rights under the First and Fourteenth Amendments.

The same extensive set of affidavits from church members and Pastor Rhoads accompanied FAC as had already afforded standing for the original complaint, including the reasserted facial and as-applied free exercise claims against CDEA. The district court noted: "At the time the original complaint was filed, there were such public-health orders in place, and there was no dispute that the plaintiffs had standing to bring claims against the State Defendants challenging those orders and the state statutes under which they were promulgated." *Grace Bible Fellowship v. Polis*, 694 F. Supp. 3d 1338, 1348 (D. Colo. 2023). However, the district court granted motions to dismiss FAC.

On appeal, the Tenth Circuit panel summarized the district court's action by saying that Plaintiffs "lacked standing to bring their newly asserted claims because "plaintiffs failed to allege the required [continuing] injury. As to the reasserted claims, the district court found that the as-applied CDEA free-exercise claim was moot, as [the Tenth Circuit] had previously ruled, and that plaintiffs'

facial free-exercise claim failed to state a claim upon which relief could be granted." App. at 4a; 2024 WL 1340201 *2 (brackets added).

The panel upheld the district court's determination made under Fed. R. Civ. P. 12(b)(1) insofar as Plaintiffs' constitutional injuries (albeit uncontroverted) were ruled as not "continuing." As such, the panel held they did not constitute an "injury-in-fact" necessary to establish standing to seek declaratory relief, "even for plaintiffs' newly asserted facial challenges." App. at 10a -11a; *id. at *4, citing Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). The panel seemed to hold that only pre-enforcement suits alleging a chill on First Amendment rights are entitled to a lower threshold in pleading injury-in-fact for standing purposes. App. at 9a - 10a; 2024 WL 1340201 *4. Moreover, according to the panel, FAC's affidavit that some church members never returned after the lockdown was held to have insufficiently pleaded a continuing injury. *Id*. fn 7.

Notably, the panel made no mention of the newly asserted "as applied" challenges nor the supporting factual allegations asserting equal protection, overbreadth and vagueness violations with respect to specific language of CDEA and the public health statutes.

Regarding FAC's as-applied free exercise claim against CDEA, a claim for which standing admittedly existed under the original complaint, the panel determined under Rule 12(b)(1) that the as-applied claim was moot, but offered no explanation beyond adopting a previous panel's interlocutory ruling regarding mandates. The panel did not consider the fact that CDEA restricts the duration

of specific mandates to 30-day periods, C.R.S. § 24-33.5-704(4), thus overlooking the fact that wrongdoing under CDEA in the instant case, and nearly always, is "capable of repetition but evading review."

Regarding FAC's facial free exercise claim, the panel ruled under 12(b)(6) that Plaintiffs failed to state a claim upon which relief can be granted. The panel distinguished FAC's allegations from this Court's intervening authority in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). to rule on the merits of the free exercise claim, rather than on "plausibility" of the allegations. *See* App. at 11a -12a; 2024 WL 1340291 *4-5.

3. Intervening authority

In addition to *Kennedy,* the Court's attention is drawn to intervening opinions on mootness, *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024), and on the proper method for analyzing First Amendment facial claims in *Moody v. NetChoice*, LLC, 144 S. Ct. 2383 (2024).

II. REASONS FOR GRANTING THE WRIT

The circuits are split and an intra-circuit split exists on the method necessary to analyze jurisdictional facts.

A. An intra-circuit split harmed Plaintiffs' case.

The intra-circuit split is addressed first regarding the method to determine jurisdictional facts when Fed. R. Civ. P. 12(b)(1) is asserted alone or with 12(b)(6). The panel relied on, and twice emphasized, a simple "wide discretion" method upheld in *Stuart v. Colo. Interstate*

Gas Co., 271 F.3d 1221 (10th Cir. 2001), despite Plaintiffs' objection that a later Tenth Circuit panel heavily criticized and restricted *Stuart's* use. *See Odom v. Penske Leasing Co.*, 893 F.3d 739 (10th Cir. 2018).

In contrast to *Stuart*, *Odom* would have required consideration on the merits in the instant case, rather than under Rule 12(b)(1), inasmuch as the lack of federal jurisdiction is not apparent from the amended complaint's four corners. *Stuart's* lenient "wide discretion" method lacks a framework to prevent dismissal from being "dispensed in gross," *c.f. Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996), without any analysis of facts offered to support each claim for relief, including here, overbreadth and vagueness facial claims which should be analyzed in light of this Court's intervening decision in *Moody,* discussed *infra.*

B. The Fifth and Eleventh Circuit's methods provide more fairness under 12(b)(1).

In contrast to *Stuart's* lack of a helpful analytical framework, the Court's attention is directed to the Fifth Circuit's requirement that a district court assume jurisdiction and proceed to the merits when issues of fact, such as in the instant case, are central to both subject matter jurisdiction and the claim on the merits. *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (rejecting a jurisdictional attack intertwined on the facts with the merits of a claim). In the instant case, the federal questions are plainly based on extensive factual allegations, too long to be repeated here. *Grace Bible Fellowship v. Polis*, No. 23-1148 (10th Cir.), Opening Brief at 2-11. While the merits of these claims, supported by affidavits, depend on

proof to be admitted at trial or upon dispositive motion, federal jurisdiction does as well. Accordingly, under *Montez* and even *Odom*, the panel's disposition was improper under *Stuart's* "wide discretion" because proof of the merits showing the constitutional wrongdoing, and federal jurisdiction, are intertwined by the same factual allegations.

Similarly, the Eleventh Circuit's method prefers that a district court initially assume jurisdiction and then decide the motion under Rule12(b)(6) when a motion seeks dismissal under both 12(b)(1) and 12(b)(6). *Jones v. State of Ga.*, 725 F.2d 622, 623 (11th Cir. 1984).

Plaintiffs would ask this Court to overrule *Stuart*, reverse and remand the case, inasmuch as *Odom* expressly relied on three of this Court's intervening decisions. *See* 893 F. 3d at 743. Moreover, *Odom*, relied in part on this Court's "emphasis on the federal courts' 'virtually unflagging' duty to hear and decide cases within [their] jurisdictional grants." *Id.* (citations omitted).

Importantly, unless this Court invalidates *Stuart*, *see Vincent v. Garland*, 80 F. 4th 1197, 2000 (10th Cir. 2023), other Tenth Circuit panels will be "obligated to follow" *Stuart* simply because it was decided prior-in-time to the *Odom* decision, s*ee Front Range Equine Rescue v. Vilsack,* 844 F. 3d 1230, 1233 (10th Cir. 2017), and the Tenth Circuit has not overruled *Stuart* by an *en banc* decision. *See Arostegui-Maldonado v. Garland*, 75 F. 4th 1132, 1142 (10th Cir. 2023).

C. A circuit-split exists on whether standing for declaratory (*i.e.,* not injunctive) relief requires that an actual injury also be "ongoing," "imminent" or "continuing" at the time a complaint is amended.

The panel recognized that the challenged statutes caused Plaintiffs to suffer months of actual injury. App. at 8a; 2024 WL 1340201 *3. Yet it held that standing for declaratory relief specifically requires the existence of a "continuing injury" at the time a complaint is amended, rather than at its initial filing. Noting that Plaintiffs' injury had supposedly "come and gone," *id.,* the panel held: "Plaintiffs' newly asserted claims [based on overbreadth, denial of equal protection and denial of freedom of speech] are not justiciable because plaintiffs fail to show the requisite [continuing] injury for Article III standing [necessary for declaratory relief]." App. at 13a; *id*. at * 5 (brackets added).

1. The First Circuit quotes a well-known treatise.

The First Circuit reached an opposite conclusion about past injury, quoting a well-known treatise: "'There is little difficulty in finding an actual controversy if all the acts that are alleged to create liability have already occurred. The court is merely being asked, as in any litigation, to determine the legal consequences of past events ... '" *Verizon New England, Inc. v. Intern'l Broth. of Electrical Workers*, 651 F. 3d 176, 189 (1st Cir. 2011), *citing* 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2757, at 475 (1998).

More specifically, declaratory judgment does not require an accompanying order for injunction as would be sought for wrongdoing "still in process." *Verizon*, 651 F.3d at 189, *citing Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus.") And a declaration that constitutional violations did or did not occur aids the parties in understanding their mutual obligations under the existing statutes or agreement. *See Verizon*, 651 F.3d at 190, *citing Bituminous Coal Operators' Ass'n. Inc. v. Int'l Union, United Mine Workers of Am., 585 F.2d 586, 595* (3d Cir. 1978), *abrogated on other grounds by Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 216 & n.4 (1979).

The *Verizon* court focused on whether "'the sought-after declaration would be of practical assistance in setting the underlying controversy to rest.'" *Id.* at 188. The court noted that Verizon's requested relief was not made in the abstract, but rather "as to the lawfulness of the particular acts described in its complaint under the no-strike clause of the [collective bargaining agreement]." *Id.* at 189. "[Verizon] seeks a declaration that the Union's past actions contravened the no-strike clause of the CBA and frustrated the company's bargained-for quid pro quo that such matters be resolved through arbitration. This is not a situation where a declaration is sought on the legal consequences of a hypothetical act that may or may not occur in the future." *Id.* at 190. The parties were still bound by the agreement for which Verizon sought resolution regarding the union's disputed activities.

