IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-1480-RM-MEH

HIGH PLAINS HARVEST CHURCH, and
MARK HOTALING,

Plaintiffs,

v.

JARED POLIS, in his official capacity as Governor of the State of Colorado, and
JILL HUNSAKER RYAN, in her official capacity as Executive Director of the Colorado Department of Public Health and Environment,

Defendants.

THE UNITED STATES' STATEMENT OF INTEREST IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest supporting Plaintiffs High Plains Harvest Church and Mark Hotaling's motion for temporary restraining order and motion for preliminary injunction filed on May 25, 2020. ECF No. 3.

This case involves important questions of how to balance the deference owed to public officials in addressing a pandemic threatening the health and safety of the public with fundamental constitutional rights. For purposes of this filing, the United States does not take a position on the ultimate question of whether the State may have a legally sufficient justification for treating Plaintiffs' group prayer in a place of worship differently from commercial, manufacturing, service, or other permitted activities that may be comparable. Based on the

materials before the Court—including Plaintiffs' commitment to comply with CDC Guidelines for faith communities and with State social distancing guidelines (ECF No. 1 (Compl.) ¶¶ 27-28)—Plaintiffs have demonstrated a likelihood of success on the merits of their claim under the Free Exercise Clause of the U.S. Constitution.

On their face, the State's executive orders prohibit religious gatherings of more than ten people in a room at a place of worship, even if undertaken with social distancing and personal hygiene protocols, while allowing comparable secular activities to proceed with social distancing. In addition, this week the State announced that it would permit up to 50 people to gather inside restaurants subject to social distancing and cleaning protocols. Yet, the State continues to deny Plaintiffs permission to gather in a place of worship with 50 people complying with social distancing and cleaning protocols. That discriminatory treatment triggers strict scrutiny review under the Supreme Court's precedents, and it is the State's burden to demonstrate that it has compelling reasons to treat Plaintiffs' proposed gatherings differently than similar secular gatherings, and that it has pursued its objectives through the least restrictive means.

Other courts have granted temporary relief to allow religious services to proceed while plaintiffs challenged similar discriminatory treatment. For example, the United States Court of Appeals for the Sixth Circuit has granted two injunctions pending appeal in similar cases. *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam). In *Roberts*, the Court concluded that "the four pages of exceptions in the orders, and the kinds of group activities allowed, remove[d] them from the safe harbor for generally applicable laws," and that there were "plenty of less restrictive

ways to address the[] public health issues" presented by COVID-19 than banning faith-based mass gatherings. 948 F.3d at 413, 415. Similarly, in *Maryville Baptist Church*, the Court concluded that the "Governor has offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same." 957 F.3d at 615.

Based on the record currently before this Court, the same can be said here. The Court should grant Plaintiffs' motion for a temporary restraining order, and Plaintiffs' group prayer should be allowed to proceed without fear of prosecution.

INTEREST OF THE UNITED STATES

The Attorney General has statutory authority "to attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. The United States also enforces 34 U.S.C. § 12601, which allows the United States to bring suit when law enforcement officers engage in a pattern or practice that deprives individuals of their federal constitutional or statutory rights.

The United States has a substantial interest in the preservation of its citizens' fundamental right to the free exercise of religion, expressly protected by the First Amendment. To that end, the United States regularly files statements of interest and amicus briefs on important issues of religious liberty in courts at every level, from trial courts to the Supreme Court of the United States. In addition, the Attorney General has issued comprehensive guidance interpreting religious-liberty protections available under the United States Constitution and federal law. *Federal Law Protections for Religious Liberty*, 82 Fed. Reg. 49,668 (Oct. 26, 2017) ("Attorney General Guidelines"). As relevant here, the Attorney General Guidelines explain that

"[a]lthough government generally may subject religious persons and organizations to neutral, generally applicable laws," government cannot "apply such laws in a discriminatory way" or otherwise "target persons or individuals because of their religion." *Id.* at 49,669.

