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.

On Appeal from the U.S. District Court for the District of Colorado
Case No. 1:20-cv-02922-CMA-KMT, Hon. Christine Arguello

PLAINTIFF-APPELLANT'S CONSOLIDATED REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EMERGENCY RELIEF NEEDED BY MONDAY, OCTOBER 5, 2020

Mathew D. Staver (Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org – hmihet@LC.org
rgannam@LC.org – dschmid@LC.org
Attorneys for Plaintiff-Appellant

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 5, 2020

/s/ Daniel J. Schmid
Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org – hmihet@LC.org
rgannam@LC.org – dschmid@LC.org

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

INTRODUCTION

Plaintiff-Appellant ANDREW WOMMACK MINISTRIES, INC. ("AWMI"), pursuant to Fed. R. App. P. 27(a)(4), hereby submits its reply in support of its Motion for Injunction Pending Appeal (hereinafter "Motion"). On October 4, 2020, Defendant-Appellees, GOVERNOR 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 ("Appellees") filed a Consolidated Response in Opposition to the Appellant's Motion for Injunction Pending Appeal (hereinafter "Opp'n").

AWMI has timely brough this action before the Court. Appellees' acknowledge that PHO 20-35, which is challenged herein, became effective September 15. The Complaint was filed on September 28, less than two weeks later, and one week before the October 5 event.

Appellees' Opposition flouts basic rules of appellate procedure by attempting to introduce numerous extra-record materials, declarations masquerading as evidence, and self-serving studies that are not properly before this Court. Indeed, Appellees' Opposition is based almost entirely upon

(and littered with citations to) materials that they failed to present to the district court below, **which are not in the record before this Court**, and **cannot – as a matter of binding law – be placed in that record**. Having failed to present evidentiary materials before the district court below, Appellees cannot now attempt to build a record in support of their position on appeal. Moreover, even if Appellees had presented their extra-record materials to the district court below, which they did not, and even if this Court could consider such materials for the first time on appeal, which it cannot, Appellees' own materials **admit** that their "blame-the-victim" approach is unsupported by their own public and official statements. This Court should reject Appellees' contentions, grant AWMI's Emergency Motion for an Injunction Pending Appeal (IPA), and preserve AWMI's cherished liberties.

LEGAL ARGUMENT

I. APPELLEES' ATTEMPT TO INTRODUCE EVIDENCE NOT PRESENTED TO THE DISTRICT COURT IS IMPROPER.

In support of their efforts to create a record which they failed to create below, Appellees attach eight exhibits masquerading as supporting evidentiary material and assert that such extra-record materials require a denial of AWMI's Motion.[1] **Such**

[1] Two of Appellees' exhibits to their Opposition – Exhibits G and I – are materials presented to the district court below by AWMI, and are therefore properly before this Court.

materials must be excluded from consideration, as Appellees are not permitted to introduce "evidence" not presented to the district court below. This Court is limited to the record below. Indeed, where materials "were not introduced in the district court," this Court "**cannot review them and [is] limited to the record below**, **in particular, the amended complaint**." *Nutter v. Ward*, 173 F. App'x 698, 699 n.2 (10th Cir. 2006) (emphasis added). *See also Aero-Medical, Inc. v. United States*, 23 F.3d 328, (10th Cir. 1994) (granting motion to strike evidence not presented in the district court but impermissibly included in the appendix); *Daiflon, Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 226-27 (10th Cir. 1976) ("**we may not properly consider [evidence] not filed in the district court in determining the appeal**" (emphasis added)); *Peterson v. Lampert*, 490 F. App'x 145, n.3 (10th Cir. 2012) (refusing to consider matters outside the record below).

