IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DENVER BIBLE CHURCH,
PASTOR ROBERT A. ENYART,
COMMUNITY BAPTIST CHURCH, and
PASTOR JOEY RHOADS

Plaintiffs-Appellees,

v.

GOVERNOR JARED POLIS, in his official capacity as Governor, State of Colorado;
JILL HUNSAKER RYAN, in her official capacity as Executive Director of the Colorado Department of Public Health and Environment,
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Defendants-Appellants,

ALEX M. AZAR II, in his official capacity as Secretary, United States Department of Health and Human Services;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
CHAD F. WOLF, in his official capacity as Acting Secretary, United States Department of Homeland Security;
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
STEVEN T. MNUCHIN, in his official capacity as Secretary, United States Department of the Treasury;
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 20-1377

STATE DEFENDANTS' MOTION TO DISMISS PENDING APPEAL AND MOTION TO SUSPEND AND VACATE ALL PENDING BRIEFING AND ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

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s/ W. Eric Kuhn
W. Eric Kuhn

Defendants, Governor Jared Polis, Executive Director Jill Hunsaker Ryan, and the Colorado Department of Public Health and Environment (collectively, the "State Defendants") move to dismiss this appeal because of a supervening change of law and mootness under Fed. R. App. P. 42(b) and 10th Cir. R. 27.3(A)(1)(b).

CERTIFICATE OF CONFERRAL

Counsel for the State Defendants has conferred with counsel for Plaintiffs regarding this motion. Plaintiffs oppose the motion to dismiss the appeal. However, Plaintiffs do not oppose the request to suspend and vacate the pending briefing deadlines and oral argument while this Court considers the motion to dismiss.

PROCEDURAL BACKGROUND

This is an appeal of the district court's partial grant of Plaintiffs' motion for preliminary injunction. *See* State Defs.' Emergency Mot. for Stay of Injunction Pending Appeal, Ex. 41 ("Mot. for Stay").

The district court partially granted Plaintiffs' motion for preliminary injunction on October 15, enjoining the State Defendants from enforcing against Plaintiffs the indoor occupancy limitations for houses of worship in Public Health Order ("PHO") 20-35, and the face-covering requirement in Executive Order D 2020 138 and PHO 20-35 "where the temporary removal of a face covering is

necessary for Plaintiffs or their employees, volunteers, or congregants to carry out their religious exercise." *Id.* at Ex. 41, p. 44 (hereinafter, "Order"). The Order was largely based only on Plaintiffs' federal free exercise claim, as it was the only claim presented that the district court found to contain "significant substantive issues." *Id.* at Ex. 41, p. 10. In so finding, the court rejected the State Defendants' application of the standards identified in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905),[1] and instead held that *Jacobson* should be read to "fit[] within existing constitutional doctrine." *Id.* at 16.

Because the public health orders at issue here implicated Plaintiffs' fundamental rights, the district court held that strict scrutiny should be applied, emphasizing that, in so doing, "many, if not most, of the mandates in Public Health Order 20-35 are neutral and generally applicable"—for example, the sanitation requirements and social-distancing rules were likely to survive review. *Id.* at 21.

[1] The State Defendants' legal position was not an outlier. Prior to the Supreme Court's ruling in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, No. 20A87, 2020 WL 6948354, at *1 (Nov. 25, 2020) (per curiam), and as noted by the *amici* organizations who filed a brief in support of Colorado in this case, the vast majority of courts across the nation—"including rulings by the U.S. Supreme Court, this Court, and the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have overwhelmingly rejected religion-based challenges to COVID-19 related public-health measures, most of which were much more restrictive of religious gatherings than are Colorado's Orders." *See* Americans United Amicus Brief, 5, 16–19, 21.

But, the district court found the occupancy limits imposed by the orders on houses of worship and, to an extent the face-mask mandate, did not survive strict scrutiny, and enjoined the State Defendants from enforcing them accordingly. *Id.* at 21–29.[2]

The next day, on October 16, 2020, the State Defendants promptly filed an appeal of the district court's Order and also filed an Emergency Motion for Stay of Injunction Pending Appeal ("Motion"). *See* Notice of Appeal; Mot. for Stay. On October 22, 2020, this Court issued an order setting the deadlines for the parties to respond to the Motion, and temporarily stayed the district court's Order solely for the benefit of the court's review process." *See* October 22, 2020 Order (Document: 010110427952).