The United States also has a strong interest, especially in the midst of the COVID-19 pandemic, in ensuring the development and maintenance of the best possible public health strategies to combat the virus and protect the people of the United States from harm. But that interest must be balanced with constitutional liberties. This case raises issues of national public importance regarding the interplay between the government's compelling interest in protecting public health and safety from COVID-19 and citizens' fundamental right to the free exercise of religion.

BACKGROUND[1]

Plaintiffs are a church and the pastor who "frequently attended and/or led" services at the Church, typically three to four times per week. ECF No. 1 (Compl.) ¶¶ 2-3, 11-12. The pastor and church members have a sincerely-held religious belief that they must gather as a group for in-person religious worship. *Id.* ¶¶ 23-24. They would like to gather for such in-person worship during the COVID-19 pandemic with "approximately 50 people," none of whom, to Mr. Hotaling's knowledge, has COVID-19. *Id.* ¶¶ 26, 29-30. They have committed that their services will follow the CDC's Guidance for Faith Communities, including encouraging hygiene and cloth face coverings, cleaning frequently, and promoting social distancing. *Id.* ¶ 27. They also have committed that their services will follow state social distancing standards. *Id.* ¶ 28.

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[1] For purposes of this brief, the United States assumes the truth of the facts alleged in the verified complaint and reflected in the accompanying exhibits.

The Colorado Department of Public Health and Environment ("CDPHE") and the Governor have been taking executive action to address the outbreak of COVID-19 in Colorado. The Governor orally declared a "disaster emergency on March 10, 2020, ECF No. 1-1, 1, and has issued several Executive Orders since then, *id.*; *see also* ECF No. 25-6 (amended and extended Executive Order). The CDPHE has likewise issued several amended public health orders. *See, e.g.,* ECF No. 1-2 (Third Amended Public Health Order); ECF No. 25-7 (Fourth Amended Public Health Order).

At the time the Complaint was filed, the governing Executive Order "[p]rohibit[ed] public gatherings of ten (10) persons or more in both public spaces and private commercial venues." ECF No. 1-1 at 3, § II.H.3. The governing CDPHE Public Health Order likewise set forth the 10-person limit on "public and private gatherings" and added that this limit did not apply when "expressly permitted" by the Order, including for "Necessary Activities," such as Critical Businesses. ECF No. 1-2 at 3, § I.C. Critical Businesses included marijuana dispensaries; self-serve laundromats; banks and credit unions; and professional services, including legal services, "accounting services," and "real estate appraisals and transactions." *Id.* at 26, App'x F §§ 4, 5, 7. The orders contemplated Critical Businesses could operate "with over fifty (50) employees in any one location." *Id.* at 8, § II.I.4. These businesses could operate if they "comply with Social Distancing Requirements" and other safety measures. *Id.* at 5, 6, 10, §§ II.B, II.I; III.C. The Public Health Order did require Critical Businesses to "avoid gatherings (meetings, waiting rooms, etc) of more than 10 people," *id.* at 6, § II.I.1.g, but did not bar them from allowing far more than ten customers into a business at one time. This Order said that it

would "be enforced by all appropriate legal means" and that "[f]ailure to comply . . . could result in penalties, including jail time, and fines." *Id.* § VI.

This week, the Governor amended those Orders to adopt even less restrictive rules for restaurants. Specifically, the Governor amended his prior "Safer at Home" Executive Orders[2] to allow CDPHE to "authorize public gatherings of groups in [restaurants and summer camps] that exceed the" 10-person limit on public gatherings, "if justified by public health conditions." ECF No. 25-6, Exec. Order at § II.iv. And CDPHE promptly put into place guidance allowing restaurants to open for in-person food service.[3] The guidance provides expressly that "[i]ndoor dine-in service can be held at 50% of the posted occupancy code limit and a maximum of 50 patrons," if social distancing between parties of "eight people or fewer" is maintained, masks are worn, and other precautions are met. *Id.* at 2.