Appellees admit that they presented no response to AWMI's claims below and claim they will refute factual allegations "in due course." (Opp'n at 4.) But, "due course" does not and cannot mean for the first time here, on appeal. What Appellees fail to acknowledge is that they were given notice of AWMI's claims (*see* Dist. Ct. Doc. 2-1, Temporary Restraining Order Information Sheet), informed that emergency relief was requested (*id.*), and informed that relief was requested by October 5, 2020. (*Id.*). Nevertheless, Appellees refrained from presenting any response, statement, or even acknowledgement of the emergency relief AWMI had

requested in the district court. (Opp'n at 4.) Nor did Appellees ask for a short extension to provide any response to AWMI's requests below. Now, Appellees ask this Court to forgive that fatal error, admit evidence outside the limited record this Court is permitted to consider, and use their extra-record "evidence" to deny AWMI's requested relief. Appellees' contentions are utterly without merit. *See, e.g.*, *Hawkinson v. Montoya*, 283 F. App'x 659, 665 n.5 (10th Cir. 2008) ("Nor will we consider new evidence . . . attached as an exhibit to his appeal brief but never presented to the district court." (citing *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545 (10h Cir. 1992)). **Put simply, Appellees ask this Court to consider that which it may not**. The record before this Court is limited to what was presented to the district court, and Appellees' failure to introduce their materials below is fatal to their contentions in this Court.

II. EVEN IF APPELLEES HAD PROPERLY SUBMITTED THEIR EXTRA-RECORD MATERIAL IN THE DISTRICT COURT, IT STILL PROVIDES NO REFUGE FOR THE GOVERNOR'S UNCONSTITUTIONAL RESTRICTIONS.

Even if Appellees had submitted evidence into the record below, which they did not, and even if this Court was permitted to consider such extra-record evidence on appeal, which it cannot, the new so-called "evidence" Appellees attempt to bring now still provides no refuge for the Governor's Orders. Though Appellees continue their "blame-the-victim" approach to discriminatorily restricting AWMI's religious gatherings, conferences, ministries, and activities as opposed to similar nonreligious

gatherings, the official statements of the Appellees in this matter even contradict the "evidence" they purport to bring now. In Exhibit J to Appellees' Opposition, Sheryl Decker, County Administrator for Teller County, Colorado, purports to testify (**again, for the first time on appeal**) that AWMI is to blame for so-called "outbreaks" in Teller County. (Opp'n, Ex. J at 2-3.) Teller County attempts to blame AWMI for one meeting on July 4 while pretending that not one COVID-19 case is connected to any of its 12 casinos, 11 of which operate 24/7. Of course, Teller County omits that Charis Bible College has been operating for five weeks with not one COVID-19 case among its 652 students plus staff.

The fatal problem for Appellees, however, is that the official statement from the Colorado government, under which the challenged Orders are issued**, admits that it cannot determine where any person contracted COVID-19**. Indeed, on its "Colorado COVID-19 Case and Outbreaks Definitions," official public statement page, Appellees state:

> **It is possible that a person may have been exposed elsewhere (and we can rarely prove where any individual was exposed with a person-to-person pathogen), but when a person worked/lived/spent time in a facility with a known outbreak, we attribute their illness to the outbreak even if there is no definitive determination that the case acquired the illness at the facility**.

Colorado COVID-19 Case and Outbreak Definitions (Aug. 7, 2020), https://docs.google.com/document/d/1eIWLtzJNCgI2gzPONGvEASGgse85WuBmcToc9ev-74/edit (last visited Oct. 4, 2020) (emphasis added).[2]

Thus, even under Appellees' own extra-record submissions in which they purport to blame AWMI for a COVID-19 outbreak in Colorado, **they admit to having no idea if that statement is true**. Yet, Appellees' sworn witness claims to testify to the truth of the assertion that AWMI is to blame. (Opp'n, Ex. J at 2, ¶10.) If, as Appellees admit, they "**can rarely prove where an individual was exposed with a person-to-person pathogen**" (*id.*), how can they now be heard on extra-record materials to assert that AWMI is to blame for all the ills of Colorado. The simple answer, both factually (on their own admission) and legally (as a matter of binding law in the Tenth Circuit), is that Appellees position can be summed up in one word: balderdash.

