CASE NO. 20-1336

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITI

ANDREW WOMMACK MINISTRIES, INC.,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EMERGENCY RELIEF NEEDED BY MONDAY, OCTOBER 5, 2020

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10TH CIR. R. 8.2(A) EMERGENCY MOTION CERTIFICATE

1. **Plaintiff-Appellant Timely Files this Motion:** Plaintiff-Appellant Andrew Wommack Ministries, Inc. ("AWMI") filed its Verified Complaint (doc. 1) and Motion for Temporary Restraining Order (TRO) and Preliminary Injunction (doc. 2) on September 28, 2020. The district court denied AWMI's Motion for TRO and Preliminary Injunction on September 29, 2020 (doc. 7), and AWMI noticed its appeal to this Court the same day. (Doc. 8). In compliance with Fed. R. App. P. 8, AWMI first sought an injunction pending appeal in the district court on September 30, 2020 (doc. 12), which the district court denied on September 30. (Doc. 14). AWMI brings the instant Emergency Motion for an Injunction Pending Appeal in this Court on October 1, 2020, less than one day after the district court's denial of the requested relief. AWMI's instant Motion is brought as soon as possible under the Federal Rules of Appellate Procedure and could not have been brought sooner.

2. **Date of the District Court's Order:** The district court's denial of AWMI's preliminary injunction was issued September 29, and its denial of AWMI's motion for injunction pending appeal was denied on September 30.

3. **Effective Date of the Order:** The district court's order, from which AWMI is appealing to this Court, was effective immediately upon entry on September 29 (preliminary injunction) and September 30 (injunction pending appeal).

4. **Contact Information for Appellant's Counsel of Record:** Plaintiff–Appellant AWMI is represented by

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I hereby certify that the foregoing information is true and correct, to the best of my knowledge.

Dated: October 1, 2020

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiff–Appellant, Andrew Wommack Ministries, Inc., states that it is domestic nonprofit charitable corporation incorporated under the laws of the State of Colorado, has no parent corporation, and does not issue stock.

Dated: October 1, 2020

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RELIEF SOUGHT AND URGENCIES JUSTIFYING EMERGENT RELIEF

AWMI moves this Court for an injunction pending appeal (IPA) of the district court's September 30, 2020 Order Denying AWMI's Motion for Preliminary Injunction ("PI Order," attached hereto as Exhibit 1), which is the subject of AWMI's Notice of Appeal to this Court (attached hereto as Exhibit 2), restraining enforcement against AWMI of the various COVID-19 orders issued by Governor Polis, Director Ryan, and other government officials in the State of Colorado (the "Governor's Orders"):

> Enjoining the discriminatory treatment of the **September 15, 2020** Public Health Order 20-35 ("PHO 20-35") and other orders that give preferential treatment to nonreligious gatherings over similar religious gatherings: (1) *Internally* allowing AWMI to engage in nonreligious gatherings with an unlimited number of individuals but imposing a 175-person limit on religious gatherings in the same building with the same people; (2) *Externally* exempting nearly 100 so-called "Critical Businesses" to have nonreligious gatherings with an unlimited number of people but imposing a 175-person limit on AWMI's similar religious gatherings; and (3) Permitting and encouraging thousands to gather in

protests but imposing a 175-person limit on AWMI's religious gatherings. ("V.Compl.," attached as Exhibit 3)

The record is uncontroverted, and the immediate and irreparable harm imposed on AWMI absent and IPA warrants immediate relief from this Court. As shown in the Verified Complaint and the Exhibits (attached hereto as Exhibit 4), immediate and irreparable injury will result to AWMI absent an IPA. The Governor's Orders interfere with and threaten "jail time and fines" (V.Compl., Ex. LL at 22) over AWMI's upcoming Pastor's Conference scheduled to commence at **7:00 PM on October 5, 2020**. (V.Compl. ¶4.) Without immediate relief, the Governor's Orders will have a chilling effect on the Free Exercise, Free Speech, and Free Assembly rights of AWMI and conference participants, and will interfere with AWMI's ability to provide them a safe experience.[1]

Moreover, after the Office of the Attorney General of Colorado threatened AWMI with legal action to enforce the Governor's Orders (V.Compl. ¶¶238-240), AWMI's counsel challenged the Governor's legal position (V.Compl. ¶¶241-243). The Teller County Attorney has also threatened AWMI. (V.Compl. ¶¶244-245.) Neither the Governor nor any designee has withdrawn the enforcement threat.