The rules for religious services in a place of worship are significantly more restrictive. Under guidance issued by CDPHE, religious gatherings inside a place of worship are permitted only "if physical distancing is observed and the gatherings are of 10 or fewer people in each room." ECF No. 1-3 ("Guidance for Places of Worship"). Places of worship thus are not allowed to host more than ten worshippers, even if they socially distance, and whether or not they are in the same party—unlike critical businesses, which may admit numerous customers into a single space so long as those customers socially distance, and unlike restaurants, which

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[2] *See* Executive Order D 2020 079, *Amending and Extending Executive Order D 2020 044 Safer at Home* (May 25, 2020), *available at* https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20079%20Extending%20Safer%20At%20Home.pdf.
[3] CDPHE, *Guidance for Restaurants and Food Services* (Published May 25, 2020, effective May 27, 2020), *available at* https://covid19.colorado.gov/safer-at-home/restaurants-food-services.

have been exempted from the public gathering limits and now may seat 50 customers, who may sit in parties where the members of the party are not socially distanced.

ARGUMENT

I. Constitutional Rights Are Preserved During a Public Health Crisis.

The federal government, the District of Columbia, and all fifty States have declared states of emergency, and have taken unprecedented and essential steps to contain the spread of the novel coronavirus and the consequences of the life-threatening COVID-19 pandemic.[4] The President issued "Coronavirus Guidelines for America," which, among other measures, urged the public to "follow the directions of [their] state and local authorities," to "avoid social gatherings in groups of more than 10 people," and to "use drive-thru, pickup, or delivery options" instead of "eating or drinking at bars, restaurants, and food courts."[5] The Centers for Disease Control and Prevention recommended that individuals "[s]tay at home as much as possible" and when in public keep "about 6 feet" away from others.[6] States and localities, in turn, imposed a variety of measures, including mandatory limitations on gatherings. More recently, however, President Trump "unveiled Guidelines for Opening Up America Again, a three-phased approach based on

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[4] *See, e.g.*, Presidential Proclamation, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergencyconcerning-novel-coronavirus-disease-covid-19-outbreak/.

[5] The President's Coronavirus Guidelines for America (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirusguidance_8.5x11_315PM.pdf.

[6] Centers for Disease Control and Prevention, How to Protect Yourself and Others (Apr. 18, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention-H.pdf.

the advice of public health experts" to "help state and local officials when reopening their economies, getting people back to work, and continuing to protect American lives."[7]

The Constitution does not hobble government from taking necessary, temporary measures to meet a genuine emergency. According to the Supreme Court, "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). In *Jacobson*, for example, the Court explained that "[a]n American citizen arriving at an American port" who had traveled to a region with yellow fever "may yet, in some circumstances, be held in quarantine against his will." *Id.* Critically, "[t]he right to practice religion freely does not include the liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Courts owe substantial deference to government actions, particularly when exercised by states and localities under their police powers during a bona fide emergency.

But there is no pandemic exception to the Constitution and its Bill of Rights. Indeed, "individual rights secured by the Constitution do not disappear during a public health crisis." *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). These individual rights, including the protections in the Bill of Rights made applicable to the states through the Fourteenth Amendment, are always operative and restrain government action. Accordingly, the Supreme Court has instructed

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[7] Guidelines: Opening Up America Again (April 16, 2020), https://www.whitehouse.gov/openingamerica/.

courts to intervene "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. Thus, if the record establishes a "plain, palpable" violation of constitutional rights, then a court must grant relief. *See In re Abbott*, 954 F.3d at 784. Courts reviewing measures designed to address the "society-threatening epidemic" of COVID-19 should be vigilant to protect against clear invasions of constitutional rights while ensuring they do "not second-guess the wisdom or efficacy of the measures" properly enacted by the democratic branches of government, on the advice of public health experts. *Id.* at 784-85.