Not only are Appellees' extra-record materials improperly submitted, not part of the record before this Court, and unsupported factually, they are internally self-contradictory and cannot suffice as "evidence" at all. Indeed, the First Amendment demands more than Appellees' demand for compliance with its draconian orders

[2] This Court may take judicial notice of the Colorado Government's Official Statement. *See, e.g.*, *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (court may take judicial notice of matters of public record); *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (same).

when they admit that they can "rarely prove" and offer no "definitive determination" of their its assertions. The First Amendment demands **evidence**, not musings, self-serving statements, and unsupported attributions. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (the Governor "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (regulation of speech must still demonstrate that the alleged harm is not "mere speculation or conjecture"). Thus, even if Appellees' submissions were properly before this Court, which they are not, this Court is neither required nor permitted to accept such self-serving statements that are not evidence at all. *See, e.g., Gen. Elec. Corp. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that "**nothing**" "requires a district court to admit opinion evidence that is only connected to existing data by the *ipse dixit* of the expert" (emphasis added)); *Kumho Tires Co., Ltd. v. Carmichael*, 526 U.S. 137, 157 (1999) (same); *A.G. v. Elsevier, Inc.*, 732 F.3d 77, 80-81 (1st Cir. 2013) (government "*ipse dixit*, unadorned by any factual assertions" does not even pass the plausibility standard).

III. NO PRECEDENT FROM THE SUPREME COURT WARRANTS THE GOVERNOR'S UNCONSTITUTIONALLY DISCRIMINATORY RESTRICTIONS ON AWMI.

Contrary to Appellee's assertions, which are unsupported by the uncontroverted record below, the Supreme Court has not addressed the Governor's Orders imposing internal discrimination between AWMI's religious worship

services, which are numerically capped, and its nonreligious gatherings in the same facility, which are wholly exempt from numerical limitation. (Motion at 6-10.) Neither has it addressed the external discrimination between AWMI's religious gatherings, which are restricted, and the treatment afforded to thousands of protestors in Colorado, which were given a de facto exemption and encouraged by the Governor. (V.Compl. ¶¶212-222.)

Indeed, six months into the COVID-19 pandemic, the Governor's burden to justify his disparate restrictions on religious worship is higher. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360, at *2 (U.S. July 24, 2020) (Alito, J., dissenting) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.").

Appellees' reliance on Chief Justice Roberts' lone concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), amounts to little more than the mere nonbinding "observations" of the Chief Justice joined by no others and shedding no light on the Court's reasoning.[3] (Opp'n at 27-28.) The concurrence focused primarily on the extraordinarily high standard for an

[3] *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting); *S. Bay*, 2020 WL 2813056, at *1 (Roberts, C.J., concurring); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 312 (3d Cir. 2013).

interlocutory writ of injunction from the Supreme Court under 28 U.S.C. §1651. *See S. Bay*, 140 S. Ct. at 1613 ("This power is used where 'the legal rights at issue are indisputably clear' and, even then, 'sparingly and only in the most critical and exigent circumstances.'"). Here, by contrast, AWMI need only establish 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. *McClendon v. City of Albuquerque,* 100 F.3d 863, 868 and n.1 (10th Cir. 1996).

Moreover, though equal in precedential value (*i.e.*, none), Appellees fail to mention the sharp and robust dissent of Justice Kavanaugh in *South Bay* (joined by two other justices), which relies heavily on the Sixth Circuit's decision in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), and in which Justice Kavanaugh explained convincingly why restrictions similar to those imposed by the Governor's Orders "indisputably discriminate[] against religion, and such discrimination violates the First Amendment." 140 S. Ct. at 1615; *cf. S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 940–947 (9th Cir. 2020) (Collins, J., dissenting).

Furthermore, the Supreme Court's denial of a writ of injunction in *Elim Romanian Church v. Pritzker*, 207 L. Ed. 2d 157 (2020), challenging Illinois worship restrictions, provides even less support for the Governor's Orders restricting religious gatherings and exempting nonreligious gatherings. In *Elim Romanian*, the Supreme Court noted that the Illinois Governor removed all worship restrictions on

the eve of the Court's emergency review, causing the Court to deny the extraordinary writ of injunction "without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant." 207 L. Ed. 2d 157. The eleventh-hour change of policy was the only rationale given.

Nor should this Court make the same obvious mistakes as the Seventh Circuit in its subsequent *Elim Romanian* decision on the merits of the preliminary injunction request, *see* 962 F.3d 341 (7th Cir. 2020) (cited in Opp'n at 3), placing the decision in direct conflict with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Lukumi* holds that a law restricting religious conduct "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree**" than the prohibited religious conduct. 508 U.S. at 543 (emphasis added). (IPA Mot 10-11.)

