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.

PLAINTIFFS' RENEWED MOTION FOR

TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION

Plaintiffs submit the following Renewed Motion for Temporary Restraining Order and for Preliminary Injunction.

I. INTRODUCTION

Plaintiffs filed their original Complaint on May 25, 2020. In that complaint Plaintiffs alleged that the State had violated their rights under the First Amendment because the government orders in place at the time burdened Plaintiffs' sincerely held religious beliefs while at the same time setting up a pervasive system of individualized exemptions that permitted other similarly situated businesses or non-religious entities (such as grocery stores; produce stands; gas stations; convenience stores; marijuana dispensaries; liquor stores; gun stores; funeral homes, airlines, mining operations, hardware stores; laundromats; banks; law

offices; and accounting offices) to continue operations while prohibiting faith-based gatherings, such as Plaintiffs' church and religious gatherings, from operating.

Four days later, on May 29, 2020, the United States Supreme Court entered an order in *South Bay United Pentecostal Church v Newsom*, 2020 WL 2813056 (U.S. 2020), in which the Court denied an application for preliminary injunctive relief in a California case in which the plaintiffs made claims similar to the claims Plaintiffs made in their May 25 Complaint. Accordingly, on May 30, 2020 Plaintiffs withdrew their then pending motion for temporary restraining order and preliminary injunction.

In his concurrence in that order Chief Justice Roberts wrote that denial of preliminary injunctive relief was appropriate because

> [a]lthough California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.

Id.

Thus, the key to the Court's decision, at least according to the Chief Justice, was that California was treating religious gatherings in a way that was comparable to "comparable secular gatherings," such as lectures concerts, movies, spectator sports, etc.

After Plaintiffs withdrew their motion for preliminary relief the factual landscape shifted dramatically. In the days that followed, thousands of protesters gathered in Denver and other cities in Colorado. These thousands of protesters marched and stood shoulder-to-shoulder for hours on end, all the while ignoring any semblance of social distancing. Some of these protests occurred literally outside of Governor Polis's office at the Colorado Capitol Building. Far from prohibiting these gatherings – which from an epidemiological perspective were far

more intense than any religious service – Governor Polis and Director Ryan actively encouraged the gatherings. This is an image from a recent protest mere feet from Governor Polis's office:

V.Compl. ¶ 10.

Today in Colorado it is perfectly legal for thousands of protesters to march and stand shoulder-to-shoulder for hours on end, all the while ignoring any semblance of social distancing, assuming, apparently, the message of the protest is one approved by Governor Polis and Director Ryan. But if 51 people were to meet to worship God in a small rural church, they would do so at the risk of being fined and imprisoned. Thus, any argument that the State may have had that it was treating religious gatherings in a way that is comparable to "comparable secular gatherings" evaporated when Defendants permitted and even encouraged these protest gatherings while continuing to impose draconian restrictions on religious gatherings. Accordingly, Plaintiffs have filed their First Amended Complaint ("Compliant" or "V.Compl.") and are renewing their request for a temporary restraining order and preliminary injunction.

II. FACTS

High Plains Harvest Church ("HPHC" or the "Church") is a small church in Ault, Colorado. V.Compl. ¶ 12. HPHC's vision is to be a Christ-centered, rural, regional church that makes a genuine difference in the hearts of people throughout northern Colorado. V.Compl. ¶ 21. The Church seeks to create an environment where each person is: cultivating daily, life-changing intimacy with the Savior; experiencing biblical community with others in the body of Christ; using their time, talents, and treasures to further God's kingdom; engaging in intentional discipleship and ministry; and bringing the Gospel into their sphere of influence with word and action. *Id*.

Hotaling is a former Navy SEAL and a service-disabled veteran. V.Compl. ¶ 22. After returning home from the Navy, Hotaling followed the Lord's call to serve Him full-time. *Id*. Hotaling is a devout Christian and a pastor in the Church. *Id*. Until the recent COVID-19 outbreak, Hotaling frequently attended and/or led services as the Church. *Id*. He typically attended and/or led three to four services and/or other religious gatherings per week. *Id*. Hotaling has a sincerely held religious belief that in-person attendance at church is central to his faith. *Id.*

In response to the presence of COVID-19 in Colorado, on June 1, 2020, Governor Polis issued his so-called "Safer at Home and in the Vast, Great Outdoors" order, Executive Order, D 2020 091 (the "Executive Order"). V.Compl. ¶ 23. A copy of the Executive Order is attached to the Complaint as Exhibit A. *Id*.