Likewise, in the instant case, Plaintiffs do not request declaratory relief "in the abstract." They

simply seek a resolution regarding the lawfulness of the government's disputed actions under the statute, not on hypothetical facts, but on the language of the statute and extensive testimony contained in (1) Pastor Rhoads' affidavit responding to the motions to dismiss, (2) the church members' thirteen affidavits attached to the amended complaint along with Rhoads' initial affidavit, and (3) the allegations in the amended complaint. As in *Verizon*, declaratory judgment will aid Plaintiffs and the government in understanding their legal rights going forward under the challenged statutes.

2. The Eighth Circuit rejects an "ongoing" requirement.

Another example of the circuit-split is *United Food and Commercial Workers Intern. Union, AFL-CIO v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988). Prior to filing suit to challenge a mass picketing statute, the union had ended its most recent strike without any actual arrests although, in earlier years, strikes prompted arrests under the statute. State officials argued that the union lacked a case or controversy because no picketers were "arrested, prosecuted or threatened with prosecution . . .during the most recent picketing activities [.]" *Id.* at 427. Rejecting the argument, the court held: "This argument misapprehends the nature of the injury in fact requirement. Plaintiffs need not expose themselves to actual arrest or prosecution if they legitimately possess more than an 'imaginary or speculative' fear of prosecution." *Id., citing Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) and *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

Plaintiffs have continually rested on the argument that, for purposes of the standing requirement for

declaratory relief, their injury need not be "ongoing," "imminent," or "continuing," as long as it was "actual." As such, their argument was not waived by not appealing the district court's ruling that injury is determined at the filing of the amended complaint. See App. at 7a, fn. 5; 2024 WL 1340201, at fn.5. Notably, however, the panel specifically relied on *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202-03 (10th Cir. 2002), for the Tenth Circuit's holding that plaintiffs may "lose their standing for claims for prospective relief." App. at 9a; 2024 WL 1340201 at *3.

The Tenth Circuit's position that standing can be "lost" is a split from the Sixth Circuit, which emphatically held that injury, for purposes of standing for declaratory relief, is a one-time determination when suit is filed. *Cleveland Branch, N.A.A.C.P. v. City of Parma, Ohio*, 263 F.3d 513 (6th Cir. 2001), *cert denied*, 535 U.S. 971 (2002). Not only that, after an impressive analysis, the court stated: "We join the First, Fifth, Seventh, Eighth, and Ninth Circuits, which have all explicitly held that standing is determined as of the time the complaint is filed." *Id.* at fn. 11 (citations omitted).

In the instant case, the lower courts' denial of standing, despite actual injury, confuses the concepts of standing and mootness. This Court's "repeated statements" are that the doctrine of mootness is "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Friends of the Earth, Inc. v. Laidlaw Envir'l Servs.*, 528 U.S. 167, 189 (2000).

3. The panel's opinion conflicts with this Court's decision in *Super Tire Engineering, Co. v. McCorkle*, 416 U.S. 115 (1974).

Plaintiffs contended that the ruling on standing conflicted with *Super Tire*. *Grace Bible Fellowship v. Polis*, No. 201348, Opening Brief at 27. Even though the tire company's injury from a strike was no longer "in process" after a strike ended, the Court upheld the company's standing to seek declaratory relief inasmuch as the statute's funding for striking workers was "lurking in the background" in every labor negotiation as an ongoing incentive for a labor strike. In the case at bar, the challenged disaster emergency statute is written to coordinate with federal statutes so as to be the legal conduit for federal emergency funding. C.R.S. § 24-33.5-704(7)(j), Related Statutes, *supra* at p. 3. As such, federal funding is lurking in the background as an incentive for the governor's decision to declare a disaster emergency, particularly where, in the case at bar, the state obtained tens of billions of dollars and other federal aid on the condition that it implement virus mitigation measures such as caused Plaintiffs' injuries.

4. The panel's opinion also conflicts with this Court's rulings on standing in First Amendment cases where government action is capable of repetition but evading review.

In its opinion regarding the individual mandates, the district court noted that State Defendants' practice of issuing new mandates created a "moving target" for Plaintiffs and the court itself. 494 F. Supp. 3d 816, fn. 8.

But the reason for the "moving target" is rooted in the disaster statute's provision for the expiration, but indefinite reissuance, of mandates on a 30-day basis. C.R.S. §24-33.5-704(4). App. at 47a. Notably, of the original complaint's challenge to the varying language contained in numerous, specific mandates, almost none of the mandates were adjudicated except the ones current at the time of district court and appellate review.

However, in *Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596 (1982), this Court upheld First Amendment standing where, as is the case here, the challenged order was of short duration. Likewise, in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court upheld standing despite the expiration of a challenged order inasmuch as it could be "reasonably assumed" that, as a newspaper, it "will someday be subjected to another order relying on the [challenged statute]." *Id.* at 603. Likewise, here, the 30-day-duration of mandates issued under the challenged statutes makes the government's actions capable of repetition but evading review. None of the defendants in the case at bar stipulated that Plaintiffs' first amendment and equal protection rights would not be violated in the future and in fact, essentially reserved their prerogative to do so.

D. A circuit-split exists on the elements necessary to prove mootness, plus the panel's decision conflicts with an intervening mootness decision by this Court on March 19, 2024.

Plaintiffs' as-applied challenge to CDEA's violation of free exercise was abruptly dismissed. Without explaining its rationale, *see* App. at 11a; 2024 WL 1340201 *5, the

panel incorporated by reference a portion of a different panel's unpublished opinion two years earlier in *Church v. Polis*, No. 20-1391, 2022 WL 200661 (10th Cir. 2022). The earlier panel deemed moot Plaintiffs' appeal of a partially denied preliminary injunction protecting religious exercise from then-expired mandates. *Id.* at 844.

The panel's adopted opinion from the earlier panel is nevertheless a split from the Sixth Circuit's framework for mootness, which requires identification of the "issue presented." *N.A.A.C.P.*, 263 F.3d at 530, *citing County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (*quoting Powell v. McCormack*, 395 U.S. 486, 496 (1969). Here, the "issue presented" does not arise from the expired mandates, but is whether Colorado's disaster statute, as applied, deprived Plaintiffs of their free exercise rights. Their interest is still "cognizable" and the issue is "live" since, by definition, it arises from past events in order to be an as-applied claim under the statute.

The Sixth Circuit's second mootness element requires evidence that "subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *Id.* In adopting the prior panel's unpublished opinion, the panel relied on the government's promise to notify the court in the event of any new government restrictions on houses of worship regarding "covid-19 cases." *Church v. Polis, No. 20-1391,* 2022 WL 200661 at fn. 8. Such a promise however, is irrelevant on the issue of whether Plaintiffs' as-applied free exercise challenge to the statute is moot, as opposed to the previous challenge to specific mandates.

The panel's opinion also lacks any analysis for the third mootness element, although the Sixth Circuit

requires that "'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" 263 F.3d at 530-531, *citing Davis,* 440 U.S. at 631. The loss of Plaintiffs' free exercise rights should have been deemed an irreparable harm "for even minimal periods of time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (*per curiam*), *citing Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (*per curiam*).

But the panel did not consider whether events have "completely and irrevocably eradicated the effects" of Plaintiffs' free exercise deprivation when such a loss cannot be replaced. And the court did not consider Plaintiff Rhoads' affidavit that the forced, on-line worship caused the church equipment costs of $10,000.00 which, "for our small congregation" was "an enormous amount of money," and that "donations were decreased to about 65% of the norm." The fact that some members "stopped attending and never returned" was considered, but rejected as insufficiently pleaded beyond the affidavit itself. App. at 91, fn. 7; 2024 WL 1340201, fn. 7.

On the mootness issue, just ten days before the panel's decision, this Court stated in *Federal Bureau Investigation v. Fikre*, 601 U.S. 234 (2024), which was not considered by the panel or *en banc*, though raised to the latter: "In all cases, it is the defendant's 'burden to establish' that it cannot reasonably be expected to resume *its* challenged conduct-whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment." 601 U.S. at 243 (emphasis in the original).

Notably, in *Fikre*, both the Ninth Circuit and this Court rejected the government's conditional affidavit that,

based on "currently available information," the plaintiff would not be restored to the disputed No-Fly List where his claim challenged past conduct, as well. Here, however, the panel relied on the government's promise to inform a previous panel whenever additional covid-19 restrictions on houses of worship are issued. Such a promise fails to satisfy the government's "formidable burden" to show mootness of Plaintiffs' as-applied free exercise claim against the statute regarding acts taken under CDEA. On the contrary, the government's statement implicitly contains its view that it has authority to take future action against houses of worship in violation of speech, free exercise and equal protection rights.

E. The panel's "wide discretion" method for jurisdictional analysis overlooks this Court's requirements for analyzing First Amendment facial challenges based on overbreadth, vagueness, and denial of equal protection.