The Seventh Circuit, however, expressly acknowledged "that warehouse workers and people who assist the poor or elderly"—essential and always exempted from numerical gathering restrictions under the Governor's Orders (V.Compl. ¶¶ 81, 98, 172-188, 203)—"may be at much the same risk as people who gather for large, in-person religious worship." 962 F.3d at 347. Under *Lukumi*, this acknowledgement required the Seventh Circuit to find that the worship restrictions at issue were not generally applicable, and to hold them unconstitutional unless they could satisfy

strict scrutiny. Compounding its error, the Seventh Circuit further violated the strict scrutiny principles of *Lukumi* by imposing its own value judgments on the importance of worship to the plaintiffs. As shown above, the court agreed that the Illinois numerical limitations exempted some nonreligious "Essential Activities" meeting material needs, but involving similar risks of COVID-19 spread as worship services, but the court nonetheless approved the disparate treatment because it assigned a lower value to spiritual needs than physical needs. *See* 962 F.3d at 347 ("Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways."). (*Cf.* Opp'n at 25 (asserting that the Governor's Orders do not internally discriminate against AWMI because its religious worship activities are the true threat, while ironically contending (despite the plain language of the Governor's Orders) that AWMI does "not enter a different category just by temporarily performing some other activity").)

But, "performing some other activity" – *i.e.*, nonreligious activity permitted under the Orders – and "performing" religious worship services are precisely the line the Governor's Orders draw. Such line drawing based on a court's view of the value of a religious activity, rather than the comparative risk of the activity to the claimed governmental interest, is what the Free Exercise Clause forbids under *Lukumi*.

IV. THE SUPREME COURT'S DECISION IN *JACOBSON* PROVIDES NO REFUGE FOR THE GOVERNOR'S DISCRIMINATORY ORDERS.

Appellees' reliance on the Supreme Court's century-old decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is misplaced, as *Jacobson* does not provide an alternative constitutional standard to save the Governor's discriminatory restrictions. (Opp'n at 19-21.) A significant contributing factor to erroneous decision of the district court below and the other cases reaching incorrect decisions concerning COVID-19 restrictions is whether the Supreme Court's *Jacobson* precedent from over a century ago still represents the seminal calculus for First Amendment issues in times of perceived emergency. Can it be that a 1905 case with minimal progeny and substantial jurisprudential developments arising since its holding was articulated 115 years ago remains the lodestar for current First Amendment jurisprudence? Certainly not.

The majority of AWMI's claims arise under the First Amendment. (Motion Ex. 3, V. Compl. ¶¶290-386.) *Jacobson* – importantly – did not involve such claims. Yet, various courts reaching erroneous decisions in COVID-19 restrictions place great emphasis on the *Jacobson* standard that was articulated long before the First Amendment even applied to the States and decades before the Supreme Court would introduce tiers of scrutiny. Indeed, the First Amendment's various clauses were not applicable to the states until decades after *Jacobson* was decided. It would not be

until 1940 that the Supreme Court would first articulate the notion that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). *See also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (incorporating the Establishment Clause).

Importantly, it would not be for another quarter century that "exacting judicial scrutiny" would even enter the First Amendment lexicon in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), another 50 years that the phrase "compelling interest" would be introduced to First Amendment jurisprudence in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 65 (1957) (Frankfurter, J., concurring), and another 60 years before strict scrutiny would ever be applied in its current form in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also* Stephen Siegel, *The Origins of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal History 355 (2008).

Moreover, in recent years the Supreme Court has effectuated a monumental shift in how and when strict scrutiny is mandated. *See, e.g.*, *Blith v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017) ("*Reed v. Town of Gilbert* then **worked a sea change in First Amendment law**" (emphasis added)). *See also Wollschlaeger*

v. Florida, 848 F.3d 1293, 1332 (11th Cir. 2017) (Tjjoflat, J., dissenting) (same); *Pan American v. Municipality of San Juan*, 2018 WL 6503215, *12 (D.P.R. Dec. 10, 2018) (noting that *Reed* "worked a sea change in First Amendment law" (citing *Norton v. City of Springfield*, 806 F3d 411, 412 (7th Cir. 2015) (Easterbrook, J.)).