In the Executive Order Governor Polis directed Director Ryan to issue a public health order to: "Prohibit public gatherings of groups of ten (10) persons in both public and private

commercial spaces unless gatherings of groups greater than ten (10) persons are expressly authorized by this Executive Order or an associated PHO." V.Compl. ¶ 24.

In accordance with the Executive Order, on June 5, 2020 Director Ryan issued her Sixth Amended Public Health Order 20-28 Safer at Home and in the Vast, Great Outdoors (the "PHO"). V.Compl. ¶ 25. A copy of the PHO is attached to the Complaint as Exhibit B. *Id*.

The PHO prohibits all public and private gatherings greater than ten individuals except for "Necessary Activities." PHO I. C. There is no numerical limit on the number of persons who may be present when "Necessary Activities" are conducted. Religious worship services are not considered Necessary Activities under the PHO. "Necessary Activities" do include activities associated with "Critical Businesses." PHO III. A. 4. "Critical Businesses" are listed in Appendix F to the PHO. The PHO permits "houses of worship" to open so long as the number of worshipers in attendance does not exceed 50% of the posted occupancy limit or 50 people, whichever is **lower**. PHO.II.M.

The PHO states that it "will be enforced by all appropriate legal means," and that "[f]ailure to comply with this order could result in penalties, including jail time, and fines . . ." PHO, VI. A previous version of the PHO invoked the authority of C.R.S. § 25-1-114 to impose criminal penalties. V.Compl. ¶ 29.

Director Ryan has also issued guidance for places of worship to implement the Executive Order (the "Guidance"). V.Compl. ¶ 30. A copy of the Guidance is attached to the Complaint as Exhibit C. *Id*.

The Executive Order, the PHO and the Guidance shall be referred to herein collectively as the "Orders."

Beginning after May 25, 2020 and continuing through the present time, thousands of protesters have gathered in Denver, including prominent protests in front of the Colorado State Capitol Building. V.Compl. ¶32. The protestors have stood literally shoulder-to-shoulder while they shouted in unison. V.Compl. ¶ 33. The protestors have ignored even a pretense of social distancing. V.Compl. ¶ 34. One need not be an epidemiologist to know that these gatherings were epidemiologically far more intense than any religious service. This conclusion is common sense. V.Compl. ¶ 35.

Governor Polis and Director Ryan have not only permitted these protests to occur, they have actively encouraged them. V.Compl. ¶¶ 36, 37. At the same time they are permitting and encouraging these gatherings of thousands, Defendants continue to limit gatherings for worship services to 50 people. V.Compl. ¶ 38.

The Bible commands Christians not to forsake the gathering together of believers. Hebrews 10:24-25. V.Compl. ¶ 39. In-person corporate worship is a fundamental tenet of Christian practice and has been for nearly 2,000 years. *Id*. HPHC and its members, including Hotaling, have a sincerely held religious belief that the physical corporate gathering of believers is a central element of religious worship commanded by the Lord. V.Compl. ¶ 40. It is a substantial burden on the religious exercise of HPHC and its members, including Hotaling, if they cannot meet for in-person corporate worship as a body of believer in numbers greater than 50. V.Compl. ¶ 41. For obvious reasons, the Orders prevent the 51st worshiper (and the 52nd and the 53rd and so on) from even entering the building. Therefore, HPHC in furtherance of the sincerely held religious beliefs of its members, desires to recommence in-person worship services in numbers greater than 50. V.Compl. ¶ 42.