Prior to the close of briefing, two intervening factual developments took place. First, Governor Polis amended the mask order on November 2, to confirm that individuals who are officiating or participating in a religious service may remove their face covering temporarily when "necessary to complete or participate

[2] As to Plaintiffs' remaining claims against the State Defendants, the district court held that they were not likely to succeed on the merits because: (1) the CDEA does not facially discriminate against religion [*Id.* at Ex. 41, p. 19]; (2) the orders are not impermissibly vague [*Id.* at Ex. 41, p. 29–36]; (3) issuance of the generally applicable public health orders did not amount to a denial of federal constitutional due process under the Fourteenth Amendment [*Id.* at Ex. 41, p. 36–37]; and (4) Plaintiffs' state law claims are likely barred by the Eleventh Amendment [*Id.* at Ex. 41, p. 37–38].

in the … religious service." Executive Order D 2020 237 (Nov. 2, 2020).[3] Second, CDPHE also issued a new public health order bringing all the previous levels into one order and assigning them colors instead of numeric values. PHO 20-36, COVID-19 Dial.[4] The State Defendants' Motion was then fully briefed as of November 3.

Since then, the United States Supreme Court has issued a decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, No. 20A87, 2020 WL 6948354, at *1 (Nov. 25, 2020) (per curiam), that significantly changes the state of the law. The Supreme Court in *Roman Catholic Diocese* enjoined Governor Cuomo of New York from enforcing his executive order that imposed a 10-person and 25-person occupancy limitations on houses of worship, pending disposition of the Diocese's appeal in the U.S. Court of Appeals for the Second Circuit. The Supreme Court held that the executive order's occupancy limitations at issue were not likely to survive strict scrutiny, as they are likely not the least restrictive means of serving a compelling state interest. *Id.* at 4.

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[3] Available at: https://drive.google.com/file/d/1OU3QnOPlmqmu_u1A_C_CKF1QoOAgiiRU/view

[4] PHO 20-36, COVID-19 Dial has since been amended twice, and is now in its Third Amended version, as will be discussed in more detail below. The Third Amended PHO 20-36, COVID-19 Dial is attached as Exhibit A.

Based on the Supreme Court's holding, this Court requested that the parties submit supplemental briefing to "1) address the impact of the Supreme Court's decision in *Roman Catholic Diocese* on the issues presented in the pending stay motion; 2) address any changes since November 3, 2020, to the occupancy and mask restrictions applicable to houses of worship and comparable secular settings in Colorado and in the particular counties in which the respective plaintiff churches are located; and 3) compare the restrictions at issue in *Roman Catholic Diocese* with those that apply to plaintiffs." *See* November 30, 2020 Order (Document: 010110445405). This Court also set oral argument on State Defendants' pending Motion, currently set to take place on December 15, 2020. *Id.*

However, per the Supreme Court's decision in *Roman Catholic Diocese*, the State Defendants have since amended the public health orders at issue to reflect the change in the law, as articulated by the Supreme Court. On December 7, the State Defendants issued Third Amended Public Health Order 20-36, COVID-19 Dial. *See* Exhibit A (clean copy); Exhibit B (redline copy). In the original versions of the PHO, houses of worship were categorized as critical businesses, but they had capacity limitations that varied by dial level. These capacity limitations have been removed.

In the new Third Amended PHO 20-36, houses of worship are still categorized as critical businesses, existing within the critical services category. *Id.* at App'x A at (5). They are subject to the same restrictions that apply to all other critical businesses. For example, they must follow all of the requirements in PHO 20-36, unless doing so would make it impossible to carry out critical functions. *Id.* at App'x A. They must comply with directives for maintaining a clean and safe work environment issued by the state or local health departments. *Id.* And they must comply with distancing requirements. *Id.*; *see also* Ex. A at III. They are not, however, subject to capacity limitations. As Third Amended PHO 20-36 states at each level of the dial, "Critical Businesses and Critical Government functions may continue to operate without capacity limitations." Ex. A at II.B.2.a; II.C.2.r; II.D.2.r; II.E.2.r; II.F.2.r; II.G.2.r.

