

<b>DISTRICT COURT, EL PASO COUNTY, COLORADO</b> Court Address: Post Office Box 2980 Colorado Springs, CO 80901		DATE FILED: November 3, 2020 4:00 PM CASE NUMBER: 2020CV30054
<b>Plaintiff(s):</b>  TELLER COUNTY DEPT. OF PUBLIC HEALTH, et al.,  v.		▲ COURT USE ONLY ▲ Case Number: 20CV30054 Div.: 2 (for Div. 11, Teller)
<b>Defendant(s):</b>  ANDREW WOMMACK MINISTRIES INC.		
<b>ORDER RE: PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION</b>		

THIS MATTER comes before the Court for review of Plaintiffs' request for entry of a preliminary injunction. Defendant opposes. The parties appeared remotely for evidentiary hearing and oral argument on October 27-28, 2020. Briefing on the Motion closed on October 30, 2020. The matters are now ripe for determination.

Both parties made requests to file over length briefs. Both requests are granted.

The current motion is one step in an ongoing and multifaceted litigation landscape between these parties over application of the State of Colorado's health regulations responding to the current global pandemic. Defendant Andrew Womack Ministries Inc. ("AWMInc") filed the original litigation in federal court. AWMInc asserted a claim that it has a constitutional exemption from compliance with the regulations or that the regulations are invalid under the United States Constitution. AWMInc filed the case against parties equivalent to those that are plaintiffs in this case, Teller County Dept. of Public Health and Environment as well as the

Colorado Dept. of Public Health and Environment (collectively “Colo/Teller”).<sup>1</sup> AWMInc’s position was rejected by the trial court and rejected by the appellate court for the 10<sup>th</sup> Circuit. Colo/Teller then sought an affirmative ruling from the federal court that the regulations at issue are applicable to AWMInc. This was done through essentially the same request for injunction now made in this court. Due to the unique procedural setting of the federal case, AWMInc had the ability to abandon the federal lawsuit and block the responsive request by Colo/Teller. AWMInc exercised this option and dismissed the federal litigation once the initial adverse rulings entered. Thus, while AWMInc had a full and fair opportunity to litigate these issues in the federal case, the federal litigation did not reach entry of a final judgment due to AWMInc’s dismissal of the action. As a result, the principles of finality do not prevent the current action from proceeding and taking a fresh review of the issues and arguments.

As indicated, Colo/Teller seek a ruling that AWMInc is required to comply with the pandemic health regulations. AWMInc opposes on the argued grounds that application of the regulation to AWMInc violates the constitutional rights of the entity (and, presumably, participants in the relevant events). This issue, in turn, is largely determined by whether the regulations at issue are neutral or discriminatory against religious practices, the free exercise of one’s religion.

Relevant to the current dispute, AWMInc operates a conference center in Teller County. AWMInc hosts conferences at its center, and its facilities are designed to accommodate large groups that number in the thousands with a capacity of approximately 5,000 for a single event. AWMInc attracts attendees from across the nation to its conferences. At hearing, AWMInc’s

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<sup>1</sup> The reader is referred to Ex. NN for the actual defendants named in the federal action.

counsel analogized their operations to hosting TedTalks or seminars selling products/services. AWMInc's counsel explained that the legally significant difference from a TedTalk is that AWMInc's conferences include worship as a purpose for participation.

Both sides agree that AWMInc's provision of conference hosting services qualifies as a "house of worship" under the relevant regulatory scheme.

At the time this case is being litigated, a global pandemic exists involving a disease known as COVID-19. The Court will assume the reader has a basic knowledge of this status but refers the reader to Dr. Herlihy's testimony for greater detail. Colorado has adopted regulations in response to the pandemic. The parties do not dispute the statutory authority for Colorado to adopt the regulations or seek their enforcement. Given the limits on available resources and time, the Court does not recite those authorities. The reader is referred to Colo/Teller's briefing for that information. As noted, AWMInc's challenge is constitutional—the form, statutory authorization, process, etc... of adoption for these pandemic regulations are not in dispute here.