In all services, HPHC and Hotaling will following CDC guidelines for faith communities. V.Compl. ¶ 43 These guidelines include:

- Encouraging staff and congregants to maintain good hand hygiene
- Encouraging use of cloth face coverings among staff and congregants
- Cleaning and disinfecting frequently touched surfaces at least daily and shared objects in between uses
- Promoting social distancing at services and other gatherings, ensuring that clergy, staff, choir, volunteers and attendees at the services follow social distancing throughout services

Id.

Hotaling and HPHC also intend to follow the social distancing standards set forth in Director Ryan's Guidance. V.Compl. ¶ 44. To the best of Hotaling's knowledge, no member of HPHC has COVID-19. V.Compl. ¶ 45.

The Church and Hotaling reasonably fear prosecution, including fines, arrest, and jail, if they proceed with this plan to meet for in-person corporate worship in a group of more than ten worshipers. V.Compl. ¶ 46. Governor Polis and Director Ryan have actively enforced the Orders and declared their intention to continue to do so. V.Compl. ¶ 47.

III. ARGUMENT

A. Standard for Granting Temporary Restraining Order and Preliminary Injunction

1. TRO

A party seeking a TRO must show (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir.2009). A showing of probable irreparable harm is the single most important prerequisite for the issuance of a TRO;

therefore, the moving party must first demonstrate that such injury is likely before the other requirements will be considered. *A.K. by & through Moyer v. Cherry Creek Sch. Dist. No. 5*, 2020 WL 2197920, at *2 (D. Colo. 2020), *quoting, First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017).

In this case all of the elements for issuance of a TRO are present. As to irreparable harm, as discussed in detail below, Plaintiffs will suffer irreparable harm to their First Amendment rights if the Orders challenged in this action are enforced. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir.2003) (citation omitted). The third and fourth factors identified in *Roda Drilling*, *supra*, also weigh in favor of Plaintiffs. When a law is likely unconstitutional, the government's interest in enforcing the law does not outweigh that of individuals in securing the protection of their constitutional rights. *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id*. at 1132. Plaintiffs have attached a form of TRO.

2. Preliminary Injunction

To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

It is well-settled that a showing of the infringement of a constitutional right is enough and requires no further showing of irreparable injury. *Free the Nipple-Fort Collins v. City of*

Fort Collins, Colorado, 916 F.3d 792, 805 (10th Cir. 2019). In the context of constitutional claims, this principle collapses the first and second preliminary-injunction factors. *Id*., at 806. The third and fourth factors also merge when the government is the opposing party. *Aposhian v. Barr*, __ F.3d __, 2020 WL 2204198, at *4 (10th Cir. 2020), *citing Nken v. Holder*, 556 U.S. 418, 435 (2009).

In a First Amendment case, the likelihood of success on the merits will often be the determinative factor. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). This is because: (a) the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury; (b) when a law is likely unconstitutional, the government's interests do not outweigh a plaintiff's interests in having his constitutional rights protected; and (c) it is always in the public interest to prevent violation of a person's constitutional rights. *Id*. Indeed, in constitutional cases whether to grant the injunction often turns on likelihood of success on the merits only, usually making it unnecessary to dwell on the remaining factors. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*) (*per curiam*). Finally, with respect to the "likelihood of success" factor, while laws are ordinarily presumed constitutional, when a law infringes on the exercise of First Amendment rights, the government bears the burden of establishing its constitutionality. *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014). *See also Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012) ("[The] presumption [of constitutionality] does not apply when the challenged statute infringes upon First Amendment rights.").

B. The Orders Violate Plaintiffs' First Amendment Free Exercise Rights

1. The *Hialeah* Standard

The First Amendment protects the "free exercise" of religion, and fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts . . . [such as the] freedom of worship and assembly.").[1] The Supreme Court has been consistent in its rigorous protection of religious freedom. It has observed that "worship in the churches and preaching from the pulpits" occupies a "high estate under the First Amendment." *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

Pursuant to these vigorous protections, "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). (hereinafter, "*Hialeah*"). In *Hialeah*, the Supreme Court noted that "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 508 U.S. 520, 531, *quoting Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). Not every regulation burdening religious practice is neutral and generally applicable, however, and a law that is neither must is subject to strict scrutiny. *Id*.