[1] Due to space limitations, AWMI focuses the instant Motion on its free exercise claims under the First Amendment. As is clear from the Verified Complaint and Motion for Preliminary Injunction in the district court, AWMI also raises a free speech and Establishment Clause claim, which it hereby incorporates by references. (*See* Exhibit 5)

(V.Compl. ¶246.) Given the pending threat of enforcement of the Governor's Orders, including the newly issued **September 20 PHO-20-35 Order**, AWMI seeks an IPA to protect its vitally important constitutional liberties.

While the Governor has unilaterally and significantly restricted the number of people AWMI is permitted to host in its facilities on pain of "jail time and fines," **without saying what fines or how much jail time** (V.Compl. Ex. LL at 22), the Governor encourages thousands of protesters who gather throughout Colorado in violation of his Orders. The Governor commends the protesters' exercise of their First Amendment rights, while officially diminishing the First Amendment rights of houses of worship like AWMI by disparately restricting their assembly and other religious exercise as compared to the protesters, as well as "Critical Businesses" and non-religious activities allowed to operate without numerical limits. This disparate treatment violates the First Amendment and must be enjoined.

JURISDICTION

On September 28, 2020, AWMI filed its Verified Complaint (Exhibit 3) and its Motion for Temporary Restraining Order and Preliminary Injunction (attached hereto as Exhibit 5). As demonstrated in the Verified Complaint, AWMI brought its claims pursuant to 42 U.S.C. 1983 and the First and Fourteenth Amendments to the United States Constitution. (V.Compl. ¶54). As such, the district court had federal question jurisdiction under 28 U.S.C. §§1331 and 1343. (V.Compl. ¶55). Because

the district court denied AWMI's motion for preliminary injunction on September 29 (Exhibit 1), from which AWMI timely noticed its appeal to this Court (Exhibit 2), this Court has jurisdiction over the instant appeal under 28 U.S.C. §1292(a)(1).

LEGAL ARGUMENT

To obtain an injunction pending appeal (IPA), AWMI is required to satisfy the same elements as that of a preliminary injunction. *See, e.g., McClendon v. City of Albequerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996) ("In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." (quoting *Walker v. Lockhart*, 678 F.3d 68, 70 (8th Cir. 1982)). AWMI must demonstrate a likelihood of success on appeal, irreparable harm, that the balance of the equities favors injunctive relief, and that the public interest favors injunctive relief. *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 465-66 (10th Cir. 2002). *See also* 10th Cir. R. 8.1(B-E) (same). AWMI satisfied these requirements both legally and factually (as demonstrated in the Verified Complaint, which AWMI hereby incorporates be reference), and the IPA should issue.

I. THE UNCONTROVERTED RECORD DEMONSTRATES THAT AWMI IS LIKELY TO SUCCEED ON THE MERITS OF ITS FIRST AMENDMENT FREE EXERCISE CLAIM.

The Governor's Orders must satisfy strict scrutiny because they substantially burden AWMI's religious exercise and are neither neutral nor generally applicable.

The Orders are not neutral or generally applicable because they *internally* discriminate between AWMI's *impermissible* religious activities and AWMI's *permissible* non-religious activities in the same building for the same number of people. They also *externally* discriminate between AWMI's religious activities, which are numerically capped, and other "Critical Businesses" and non-religious activities of similar risk, which are not numerically capped.

A. The Governor's Orders Must Satisfy Strict Scrutiny Because They Substantially Burden AWMI's Religious Exercise and Are Neither Neutral nor Generally Applicable.

1. The Orders Substantially Burden AWMI's Religious Exercise.

AWMI has and exercises sincere beliefs, rooted in Scripture's commands (*Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so more in times of peril (V.Compl. ¶ 61), and that the Bible commands AWMI to assemble together **in person** for a host of religious ministries, including laying hands on the sick, and signing together, which can only be accomplished when Believers are assembled together in person. (*Id.*) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249, at *8 (W.D. Ky. Apr. 11, 2020) [hereinafter, *On Fire*] (cleaned up) (emphasis added). The Governor's arbitrarily restricting AWMI's religious events, conferences, ministries, and worship services at its facilities, on pain of criminal sanctions, unquestionably and

substantially burdens AWMI's exercise of religion and beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—and **plainly so**." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added). "The 'establishment of religion' clause of the First Amendment means at least this: **Neither a state nor the Federal Government can set up a church. . . . Neither can force nor influence a person to go to or to remain away from church against his will**." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added).