With respect to FAC's as-applied and facial First Amendment claims for violations of overbreadth, vagueness and equal protection, neither the district court nor the panel, by dismissing the claims under 12(b)(1) for lack of a "continuing injury," reviewed FAC under the requirements in this Court's intervening *Moody* decision on July 1, 2024. 144 S. Ct. 2383. This Court vacated and remanded decisions by the Fifth and Eleventh Circuits because of "much work to do below on both these cases, given the facial nature." Likewise, Plaintiffs would ask the Court to vacate and remand the case at bar because, based on the requisite analysis set out in *Moody*, there is much work to do to analyze the First Amendment claims in this case, both facial and as-applied.

III. The questions presented are important and recurring

Odom, *supra,* highlighted the importance of Rule 12(b)(1) determinations, in part, because of this Court's "emphasis on the federal courts' 'virtually unflagging' duty to hear and decide cases within [their] jurisdictional grants." 893 F.3d at 743 (citations omitted). Yet, the panel ruled on the basis of *Stuart*, without any sophisticated framework to prevent the "wide discretion" analysis from also becoming the method for determining a supposed 12(b)(6) failure to state a claim upon which relief can be granted, skirting the normal "plausibility" protections under *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007).

The questions presented in this case arise from government's unprecedented challenge to individual constitutional rights accomplished simply with postings on a webpage, using phrases of "emergency" and "public health," and tapping into billions of already prized federal funding.

CONCLUSION

Stuart's "wide discretion" method under Rule 12(b)(1) led to Plaintiffs' being denied ordinary protections under Rules 12(b)(6) and Rule 56. Accordingly, for the reasons set forth above, Plaintiffs ask the Court to grant this *Petition for Writ of Certiorari* or otherwise to vacate the panel's opinion, directing a remand to the district court for reconsideration under the cited authorities.

Respectfully submitted,

Rebecca R. Messall
Counsel of Record
Messall Law Firm, LLC
11670 Fountains Drive, Suite 200
Maple Grove, MN 55364
(612) 471-5800
rm@lawmessall.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-1148
(D.C. No. 1:20-CV-02362-DDD-NRN)
(D. Colo.)

GRACE BIBLE FELLOWSHIP; JOEY RHOADS,

Plaintiffs-Appellants,

v.

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; WELD COUNTY DISTRICT ATTORNEY, IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before **MORITZ**, **MURPHY**, and **CARSON**, Circuit Judges.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Appendix A

Grace Bible Fellowship and its pastor, Joey Rhoads, appeal the district court's order dismissing their amended complaint.[1] Because we agree that plaintiffs fail to demonstrate the injury required for constitutional standing as to most of their claims, that one of their claims is moot, and that they fail to state their remaining claim, we affirm.

Background

Plaintiffs filed their original complaint in August 2020, challenging various COVID-19 restrictions imposed by Colorado and the federal government's award of COVID-19 relief funds to Colorado. Plaintiffs also moved to preliminarily enjoin Colorado from enforcing its executive and public-health orders and to prohibit various federal agencies from approving or providing any future monetary assistance to the state. The district court largely denied plaintiffs' motion, ruling that they failed to make the required strong showing of a substantial likelihood of success on the merits. *See Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 822-23 (D. Colo. 2020).[2]

---

1. Rhoads is the only remaining plaintiff from the original complaint: the district court allowed Grace Bible Fellowship to substitute for Community Baptist Church, and the remaining plaintiffs withdrew. *See* Fed. R. Civ. P. 25(c).

2. The district court did issue a relatively narrow preliminary injunction against Colorado's numerical occupancy limitation and masking requirement for worship services. *See Denver Bible Church*, 494 F. Supp. 3d at 843-44. Colorado initially appealed that order but then voluntarily dismissed its appeal. *See Denver Bible Church v. Polis*, No. 20-1377, 2020 U.S. App. LEXIS 42049 (order granting motion to voluntarily dismiss appeal).

Appendix A

Plaintiffs appealed, but by the time the case reached oral argument in November 2021, Colorado no longer imposed any COVID-19 restrictions on plaintiffs, so we dismissed most of their claims as moot. *See Cmty. Baptist Church v. Polis*, No. 20-1391, 2022 U.S. App. LEXIS 1994, 2022 WL 200661, at *1, 7 (10th Cir. Jan. 24, 2022) (unpublished). And on plaintiffs' facial free-exercise challenge to the Colorado Disaster Emergency Act (CDEA), Colo. Rev. Stat. §§ 24-33.5-701 to 24-33.5-717, we affirmed the denial of a preliminary injunction because plaintiffs were unlikely to succeed on the merits. 2022 U.S. App. LEXIS 1994, [WL] at *7.

On remand, the district court dismissed the moot claims, and plaintiffs filed an amended complaint challenging "the State's authority to impose any sort of public-health restrictions . . . on houses of worship[] and . . . assert[ing] that certain state statutes that authorize the issuance of such public-health orders impermissibly treat secular institutions more favorably than religious ones." App. vol. 3, 645. The amended complaint listed 14 claims, alleging that both the CDEA and certain public-health statutes that govern the CDPHE, Colo. Rev. Stat. §§ 25-1.5-101 and 25-1.5-102, (1) are unconstitutionally overbroad and violate plaintiffs' free-speech rights both facially and as applied; (2) are unconstitutionally vague both facially and as applied; and (3) violate equal protection both facially and as applied. Plaintiffs also reasserted two claims from their original complaint, contending that the CDEA violates their free-exercise rights both facially and as applied. For relief, plaintiffs requested a "declaratory judgment and permanent injunctive relief . . . declaring [their] rights under [the] CDEA and the [p]ublic[-h]ealth

[s]tatutes and prohibiting [d]efendants . . . from issuing, enforcing[,] or threatening to enforce . . . any executive orders and/or public[-]health orders issued" under those laws. App. vol. 1, 36.

Defendants moved to dismiss the claims against them for lack of subject-matter jurisdiction and failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) and (6), arguing that plaintiffs lacked standing, that their claims were moot, and that they failed to state a claim. In support, defendants submitted affidavits and evidence demonstrating that no executive or public-health orders issued under the challenged statutes were currently in effect.

The district court granted defendants' motions and dismissed the amended complaint, concluding that plaintiffs lacked standing to bring their newly asserted claims because plaintiffs failed to allege the required injury. As to the reasserted claims, the district found that the as-applied CDEA free-exercise claim was moot, as we had previously ruled, and that plaintiffs' facial CDEA free-exercise claim failed to state a claim upon which relief could be granted.[3]

Plaintiffs now appeal the dismissal of their claims for prospective declaratory relief.[4]

---

3. The district court also granted in part plaintiffs' motion for interim attorney fees based on their success in obtaining partial, preliminary injunctive relief.

4. Plaintiffs do not appeal the attorney-fee ruling or the dismissal of their claims for a permanent injunction.

Appendix A

Analysis

Plaintiffs argue that the district court erred in dismissing their claims. Our review is de novo, except that we review any jurisdictional findings of fact for clear error. *See Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020) (noting de novo review of Rule 12(b)(1) dismissal and clear-error review of jurisdictional fact findings); *Serna v. Denver Police Dep't*, 58 F.4th 1167, 1169 (10th Cir. 2023) (noting de novo review of Rule 12(b)(6) dismissal); *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1159 (10th Cir. 2023) (noting de novo review of standing and mootness).

As an initial matter, plaintiffs argue that the district court procedurally erred by considering evidence outside the complaint when dismissing their newly asserted claims for lack of subject-matter jurisdiction under Rule 12(b)(1). To be sure, defendants factually attacked the district court's subject-matter jurisdiction by submitting evidence showing the absence of any existing executive or public-health orders issued under the challenged statutes. And the district court considered that evidence when ruling that plaintiffs failed to establish any current and ongoing or imminent injury, as required to obtain the requested prospective relief on their newly asserted claims. But it did not err in doing so.

A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction can take two forms: a facial or a factual attack. *Baker*, 979 F.3d at 872. "A facial attack assumes the allegations in the complaint are true and argues they fail to establish jurisdiction." *Id.* By contrast, "[a] factual

attack goes beyond the allegations in the complaint and adduces evidence to contest jurisdiction." *Id.* And when faced with a factual attack on subject-matter jurisdiction, the district court has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* (quoting *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001)). The district court's "exercise of such discretion does not convert a Rule 12(b)(1) motion into a summary[-] judgment motion unless 'resolution of the jurisdictional question is intertwined with the merits,'" which is not the case here. *Id.* (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995), *abrogated in part on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 121 S. Ct. 1005, 148 L. Ed. 2d 919 (2001)). Additionally, although plaintiffs suggest in passing that the district court further erred by failing to conduct a hearing, they never asked for a hearing below and do not explain on appeal how failing to conduct one here was an abuse of discretion. *See id.* (noting "wide discretion" to allow evidentiary hearing on jurisdictional facts). We therefore reject plaintiffs' procedural challenge to the district court's jurisdictional rulings.