The primary regulations at issue in this case are found in Public Health Order 20-35 and Executive Order D 2020 138. The parties focus the disputes in this litigation on three elements of restriction imposed by these regulations: 1) the requirement to wear masks; 2) social distancing requirements; and 3) the size limitation on gathering of people. The specific size limitation at issue here, applicable as of the date of hearing,<sup>2</sup> limits indoor gatherings to

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<sup>2</sup> The Court notes the timing because infection rates are rising as the hearing was conducted and this Order is being prepared. Thus, the actual number of the cap on participants applicable to AWMInc's facility in Teller County under the regulation may change. For example, the section of the cited regulation governing El Paso County rose to Level 2 while these issues were being briefed. This Order addresses application of the cited regulations as a whole and the same analysis would apply if, for example, Teller County were to rise to the next level of risk as El Paso County has.

approximately 175 people.

As a threshold matter, AWMInc argued at the outset of the hearing that the pending Motion has been rendered moot because Order 20-35 has been amended since the date the litigation was filed. AWMInc explained that the Order's relevant limitation was 175 attendees at the time the case was filed. This limit has been amended to 175 attendees exclusive of staff. The Court is not persuaded that amendment of this type to the regulation moots the issues presented. The issue presented here is whether AWMInc can be constitutionally subjected to limitation under the regulation. Neither side has presented any argument that the specific number of the limitation is constitutionally significant, or even relevant, in context.

In arguing that the addition of the reference to excluding "staff" from the count of attendees, AWMInc's counsel argued that this inclusion effectively vacates the limitation. AWMInc's counsel asserted that the entity has more than 600 employees and that the inclusion of "staff" would raise the limit by this number. Even if the argument presented a viable analysis of the language, it would still leave a limit in place to which AWMInc would, presumably, argue exemption. Thus, the Court is not persuaded by the argument that the amendment has mooted the numeric cap aspect of the parties' dispute.

The Court must also note that it assumes counsel's argument that the 175 person limitation is raised by the 600 plus employees AWMInc can count was a rhetorical flourish rather than proposing an interpretation of the language for adoption. The Court does not find persuasive such an interpretation of the term "staff" as used in this context.

AWMInc also argued that the dispute over mask wearing is rendered moot because AWMInc is committing to follow the mask wearing requirement. However, AWMInc declines

to stipulate to compliance and maintained at hearing its argument of exemption from the requirement. Moreover, AWMInc gave an explanation of what it would do to “comply” with the mask requirement. This explanation made clear that AWMInc was not actually committing to abide by the mask requirement. Instead, AWMInc stated only that it would require its personnel to wear masks but *not* require attendees to wear masks. This would not result in compliance with the masking requirement. The factual representation presented by AWMInc indicated an intent to host conferences in violation of, rather than compliance with, the mask requirement.

AWMInc was less explicit in its assertion that the social distancing requirement dispute should be considered moot. AWMInc indicated broadly that it would comply with the requirement but offered no stipulation or specific explanation. For purposes of this ruling, the Court assumes that AWMInc continues to contest application of the social distancing requirement to it.

At the start of the hearing, the Court declined to vacate the hearing on the basis of the mootness argument but reserved further ruling until the completion of the hearing. Having now conducted the hearing and reviewed the parties’ briefing, the Court denies the mootness objection. At the conclusion of the hearing, the Court left open the option of considering the mootness argument raised to be treated like a separate request to dismiss the case under Rule 12 that would be briefed separately. Having now had the opportunity to review the arguments in full, the Court concludes that the existing assertion of the mootness argument is denied in full and will not be treated as a separate Rule 12 request to dismiss the case as a whole. No further briefing will be pursued on the existing objection. If AWMInc wishes to pursue dismissal of the case as a whole on the argument of mootness or otherwise, it will need to file a separate motion.

We now turn to the merits of Colo/Teller's request for entry of preliminary injunction. AWMInc opposes the request almost entirely on the constitutional argument. The Court will, nonetheless, review the factors Colo/Teller is required to demonstrate but will limit its discussion of the other issues not directly placed in dispute in the interest of time.

As the parties are aware, one seeking a preliminary injunction under C.R.C.P. 65 must demonstrate that the so-called *Rathke* factors weigh in favor of such an injunction.

**Success on the Merits.** The first factor requires the movant to demonstrate a reasonable probability of success on the merits. This factor is the focus of nearly all of the parties' arguments as it is the factor under which the Court must consider AWMInc's constitutional objections.

The parties have briefed extensively the constitutional authorities applicable to this issue. This Court lacks the resources of the parties or the appellate courts to address at length in this order those authorities and still issue this order on a timely basis (a scheduled conference is rapidly approaching). Therefore, the reader is referred to the parties' briefing for a more thorough discussion of the specific authorities. In general, the parties have relatively few dispositive disputes over the decisional legal standards or the august line of cases relevant to the current dispute.