2. The Orders Are Not Neutral Or Generally Applicable Because They Internally Discriminate Between AWMI's Impermissible Religious Activities And AWMI's Permissible Nonreligious Activities In The Same Building For The Same Number Of People.

A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 533–34 (cleaned up). The First Amendment prohibits hostility that is "masked, as well as overt." *Id.* The Governor's Orders are not facially neutral, but even if so, they covertly or subtly depart from neutrality by treating AWMI' religious activities differently from similar nonreligious activities. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates

against some or all religious beliefs or **regulates or prohibits conduct because it is undertaken for religious reasons**." *Lukumi*, 508 U.S. at 532 (emphasis added). Prohibiting Coloradans from joining others at a religious gathering for religious reasons, such as a worship service or conference, while permitting them to join others at the same facility for non-religious reasons, such as giving or receiving food, shelter, or counseling, "**violat[es] the Free Exercise Clause beyond all question**." *On Fire*, 2020 WL 1820249, at *6 (emphasis added).

PHO 20-24 was the first order to use the designation "Critical Businesses" to establish the non-religious operations and activities that AWMI could engage in without numerical restrictions, including the provision of "food, shelter, social services, and other necessities of life for economically disadvantaged, persons with access and functional needs, or otherwise needy individuals." (V.Compl. Ex. D § II.2.) The exemption has continued in every iteration of the Governor's Orders (V.Compl. ¶¶ 78-167), and remains in effect under the current Safer at Home Dial (PHO 20-35) (V.Compl. Ex. LL at 24 (App'x A).)

AWMI provides financial support for many local charitable ministries, and volunteers affiliated with AWMI's ministries, including students at Charis Bible College, provide volunteer support to the ministries. (V.Compl. ¶¶ 176.) The supported ministries include Life Network & Choices crisis pregnancy centers, Gospel Home for Women, Springs Rescue Mission, Crossroads Ministries, and

others, through which needy constituents receive food, clothing, shelter, counseling, and other material and social services. (*Id*.) Under the Governor's Orders, volunteers associated with AWMI and Charis Bible College may gather at AWMI's facilities **without numerical limit** to provide food, shelter, social services, and other necessities of life to the constituencies of these ministries or to any others in need, also without numerical limit. (V. Compl. ¶¶177, 180, 182, 185.) But, if those same volunteers pause or transition from these non-religious charitable activities to conduct worship-based activities such as providing spiritual counseling in a sermon or spiritual food in communion—**in the same facility for the same people**—the Governor's Orders subject AWMI's volunteers to jail time and fines if there are more than 175 people in the room, no matter its capacity. (V. Compl. ¶165 and Ex. LL at 4, §II.B). This plainly demonstrates that the Governor's Orders are not neutral or generally applicable because they single out religious conduct "**because it is undertaken for religious reasons**." *Lukumi*, 508 U.S. at 532 (emphasis added).

As demonstrated by the uncontroverted record, the Governor's Orders also internally discriminate between AWMI's religious events, conferences, ministries, and services (which are numerically capped) and its provision of educational programs to Charis Bible College students (which are not numerically limited). Under PHO 20-35, the Safer at Home Dial, AWMI's educational ministries at Charis Bible College are Critical Businesses that are permitted to operate according to

specific "seated event" requirements. (V.Compl. Ex. LL at 14–16, § III.M, R, 28 (App'x A), 45 (App'x I).) The seated event requirements limit attendance only by 6-foot physical distancing. (V.Compl. Ex. LL at 45 (App'x I), § I.A.1.)

AWMI employees operate Charis Bible College with an enrollment of 652 students, who gather together in various shared facilities for religious educational programs, services, convocations, events, and other activities. (V.Compl. ¶ 192.) Under the Governor's Orders' seated event requirements, Charis Bible College students may gather in any of the shared facilities for in-person religious education without numerical limitation provided they engage in social distancing and other applicable sanitization requirements. (V.Compl. ¶¶ 193.)

Thus, in AWMI's 3,100 seat auditorium used by AWMI and Charis Bible College, AWMI employees may provide a one-hour educational program for all 652 Charis Bible College students without violating any the Governor's Orders' seated event requirements provided social distancing requirements are met. But if the same 652 students remain in that same room for an additional hour after the Charis Bible College educational program, and AWMI conducts a religious worship service for them, the event would violate the 175-person restriction for worship services under the Governor's Orders. The First Amendment knows no such incongruity.

PHO 20-35 permits public and private schools to provide in-person education to an **unlimited number of students**, provided social distancing is met. (V.Compl.