STANDARD OF REVIEW

Pursuant to 10th Cir. R. 27.3(A)(1)(a)–(b), a party may file "a motion to dismiss the entire case for lack of appellate jurisdiction" or "a motion for summary disposition because of a supervening change of law or mootness."

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000)

(citations omitted). "The crucial question is whether 'granting a present determination of the issues offered ... will have some effect in the real world.'" *Id.* (citing *Kennecott Utah Copper Corp. v. Becker,* 186 F.3d 1261, 1266 (10th Cir. 1999) (quotations and citations omitted). "Because 'the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction,' the court must determine whether a case is moot before proceeding to the merits." *Id*.

ARGUMENT

I. This appeal is moot because an intervening change in the law prompted changes to the challenged orders.

"Although [courts] have jurisdiction to review a district court's order granting a preliminary injunction, [courts] may lose that 'jurisdiction if an interlocutory appeal no longer presents a live case or controversy[.]'" *S. Wind Women's Ctr. LLC v. Stitt*, 823 F. App'x 677, 680 (10th Cir. 2020) (finding appeal moot because "deciding the merits of" an interlocutory appeal of an injunction that enjoined Oklahoma from enforcing a COVID executive order prohibiting abortions "would have no real-world effect" after the order expired during the appeal and "Oklahoma no longer seeks to do what the injunction prohibits.").

Because the challenged orders were amended to comport with a change in law and deciding the merits of the State Defendants' appeal will have no real-world effect, the Court should dismiss this appeal as moot.

A. *Roman Catholic Diocese* and the State Defendants' Response

As this Court is aware, on November 25, the Supreme Court issued a per curium decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*. 592 U.S. ___, No. 20A87, 2020 WL 6948354, at *1 (Nov. 25, 2020). The Supreme Court granted the Roman Catholic Diocese and Agudath Israel of America's emergency applications for injunctive relief that sought to enjoin the houses of worship capacity limitations in New York's Executive Order 202.68. *Id*.

The capacity limitations in New York's executive order differed per zone based on COVID-19 transmission data and other metrics in certain geographical areas. *Id*. At issue were two zone designations, "red" and "orange." *Id*. In red zones, attendance was capped at 25% of maximum occupancy or 10 persons, and in orange zones, attendance was capped at 33% of maximum occupancy or 25 persons. *Id*. The Supreme Court held that because businesses categorized as "essential" are not subject to capacity limitations, New York's Executive Order is not "'neutral' and of 'general applicability'" or narrowly tailored, and therefore

fails strict scrutiny. *Id*. at *2 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533(1993)).

Roman Catholic Diocese represents a stark shift in the Supreme Court's constitutional analysis of COVID-19 house of worship restrictions. The Supreme Court denied two prior house of worship emergency applications for injunctive relief in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). The Court did not issue a majority opinion in either case. Chief Justice Roberts issued a concurrence in *South Bay*, indicating his understanding that *Jacobson* was the appropriate framework for review. This understanding was reflected by the majority of circuit courts nationwide.

With *Roman Catholic Diocese*, the Supreme Court has provided the free exercise framework that should be used for houses of worship in the COVID-19 context. In response to this direction, the State Defendants amended the public health order at issue to comply with this framework. The prior order included capacity limitations on houses of worship that were no more restrictive than those limitations on comparably similar secular establishments such as movie theaters,

restaurants, concert halls, and other indoor event settings.[5] Weld and Jefferson Counties, where the Plaintiffs' houses of worship are located, are currently in level red on the COVID-19 dial.[6] Before amendment, the previous order's level red restrictions, houses of worship were limited to 25% of the posted occupancy limit indoors not to exceed 50 people, excluding staff. Meanwhile, restaurants, smoking lounges, movie theaters, concert halls, and other indoor events were closed entirely to indoor patrons.[7]

Third Amended PHO 20-36 keeps houses of worship in the same category as other critical services, but it removes any specific restrictions from them. Ex. A, App'x A at 38. This category includes services such as trash processing and disposal, mailing and shipping, warehouse distribution and fulfillment, building cleaning and maintenance, and critical functions. *Id.* at 38, (5). This amendment removes the capacity limitations on houses of worship but keeps in effect other,

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[5] Similar to the New York executive order challenged in *Roman Catholic Diocese*, Colorado's public health restrictions differ based on geographical location (in Colorado, it is county-by-county) and COVID-19 metrics, such as transmission and hospitalizations, in that location.