The parties agree that an emergency does not eliminate constitutional protections. The parties agree that governments may adopt regulations that apply to houses of worship. However, regulations must be neutral and may not discriminate against religious activities. Moreover, courts must guard against "subtle departures from neutrality" that may otherwise appear facially neutral but operate discriminatorily. The protections of the Free Exercise Clause in the United

States Constitution prevent a law or regulation from discriminating against or barring conduct because it is undertaken for religious reasons. *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

As AWMInc explains in their brief by quoting the Sixth Circuit, “[o]n one side of the line, a generally applicable law that incidentally burdens religious practice usually will be upheld.” However, “a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be justified by a compelling interest and is narrowly tailored to advance that interest.” *See* AWMInc’s Response at 7-8 (internal quotations and citations omitted).

The parties also appear to agree that a regulation that is non neutral toward religion is subject to strict scrutiny.

Rather than disputing the legal authorities (with some exceptions, as the parties do dispute some of the applicable authorities but resolution of those disputes wind up being unnecessary), the parties ground their dispute on whether the regulations at issue are neutral or discriminatory toward religious practices. This Court concludes that the regulations at issue are neutral and nondiscriminatory.

As noted, the parties’ disputes focus on the three restrictions of the regulations at issue. Colo/Teller specifically request a ruling that AWMInc is subject to these three restrictions as well as the regulations. AWMInc has objected to entry of such a ruling as to the regulations and these three specific limitations. However, consistent with AWMInc’s argument on mootness, the Court can find no real argument or analytical path proposed by AWMInc that the social distancing or mask requirements are non-neutral. A review of Order 20-35 and Exec. Order D

2020 138 reveals to this Court no basis for a finding of anything other than neutrality. Other than terms not relevant here, both requirements are essentially universally applicable. *See, e.g.*, Order 20-35 at ¶II.B.2. and ¶IV.D. (applying “distancing requirements” to all, regardless of the purpose of the gathering).

While objecting generally, AWMInc’s specific arguments against application address only the gathering size limitation. AWMInc argues that Order 20-35 treats houses of worship differently, and discriminatorily, as compared to others subject to the regulation.

Order 20-35 is a lengthy regulation, more than 50 pages single spaced. The Order includes findings and sets of limitations imposed on different categories of activities and at different levels of risk. While the dispute in this litigation is whether AWMInc is exempt from the regulation as a whole, the parties present the issues in the context of the current application of the regulation to AWMInc’s facilities. The facilities are located in Teller County, a relatively rural county in Colorado. At the time of hearing, Teller County was operating under what the Order identifies as “Safer at Home, Level 1” restrictions.

The Order then sets a number of restrictions for different categories of gatherings. A separate category is established for “Houses of worship and Life Rites.” *See* Order 20-35 at ¶II.B.2.j. As noted, the parties agree that AWMInc is a “house of worship” under the regulation. The regulations limits the indoor gathering size as follows:

may operate at 50% of the posted occupancy limit indoors not to exceed 175 people excluding staff, whichever is less, per room.

*Id.*

AWMInc contends this limitation is discriminatory because its treats houses of worship



differently and adversely compared to other restrictions.

If we review other restrictions in the regulation for the same level (Safer at Home, Level 1) and comparable activity, we find that “public and private gatherings” are much more severely restricted with a limitation to 25 people as of the hearing date. “Indoor events” is the category most analogous to the AWMInc conferences and has a restriction substantively identical to the restriction at issue:

Indoor Events may be conducted at 50% of the posted occupancy limit not to exceed 175 people per room excluding staff.

*Id.* at ¶II.B.2.k. “Field services” are subjected to the same “indoor events” limitation.

Restaurants are subject to the same limitation as well as a discussion of some other issues not applicable. *Id.* at ¶II.B.2.h.

AWMInc argues that “houses of worship” are treated discriminatorily when compared to “big box” stores which are not subject to a hard number cap on gatherings. AWMInc is correct that the regulation does not limit “big box” stores and some other categories to a hard number cap of participants. However, the evidence did not establish credibly that the categories are comparable.