Ex. LL at 28 (App'x A) §13.) But, if AWMI then offers a religious worship service to the same P-12 students in the same 3,100 seat auditorium for the hour following the educational program, it is a prohibited worship service. (V.Compl. ¶200.) At many of AWMI's conferences, events, and ministries, it offers programs, activities, and religious educational programs for middle and high school students. Under the Governor's Orders, it could do so without numerical limitation if such programs are considered educational (*id.*), but would be subject to "jail time and fines" if the same program for the same students was a religious program.

3. The Governor's Orders Are Not Neutral Or Generally Applicable Because They Externally Discriminate Between AWMI's Religious Activities, Which Are Numerically Capped, And Other "Critical Businesses" And Nonreligious Activities Of Similar Risk, Which Are Not Numerically Capped.

"Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. To determine general applicability, courts focus on disparate treatment of similar conduct. *Lukumi*, 508 U.S. at 542. "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." *Id.* A law is not generally applicable where "inequality results" from the government's "decid[ing] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with religious motivation." *Id.* at 543. Thus, a law "fall[s] well below the

minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

From the original PHO 20-28 to the current PHO 20-35 Safer at Home Dial, the Governor's Orders **expanded to 13 categories and nearly 100 specific subcategories the "Critical Business" operations and activities exempt from the numerical and stay-at-home restrictions of the Governor's Orders**, including, *inter alia*, grocery stores; 'big box' hardware, farm supply, and construction retail stores (e.g., Home Depot, Lowes, etc.); 'big box' retail stores that supply home products (e.g., Walmart, Target, etc.); marijuana dispensaries, liquor stores, accounting firms, laundromats, funeral homes, and warehouse distribution facilities. (V.Compl. ¶¶ 95-167, 207.) Also from the original PHO 20-28 to the current PHO 20-35 Safer at Home Dial in Levels 1 and 2, Non-Critical Retail (e.g., "clothing, home goods, cell phone stores, mattresses, appliances, thrift shops, apothecaries, vape and tobacco shops, craft, hobby and fabric stores, fishing tackle retailers, sporting goods, boutiques, etc.") and Non-Critical Office-Based Businesses are permitted to open at 50% capacity without any numerical cap or time restrictions for customers or employees. (V.Compl. ¶¶ 95-167, 208-209.)

In all of the same Orders, the activities and operations of houses of worship, even if socially distanced and limited to one or two hours, have been subjected to stricter capacity and numerical limits as compared to Critical Businesses, Non-Critical Retail, and Non-Critical Office-Based businesses, even though **houses of worship are also listed as Critical Businesses in the same orders**. (V.Compl. ¶¶ 117-167.) However, unlike the 100 categories of Critical Businesses under the Governor's Orders, houses of worship are the **only** one that has a 175-person cap. For example, under Level 1 of the PHO 20-35 Safer at Home Dial, which restricts the activities of houses of worship to the lesser of 50% capacity or 175 people per room, AWMI cannot conduct a one-hour worship service in its 3,100-seat auditorium with more than 175 people, even though 50% of its seating capacity would be over 1,500 people. (V.Compl. ¶ 165.) By contrast, other Critical Businesses in facilities of the same capacity can operate with no numerical limit for unlimited periods of time, and both Non-Critical Retail and Non-Critical Office-Based Businesses can operate at 50% capacity with no numerical cap for unlimited periods of time. (*Id.*)

And for outdoor events such as receptions, fairs, auctions, outdoor markets, and concerts, the PHO 20-35 Stay at Home Dial automatically allows up to 250 people under Level 1, up to 175 under Level 2, and up to 75 under Level 3. By contrast houses of worship—under any Level—**must ask local government**

authorities for the number of people allowed to attend an outdoor worship service. (V.Compl. ¶211.)

The Governor is unable to demonstrate the difference in risk of spreading COVID-19, if any, as between a worshipper who spends an hour at a socially-distanced religious event, conference, ministry, or service with a limited number of people (due to distancing), and a shopper who spends an hour in a 'big box' or warehouse store with unlimited other shoppers, which is allowed without numerical limitation. The Governor certainly cannot demonstrate the religious gathering is riskier, **and the uncontroverted record plainly fails to establish any such risk**. Nor can the Governor demonstrate AWMI's socially-distanced religious services, standing in place for an hour or so at a time, are riskier than any Walmart or King Soopers, working dozens of moving and stationary employees together for hours at a time, cycling hundreds or thousands of roving customers through the building, with no shopping time limit all day, 7 days a week. To be sure, **dozens, hundreds, or more employees can work at the same time for any one of the "Critical Businesses"—*e.g.*, Amazon warehouses, Home Depots, Wells Fargo processing centers, etc.—in one building, for 8, 10, 12 or more hours at a time, 5, 6, or 7 days a week**, subject only to the Orders' social distancing guidance. Neither logic, common experience, nor the uncontroverted record allows the conclusion that

socially distanced religious gatherings pose more risk than the myriad "Critical Businesses" and activities that are exempt from numerical limit.