[6] Jefferson County moved to level red on November 20 and Weld moved on November 22. Previously, both counties were in level yellow and subject to a 50% occupancy limit not to exceed 50 people excluding staff restriction.

[7] *See* Second Amended PHO 20-36 COVID-19 Dial at § II.F.2.h--K: https://drive.google.com/file/d/1tuesNFfblAKcw62ao-fALbBxSUC0gccP/view

neutrally and generally applicable public health requirements, such as social distancing and sanitizing. *Id.*

B. The State Defendants' Appeal is Moot

"In general, the repeal of a challenged statute is one of those events that makes it 'absolutely clear that the allegedly wrongful behavior'—here, the threat of enforcement under one of the repealed sections—'could not reasonably be expected to recur.'" *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167 (2000)). "Indeed, this court has held that 'a declaratory judgment on the validity of a repealed statute is a textbook example of advising what the law would be upon a hypothetical state of facts.'" *Id*. (citing *Nat'l Advertising Co. v. City & Cty. of Denver,* 912 F.2d 405, 412 (10th Cir.1990) (quotations and citations omitted)). "[P]arties have no legally cognizable interest in the constitutional validity of an obsolete statute." *Id*.

Deciding the merits of the State Defendants' appeal will have "no real-world effect" because of the amendments to the challenged orders. *See S. Wind Women's Ctr. LLC v. Stitt*, 823 F. App'x 677, 680 (10th Cir. 2020). With the amendments, the State Defendants "no longer seek[] to do what the [district court's] injunction prohibits," i.e. enforcement of capacity limitations or face covering requirements

against Plaintiffs. *Id*. The State Defendants recognize that voluntary cessation of challenged conduct does not ordinarily render a case moot, *see Knox v. Serv. Emps. Int'l. Union, Local 1000*, 132 S. Ct. 2277, 2287 (U.S. 2012), but the posture of this case and the recent change in law warrant dismissal here.

First, the State Defendants seek to dismiss their own appeal of an injunction entered by the district court that is unfavorable to them. As a result, Plaintiffs will not be harmed if the State Defendants' appeal is dismissed. Plaintiffs received a favorable injunction below and may still maintain their cross appeal with this Court if they so wish.

Second, the amendments to the order were not made in bad faith or as a litigation tactic, but rather to comply with intervening changes in the law.[8] The State Defendants amended the public health orders in response to the Supreme Court's decision in *Roman Catholic Diocese*. *See Fed'n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 931 (7th Cir. 2003) ("We

[8] As noted by the district court in its Order, the State Defendants made their policy decisions in the public health orders "in good faith, in an effort to balance the benefits of more public interaction against the added risk that inheres in it." Mot. for Stay, Ex. 41 at p. 3. In fact, the court was "convinced that all of the Defendants ha[d] acted in good faith" and were not motivated by religious animus or bigotry. *Id.* at n.22. In changing its orders to comply with the Supreme Court's decision in *Roman Catholic Diocese*, the State Defendants again act in good faith in order to ensure the orders are adhering to the recent change in the law.

can hardly fault the City for its attempts to craft an ordinance that passes constitutional muster and complies with judicial decisions."); *see also Brown v. Buhman*, 822 F.3d 1151, 1171 (10th Cir. 2016) (even where a government policy change is made in the context of litigation, the change may actually "make it more likely the policy will be followed, especially with respect to the plaintiffs in that particular case.") (citing *Fed'n of Advert. Indus. Reps. Inc.*, 326 F.3d at 931). The executive order was similarly amended during the appeal.