II. The Free Exercise Clause Prohibits Unequal Treatment of Religious Individuals and Organizations.

A. The Free Exercise Clause guarantees to all Americans the "right to believe and profess whatever religious doctrine [they] desire[]." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). It also protects their right to act on these beliefs, through gathering for public worship as in this case, or through other acts of religious exercise in their daily lives. While the protections for actions based on one's religion are not absolute, *id.* at 878-79, among the most basic requirements of the Free Exercise Clause are that government may not restrict "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display," *id.* at 877, nor "target the religious for special disabilities based on their religious status," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citation and internal quotation marks omitted); *see also* Attorney General Guidelines, 82 Fed. Reg. at 49,672. To determine whether a law impermissibly targets religious believers or their practices, the Supreme Court has directed courts to "survey meticulously" the text and

operation of a challenged law to ensure that it is neutral and of general applicability. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). The Court explained: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543; *see also* Attorney General Guidelines, 82 Fed. Reg. at 49672.

Under the Free Exercise Clause precedent, a law or rule, or the application of a law or rule, that is not both neutral and generally applicable is subject to heightened scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531. A law or rule is not neutral if it singles out particular religious conduct for adverse treatment; treats the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons; "visits gratuitous restrictions on religious conduct"; or "accomplishes . . . a religious gerrymander, an impermissible attempt to target [certain individuals] and their religious practices." *Id.* at 533-35, 538 (citations and internal quotation marks omitted); *see also* Attorney General Guidelines, 82 Fed. Reg. at 49672. "Under *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law." *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1260 n.7 (10th Cir. 2008) (citation omitted).

A law is not generally applicable if "in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief," including by "fail[ing] to prohibit nonreligious conduct that endangers [its] interests in a similar or greater degree than does" the prohibited conduct. *Church of the Lukumi Babalu Aye*, 508 U.S. at 534; *see also* Attorney General Guidelines, 82 Fed. Reg. at 49672. In *Church of the Lukumi Babalu Aye*, the Court found that the challenged ordinances were "underinclusive with regard to the [government's] interest in public health"

because they outlawed the religious conduct at issue but failed to prohibit various nonreligious conduct that had an equal or greater impact on public health. 508 U.S. at 543-45. The ordinances were thus not generally applicable. *Id.*

A "prohibition that society is prepared to impose upon [religious] worshippers but not upon itself," the Supreme Court held, is not generally applicable and is subject to strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 545-46 (citation omitted); *see also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 650 (10th Cir. 2006) ("[A]s long as a law remains exemptionless, it is considered generally applicable and religious groups cannot claim a right to exemption; however, when a law has secular exemptions, a challenge by a religious group becomes possible."). Accordingly, the Supreme Court's Free Exercise Clause decisions instruct this Court to "survey meticulously," *Church of the Lukumi Babalu Aye*, 508 U.S. at 534, the risks and character of the various activities the state chooses to permit. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause protect[s] religious observers against unequal treatment." *See id.* at 542 (internal citation omitted).

Here, the Court must determine whether the State's distinctions between religious and secular gatherings are truly neutral and generally applicable. In other words, the Court must ensure that like things are treated as like, and that religious gatherings do not receive unequal treatment.

If the Court determines that the Orders fail to prohibit secular activities comparable to Plaintiffs' religious gatherings of more than ten individuals, then the Court must review the State's purported justifications and determine if they meet strict scrutiny, *i.e.*, whether the State

has demonstrated a compelling governmental interest, pursued through the least restrictive means. *See id.* at 546 ("The compelling interest standard that we apply . . . is not 'water[ed] . . . down' but 'really means what it says.'" (internal citation omitted)); *see also Taylor v. Roswell Independent Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) ("Under strict scrutiny, the government must prove its policy or application of that policy is narrowly tailored to accomplish a governmental interest that is compelling, not merely legitimate.").