4. The Governor Violates The First Amendment By Discriminating Between Similar Nonreligious And Religious Activities.

The Governor has not only refused to enforce his Orders against thousands of protestors but has openly encouraged their flagrant violations of his Orders. (V.Compl. ¶¶212-222.) The constitutional incongruity of Governor Polis's commending protesters and excusing their violations while restricting worshippers (V.Compl. ¶¶212-222) was highlighted by Judge Ho of the Fifth Circuit in his concurrence in *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020).

> At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest

Id. at 180-81 (Ho, J., concurring) (italics original).

"But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them . . . ." *Id.* at 181.

> For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? **The answer is that they can't.** Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."

Id. (emphasis added).

"To survive First Amendment scrutiny, however, those orders must be applied consistently, not selectively. And it is hard to see how that rule is met here [in light] of the recent protests." *Id.* at 182. "It is common knowledge, and easily proved, that protesters do not comply with social distancing requirements. But instead of enforcing the Governor's orders, officials are **encouraging the protests**—out of an admirable, if belated, respect for First Amendment rights." *Id.* As the Constitution demands, "[i]f protests are exempt from social distancing requirements, then worship must be too." *Id.* (emphasis added).

"The point here is that state and local officials gave [protesters] the choice" to ignore the prohibitions on gathering. *Id.* "Those officials took no action when protesters chose to ignore health experts and violate social distancing rules. **And that forbearance has consequences**." *Id.* (emphasis added).

> The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. **In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution**.

Id. (emphasis added).

In *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020), the New York officials openly encouraged protesters gathering in large numbers in New York, 2020 WL 3488742, *4–5, while continuing to prohibit in-person religious gatherings. *Id.* at *5-6. The Northern District of New York issued

a preliminary injunction enjoining the enforcement of the "ever changing maximum number of people" for religious worship because the disparate treatment for protesters as compared to religious congregants in worship services violated the First Amendment. *Id.* at *8 ("[I]t is plain to this court that the broad limits of that executive latitude have been exceeded.").

With respect to openly supporting protesters while imposing draconian restrictions on indoor religious worship services, the court noted that "Mayor de Blasio's simultaneous pro-protest/anti-religious gatherings message . . . clearly undermines the legitimacy of the proffered reason for what seems to be a clear exemption, no matter the reason." *Id.*, at *12. Indeed,

> Governor Cuomo and Mayor de Blasio could have just as easily discouraged protests, short of condemning their message, in the name of public health and exercised discretion to suspend enforcement for public safety reasons instead of encouraging what they knew was a flagrant disregard of the outdoor limits and social distancing rules. They could have also been silent. **But, by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of special treatment.**

Id. at *12 (emphasis added). The court held that such discrimination violated the Free Exercise Clause and issued a preliminary injunction. *Id.* at *13.

The Governor's Orders impose discriminatory numerical limitations on AWMI's religious events, conferences, ministries, and worship services. Under the current Safer at Home Dial Level 1, currently applicable in Teller County, AWMI is limited to 175 people for an indoor religious service (even in its 3,100 seat

auditorium), and is required to seek a number limit from the government for an outdoor religious service. (V.Compl. Ex LL at 5, § II.B.j). But the Governor officially excuses mass protesters from the clearly applicable numerical limitations in his Orders, essentially making a value judgment that assembling for religious exercise under the First Amendment is substantially less valuable than mass protests, even where the religious exercise is socially distanced and the protests are not. In fact, the Governor treats mass protests as imperative regardless of his Orders, proclaiming "it is not possible to stay home" and that he was "glad" to see the protesters gathering in the streets (V.Compl. ¶¶ 214, 218), thereby exemplifying "**freedom for me, but not for thee**," *Spell*, 962 F.3d at 183 (emphasis added), which "**has no place under our Constitution.**" *Id.* (emphasis added).