[1] This protection was incorporated against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The *Hialeah* Court began by addressing neutrality. It noted that "to determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id*. at 533. Specifically, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id*. The Supreme Court then stated that even if a law were facially neutral, "[w]e reject the contention . . . that our inquiry must end with the text of the laws at issue." *Id*. at 534. "Facial neutrality is not determinative." *Id*. The Free Exercise Clause forbids even "subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Id*. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id*.

The *Hialeah* Court next addressed the requirement of general applicability and noted that the "Free Exercise Clause protect[s] religious observers against unequal treatment." *Id*. at 542. "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. Thus, where government restricts conduct protected by the First Amendment but "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id*. at 546-547.

If the law is not neutral or generally applicable, it "must undergo the most rigorous of scrutiny." *Hialeah*, 508 U.S. at 546. "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." *Id*. (internal quotation marks omitted). The compelling interest standard applied once a law fails to meet the *Smith* requirements is not watered down but really means what it says. *Id*. (internal quotation marks omitted). The government must show that the burden on religious practice is the "least restrictive means" of achieving its asserted interest. *Thomas v. Review Bd. of Indiana Employment Sec. Div*., 450 U.S. 707, 718 (1981). Such a law will survive strict scrutiny only in **rare cases**. *Hialeah*, 508 U.S. at 546.

2. The *Hialeah* Standard Applied in *South Bay United Pentecostal Church*

On May 29, 2020, the United States Supreme Court entered an order in *South Bay United Pentecostal Church v Newsom*, WL 2813056 (U.S. 2020), in which the Court denied an application for preliminary injunctive relief in a California case in which the plaintiffs claimed the state's COVID-19 health orders were not generally applicable, because they treated similar activities such as offices and factors differently than churches. In his concurrence in that order Chief Justice Roberts rejected the contention that the activities pointed to by the plaintiffs were in fact similar to churches. He wrote:

> [a]lthough California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.

Id. *1.

Thus, the key to the Court's decision distinguishing the California orders from *Hialeah*, at least according to the Chief Justice, was that California was treating religious gatherings in a way that was comparable to "comparable secular gatherings," such as lectures concerts, movies, spectator sports, etc.

What if, rather than treating religious gatherings comparably to comparable secular gatherings, the State allowed and even actively encouraged much more intense secular gatherings while continuing to clamp down on religious gatherings? Presumably, the Chief Justice would agree that the logic of his concurrence in *South Bay United Pentecostal Church* would no longer apply, and instead the *Hialeah* standard would be applicable. If that were the case, it is highly likely that Justice Kavanaugh's dissent would become the controlling law. In his dissent Justice Kavanaugh noted that a state's discrimination against religious worship services contravenes the Constitution, because such discrimination is "odious to our Constitution." *Id*., *2, *quoting Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. __, 137 S.Ct. 2012, 2025, (2017). To justify its discriminatory treatment of religious worship services, a state must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Id., quoting Hialeah*, 508 U.S. at 531-32. A state undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens, but "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Id., quoting Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (*per curiam*). Absent a compelling justification, a state may not take a looser approach with secular gatherings while imposing stricter requirements on places of worship. *Id*.*3. In closing, Justice Kavanaugh stated: "The State [] has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion." *Id*.

3. The Orders Burden Plaintiffs' Free Exercise Rights Under the First Amendment

Plaintiffs have sincerely held religious beliefs, rooted in Scripture's commands (e.g., Hebrews 10:25), that Christians are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. V.Compl. ¶¶ 39-40. And, as the court recognized in *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249 (W.D. Ky. 2020), "many Christians take comfort and draw strength from Christ's promise that 'where two or three are gathered together in My name, there am I in the midst of them.'" *Id*., at *8, *quoting* Matthew 18:20. Indeed, the court explained, the Greek word translated "church" in English Bibles is "*ekklesia*," which literally means "assembly."