As noted, AWMInc’s counsel drew the analogy to a TedTalk or seminar but involving a purpose of worship. Thus, by counsel’s own analogy, the closest category within the regulation would be the category for “Indoor Event” which would cover such conferences. If the regulation set one standard for such conferences and a more restrictive standard for the same conference assembled for purposes of worship, this would violate the neutrality requirement. It would treat the same event differently because of the religious purpose of the event. However, the regulation

addresses both categories from the argument made by counsel for AWMInc with the identical limitation, 175 people exclusive of staff.

In contrast, the examples identified by AWMInc that have less restrictive caps on the gathering size are not analogous to the conferences AWMInc holds. Dr. Herlihy testified persuasively that the situations are not analogous. The conferences AWMInc is hosting involve close contact among people not ordinarily in close contact with each other and for relatively long periods of time. The shopper in the grocery or “big box” store has limited close contact with others at the store and has that contact for only brief periods of time. The person is nearly in constant motion at the “big box” store while the house of worship attendee is relatively stationary for periods of time that are long in the context of virus spread. Dr. Herlihy was persuasive that these are very different risk profiles for the pandemic and, therefore, are treated differently in the regulations. The Court did not find AWMInc’s challenges to the credibility of Dr. Herlihy’s opinions to be persuasive.

The Court does not find the non-neutral discriminatory treatment of religion in these regulations urged by AWMInc. Therefore, “strict scrutiny” does not apply in this case. AWMInc did not pursue a challenge to the regulations on the basis of any standard other than the “strict scrutiny” standard. AWMInc also acknowledged that the pandemic provides a “compelling” state interest in regulations such as these. Given the framing of the issues and the presentations made, the Court concludes that Colo/Teller has demonstrated a likelihood of success on the merits.

In its brief filed shortly before the start of the hearing, AWMInc also argued that the plaintiffs are discriminating against religious practices due to the existence of public protests in

other locations. AWMInc did not pursue this line of argument at the hearing. Thus, while the Court has reviewed the briefing on this topic, it does not pursue the analysis further in this Order. As best the Court can tell, this argument was major focus in the federal court proceedings and was a “holdover” in the briefing presented. The Court did not find the argument contained in the brief to be persuasive and, as noted, the argument was not pursued at hearing.

This factor favors the injunction.

**Danger of real, immediate, and irreparable injury.** While not central to the objections raised, AWMInc suggested skepticism about the scientific evidence supporting the potential for spread of COVID-19 and the types of exposure that permit its spread absent compliance with the regulations. The Court found Dr. Herlihy’s testimony credible on these issues.

AWMInc has held prior conferences and is proposing its next conference to begin on November 5, 2020. The Court is persuaded that a failure to comply with the health regulations cited presents a danger of real, immediate, and irreparable injury in the form of further spread of the pandemic in Teller County and in Colorado. As noted, AWMInc conferences bring large numbers of people to a relatively sparsely populated county from across the country. Those people are brought to AWMInc’s facility but, in the process, pass through and interact with many other parts of the community including travel facilities, housing facilities, eating facilities, and other facilities including the type of shopping areas noted by AWMInc at hearing.

Prior conferences are evidence of the level of injury likely to result from such a conference in violation of the pandemic regulations. The evidence credibly attributed 24% of Teller County’s total cases to a prior AWMInc event which also accounted for 45% of Teller

County's two-week case average.<sup>3</sup> The evidence credibly established that AWMInc's conference activity is likely one of Teller County's primary sources of the spread of COVID-19 and a primary importer of the virus to the community.

Within the "danger of" language of this factor is consideration of what risk exists that AWMInc would violate the restrictions in the absence of the requested injunction. Both sides ended up devoting a fair amount of time to this question in different forms during the hearing. As noted, part of AWMInc's mootness argument was the assertion that it would comply with two of the three highlighted restrictions (though later reciting facts indicating it would not comply).

The evidence was persuasive that AWMInc has not complied with the mask requirement or the capacity limitations in the past—AWMInc's own evidence establishes this noncompliance. The evidence suggested that AWMInc has not likely complied with the social distancing requirements in the past. This recent history along with AWMInc's positions indicate that AWMInc does not intend to comply in the future.