5. The Governor's Orders Fail Neutrality And General Applicability Because Of The Governor's Selective Enforcement.

The Governor's selective enforcement of his Orders demonstrates they are neither neutral nor generally applicable. *See, e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) ("selective, discriminatory enforcement of [government regulations] violates the neutrality principle of *Lukumi*"); *East End Eruv Ass'n, Inc. v. Vill of Westhampton Beach*, 828 F. Supp. 2d 526, 539 (E.D.N.Y. 2011) (same). There is no question that the Governor's restrictions on gatherings are being selectively enforced. While AWMI is subject to

"jail time and fines" for increasingly restrictive prohibitions on religious gatherings, the Governor openly and publicly declared a *de facto* exemption for mass protest gatherings. (V.Compl. ¶¶ 212-222). It is difficult to imagine a more selective of the Governor's Orders.

B. Substantial Precedent Arising From COVID-19 Challenges Holds That Prohibitions Like the Governor's Orders Are Subject to Strict Scrutiny and Cannot Satisfy It.

Twice in two weeks the Sixth Circuit Court of Appeals enjoined enforcement of executive orders like the Governor's Orders, determining that restrictions on drive-in **and in-person** worship services violated the First Amendment. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (**in-person** worship services); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (holding plaintiffs likely to succeed on merits of First Amendment claims for both drive-in and **in-person** services). Also, in *First Pentecostal Church v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020), the Fifth Circuit Court of Appeals granted an IPA to a Mississippi church, enjoining enforcement of the state's orders.

In *Roberts*, the Sixth Circuit granted an IPA enjoining the Kentucky Governor from treating religious gatherings differently from those of exempt essential activities, concluding that such prohibitions "likely fall on the prohibited side of the line" drawn by the First Amendment. 958 F.3d at 414. Indeed, "[a]s a

rule of thumb, the more exceptions to a prohibition, the less likely it will count as generally applicable, non-discriminatory law." *Id.*

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers." *Id.* at 414. Thus, the court rejected the Governor's suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport." *Id.* at 416.

> Keep in mind that the Church and its congregants just want to be treated equally. . . . They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . . **The Governor has offered no good reason 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**.
>
> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

Id. at 414 (emphasis added). And, relying on the Sixth Circuit's *Maryville Baptist Church* IPA decision, the Eastern District of Kentucky concluded:

> It follows that the prohibition on **in-person** services should be enjoined . . . . There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, *benefit from constitutional protection***.

Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear, No. 3:20-CV-00033-GFVT, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020) (emphasis added). And, as the uncontroverted record below makes plain, AWMI is engaging in extensive social distancing, enhanced sanitization, checking temperatures, and a host of other protective measures for all of its religious gatherings. (V.Compl. ¶¶247-267.)[2]

C. The Governor's Orders Fail Strict Scrutiny.

Because the Governor's discriminatory orders trigger strict scrutiny under the First Amendment (*see supra* Parts I.B, C), the Governor is subject to "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . .").

[2] Though there have certainly been cases reaching the opposite conclusion, AWMI respectfully submits that those cases were decided in error and are factually distinguishable. (*See* Exhibit 5 at 25 n.1.)

Whatever interest[3] the Governor purports to claim, he cannot show the orders are the least restrictive means of protecting that interest. It is the Governor's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Plaintiffs] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

The government must show 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*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). And the Governor cannot meet the burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined**

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[3] Where the Governor permits thousands of protesters to gather without numerical limitation across Colorado, the government's assertions of a compelling interest are substantially diminished. Put simply, the Governor's orders "cannot be regarded as protecting an interest of the highest order . . . **when [they] leave[] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added).

and ruled out for good reason." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added).

II. AWMI WILL SUFFER IRREPARABLE HARM ABSENT RELIEF.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that **no further showing of irreparable injury is necessary**." (emphasis added)). Thus, demonstrating irreparable injury in this matter "**is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added)**.**

III. AWMI SATISFIES THE OTHER REQUIREMENTS FOR AN IPA.

As the en banc Tenth Circuit has made clear, "when a law is likely unconstitutional, [the government's interests] do not outweigh a plaintiff's interest in having its constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1131-32 (10th Cir. 2012)). Also, the public interests favors an IPA. *See Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir.2005) ("Vindicating

First Amendment freedoms is clearly in the public interest."). Indeed, "**it is always in the public interest to prevent the violation of a party's constitutional rights**." *Awad*, 670 F.3d at 1132 (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should issue the IPA.

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I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record. In addition, counsel for Defendants–Appellees has also been served with a true and correct copy of the foregoing via electronic mail.

/s/ Daniel J. Schmid
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