Turning to the merits of the jurisdictional matters, Article III of the Constitution confines the federal judicial power to deciding "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. This constitutional limitation requires "a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions." *Carney v. Adams*, 592 U.S. 53, 58, 141 S. Ct. 493, 208 L. Ed. 2d 305 (2020). "The doctrines of standing and

mootness aim to ensure federal courts stay within Article III's bounds throughout the litigation." *Rio Grande*, 57 F.4th at 1159-60. To establish Article III standing, a plaintiff must demonstrate "a concrete and particularized injury that is fairly traceable to the challenged conduct[] and is likely to be redressed by a favorable judicial decision." *Carney*, 592 U.S. at 58 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)). And a case becomes moot "[w]hen it becomes impossible for a court to grant effective relief." *Rio Grande*, 57 F.4th at 1165 (quoting *Kan. Jud. Rev. v. Stout*, 562 F.3d 1240, 1246 (10th Cir. 2009)).

Like the district court, we consider plaintiffs' claims in two groups, beginning with the claims asserted for the first time in the amended complaint. The district court found that plaintiffs lacked standing as to these new claims based on their failure to allege the injury component. An injury is "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). "[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury[-]in[-]fact.'"[5] *Carney*, 592 U.S. at 58.

5. Standing is typically assessed as of the date the complaint is filed. *See Rio Grande*, 57 F.4th at 1161. The district court concluded that the appropriate point of reference for the newly asserted claims is the date that plaintiffs filed their amended complaint. Plaintiffs

Plaintiffs first argue, as they did below, that they "were injured by complying with unconstitutional orders or violating them at the risk of prosecution." Aplt. Br. 30. Stated differently, plaintiffs say that they "suffered [an] actual injury-in-fact by enduring the State's months-long invasion of the [c]hurch's First and Fourteenth Amendment interests" via the orders imposing COVID-19 restrictions on them. Rep. Br. 3. But as the district court explained, that alleged injury has come and gone: the complained-of orders imposing COVID-19 restrictions on plaintiffs are no longer in force. This is critical because plaintiffs seek prospective—not retrospective—relief. *See Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) ("Plaintiffs have the burden to demonstrate standing for each form of relief sought." (quoting *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006))). That is, plaintiffs do not seek relief for their asserted past injuries; instead, they ask for a declaration about the legality of certain statutes going forward. *See PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) (explaining that declaratory relief is retrospective only "to the extent that it is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred"). And even though "plaintiff[s] may present evidence of a past injury to establish standing for *retrospective* relief,

---

do not challenge that conclusion, so we accept it for purposes of this appeal. *See Atlas Biologicals, Inc. v. Kutrubes*, 50 F.4th 1307, 1322 (10th Cir. 2022) (explaining that it is plaintiffs' burden to establish jurisdiction and "a federal court is not obliged 'to conjure up possible theories' to support subject-matter jurisdiction" (quoting *Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1275 (10th Cir. 2011))).

[they] must demonstrate a continuing injury to establish standing for *prospective* relief."[6] *Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011) (emphases added); *see also PeTA*, 298 F.3d at 1202-03 (noting that plaintiffs may "lose their standing for claims for prospective relief" if, during litigation, "an event occurs that heals the injury"). Thus, plaintiffs' alleged past injuries do not "demonstrate a continuing injury to establish standing for prospective relief," which is the only kind of relief plaintiffs seek.[7] *Jordan*, 654 F.3d at 1019.

To be sure, a slightly lower threshold applies when assessing injury for pre-enforcement First Amendment claims. *See Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022). Under this lower standard, a plaintiff must allege an intention to engage in constitutionally protected

---

6. Plaintiffs purport to challenge this legal proposition, contending that a claim seeking prospective declaratory relief can be based on a past injury. But we have expressly held to the contrary, explaining that even though "a complaint for nominal damages [for a past injury] could satisfy Article III's case[-]or[-]controversy requirements, . . . a functionally identical claim for declaratory relief will not." *Utah Animal Rts. Coal. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004).

7. Plaintiffs briefly assert that their past injuries resulted in "a continuing injury due to the fact [that] some church members never returned after the lockdown." Aplt. Br. 27. But even assuming that the loss of church members could constitute a continuing injury (a proposition that plaintiffs fail to develop or provide authority for), plaintiffs do not allege that such loss is traceable to defendants' conduct or that it is likely to be redressed by a favorable judicial decision, as they must to establish standing. *See Carney*, 592 U.S. at 58.

conduct proscribed by statute and a credible threat of future prosecution, plus ongoing injury resulting from this chilling effect. *See id.* But here, as the district court concluded, "the amended complaint contains no plausible allegations that . . . plaintiffs are avoiding engaging in any activity they have previously engaged in based on an objectively justified fear of future enforcement." App. vol. 3, 656. Nor have plaintiffs "adequately alleged that they are subject to a credible threat of enforcement of any public-health restrictions that may proscribe protected religious or expressive conduct in the future." *Id.* at 654. And there is nothing in the challenged statutes themselves "that prohibits or restricts . . . plaintiffs from engaging in religious activities." *Id.* at 656.

Plaintiffs do not dispute these propositions on appeal. In fact, they seemingly disavow any reliance on imminent injuries and disclaim any pre-enforcement First Amendment challenge, stating that their amended complaint "is not a 'pre[-]enforcement action.'" Aplt. Br. 30. In other words, plaintiffs do not seek to establish standing under the lower First Amendment threshold and instead stake standing on their alleged actual injuries, which occurred in the past, are not ongoing, and do not establish standing for the prospective relief they seek.

In sum, that plaintiffs' newly asserted claims challenge various existing state statutes is not enough to confer standing: the "mere presence on the statute books of an unconstitutional statute . . . does not entitle anyone to sue." *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006). This is true even for plaintiffs' newly asserted

facial challenges because we have made clear that "[a] plaintiff bringing a facial challenge to a statute . . . must . . . establish an injury-in-fact sufficient to satisfy Article III's case-or-controversy requirement." *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). Plaintiffs have not done so here, so they lack standing for such claims.

We next consider plaintiffs' reasserted claims challenging the CDEA on free-exercise grounds. For the as-applied claim, we agree with the district court that such claim is moot, as we previously held. *See Cmty. Baptist Church*, 2022 U.S. App. LEXIS 1994, 2022 WL 200661, at *6-7.

For the facial claim, we agree with the district court that plaintiffs fail to state a claim. In so holding, the district court determined (as we suggested in deciding plaintiffs' prior appeal, *see* 2022 U.S. App. LEXIS 1994, [WL] at *8-9) that the CDEA was neutral, generally applicable, and survived the resulting rational-basis review. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) (explaining rational-basis review of neutral, generally applicable laws, as compared to strict-scrutiny review of laws or policies that are not neutral or generally applicable).

Plaintiffs dispute only the general applicability of the CDEA, relying for support on the Supreme Court's recent ruling in *Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022). But that case doesn't help plaintiffs. There, the Court held that the challenged practice (prohibiting a football coach from

leading a prayer on the field after a game) was "neither neutral nor generally applicable" because the defendant school district "sought to restrict [the coach's] actions at least in part because of their religious character." *Kennedy*, 597 U.S. at 526. Such facts sharply contrast with plaintiffs' allegations about the CDEA. As the district court put it, the "amended complaint does not allege that the law is discriminatorily motivated or constitutes an official expression of hostility to religion." App. vol. 3, 651 n.4; *see also Grace United*, 451 F.3d at 649-50 ("A law is neutral so long as its object is something other than the infringement or restriction of religious practices."); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (noting that rule motivated by discrimination is not neutral or generally applicable). To be sure, the CDEA contains some limited secular exemptions, but we previously explained why those exemptions were far less broad than plaintiffs would have it. *See Cmty. Baptist Church*, 2022 U.S. App. LEXIS 1994, 2022 WL 200661, at *9. And plaintiffs advance no reason to question our prior reasoning. Indeed, although plaintiffs baldly assert on appeal that the CDEA "allow[s them] to be punished for 'personal religious observance,'" Aplt. Br. 36 (quoting *Kennedy*, 597 U.S. at 543), they "have not pointed to any part of the law that . . . prohibits any religious conduct or burdens their religious practice in any way," App. vol. 3, 651 n.4. We therefore agree with the district court that plaintiffs fail to state a claim that the CDEA facially violates the Free Exercise Clause.

Appendix A

Conclusion

Plaintiffs' newly asserted claims are not justiciable because plaintiffs fail to show the requisite injury for Article III standing. As for plaintiffs' reasserted free-exercise challenges to the CDEA, their as-applied claim is moot, and they fail to state a facial claim. We thus affirm the district court's order dismissing plaintiffs' amended complaint.

Entered for the Court

Nancy L. Moritz
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED MARCH 22, 2023

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

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

GRACE BIBLE FELLOWSHIP; and JOEY RHOADS,

Plaintiffs,

v.