Simply put, *Jacobson* preceded all of these developments, did not involve the First Amendment questions at issue here, and could not foresee that jurisprudence would require the Governor's Orders to survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 US. 507, 534 (1997). *Jacobson*'s relevance is therefore suspect at best, and utterly irrelevant at worst. Precedent dictates a higher standard in this matter.

The Sixth Circuit in *Roberts v. Neace* rightly rejected application of *Jacobson* as supplying a separate, permissive framework for evaluation of free exercise claims against continuing executive restrictions. 958 F.3d 409 (6th Cir. 2020) (granting injunction pending appeal against the Governor of Kentucky's similar COVID-19 restrictions on in-person religious worship services). As the Sixth Circuit eloquently articulated, "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Roberts*, 958 F.3d at 414-15; *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (same); *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249, *8 (W.D. Ky. Apr. 11, 2020) ("[E]ven under *Jacobson*, constitutional rights still exist. Among them is

the freedom to worship as we choose."); *cf. Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313, *1 (E.D.N.C. May 16, 2020) ("There is no pandemic exception to the Constitution of the United States or the Free Exercise Clause . . . .").

And, just last month, the Western District of Pennsylvania rejected application of *Jacobson* to permit a Governor to continue imposing draconian and discriminatory restrictions on religious gatherings in perpetuity. Under the First Amendment, not to mention the entire regime established by the Constitution, a governor is not permitted to use exigent and emergent circumstances to curtail the democratic process in perpetuity and extend his unchecked authority over the lives of the citizens of his state into an undemocratic reign of government by executive whim. And, *Jacobson* does not alter that unassailable conclusion. "Although the *Jacobson* Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that discretion limitless." *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 55106990, *6 (W.D. Pen. Sept. 14, 2020). And, since the time *Jacobson* was decided well over a century ago, "there has been substantial development of federal constitutional law in the area of civil liberties [and] this development has seen a jurisprudential shift whereby federal courts **have given greater deference to**

considerations of individual liberties, as weighed against the exercise of state police powers." *Id.* (emphasis added).

Indeed,

> the ongoing and indefinite nature of Defendants' actions weigh strongly against application of a more deferential level of review. The extraordinary emergency measures taken by Defendants in this case were promulgating beginning in March—six months ago. What were initially billed as temporary measures to "flatten the curve" and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end—stopping the spread of an infectious disease and preventing new cases from arising—which requires ongoing and open-ended efforts. . . . Defendants [do] not establish any specific exit gate or end date to the emergency interventions. Rather, the record shows that Defendants view the presence of disease mitigation restrictions as a "new normal" and they have no actual plan to return to a state where all restrictions are lifted. **It bears repeating; after six months, there is no plan to return to a situation where there are no restrictions imposed upon the people of the Commonwealth**.

Id. at *8 (emphasis added).

As the court pointed out, "deference cannot go on forever" because "'**suspension of normal constitutional levels of scrutiny may ultimately lead to the suspension of constitutional liberties themselves**." *Id.* at *9 (emphasis added). Most notably, in stark contrast to what Appellees request of this Court here (Opp'n at 1), the court held that following an overly deferential approach outlined in *Jacobson* to First Amendment claims "risks subordinating the guarantees of the Constitution" and "undermin[ing] our system of constitutional liberties." *Id.*

Indeed, following the significant jurisprudential developments requiring heightened scrutiny in First Amendment litigation does not, as Appellees suggest, "prevent government officials from taking extraordinary actions to face extraordinary situations," it "**only require[s] the government to respect the fact that the Constitution applies even in times of emergency**." *Id.* at *10 (emphasis added). This Court should also hold the Governor to the standards necessary to protect cherished constitutional rights and reject Appellees' requests for deference in perpetuity. The Constitution demands nothing less.

V. APPELLEES' HAVE PRESENTED NO EVIDENCE TO SATISFY THEIR BURDEN TO PROVE NARROW TAILORING.

As AWMI demonstrated in its Motion (Motion at 21-22), 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).