The evidence established that AWMInc has been deceptive in its dealings with Colo/Teller to avoid compliance. These parties engaged in considerable discussions about the regulation restrictions leading up to recent conferences. For one conference, AWMInc represented to Teller that AWMInc was cancelling the conference. This ended efforts at the county and state level to address the risks/issues presented—AWMInc led them to believe those

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<sup>3</sup> AWMInc challenged the credibility of the attribution of cases to its events. However, the evidence demonstrated credibly that AWMInc has failed to cooperate with efforts to obtain data regarding the impact of its events and has obstructed Colo/Teller's research efforts. Thus, AWMInc is not well positioned to credibly claim the data and research they have obstructed is not sufficient. The evidence presented by Colo/Teller attributing cases to AWMInc was credible and persuasive.

risks would no longer be presented. However, AWMInc just relocated the conference to another county. The evidence was persuasive that AWMInc pursued the move and other logistics (using a different host entity) as a means to deceive Colo/Teller and avoid the restrictions of the pandemic regulations.

When non-compliant events were conducted in Teller County by AWMInc, AWMInc refused Colo/Teller's requests to pursue mitigation efforts, specifically tracing and notification efforts. AWMInc makes claims to the contrary, but the factual evidence credibly established that AWMInc failed to cooperate and obstructed these mitigation efforts.

AWMInc's communications with Colo/Teller have also been marked by evasions as well as the more direct deception described above.

Finally, AWMInc's arguments at hearing also indicated a danger of noncompliance with the regulations. As noted, AWMInc represented that it has and will comply with the masking requirement. However, AWMInc went on to explain facts that establish a lack of compliance. This added to AWMInc's credibility challenges. We next turn to the mootness argument. While the Court assumes the argument about disregarding the numeric cap on gathering size through interpretation of the word "staff" was a facetious flourish of rhetoric, the argument is consistent with the other history of AWMInc's approach to the regulations and adds to the evidence establishing a genuine risk that AWMInc will violate the regulations absent the injunction.

This factor favors the injunction.

**No plain, speedy, adequate remedy at law.** The nature of the injury, as noted, is the spread of disease through the community at a statistically significant level. No adequate remedy at law exists for this injury.

**Public Interest.** The Court concludes that granting of the injunction requiring AWMInc to comply with the health regulations related to the pandemic would serve the public interest. Here, the public has a clear interest in limiting the spread of the pandemic. As indicated by AWMInc's counsel, that public interest is a compelling interest. The regulations challenged are credibly established by the evidence to help limit the spread of the pandemic. Therefore, an order directing compliance by AWMInc would serve that public interest as well.

The public also has an interest in preserving constitutional rights and protections. However, these pandemic regulations are not discriminatory against religious practices or beliefs. The relevant constitutional rights and protections are not violated by these regulations. Therefore, the public interest is not disserved by directing AWMInc's compliance.

This factor favors issuance of the injunction.

**Balance of Equities.** The Court finds the balance of the equities to favor issuance of the injunction for the reasons discussed above.

This factor favors issuance of the injunction.

**Preservation of Status Quo.** The injunction would preserve the status quo in the form of community compliance with the regulations.

## **CONCLUSION**

The Court concludes that the evidence and arguments support findings that the *Rathke* factors weigh in favor of entering injunctive relief.

Defendant, acting through its officers and personnel, are enjoined from violating Colorado's and Teller County's pandemic related regulations.

More specifically,

- Defendant is enjoined from holding or hosting a conference or other event that does not comply with the pandemic related regulations Order 20-35 and Executive Order D 2020 138.
- Defendant is enjoined from holding, conducting, or hosting a conference or other event that does not comply with the social distancing and masking requirements as well as the applicable attendee limitation.
- Defendant's two events reportedly scheduled to begin on November 5, 2020 and December 11, 2020 appear to be planned to occur in violation of the referenced regulations and Defendant is enjoined from holding, conducting, or hosting these events absent compliance with the referenced regulations.

Defendant is enjoined from barring or limiting Plaintiffs' access to and/or attendance at any conferences or other events occurring at, hosted by, conducted by, or held by Defendant during the life of this injunction. Plaintiffs' access ordered here is limited to access reasonably necessary to determine compliance with the cited regulations.

Pursuant to statute, Plaintiffs are not required to post security for the injunction.

The case will be deemed "at issue" under Rule 16 as of November 15, 2020 and the disclosure/discovery process is to proceed accordingly. Lead counsel are to contact the division clerk and set an initial case management conference to occur within 49 days of the date of this Order.

DONE and ORDERED November 3, 2020.

BY THE COURT

A handwritten signature in black ink, appearing to read 'D. Prince', written over a horizontal line.

David S. Prince  
DISTRICT COURT JUDGE