In the Orders the State has invoked the enforcement provisions of C.R.S. § 25-1-114. By invoking this statute, the State has asserted that any violation of the PHO is a criminal act punishable by a $1,000 fine and up to one year in jail. Therefore, Plaintiffs would have to risk incurring these criminal sanctions if they were to assemble in a group of more than 51 persons to worship God. Thus, the Orders unquestionably and substantially burden Plaintiffs' religious practice of assembling together for worship according to their sincerely held beliefs.

4. The State is Allowing Very Intense Secular Gatherings Numbering in the Thousands While Continuing to Clamp Down on Religious Gatherings

After Plaintiffs withdrew their original motion for preliminary relief the factual landscape shifted dramatically. In the days that followed thousands of protesters gathered in Denver and other cities in Colorado. These thousands of protesters marched and stood shoulder-to-shoulder for hours on end, all the while ignoring any semblance of social distancing. Some of these protests occurred literally outside of Governor Polis's office at the Colorado Capitol Building. Far from prohibiting these gatherings – which from an

epidemiological perspective were far more intense than any religious service – Governor Polis and Director Ryan permitted and even encouraged the gatherings.

Any argument that the State may have had that it was treating religious gatherings in a way that was comparable to "comparable secular gatherings" evaporated when Defendants permitted and encouraged these protest gatherings while continuing to impose draconian restrictions on religious gatherings. Accordingly, under *Hialeah*, strict scrutiny must be applied.

5. The Orders Fail Under Strict Scrutiny Review.

(a) Introduction

Because the Orders burden Plaintiff's free exercise rights and are neither neutral nor generally applicable, they are subject to strict scrutiny. Accordingly, the government has the burden of demonstrating that the Orders serve a compelling governmental interest in a way that is narrowly tailored to achieve that goal through the least restrictive means.

(b) The Orders do Not Serve a Compelling Interest

There is an important difference between, on the one hand, **identifying** a compelling governmental interest, and, on the other hand, demonstrating that the regulation under scrutiny **serves** that interest. In this case there is little question that the government has identified a compelling interest in addressing the COVID-19 virus. But where the government permits regular large gatherings of persons for secular purposes, while prohibiting faith-based gatherings, the assertion that the regulation serves a compelling interest fails. It is well-established in strict scrutiny jurisprudence 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." *Hialeah* 508 U.S. 520, 546–47, *quoting The Fla. Star v. B.J.F.*, 491

U.S. 524, 541-42 (1989). Thus, while the government has certainly identified a compelling interest, there is substantial question regarding whether the Orders, as applied, actually serve that interest.

In its response to the original motion, the State asserted that COVID-19 is a public health emergency that is spread in large gatherings and social distancing can mitigate its spread. Resp. 3-4; 5-7; 13-16). The State asserted it may enact health regulations to mitigate the spread of COVID-19. Resp. 13 Plaintiffs do not dispute any of these assertions. Nevertheless, even in the pursuit of legitimate interests government cannot regulate in a selective manner that imposes burdens on conduct motivated by religious belief. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543 (1993). This principle "is **essential to the protection** of the rights guaranteed by the Free Exercise Clause." *Id*. (emphasis added). The Orders violate this principle. That is the point of this case.

Thus, all of the State's arguments about how serious COVID-19 is and how it has enacted regulations to control its spread are completely beside the point and irrelevant to Plaintiffs' constitutional challenge. No one disputes that the State may enact generally applicable regulations to combat the virus. Plaintiffs vigorously dispute that the State may allow thousands of people to stand by each other at a protest, while limiting to 50 the number of people who may worship God together.

(c) The Orders are Not Narrowly Tailored

Even assuming for the sake of argument that the Orders serve a compelling governmental interest, they nevertheless fail under strict scrutiny, because they are not narrowly tailored to serve that interest through the least restrictive means.

The State cannot carry its burden to demonstrate the Orders are narrowly tailored because it cannot demonstrate that it seriously undertook to consider other, less-restrictive alternatives and ruled them out for good reason. To meet this burden, the State must show that it "seriously undertook to address the problem with less intrusive tools readily available to it," meaning that it "considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). The State cannot meet its burden by showing "simply that the chosen route is easier." *Id*. at 495. Thus, the State "would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Bruni v. City of Pittsburgh,* 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added). Furthermore, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). There must be a fit between the ends and the means chosen to accomplish those ends. *Sorrell v. IMS Health*, *Inc*., 564 U.S. 552, 572 (2011).