Appellees utterly fail that test for several reasons:

(a) Appellees admit that certain nonreligious activities of AWMI are exempt under the Orders, while religious worship is excluded, and offer no reasons for such disparate treatment. Appellees admit that AWMI can provide food, shelter, social services, and other necessities of life without numerical limitation. (Opp'n at 25.) But, disingenuously, Appellees contend that nothing in the Orders prohibit those same individuals being provided food, shelter, or social services from transitioning to a religious worship service. (*Id.*). But, PHO 20-35 explicitly restricts religious worship services to a numerical limitation. (V.Compl. ¶¶172-188.) If Appellees' contention that AWMI could host a religious worship service with those individuals receiving social services was true, which the Orders expressly contradict, then the entire restriction on Houses of Worship and AWMI's religious gatherings would be completely undermined. As this Court has said, government regulations are supposed to be read to "avoid unreasonable or absurd results." *Beck v. N. Nat. Gas Co.*, 170 F.3d 1018, 1024 (10th Cir. 1999). Lending credence to Appellees' express contradiction to the plain language of the Governor's Orders would lead to an absurd result.

(b) Appellees admit that "commercial, manufacturing, or service activities" are exempt from the numerical limitations. (Opp'n at 24.) And, Appellees admit that Houses of Worship are considered a "Critical Business" under PHO 20-

35. Yet, Houses of Worship, such as AWMI, are the only Critical Business subject to the numerical limitation. (V.Compl. ¶¶165-167.)

(c) Appellees fail to rebut the fact that under the new PHO 20-35, P-12 education can meet without numerical limitation (V.Compl. ¶199), such that AWMI could host educational programs for such students in unlimited numbers but the numerical restrictions apply when AWMI transitions from nonreligious education to religious worship with these same students. (V.Compl. ¶200.) There is no rational or compelling justification for permitting one (education) while excluding the other (religious worship). In fact, **that is textbook discrimination under *Lukumi*.** . 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." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

(d) Appellees admit PHO 20-35 identifies the "type of settings," and that retail has no numerical limits because, they allege, retail differs because the individuals have a short time to interact. They omit the fact that workers are present for 8 hours a day, 5 days a week. They say that worship brings young and old together, but so do social services and retail, which again undercuts the argument. They say that retail can do social distancing, good hygiene, face coverings and frequent cleaning and disinfection, but so can houses of worship. AWMI merely

seeks equal treatment. The issue is not either health or the First Amendment. Both can be properly balanced, but the Governor has failed to do so. There is no pandemic pause button on the First Amendment.

The Governor's Orders plainly fail the test of neutrality and are not the least restrictive means to achieve any purported interest.

VI. AWMI'S IS SUFFERING *PER SE* IRREPARABLE HARM, REGARDLESS OF THE DISTRICT COURT OR APPELLEES' CONTENTIONS TO THE CONTRARY.

Neither the district court's (Motion Ex. A, at 5-6), nor Appellees' contention (Opp'n at 12-15) that AWMI's current suffering of irreparable harm is diminished by timing considerations has any merit. Neither contention is factually or legally supported.

First, as a legal matter, AWMI is raising violations of the First Amendment, and the Governor's discriminatory prohibitions are *per se* irreparable harm – regardless of timing. Indeed, timing constraints of irrelevant in the First Amendment context as a matter of settled law. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, **for even minimal periods of time**, unquestionably constitutes irreparable injury." (emphasis added)). Appellees fail to cite a single **First Amendment** case where their position is supported. (*See* Opp'n at 13 (citing *Dominion Video Satellite, Inc. v. Ecostar Satellite Corp.*, 356 F.3d 1256 (10th Cir. 2004) (involving contract/lease violation challenges); *New Mexico Dep't*

of Game & Fish v. U.S. Dep't of Interior, 854 F.3d 1236 (10th Cir. 2017) (environmental regulations)). Such challenges are wholly inapposite to the issue presented here.

"**The Constitution can hardly be thought to deny one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands**." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (emphasis added). *See also Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one.").

And, Appellees' contentions to this Court are illogical. Appellees fault AWMI for not trusting them to provide protection for cherished liberties – even under the Governor's Orders (Opp'n at 15-16 (claiming AWMI should have sought precisely what the Governor has forbidden)), and **simultaneously** condemn them for giving Appellees a period of trust that the Governor's discrimination might end **but never did**. As the undisputed record demonstrates, AWMI was initially willing to – and did – comply with the Governor's restrictions. (Motion, Ex. 3 at 66, ¶233). But, its initial compliance with what it thought were "temporary measures" grew stale after unending reinstitution of the unconstitutional restrictions. As *Wolf* noted, "[t]he extraordinary emergency measures taken by Defendants in this case were

promulgating beginning in March," 2020 WL 55106990, at *8, **but that was 8 moths ago**.