The Court must be appropriately deferential to the expertise of public health officials in evaluating potential distinctions between secular gatherings listed in the Orders and religious gatherings. *See Jacobson*, 197 U.S. at 31; *In re Abbott*, 954 F.3d at 784-85. But such deference will not justify action that is "beyond all question, a plain, palpable" violation of free exercise principles. *Jacobson*, 197 U.S. at 31; *see also In re Abbott*, 954 F.3d at 784-85. Thus, if the Court determines that the Orders plainly are not neutral and generally applicable, then the Court may sustain their disparate treatment of religious gatherings only if it meets the demands of strict scrutiny.

B. In prohibiting church services or other religious gatherings that exceed ten people, despite permitting various other secular activities that allow many more individuals to gather, the State's Orders appear, at least, not generally applicable.

First, while the Orders have permitted many businesses to admit numerous customers or patrons into the same physical space inside a place of business, the Orders do not permit more than ten individuals to gather at a place of worship to pray together, even if they socially distance. ECF No. 1-2 at 5. Second, restaurants can now host up to fifty patrons and up to 50%

of occupancy, including "parties" of up to eight patrons. Yet, worship services are limited to ten under the Guidance, regardless of occupancy and "party" size.

As the Supreme Court made clear in *Church of the Lukumi Babalu Aye*, a "prohibition that society is prepared to impose upon [religious worshippers] but not upon itself," is not generally applicable. 508 U.S. at 545 (citation omitted). Or, as then-Judge Alito explained, "[a] law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

This is what the Sixth Circuit held recently in *Maryville Baptist Church* and *Roberts*. Because "[t]he Governor ha[d] offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same," *Maryville Baptist Church*, 957 F.3d at 615; *see also Roberts*, 958 F.3d at 414, the Sixth Circuit determined in each case that the rules were not generally applicable under *Church of the Lukumi Babalu Aye* and that strict scrutiny applied. *Maryville Baptist Church*, 957 F.3d at 614-15; *Roberts*, 958 F.3d at 414-15. By comparison, the Ninth Circuit rejected a "challenge to the application of the State of California and County of San Diego's stay-at-home orders to in-person religious services," where, in its view, the actions did not "in a selective manner impose burdens only on conduct motivated by religious belief." *South Bay United Pentecostal Church v. Newsom*, __ F.3d __, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020).

Here, the Orders' inconsistent treatment of religious conduct that appears to endanger the State's interest to no greater degree than the permitted secular activities shows, on this record, that the State has not acted in a generally applicable manner.[8] As discussed in Part III, it is thus incumbent on the State to show how its disparate treatment can satisfy strict scrutiny.

C. The United States does not take a position in this Statement on Colorado's general approach to in-person gatherings at this time. The proper response to the COVID-19 pandemic will vary over time depending on facts on the ground. But the State cannot treat religious gatherings less favorably than other similar, secular activities. To be clear, this principle does not prevent a government from establishing "that mass gatherings at churches [of the sort Plaintiffs propose] pose unique health risks that do not arise" in the context of the activities that the Orders permit. *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 20-1102-JWB, 2020 WL 1910021, at *8 (D. Kan. April 18, 2020); *see infra* Part III. As discussed in Part III, however, the State has not proven any such carefully tailored approach, and Plaintiffs would be entitled to relief unless the State can carry its burden on strict scrutiny. *See, e.g.*, *id.* at *3 & 7 (holding that "secular facilities that are still exempt from the mass gathering prohibition or that

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[8] Because the Orders are not generally applicable, strict scrutiny applies, and the Court need not reach the issue of whether the Orders are neutral toward religion. The United States notes, however, that "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye*, 508 U.S. at 531. The value judgment inherent in providing exemptions for secular activities like dine-in restaurants, which would seem to implicate the State's public health interests to a similar, if not greater degree, while not providing exemptions for Plaintiffs' religious activities tends to indicate that the State's actions may not be religion-neutral. *See Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (1999) (Alito, J.) ("[I]n *Smith* and *Lukumi*, it is clear . . . the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations"); *id.* at 366 (heightened scrutiny attaches when government "makes a value judgment in favor of secular motivations, but not religious motivations").

are given more lenient treatment," including "airports, childcare locations, hotels, food pantries and shelters, detoxification centers," "shopping malls," and "office spaces," demonstrated religious targeting that failed strict scrutiny and called for a temporary restraining order against the Kansas Governor's COVID-19 Order).