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 WELD COUNTY DISTRICT ATTORNEY, IN HIS OFFICIAL CAPACITY,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS

This case was originally filed in August 2020, during the height of the COVID-19 pandemic. At that time, the State of Colorado[1] had put in place numerous public-

1. The originally named "State Defendants" were Jared Polis, Jill Hun-saker Ryan, and the Colorado Department of Public Health and Environment. The plaintiffs have since voluntarily dismissed their claims against the public-health department. (Docs. 152, 154.)

health restrictions on public and private gatherings and operation of businesses. The plaintiffs in this case, the governing body and pastor of a church located in Brighton, Colorado,[2] claimed those restrictions violated their constitutional rights. The plaintiffs' original complaint had some merit, as shown by my order granting in part their motion for a preliminary injunction and the State's subsequent amendment of its public-health orders and withdrawal of its appeal of the preliminary injunction. The State no longer imposes any COVID-19 restrictions on the plaintiffs. But the plaintiffs seek to keep this case alive via an amended complaint when the State (and by extension, local prosecutors) have moved on. There is no longer a case or controversy under Article III of the Constitution, so the plaintiffs' amended complaint must be dismissed for lack of subject-matter jurisdiction. As the prevailing party at the preliminary-injunction stage, the plaintiffs are awarded reasonable attorney fees and costs against the State Defendants in the amount of $118,948.12.

BACKGROUND

The plaintiffs filed their original complaint on August 9, 2020, followed shortly by a motion for preliminary injunction on August 17, 2020. (Docs. 1, 13.) On October 15, 2020, I granted in part the preliminary-injunction motion. (Doc. 65.) Both the plaintiffs and the State Defendants appealed that order (Docs. 66, 74), and I stayed the

2. Of the original plaintiffs, Pastor Joey Rhoads is the only one who remains. (*See* Docs. 130, 131, 133, 134.) The withdrawal and substitution of some of the plaintiffs, however, does not alter the analysis or result here. I will use "plaintiffs" in this Order to refer to all of the plaintiffs, past and present.

case between those parties pending resolution of their interlocutory appeals (Doc. 82).

While the appeals were pending, the Supreme Court issued decisions in *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021). In response, the State Defendants amended their public-health orders and voluntarily dismissed their appeal. (Doc. 96; Doc. 114 at 11.) The plaintiffs' appeal proceeded to disposition by the Tenth Circuit, which found that "[b]ecause the State no longer imposes any COVID-19 restrictions on plaintiffs, all but one of their claims against the State are moot." (Doc. 114 at 26.) The Circuit therefore vacated my interlocutory rulings as to the moot claims and remanded the case with instructions to dismiss those claims without prejudice. (*Id.* at 26-27.)

After the plaintiffs' petition to the Supreme Court for a writ of certiorari was denied (Docs. 123, 124), I lifted the stay of this case and dismissed the plaintiffs' moot claims as instructed by the Tenth Circuit (Doc. 129). I also granted the plaintiffs leave to file an amended complaint. (*Id.*) The plaintiffs did so on August 1, 2022, and that amended complaint (Doc. 135) is the subject of this Order. The amended complaint names as defendants Jared Polis, the Governor of Colorado; Jill Hunsaker Ryan, the Executive Director of the Colorado Department of Health and Environment; and the Weld County District Attorney. (*Id.*)

The plaintiffs take issue with the State's authority to impose any sort of public-health restrictions—*e.g.*,

occupancy limitations, social-distancing requirements, and mask-wearing requirements—on houses of worship, and they assert that certain state statutes that authorize the issuance of such public-health orders impermissibly treat secular institutions more favorably than religious ones. (*See generally id.*) The plaintiffs assert fourteen claims for relief:

(1) the Colorado Disaster Emergency Act ("CDEA"), Colo. Rev. Stat. §§ 24-33.5-701 to 717, which authorizes the Colorado Governor to declare a state of disaster emergency and issue executive orders to combat such emergencies, is unconstitutionally overbroad and violates the plaintiffs' free-speech rights both facially (Claim 1) and as applied (Claim 2);

(2) the CDEA is unconstitutionally vague both facially (Claim 3) and as applied (Claim 4);

(3) the CDEA violates the plaintiffs' free-exercise rights both facially (Claim 5) and as applied (Claim 6);

(4) the CDEA violates the plaintiffs' equal-protection rights both facially (Claim 7) and as applied (Claim 8);

(5) the public-health statutes that govern the powers and duties of the Colorado Department of Health and Environment, Colo. Rev. Stat. §§ 25-1.5-101 and 102, are

unconstitutionally overbroad and violate the plaintiffs' free-speech rights both facially (Claim 9) and as applied (Claim 10);

(6) the public-health statutes are unconstitutionally vague both facially (Claim 11) and as applied (Claim 12); and

(7) the public-health statutes violate the plaintiffs' equal-protection rights both facially (Claim 13) and as applied (Claim 14).

(*Id.* ¶¶ 46-59.)

All three defendants move to dismiss the claims against them. (Docs. 143, 159.) The plaintiffs move for an award of interim attorney fees against the State Defendants pursuant to 42 U.S.C. § 1988, asserting that they are the prevailing party based on their success in obtaining preliminary injunctive relief and the State Defendants' subsequent abandonment of their appeal. (Doc. 116.)

DISCUSSION

I. Motions to Dismiss

A. Applicable Law

"Federal courts do not possess a roving commission to publicly opine on every legal question," even ones involving important legal or constitutional matters. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 210 L. Ed. 2d 568

(2021). The federal courts' subject-matter jurisdiction is limited, and among the most foundational limitations is that Article III of the Constitution permits federal courts to decide only "Cases" or "Controversies." U.S. Const. art. III, § 2. "[T]he existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996); *see also Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.").

"To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). "The doctrines of standing and mootness aim to ensure federal courts stay within Article III's bounds throughout the litigation." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1159-60 (10th Cir. 2023); *see also Allen*, 468 U.S. at 750. "Standing concerns whether a plaintiff's action qualifies as a case or controversy when it is filed; mootness ensures it remains one at the time a court renders its decision." *Rio Grande Found.*, 57 F.4th at 1160.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (cleaned up). "Second,

there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (cleaned up). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).[3]

"[S]tanding is determined at the time the action is brought, and [courts] generally look to when the complaint was first filed, not to subsequent events." *Mink v. Suthers*, 482 F.3d 1244, 1253-54 (10th Cir. 2007) (citation omitted). Standing is assessed as of the time of the original complaint, even if the complaint is later amended. *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013); *accord Rio Grande Found.*, 57 F.4th at 1161. But a court must "examine 'the amended complaint in assessing a plaintiff's claims, including the allegations in support of standing.'" *S. Utah Wilderness Alliance*, 707 F.3d at 1152-53 (quoting *Mink*, 482 F.3d at 1254). When, as in this case, an amended complaint raises new claims or adds parties that were not present in the original complaint, the time for evaluating standing "is not so

3. *See also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937) (dispute is only cognizable case or controversy if it is both "definite, concrete, and touches on the legal relations of the parties" and "sufficiently immediate and real"); *Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012) (plaintiff seeking injunctive relief must show "ongoing, personal stake in the outcome of the controversy, a likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law").

clear"; the rule "seems to be that standing is determined at the time the relevant claim is raised or party is joined." *Saleh v. Fed. Bureau of Prisons*, Nos. 05-cv-02467-PAB-KLM, 06-cv-01747-PAB-KLM, 07-cv-00021-PAB-KLM, 2009 U.S. Dist. LEXIS 89962, 2009 WL 3158120, at *5 (D. Colo. Sept. 29, 2009); *accord Prairie Prot. Colo. v. USDA APHIS Wildlife Servs.*, No. 19-cv-2537-WJM-KLM, 2020 U.S. Dist. LEXIS 111851, 2020 WL 3469712, at *8 to *9 (D. Colo. June 25, 2020) ("[S]tanding to bring a claim asserted for the first time in an amended complaint must be judged as of the amended complaint.").

"Mootness usually results when a plaintiff has standing at the beginning of a case, but, due to intervening events, loses one of the elements of standing during litigation; thus, courts have sometimes described mootness as 'the doctrine of standing set in a time frame.'" *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012); *see also Smallwood v. Scibana*, 227 F. App'x 747, 748 (10th Cir. 2007) ("Mootness is implicated when a case or controversy, originally present, ceases to exist."). Mootness, "though analytically similar to standing," differs in some ways. *WildEarth Guardians*, 690 F.3d at 1182. As relevant here, "the plaintiff bears the burden of demonstrating standing, [while] the defendant bears the burden of proving moot-ness." *Id.* at 1183.

"Both standing and mootness are threshold jurisdictional issues." *In re Yellow Cab Co-op. Ass'n*, 132 F.3d 591, 594 (10th Cir. 1997). A motion to dismiss for lack of subject-matter jurisdiction generally takes one of two forms: a facial or factual attack. *Holt v. United*

States, 46 F.3d 1000, 1002-03 (10th Cir. 1995). A facial attack challenges the sufficiency of the complaint's factual allegations as to subject-matter jurisdiction, while a factual attack challenges the facts on which subject-matter jurisdiction depends. *Id.* When reviewing a facial attack on a complaint, a district court must accept the allegations in the complaint as true. *Id.* at 1002. But when reviewing a factual attack, the court "may not presume the truthfulness of the complaint's factual allegations." *Id.* at 1003. The court must instead make its own findings as to the relevant jurisdictional facts, and has wide discretion to consider affidavits, documents, and other evidence outside the pleadings. *Id.*

B. Analysis

1. There is no live case or controversy between the parties, and therefore no subject-matter jurisdiction under Article III.