The State fails this test. The State tried nothing else. For religious gatherings, it considered nothing but a complete prohibition of gatherings over 50 people, while expansively exempting the protests where thousands gathered. The State has not and cannot state why or how crowds thousands at a protest are any less "dangerous" to public health than a responsibly distanced and sanitized worship service of 51 people.

Finally, the State offers no justification whatsoever for why voluntary compliance has failed to satisfy the compelling public health interest or why criminal penalties are necessary to promote compliance by Coloradans engaged in religious services or activities (but not in the protests). Indeed, the continued reliance on voluntary social distancing and hygiene restrictions

for gatherings in dozens of other categories suggests the burdens on religious services or activities – under penalty of arrest, imprisonment or criminal fine – are not the least-restrictive option to satisfy the State's compelling interest.

The State's failure to tailor its restrictions to closely fit the safety ends it espouses, and its failure to try other, less restrictive alternatives that have worked and are working in other jurisdictions across the country, demonstrates that the State cannot satisfy its burden to prove narrow tailoring. Thus, the State's enforcement of the Orders fails strict scrutiny, and injunctive relief is warranted.

6. Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits

In summary, for the foregoing reasons, Plaintiffs have demonstrated a substantial likelihood of success on the merits of their free exercise claim.

D. The State Has Engaged in Viewpoint Discrimination

The discriminatory enforcement of the Orders is a blatant violation of Plaintiffs' free speech rights because it amounts to viewpoint discrimination. Viewpoint discrimination is a "particularly egregious form" of content discrimination. *Pahls v. Thomas*, 718 F.3d 1210, 1229 (10th Cir. 2013), *quoting Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 829, (1995). Such discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberge*r, 515 U.S. at 829. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id*. Viewpoint-based speech restrictions are **presumptively invalid**. *Pahls v. Thomas*, 718 F.3d at 1229, *citing Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009); *Rosenberger*, 515 U.S. at 830-31; and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

In this case the State has clearly engaged in viewpoint discrimination. The protesters were engaging in officially approved speech[2]. Therefore, the State exempted them from the Orders by not only failing to enforce the Orders but by actively encouraging the flouting of the Orders. Plaintiffs desire to engage in religious speech that for whatever reason has not found favor with the State. As a result, the State allows the protesters to speak in mass gatherings while ignoring the Orders with impunity. And at the same time the State continues to clamp down on gatherings the purpose of which is to engage in religious speech. It is difficult to imagine a clearer case of viewpoint discrimination. Thus, the State's actions in discriminating against Plaintiffs' speech are presumptively invalid, and Plaintiffs have demonstrated probable success on the merits on this independent ground.

E. *Jacobson* is Not a License to Suspend the Constitution

The State relies on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), but that case does not stand for the proposition that the government can suspend the Constitution in times of emergency. In fact, the case states exactly the opposite. *Jacobson* was a challenge to a compulsory vaccination law, and the Court held the law was within the state's police power. The Court specifically stated, however, that if a law – even a law enacted to protect the public health or safety – invades "rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id*., at 31. Far from being a license to suspend the Constitution in times of emergency, *Jacobson* specifically stated that health regulations that violated the constitution must be set aside.

In *Jacobson* the Court noted that the Massachusetts health regulation applied equally to all adults. *Id*. at 30. Surely the Court would have struck down a health regulation that

[2] For purposes of the Constitutional analysis, the merits of the protesters' speech is beside the point. The Constitution prohibits the government from picking winners and losers in the area of free speech.

compelled church attenders to obtain vaccinations while exempting other, similarly situated, people. But that is what has happened here. The Orders discriminate against faith communities and therefore violate the Free Exercise and Free Speech clauses of the First Amendment.