III. The Compelling Interest / Least Restrictive Means Test Is a Searching Inquiry

A law burdening religious practice that is not neutral and generally applicable must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. "The compelling interest standard that we apply . . . is not 'water[ed] . . . down' but 'really means what it says.'" *Id.*; *see also Axson-Flynn*, 356 F.3d at 1294 (Where a law or rule is not neutral and generally applicable, defendants "face the daunting task of establishing that the requirement was narrowly tailored to advance a compelling governmental interest."). This is a difficult standard for the State to meet. "As the Supreme Court has said, it's sometimes hard to see how a law or regulation can 'be regarded as protecting an interest of the highest order,' as serving a compelling interest, 'when it leaves appreciable damage to [the] supposedly vital interest unprohibited.'" *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547).

As a general matter, prohibiting large gatherings to slow the spread of COVID-19 undeniably advances a compelling government interest. The Fifth Circuit has recently recognized "the escalating spread of COVID-19, and the state's critical interest in protecting the public health." *In re Abbott*, 954 F.3d at 778. Moreover, the Supreme Court has noted that

"'context matters' in applying the compelling interest test, and has emphasized that strict scrutiny's fundamental purpose is to take 'relevant differences' into account." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). For example, in *Cutter v. Wilkinson*, the Supreme Court applied the compelling interest standard in a manner that directed that prison administrators be afforded deference on what constitutes safety and good order. 544 U.S. 709, 723 (2005). Similarly, here, a court must apply this standard in the context of the pandemic.

But the existence of a pandemic is not the end of the inquiry. In *O Centro*, the Supreme Court considered under the federal RFRA whether banning a religious group from using a particular controlled substance in its worship service was supported by the compelling interest of enforcing the drug laws. *See O Centro*, 546 U.S. at 428-39. The Court recognized that while enforcing the drug laws undoubtedly constitutes a compelling interest as a general matter, the government had to show more: a compelling interest in applying those laws to the small religious group that sought to use a drug in religious ceremonies that was not a sought-after recreational drug and thus not prone to diversion. Drawing on its Free Exercise Clause precedents, the Supreme Court held that courts must look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. And given that "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited," the existence of other exemptions for similar conduct will be relevant in determining whether denying the desired religious exemption survives strict scrutiny. *Id.* at 433; *see also, e.g.*, *Holt v. Hobbs*, 135 S. Ct.

853, 864-67 (2015) (recognizing the deference due prison officials but holding that other exemptions showed that the prison did not satisfy strict scrutiny).

The ultimate question for this Court, then, is whether applying the State's prohibition on in-person religious worship exceeding ten people to Plaintiffs' proposed fifty-person gatherings—while exempting numerous businesses from that ten-person limit, allowing some businesses to admit numerous customers and now allowing restaurants to serve fifty patrons—furthers a compelling interest, and whether there is no less restrictive measure the State could use to achieve that interest while allowing the church to hold its services. In this fact-intensive and context-laden analysis, the State has the burden to show that there are "relevant differences," *O Centro*, 546 U.S. at 431-32, with regard to efficacy in slowing the spread of COVID-19, between allowing the Church to meet as proposed and allowing other preferentially-treated secular gatherings, such as at restaurants.