The plaintiffs' amended complaint seeks (1) declaratory relief "declaring Plaintiffs['] rights under [the] CDEA and the Public Health Statutes," and (2) injunctive relief "prohibiting Defendants . . . from issuing, enforcing, or threatening to enforce against Plaintiffs and other persons any executive orders and/or public health orders issued pursuant to [the] CDEA and the Public Health Statutes." (Doc. 135 at 13.) At the time the amended complaint was filed (and now), there were no "executive orders and/or public health orders issued pursuant to [the] CDEA and the Public Health Statutes" in force to which the plaintiffs object. (*See* Doc. 155 at 10 ("Grace Bible Fellowship's

members were restricted, between March 2020 and June 2021 . . . ."); Doc. 143-1 ¶ 4 (State Defendants "currently impose no COVID-19-related restrictions on Plaintiffs in this case or houses of worship generally"); Doc. 143-2 ¶ 4 (same) *see also, e.g.*, Doc. 135 ¶ 41 (discussing public-health orders in past tense); Doc. 135-10 ¶ 6 (same).)

At the time the original complaint was filed, there were such public-health orders in place, and there was no dispute that the plaintiffs had standing to bring claims against the State Defendants challenging those orders and the state statutes under which they were promulgated. But when the State Defendants amended the relevant public-health orders, the majority of the plaintiffs' original claims became moot. (Doc. 114; *see also* Doc. 129.) The defendants now argue that the plaintiffs' as-applied claims in the amended complaint are likewise moot (*see* Doc. 143 at 4-7; Doc. 159 at 4-7), but I do not think that is quite right. Most of the plaintiffs' claims in the in the amended complaint—both facial and as-applied—are asserted for the first time in the amended complaint, which was filed after the challenged government restrictions had ended. The question as to those claims, then, is whether the plaintiffs had standing to bring them at the time the amended complaint was filed.[4]

---

4. The only claims in the amended complaint that also appear in the original complaint are the claims against the State Defendants asserting facial and as-applied free-exercise challenges to the CDEA. (*Compare* Doc. 1 (Claim 3), *with* Doc. 135 (Claims 5 and 6).) The as-applied challenge is moot, as held by the Tenth Circuit. (Doc. 114.) The Circuit found that the facial challenge was not moot, at least as of the time its order issued. (Doc. 114 at 16.) There is nothing in

But whether the case-or-controversy question is phrased in terms of standing or mootness, in order for a justiciable controversy to exist now, the plaintiffs must have suffered in the past, be suffering presently, or be threatened with in the future an actual injury traceable to the defendants that is likely to be redressed by a favorable judicial decision.

a. The Past and Present

The State Defendants did at one time issue public-health orders that, as previously held, likely harmed the plaintiffs and violated their constitutional right to free exercise. But the CDEA and public-health statutes that are the subject of the plaintiffs' amended complaint

---

the Circuit's rather cursory treatment of the mootness question to suggest that it meant to say that any facial challenge the plaintiffs might bring would always present a case or controversy. For the reasons discussed below, I believe the facial free-exercise claim against the State Defendants, like the rest of the plaintiffs' claims, does not currently present a justiciable case or controversy. But to the extent the law-of-the-case doctrine and the mandate rule compel me to hold that claim is not moot, it must be dismissed for failure to state a claim upon which relief can be granted. The CDEA is neutral and generally applicable and survives rational-basis review, and the plaintiffs' amended complaint does not allege that the law is discriminatorily motivated or constitutes an official expression of hostility to religion. (*See* Doc. 65 at 19-20; Doc. 114 at 18-22.) The Supreme Court's recent decision in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022), does not change that conclusion. And the plaintiffs have not pointed to any part of the law that, in the absence of an active public-health order issued by the governor or the public-health department, prohibits any religious conduct or burdens their religious practice in any way.

have not been used to adopt any orders restricting the plaintiffs' religious activities since at least June 2021. (Doc. 155 at 10.) The past harm to the plaintiffs from the State Defendants' now-rescinded public-health orders is not enough to present a live case or controversy now. Damages are the typical remedy for past harms, so where, as here, only prospective relief is at stake, prior injury is not likely to be an adequate basis for a live case or controversy. *See Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011) ("Although a plaintiff may present evidence of a past injury to establish standing for retrospective relief, he must demonstrate a continuing injury to establish standing for prospective relief."); *PeTA v. Rasmussen*, 298 F.3d 1198, 1202-03 (10th Cir. 2002) (event during litigation can "heal" injury and cause plaintiffs to lose standing). The plaintiffs' desire for the "satisfaction of a declaration [they were] wronged" does not create an Article III case or controversy. *Bauchman v. W. High Sch.*, 132 F.3d 542, 548-49 (10th Cir. 1997). And "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)). A declaration or injunction would not change anything about the defendants' past conduct or do anything more to redress the plaintiffs' past injury than what has already been done by the State Defendants' (semi-voluntary) recission of their public-health orders.

Nor would a declaration or injunction alter the parties' current actions toward each other. A live case or controversy only exists if a court's decision would

"settl[e] some dispute which affects the behavior of the defendant toward the plaintiff." *Jordan*, 654 F.3d at 1025. A declaration or injunction of the sort requested in the amended complaint, however, would not change anything about the defendants' current behavior. The "mere presence" on the State's books of a statute a plaintiff believes is unconstitutional does not confer standing to challenge it. *See Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006). Of course, a court order declaring the challenged statutes unconstitutional might provide the plaintiffs with some reassurance and the satisfaction of knowing that their legal theories are correct and respected. But that is the definition of an advisory opinion, and "federal courts do not issue advisory opinions." *TransUnion*, 141 S. Ct. at 2203. While we all have an interest in not having unconstitutional laws on the books,

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan, 504 U.S. at 573-74. The Constitution leaves such grievances "for resolution through the political process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

A live case or controversy therefore does not exist based on any past or presently ongoing injury to the plaintiffs.

b. The Future

If there is no past or present injury that gives rise to a viable case or controversy, what about the future? Preventing harm in the future can be the source of standing in some circumstances. But those circumstances are not present here.

To give rise to standing, an injury must be "actual or imminent." *Lujan*, 504 U.S. at 560. As explained, there is no actual, current injury caused by the challenged statutes or the defendants' actions. To the extent the plaintiffs have suffered actual injuries, those injuries are in the past and would not be redressed even if their substantive arguments prevailed. The plaintiffs' concerns about future injury might be redress-able, but any potential future injuries are not imminent; they are instead the sort of "conjectural or hypothetical" injuries that *Lujan* and its progeny teach are insufficient to confer standing.

The injury-in-fact requirement may be applied "somewhat more leniently" in the First Amendment context, "facilitating pre-enforcement suits." *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022) (citing *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)); *see also Mink*, 482 F.3d at 1253, *Winsness*, 433 F.3d at 731. Under this more lenient approach, a plaintiff may show an injury

in fact by alleging (a) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder," or (b) "a credible threat of future prosecution" plus an "ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights." *Peck*, 43 F.4th at 1129. As the *Peck* court noted, "though these are listed as two distinct tests in *Ward*, they overlap and the analysis will be similar under either." *Id.* at 1129 n.9.

The plaintiffs here have not adequately alleged that they are subject to a credible threat of enforcement of any public-health restrictions that may proscribe protected religious or expressive conduct in the future. As the Tenth Circuit explained, it is unreasonable to expect that the defendants will reinstate the challenged restrictions against houses of worship. (Doc. 114 at 9-15; *see also* Doc. 129 at 3-5.) The chance that the State might do so in response to the COVID-19 pandemic—or that it might impose some other restriction that burdens religious practice in response to some hypothetical future public-health emergency—is "entirely speculative." (Doc. 114 at 14.)

Nothing in the amended complaint supports an inference that a credible threat of prosecution has arisen since the Tenth Circuit issued its order. There are no allegations that the plaintiffs are engaging in, intend to engage in, or are being chilled from engaging in any activity that is currently proscribed by the CDEA, the challenged public-health statutes, or any public-health orders issued pursuant to those laws. The plaintiffs'

allegations are based on the theory that the State Defendants *could* use the challenged laws to adopt orders or regulations that *might* unconstitutionally infringe on the plaintiffs' protected activities. That is simply not plausible in any relevant way. Comparing the plaintiffs' situation to that in *Peck* is useful.

In *Peck*, the court explained that plaintiffs suing for prospective relief based on a law's alleged chilling effect

> can satisfy the requirement that their claim of injury be "concrete and particularized" by (1) evidence that in the past they have engaged in the type of [conduct] affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such [conduct]; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the [challenged law] will be enforced.