F. *Lawrence v. Colorado* Supports Plaintiffs' Case, Not the State's

The State asserts that Judge Dominico's order in *Lawrence v. Colorado*, 2020 WL 2737811 (D. Colo. Apr. 19, 2020) is applicable to this case. That is true, but not in the say the State intends. In *Lawrence* Judge Dominico held that the Plaintiff's inability to attend Mass was the result of a private decision of the Catholic bishops. *Id*. at 6-7. Therefore, he could not trace his injury to an action of the State and had no Article III standing. *Id*. Therefore, Judge Dominico held "the Court does not have jurisdiction to address Mr. Lawrence's free exercise claim."

Judge Dominico appended the following caveat to this statement:

> Where the government has actually prohibited activity that a church wishes to undertake, **the church, at least, will have standing to challenge that action**.

Id. (emphasis added).

Judge Dominico did not reach Mr. Lawrence's Free Exercise claim. But far from undermining Plaintiffs' standing to assert their claims, Judge Dominico specifically stated that they would have standing.

G. Facial Neutrality is Not Determinative

The State had argued the Orders are facially neutral and therefore the constitutional analysis ends. The State's argument that facial neutrality is dispositive runs squarely into the holding in *Hialeah*. "Facial neutrality is not determinative." *Hialeah*, at 534. State action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*.

I. Other Factors

As noted above, in constitutional cases whether to grant an injunction often turn on likelihood of success on the merits only, usually making it unnecessary to dwell on the remaining three factors. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*) (*per curiam*). Nevertheless, Plaintiffs will briefly address these elements. The Supreme Court recognizes that the deprivation of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs' constitutional rights have been violated by the State and will continue to be violated absent immediate relief. The equities favor Plaintiffs because the law places a premium on protecting constitutional rights. The Orders irreparably harm Plaintiffs' constitutional freedoms and significantly hinders their ministry to their parishioners and community. Meanwhile, an injunction will not harm the State at all. The State can achieve any valid interest through valid orders. It need not apply an order unconstitutionally burdening the free exercise of religion. The State is free to enact permissible and reasonable regulations on church services, including narrowly-tailored social distancing and gathering conditions. Finally, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd' sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (quotations omitted). This is particularly true for First Amendment freedoms. Because the requested injunction will accomplish this, the public interest also favors an order protecting Plaintiffs.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to enter a temporary restraining order and a preliminary injunction enjoining the State from imposing criminal penalties (including fines and jail time) for engaging in corporate worship in the Church's sanctuary.

Respectfully submitted this 10th day of June 2020.

/s/ Barry K. Arrington

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via email to the following parties of record:

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Eric R. Olson
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/s/ Barry K. Arrington

Barry K. Arrington

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.

TEMPORARY RESTRAINING ORDER

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1. The Court GRANTS the motion for a temporary restraining order filed by High Plains Harvest Church and Mark Hotaling ("Plaintiffs") against Governor Jared Polis and Executive Director Jill Hunsaker Ryan (together, the "State").

2. The Court **ENTERS** this Temporary Restraining Order on June ___, 2020 at _____ __.M. Fed. R. Civ. P. 65(b)(2).

3. The Court **ENJOINS** the State from enforcing; attempting to enforce; threatening to enforce; or otherwise requiring compliance with any prohibition on in-person church services by Plaintiffs or the members of High Plains Harvest Church.

4. Unless the Court enters this Temporary Restraining Order, the Plaintiffs and the members of High Plains Harvest Church will suffer irreparable harm. *Id*. Plaintiffs reasonably fear prosecution, including fines, arrest, and jail, if they meet for in-person corporate worship in

a group of more than ten worshipers, and therefore their religious liberties are substantially burdened. V.Compl. ¶ 46.

5. The facts in Plaintiffs' Verified First Amended Complaint "clearly show that immediate and irreparable injury, loss, or damage will result to [Plaintiffs] before [the State] may be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A).

6. Plaintiffs do not need to post a security bond because enjoining the State's from prohibiting in-person church services at the Church does not interfere with the State's rights. Fed. R. Civ.P. 65(c).

7. The Court **GRANTS** Plaintiffs' request for Oral Argument. The Court will hold a telephonic hearing on the preliminary injunction motion on June __, 2020 at _____ __.M..

BY THE COURT

_____
Judge, United States District Court