In the view of the United States, the State has not yet met that burden. To begin, rather than show that it could not achieve its public health interests while allowing larger religious gatherings to occur with social distancing and hygiene protocols, the State attempts to change the analysis: It asserts that it may restrict religious gatherings to achieve its public health interests so long as such restrictions are not imposed *because* of the religious message of the activity. *See* ECF No. 25 at 20. But while evidence that a law does not target religious conduct because it is religious may be relevant to determining whether the law is neutral and generally applicable, it does not resolve the question whether it survives strict scrutiny. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 545-46 (addressing the targeting question and then turning to the strict scrutiny analysis).

The State's filings thus far have not met its burden under strict scrutiny. Notably, the State has not established that its limits on religious gatherings are the least restrictive means of achieving its public health interests. And it is hard to see how it could do so, given that it is allowing secular activities by people subject to the same social-distancing and personal hygiene protocols that Plaintiffs propose to implement. While the State suggests concerns of risks from houses of worship, it does not present evidence that any such concerns would not similarly apply to the extensive activities the State is allowing in critical businesses and restaurants. ECF No. 25-2. Showing that an approach represents the least restrictive means available to further a compelling interest requires refuting the "'alternative schemes' suggested by the plaintiff to achieve that same interest and show[ing] why they are inadequate." *Yellowbear v. Lampert*, 741 F.3d 48, 62-63 (10th Cir. 2014) (Gorsuch, J.) (discussing the application of the least restrictive means test, in the context of a claim under the Religious Land Use and Institutionalized Persons Act, and quoting *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011)). Here, Plaintiffs have made representations that they will follow applicable CDC and state social distancing and hygiene protocols, including use of face coverings and cleaning and disinfection measures. ECF No. 1 (Compl.) ¶¶ 27-28. The Orders do not require any similar representations from restaurants and other businesses permitted to open to greater numbers of patrons.

Indeed, in assessing Kentucky's ban on in-person religious services, the Sixth Circuit proposed precisely what Plaintiffs seek to do as a less restrictive means of achieving the public health interests implicated by COVID. *See Roberts*, 958 F.3d at 415 ("Why not insist that the congregants adhere to social distancing and other health requirements and leave it at that—just as

the Governor has done for comparable secular activities?”). There, Kentucky had allowed some in-office gatherings to continue. The Sixth Circuit reasoned:

> If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. . . . How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.

Roberts, 958 F.3d at 415; *see also First Baptist Church*, 2020 WL 1910021, at *8 (“[T]he court finds that Plaintiffs can likely show that the broad prohibition against in-person religious services of more than ten congregants is not narrowly tailored to achieve the stated public health goals where the comparable secular gatherings are subjected to much less restrictive conditions.”). A similar point could be made about Colorado’s decision to trust its people to innovate to gather inside restaurants subject to social distancing and cleaning protocols. The State bears the burden to show that its Orders satisfy strict scrutiny, and it has not done so. Plaintiffs have accordingly established a likelihood of success on the merits of this claim.

Likewise, Plaintiffs have made at least an initial showing of irreparable injury. *See Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (“[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). And the State has not sufficiently explained why the equities and public interest would weigh against Plaintiffs’ proposed gatherings, which, as alleged, serve an essential function for their congregants while complying with all social distancing and sanitation guidelines. Thus, on this record, a temporary restraining order should issue and a preliminary injunction may be warranted.

CONCLUSION

The United States respectfully requests that the Court consider these arguments in deciding Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction. The facts, on this record, show that the State has imposed limits on religious activity that it has not imposed on comparable secular activities. If proven, the facts alleged in Plaintiffs' complaint would thus establish a Free Exercise violation unless the State demonstrates that its actions satisfy the demanding strict scrutiny standard. The State has not yet done so. Accordingly, to ensure that worship services can proceed with the same safety measures as secular businesses, the United States respectfully requests that the Court grant Plaintiffs' requested Temporary Restraining Order and Preliminary Injunction.

DATED: May 29, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all CM/ECF users associated with this case.

/s/ Eric W. Treene
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