43 F.4th at 1129-30 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088-89 (10th Cir. 2006)). Ms. Peck satisfied those requirements as to one of her claims because (1) she previously disclosed information to a newspaper in apparent violation of the challenged statute; (2) she submitted a sworn declaration stating her desire to make such disclosures to the public and press in the future; and (3) there was a credible threat of enforcement because a judge had issued an order warning her against making prohibited disclosures again, and the state had not disavowed future enforcement. *Id.* at 1130-33.

Here, by contrast, the amended complaint contains no plausible allegations that the plaintiffs are avoiding engaging in any activity they have previously engaged in based on an objectively justified fear of future enforcement. They rely entirely on the State Defendants' past public-health orders that placed restrictions on houses of worship. But that is insufficient under any of the applicable factors. There is nothing in the CDEA or the challenged public-health statutes that prohibits or restricts the plaintiffs from engaging in religious activities that they are doing, have done, or allege they wish to do. While "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," "they do not confer standing to pursue prospective relief without some credible threat of future injury." *Mink*, 482 F.3d at 1253. It has been well-established in this case that the State Defendants' past wrongs are not evidence of a credible threat of enforcement of public-health orders that may or may not be issued in the future.

The presence on the State's books of statutes that grant broad authority to the Governor and state bureaucrats to order extraordinary limits on the freedoms of its citizens in an emergency is worth pondering. That these statutes have been used in the recent past to adopt public-health orders that likely discriminated against religious activity is troubling. That the State at one point argued that the federal courts owe near-total deference to its determinations as to what extraordinary measures are warranted, and what counts as emergency that justifies such measures, is even more so.

But at this point, the State has rescinded all such emergency measures. The Tenth Circuit has recognized that the State is unlikely to return to such measures, at least in the face of this Court's prior order and subsequent decisions of the Supreme Court. The plaintiffs here do not allege a credible threat of prosecution or enforcement of any current or future public-health restrictions under the CDEA or challenged public-health statutes. A live case or controversy therefore does not exist based on potential future injury to the plaintiffs.

2. The plaintiffs' arguments to the contrary are unavailing.

The plaintiffs' counterarguments are incorrect. In large part, their arguments rehash those they made as to their original free-exercise claims—they argue that the CDEA and public-health statutes permit the entry of new orders at any time, and that the State Defendants only withdrew the prior orders to avoid review and have not entirely disavowed the possibility of adopting new, similar orders. They also argue that their facial challenges do not need to meet the usual standing requirements otherwise required under *Lujan* and its progeny.

As explained above, the State Defendants' previous imposition of public-health orders that caused the plaintiffs injury does not suffice to give the plaintiffs standing to pursue prospective relief now that those orders are well in the past. And plaintiffs bringing facial challenges must still show an injury in fact sufficient to satisfy the Article III case-or-controversy requirement, even under the more

lenient standards that apply in the First Amendment context. *See Ward*, 321 F.3d at 1267; *D.L.S. v. Utah*, 374 F.3d 971, 975-76 (10th Cir. 2004).

The plaintiffs are also incorrect in arguing that a credible threat of enforcement exists unless and until the defendants "foreswear" any future enforcement. "It is not necessary for defendants to refute and eliminate all possible risk that the statute might be enforced to demonstrate a lack of a case or controversy." *Mink*, 482 F.3d at 1255 (cleaned up). And the State Defendants have affirmed that they have "no plans to impose on Plaintiffs or houses of worship any future restrictions related to the COVID-19 pandemic." (Doc. 143-1 ¶ 4; Doc. 143-2 ¶ 4.) Nor are the plaintiffs correct that the State Defendants' declarations are inadmissible at the motion-to-dismiss stage. A court has wide discretion to consider affidavits, documents, and other evidence outside the pleadings when evaluating a factual challenge to its subject-matter jurisdiction. *Holt*, 46 F.3d at 1003; *see also Mink*, 482 F.3d at 1253-55 (citing various cases relying on government officials' assurances regarding their intentions to determine standing questions).

The authorities cited by the plaintiffs do not go as far as they argue. (*See* Doc. 155 at 10, 12-14, 23-24.) Neither *Peck* nor Rich's *Modern Constitutional Law* suggest there is a general exception to Article III standing requirements for First Amendment cases or for overbreadth challenges. *Peck*, as explained above, simply recognizes that at least in expression cases, a plaintiff can have standing without risking prosecution by actually violating the

law in question. But plaintiffs still must show a credible threat of prosecution if they were to violate the law. 43 F.4th at 1129-30. And the "general exception to the law of standing" for over-breadth claims that Rich discusses is an exception to the usual third-party standing rule. (*See* Doc. 155 at 10.) That exception just means that plaintiffs whose own behavior falls squarely within the core of the law in question can still mount an overbreadth challenge. But such plaintiffs "still must show that they themselves have suffered some cognizable injury from the statute." *D.L.S.*, 374 F.3d at 976. The plaintiffs cite *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995), for the proposition that they may continue to pursue declaratory relief for past injuries. But in that case, the plaintiffs also sought nominal damages, which prevented mootness; the plaintiffs here do not assert any claim for damages.

The Tenth Circuit discussed at length the reasons why public-health restrictions similar to those that previously injured the plaintiffs are unlikely to be enacted in the future. Nothing alleged in the amended complaint or anything that has happened since the Circuit's order issued has made future enactment of such restrictions any more likely. If anything, the passage of time has made it more and more clear that the Circuit's prediction was correct. There is no credible threat that the plaintiffs will be subject to restrictions (let alone prosecution) of the sort they contend would violate their constitutional rights. The harm they seek to prevent is thus too conjectural and speculative to present a justiciable a case or controversy. Their claims must therefore be dismissed for lack of subject-matter jurisdiction.

II. Motion for Attorney Fees

The plaintiffs seek an award of "interim attorney fees" as the prevailing party at the preliminary-injunction stage. (Doc. 116.)

A. Applicable Law

"In any action or proceeding to enforce a provision of section[] . . . 1983, . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988(b). "In any fee request under § 1988(b), a claimant must prove two elements: (1) that the claimant was the 'prevailing party' in the proceeding; and (2) that the claimant's fee request is 'reasonable.'" *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). Here, the parties do not dispute that the plaintiffs are "prevailing parties" in light of their success in obtaining preliminary injunctive relief and the fact that the State Defendants ultimately amended their public-health orders and voluntarily dismissed their interlocutory appeal. *See Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1235-38 (10th Cir. 2011) (plaintiff that obtains preliminary injunction based on likelihood of success on the merits is prevailing party if events outside plaintiff's control moot the case before final adjudication). They do dispute, however, what amount of attorney fees is "reasonable" in light of the plaintiffs' degree of success.

"To determine the reasonableness of a fee request, a court must begin by calculating the so-called 'lodestar amount' of a fee." *Robinson*, 160 F.3d at 1281. "The lodestar

calculation is the product of the number of attorney hours 'reasonably expended' and a 'reasonable hourly rate.'" *Id.* "[A] claimant is entitled to the presumption that this lodestar amount reflects a 'reasonable' fee," *id.*, but if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount," *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

"[T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." *Id.* at 440. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Id.* "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Id.* at 436-37.

B. Analysis

The plaintiffs have submitted attorney invoices reflecting (with adjustments): 508.7 hours billed from July 6, 2020 through December 14, 2020, at $350 per hour, for a total of $178,045 in fees, plus $251.45 in costs, for a grand

total of $178,296.45. (Doc. 169.) The State Defendants do not contest that $350 is a reasonable hourly rate for the plaintiffs' counsel. They do, however, contest the number of attorney hours reasonably billed. The State Defendants argue that (1) the plaintiffs are not entitled to recover fees for work expended on claims unrelated to the one claim on which the plaintiffs were partially successful (*i.e.*, claims other than the plaintiffs' as-applied free-exercise challenge to the CDEA); (2) the plaintiffs are not entitled to recover fees for work expended after partial injunctive relief was granted on October 15, 2020, because the plaintiffs "did not prevail on any claims or legal arguments after that point"; and (3) the plaintiffs' fees should be further reduced "as this Court deems appropriate" to account for the limited degree of the plaintiffs' success in obtaining only part of the injunctive relief they sought. (*See generally* Doc. 140.)

The plaintiffs' original complaint asserted eleven substantive causes of action, and they sought preliminary injunctive relief based on nine of those, seven of which were asserted against the State Defendants. (*See* Doc. 65 at 9, 40 n.27.) The plaintiffs obtained relief based on only one of those claims: their as-applied free-exercise challenge to the CDEA. (*See id.* at 3 (plaintiffs "have not demonstrated a likelihood of success on the merits of most of their asserted claims").) And, they obtained only part of the relief they sought—the plaintiffs sought to enjoin enforcement of "any and all" public-health restrictions the State imposed on houses of worship (*see, e.g.*, Doc. 98 at 2, 23), but I enjoined enforcement of the State Defendants' public-health orders "in relatively

narrow part": I prohibited the State from enforcing (1) numerical occupancy limitations for worship services, and (2) the face-mask requirement, to the extent that "the temporary removal of a face covering is necessary for Plaintiffs or their employees, volunteers, or congregants to carry out their religious exercise" (Doc. 65 at 2, 44). Injunctive relief was denied as to "the neutrally applicable rules and prohibitions in [the public-health orders]," including "sanitization requirements, main-tain[ing] social distancing between individuals, and not permit[ting] shaking hands." (*Id.* at 29.)