Should AWMI be made to accept that Appellees' requested deference "go on forever," and that the suspension of its cherished constitutional liberties "ultimately lead to the suspension of constitutional liberties themselves." *Id.* Certainly not, and blaming AWMI for initially trusting the government that its measures were temporary, attempting to comply with them initially, and then challenging them after so-called "temporary" measures became unending and perpetual restrictions on constitutional freedoms is a proposition unknown to constitutional law. The Constitution demands higher standards, and loss of First Amendment freedoms – **for even a moment** – is too costly to bear.

Second, Appellees contend that AWMI could have avoided irreparable harm by requesting a variance from the County. (Opp'n at 16.)[4] But, neither the Attorney General nor Teller County ever offered such a solution to AWMI, despite the fact that AWMI had been in regular communication with Teller County Public Health officials. In fact, Appellees' only response to AWMI's stated desire to exercise its

[4] Notably, Appellees' contention that AWMI go "hat-in-hand" to the Governor to request permission to exercise its religious beliefs is a classic, presumptively unconstitutional prior restraint. *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002) ("**[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition"** (emphasis added)).

religious beliefs and host in-person religious gatherings was to send cease and desist letters to AWMI threatening them with legal action and criminal sanctions for exercising its constitutional rights. (Motion, Ex. 3, V.Compl. ¶¶238-240.) Thus, as a factual matter, Appellees cannot complain that AWMI could have avoided injury by seeking relief from Colorado government officials that had just threatened them with sanction for exercising the right that Appellees now say AWMI could have requested via a variance. Moreover, AWMI did request relief from the Governor prior to hosting its conferences (V.Compl. ¶¶242-243.) Yet, to this day, Appellees have not responded to AWMI's written request to be treated equally with other nonreligious gatherings meeting without numerical limitation. (V.Compl. ¶246.)

Finally, Appellees' contention that AWMI waited too long to bring its claim is factually incorrect. PHO 20-35 became effective September 15. AWMI filed the instant action less than two weeks on September 28, 2020 with a Verified Complaint and pleadings of approximately 700 pages (Motion Exs. 3-5) – a mere 13 days after the current PHO 20-35 went into effect and one week prior to the date its next event was scheduled to take place. As demonstrated *supra*, seeking relief from per se irreparable harm a week before the desired relief and a mere two weeks after the challenged order was issued is not sleeping on any rights. AWMI actively sought relief at the appropriate time.

VI. THE PUBLIC INTEREST FAVORS AN IPA.

Appellees contend that the risk of transmission is reduced at the categories it has exempted, while such risk is too great for religious worship. (Opp'n at 25-28.) But, Appellees ignore that all AWMI seeks is to afforded the same opportunity to engage in the social distancing and safety protocols the Governor trusts non-essential retail, office, and other commercial establishments to engage in. (V.Compl. ¶¶247-267.) In fact, AWMI has gone above and beyond anything that the Governor's Orders require of exempted businesses (V.Compl. ¶¶247-267), yet AWMI is still subject to more draconian restrictions than its nonreligious comparators.

"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." *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020).

> 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).

Treating AWMI differently simply because it is religious is constitutionally impermissible, and should be enjoined.

CONCLUSION

For the foregoing reasons and those articulated in AWMI's Motion for Injunction Pending Appeal, this Court should issue the IPA.

Dated: October 5, 2020

/s/ Daniel J. Schmid
Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org – hmihet@LC.org
rgannam@LC.org – dschmid@LC.org
Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and 10th Cir. R. 27-3. This document is proportionally spaced and, not counting the items excluded from the length by Fed. R. App. P. 32(f), contains 5,651 words, which – when filed in a consolidated reply to the three Appellee's consolidated opposition – does not exceed the count permitted if Appellant had separately responded to each Appellee.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiff–Appellant

CERTIFICATE OF SERVICE

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
Daniel J. Schmid
Attorney for Plaintiff–Appellant