Finally, in light of the Supreme Court's decision in *Roman Catholic Diocese*, there is no reasonable expectation that the State Defendants will rescind the amendments and reissue the challenged capacity limitations and face covering requirements. The State Defendants did not amend the orders as a bad faith litigation tactic, and there can be no indication that they did so. *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 885 (10th Cir. 2019) (reiterating that '"a government official's decision to adopt a policy in the context of litigation may actually make it *more* likely the policy will be followed' and that a defendant's cessation of alleged wrongful conduct in 'reaction to the [plaintiff's] suit ... does not necessarily make it suspect.'") (citations omitted); *see also* 13C Wright, Miller & Cooper, *supra* note 15, § 3533.7, at 326 ("[a]t any rate, self-correction again provides a secure foundation for mootness so long as it seems genuine").

Instead, the amendments were issued in light of a change in law. *See Fed'n of Advert*, 326 F.3d at 931. To that end, it is highly unlikely that the Supreme Court will again change course during the COVID-19 pandemic and require the State Defendants to amend house of worship restrictions to the Plaintiffs' detriment. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (holding "the 'mere possibility' that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy."). Nor would the State Defendants change course absent a contrary ruling by that Court. To the contrary, the State Defendants represent that the changes to the public health orders to classify houses of worship as critical businesses are not temporary. They are a reaction to the Supreme Court's decision, and are the policy of this State.

For those reasons, the State Defendants' appeal is moot and the Court should dismiss this appeal.

II. The State Defendants' briefing schedule in this appeal, including all supplemental briefing and oral argument, should be suspended upon filing of this Motion to Dismiss.

Per 10th Cir. R. 27.3(C), the filing of this Motion to Dismiss suspends the briefing schedule unless this Court orders otherwise. Given the current posture of this case, the State Defendants respectfully request that this Court suspend and/or vacate the pending deadlines for the substantive briefing schedule, as well as the

supplemental briefing requested and the scheduled oral argument. As discussed above, this Motion already addresses the questions raised by this Court in its Order for Supplemental Briefing, specifically: (1) the impact of the Supreme Court's decision in *Roman Catholic Diocese* on the issues presented in the pending stay motion; (2) any changes since November 3, 2020, to the occupancy and mask restrictions applicable to houses of worship; and (3) comparing the restrictions at issue in *Roman Catholic Diocese* with those that apply to plaintiffs. *See* October 22, 2020 Order (Document: 010110427952).

Because the restrictions that were at issue in this appeal are no longer in effect, the State Defendants respectfully request this appeal be dismissed and all pending deadlines be suspended and ultimately vacated. Dismissal will not harm Plaintiffs. The State Defendants seek to dismiss their *own* appeal, returning Plaintiffs to the lower court where an injunction entered in their favor.

CONCLUSION

The State Defendants have changed their orders to remove capacity restrictions on Colorado houses of worship, placing them in the same category as essential businesses. It did so based on the Supreme Court's clarification of how public health orders impacting houses of worship should be viewed during the COVID-19 pandemic. As a reaction to the Supreme Court's decision, the concerns

surrounding a voluntary change in position are not applicable. Further, State Defendants seek to dismiss their *own* appeal. Far from harming Plaintiffs, it will return them to the lower court, where a preliminary injunction entered in their favor. For these reasons, the State Defendants respectfully request that this Court suspend or vacate the substantive briefing and supplemental briefing due, as well as the oral argument currently set for December 15, 2020, and dismiss this appeal pursuant to 10th Cir. R. 27.3(A) and (C).

Dated: December 8, 2020

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5 and ECF User Manual, Section II, Part J(a).

I hereby certify that the hard copies to be submitted to the court are exact copies of the version submitted electronically pursuant to ECF User Manual, Section II, Part J(b).

I hereby certify that the electronic submission was scanned for viruses with CrowdStrike Falcon Senor, version 5.41.12309.0, and is free of viruses pursuant to ECF User Manual, Section II, Part J(c).

s/ W. Eric Kuhn
W. Eric Kuhn

CERTIFICATE OF SERVICE

I certify that I served the foregoing MOTION TO DISMISS PENDING APPEAL AND MOTION TO SUSPEND AND VACATE ALL PENDING BRIEFING AND ORAL ARGUMENT upon all parties herein by e-filing with the CM/ECF system maintained by the Court, this 8th day of December, 2020 addressed as follows:

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