As to whether it is reasonable for the plaintiffs to recover for hours expended on claims other than their as-applied free-exercise challenge to the CDEA, I agree with the State Defendants that the plaintiffs should not recover for time spent on their claims asserted against the Federal Defendants under the Religious Freedom Restoration Act and Stafford Act, as those claims raised unrelated legal issues against separate defendants based on a separate set of facts. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1512-13 (10th Cir. 1995) (affirming denial of fees expended on unsuccessful claims that raised unrelated issues). But as to the other claims asserted against the State Defendants on which the plaintiffs were unsuccessful, at least some of them were interrelated with the claim on which the plaintiffs achieved success. *See id.* (failure on some claims should not preclude full recovery of fees if success was achieved on significant claim based on related legal theories or common core of facts). The plaintiffs' free-exercise challenge under the Colorado Constitution asserted a related legal theory,

and their vagueness challenges were based on a common core of facts inasmuch as they necessitated detailed review and scrutiny of the various restrictions imposed by the numerous public-health orders issued by the State Defendants.

As to hours expended after partial injunctive relief was granted on October 15, 2020, while the plaintiffs were not successful in obtaining any further relief after that date, it was reasonable for them to continue to expend attorney time defending the preliminary relief they had obtained. The State Defendants immediately appealed my preliminary-injunction order, and filed motions before this Court and the Tenth Circuit seeking to stay that order. It was reasonable for the plaintiffs to spend attorney time opposing those motions and defending against the State Defendants' interlocutory appeal. Some of the time the plaintiffs spent after that date, though, was not reasonably expended. The hours the plaintiffs spent on their own appeal of my denial of injunctive relief with respect to unrelated claims should not be recoverable. And some of the time the plaintiffs spent defending against the State Defendants' appeal appears to have been unnecessary or excessive. For example, although the State Defendants moved to voluntarily dismiss their appeal on December 8, 2020 and the plaintiffs ultimately did not oppose, their counsel spent 15.1 hours drafting and filing a response brief "objecting to the motion's rationale, while not objecting to a Rule 42(b) dismissal." *See* (Doc. 169-6 at 1-2); *Polis v. Denver Bible Church*, No. 20-1377 (10th Cir. filed Oct. 16, 2020), ECF Nos. 10791840, 10793016.

Finally, I agree with the State Defendants that some reduction of the plaintiffs' fee award is warranted to account for the degree of success the plaintiffs achieved even on the one claim on which they were successful. The plaintiffs achieved a significant success by obtaining a preliminary injunction based on the legal conclusion that "normal constitutional scrutiny—even strict scrutiny, where appropriate" applies during a public-health emergency. *See* (Doc. 65 at 11-19); *see also Roman Catholic Diocese*, 141 S. Ct. at 68 ("[E]even in a pandemic, the Constitution cannot be put away and forgotten."). The application of normal constitutional scrutiny in this case, however, ultimately resulted in an injunction barring enforcement of only two narrow provisions of the State's public-health orders, which was a far cry from the sweeping injunctive relief that the plaintiffs sought. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440.

Based on my detailed review of the plaintiffs' invoices and after consideration of all the relevant factors, I find that a one-third reduction of the plaintiffs' attorney fees is appropriate to account for attorney time spent on claims wholly unrelated to the claim on which the plaintiffs were successful, and the plaintiffs' limited degree of success with respect to the claim on which they prevailed.[5] *See*

5. The plaintiffs note that counsel exercised billing judgment by writing off 40.1 hours/$14,035 during the six months at issue; that of two attorneys of record, only one submitted invoices; and that they have not sought to recover fees for the time spent preparing their motion and reply. (Doc. 144 at 6; *see also* Doc. 169.) I have not

Fox v. Vice, 563 U.S. 826, 838, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011) ("[T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection."); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1203 (10th Cir. 1986) ("A general reduction of hours claimed in order to achieve what the court determines to be a reasonable number is not an erroneous method, so long as there is sufficient reason for its use. . . . [T]he district court did not err by refusing to isolate and analyze every hour assigned to different tasks . . . and then prescribe task hours which were acceptable."); *DeGrado v. Jefferson Pilot Fin. Ins. Co.*, No. 02-cv-01533-WYD-BNB, 2009 U.S. Dist. LEXIS 60515, 2009 WL 1973501, at *9 to *10 (D. Colo. July 6, 2009) (rather than "evaluat[ing] almost every task [to] determine how much time should be deducted," applying 25% across-the-board reduction to account for duplicative or excessive time); *Carr v. Fort Morgan School Dist.*, 4 F. Supp. 2d 998, 1003 (D. Colo. 1998) (15% across-the-board reduction appropriate to account for excessive time). Applying that reduction results in attorney fees of $118,696.67. Adding in the $251.45 in costs that the State Defendants have not contested results in a total award of $118,948.12.

---

reduced the plaintiffs' fees to account for an excessive amount of time spent on any particular task or tasks due to inexperience of counsel, duplication of effort, or the like. Recovery of co-counsel's fees or fees for the time spent preparing the instant motion may or may not be reasonable. But it is the plaintiffs' burden to prove the amount of fees to which they are reasonably entitled, and I cannot evaluate the reasonableness of including or excluding fees that I have not seen.

Appendix B

CONCLUSION

It is **ORDERED** that:

The State Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (**Doc. 143**) is **GRANTED**;

Defendant Weld County District Attorney's Motion to Dismiss First Amended Complaint (**Doc. 159**) is **GRANTED**;

Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief (**Doc. 135**) is **DISMISSED WITHOUT PREJUDICE**;

Plaintiffs' Objection to Magistrate Ruling (**Doc. 167**) is **OVERRULED AS MOOT**;

Plaintiffs' Motion for Interim Attorney Fees Against State Defendants (**Doc. 116**) is **GRANTED IN PART**. Pursuant to 42 U.S.C. § 1988(b), the plaintiffs are awarded reasonable attorney fees and costs against the State Defendants in the amount of $118,948.12; and

The Clerk of Court is **DIRECTED** to close this case.

DATED: March 22, 2023

BY THE COURT:

/s/ Daniel D. Domenico
Daniel D. Domenico
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-1148
(D.C. No. 1:20-CV-02362-DDD-NRN)
(D. Colo.)

GRACE BIBLE FELLOWSHIP, *et al.*,

Plaintiffs-Appellants,

v.

JARED POLIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR, STATE OF COLORADO, *et al.*,

Defendants-Appellees.

ORDER

Before **MORITZ**, **MURPHY**, and **CARSON**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix C

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D — RELEVANT STATUTORY PROVISIONS

C.R.S.A. § 24-33.5-702
Formerly cited as CO ST § 24-32-2102

§ 24-33.5-702. Purposes and limitations

* * *

(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.

Appendix D

C.R.S.A. § 24-33.5-703
Formerly cited as CO ST § 24-32-2103

§ 24-33.5-703. Definitions

* * *

(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.

* * * *

Appendix D

C.R.S.A. § 24-33.5-704
Formerly cited as CO ST § 24-32-2104

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

* * *

(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.

* * *

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

* * *

(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;

* * *

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

* * *

(8) Repealed by Laws 2018, Ch. 234, § 21, eff. August 8, 2018, and relocated and amended by Laws 2018, Ch. 234, § 5, eff. August 8, 2018.

* * * *

Appendix D

C.R.S.A. § 25-1.5-101

§ 25-1.5-101. Powers and duties of department--laboratory cash fund--office of suicide prevention--suicide prevention coordination cash fund--dispensation of payments under contracts with grantees--report--definitions

(1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows:

(a) To close theaters, schools, and other public places, and to forbid gatherings of people when necessary to protect the public health;

* * * *

Appendix D

C.R.S.A. § 25-1.5-102

§ 25-1.5-102. Epidemic and communicable diseases--powers and duties of department--rules--definitions

(1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows:

(a)(I) To investigate and control the causes of epidemic and communicable diseases affecting the public health.

* * *

(II) Except as otherwise directed by executive order of the governor, the department shall exercise its powers and duties to control epidemic and communicable diseases and protect the public health as set out in this section.

* * *

(c) To establish, maintain, and enforce isolation and quarantine, and, in pursuance thereof and for this purpose only, to exercise such physical control over property and the persons of the people within this state as the department may find necessary for the protection of the public health;

(d) To abate nuisances when necessary for the purpose of eliminating sources of epidemic and communicable diseases affecting the public health.

* * * *

Appendix D

Colo. Rev. Stat. § 25-1-502 Definitions (Colorado Revised Statutes (2024 Edition))

§ 25-1-502. Definitions

* * *

(5) "Public health" means the prevention of injury, disease, and premature mortality; the promotion of health in the community; and the response to public and environmental health needs and emergencies and is accomplished through the provision of essential public health services.

* * * *