UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

ELIM ROMANIAN PENTECOSTAL CHURCH, and LOGOS BAPTIST MINISTRIES,	)	
Plaintiffs,	)	Case No. 1:20-cv-02782
v.	)	
JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois,	)	
Defendant.	)	

PLAINTIFFS MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant L. Civ. R. 7.1, Plaintiffs, ELIM ROMANIAN PENTECOSTAL CHURCH, and LOGOS BAPTIST MINISTRIES ("Churches"), by and through counsel, hereby file this Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, as set forth below and in Plaintiffs' contemporaneously filed Verified Complaint (ECF 1).

URGENICES JUSTIFIYING TEMPORARY RESTRAINING ORDER

In their Prayer for Relief in the Verified Complaint, Plaintiffs seek a temporary restraining order (TRO) and preliminary injunction (PI) restraining and enjoining Governor Pritzker and his designees from unconstitutionally enforcing and applying the various COVID-19 Executive Orders and other enforcement directives (collectively "GATHERING ORDERS") purporting to prohibit Plaintiffs, on pain of criminal sanctions, from gathering for worship services at Plaintiffs' churches, regardless of whether Plaintiffs meet or exceed the social distancing and hygiene guidelines pursuant to which the State disparately and discriminatorily allows so-called "essential" commercial and non-religious entities (*e.g.*, liquor stores, cannabis stores, warehouse clubs, 'big box' and 'supercenter' stores) to accommodate gatherings of more than 10 people without scrutiny or threat of criminal sanctions. As shown in the Verified Complaint, the GATHERING ORDERS have been interpreted, applied, and enforced against Plaintiffs' churches as the Illinois State Police have threatened to impose criminal sanctions against religious gatherings that include more than 10 people, regardless of whether government-recommended social distancing and hygiene recommendations are practiced. **Governor Pritzker has made it clear that churches, such as Plaintiffs, will not be able to hold in-person gatherings of more than 10 people until Phase 4 of his Restore Illinois plan, and that gathering of more than 50 cannot take place until Phase**

5—which he has stated may take more than 1 year to achieve, and will only be available if there is some as-yet undeveloped vaccine or treatment widely available.

At around the same time as Governor Pritzker's Executive Orders surrounding COVID-19 were being used to threaten criminal sanctions on Plaintiffs, their churches, and their congregants, officials in other jurisdictions had similarly threatened to impose criminal sanctions on other religious gatherings. In Louisville, Kentucky, for example, the government threatened to use police to impose criminal sanctions on those individuals found in violation of similar COVID-19 orders. The United States District Court for the Western District of Kentucky found that the mere threat of such criminal sanctions warranted a TRO. *See On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020) [hereinafter *On Fire*]. The *On Fire* TRO enjoined the Mayor of Louisville from "**enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on drive-in church services at On Fire**." *Id.* at *1 (emphasis added).

Additionally, the Governor of Kansas had imposed a virtually identical restriction on religious gatherings in Kansas, stating that "gatherings" of more than 10 individuals are prohibited, including religious gatherings. On April 18, 2020, the United States District for the District of Kansas issued a TRO enjoining Kansas officials from enforcing its discriminatory prohibition on religious gatherings and required the government to treat "religious" gatherings (worship services) the same as other similar gatherings that are permitted. *See First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, *6–7 (D. Kan. Apr. 18, 2020) [hereinafter *First Baptist*]. The *First Baptist* TRO specifically stated that the government's disparate treatment of religious gatherings was a violation of the Free Exercise Clause because it showed that "**religious activities were specifically targeted for more onerous restrictions than comparable secular activities**," and

that the churches had shown irreparable harm because they would "be prevented from gathering for worship at their churches" during the pendency of the executive order. *Id.* at *7–8 (emphasis added). In discussing the Kansas orders—which imposed a 10-person limit on in-person gatherings just as Governor Pritzker's orders here—the court said that specifically singling out religious gatherings for disparate treatment while permitting other non-religious activities "show[s] that these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral," *First Baptist*, 2020 WL 1910021, at *7. In fact, much like here, "churches and religious activities appear to have been singled out among essential functions for stricter treatment. **It appears to be the only essential function whose core purpose—association for the purpose of worship—had been basically eliminated**." *Id.* (emphasis added). Thus, the court found that Kansas should be enjoined from enforcing their disparate terms against churches.

Additionally, the Sixth Circuit Court of Appeals has issued an emergency injunction pending appeal prohibiting the Kentucky Governor from enforcing similar prohibitions on religious worship services. *See Maryville Baptist Church, Inc. v. Beshear*, -- F.3d --, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020). In that appeal, challenging orders similar to Governor Pritzker's orders here, the Sixth Circuit held that "[t]he Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. . . . **Orders prohibiting religious gatherings, enforced by police officers telling congregants they violated a criminal law and by officers taking down license plate numbers, amount to a significant burden on worship gatherings**." 2020 WL 2111316, at *2 (emphasis added). Additionally, "[t]he way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches." *Id.* "Outright bans on religious activity alone obviously count. So do general bans that cover religious activity when there are exceptions for

comparable secular activities." *Id.*, at *3. In discussing the prohibitions on religious gatherings, the Sixth Circuit posed several questions of equal import here:

> Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? **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. While the law may take periodic naps during a pandemic, we will not let it sleep through one.**

Id., at *4 (emphasis added).

Because the prohibition on religious gatherings substantially burdened Maryville Baptist's sincerely held religious beliefs and was not the least restrictive means, the Sixth Circuit concluded the plaintiff church and pastor were likely to succeed on the merits of their free exercise and state RFRA claims as to both in-person and drive-in services, and were being irreparably harmed as to both. *Id.*, at *2–3, 4. Balancing the remaining injunction factors, the court issued an injunction pending appeal enjoining the Governor of Kentucky from enforcing his unconstitutional orders against drive-in services, and directed the district court to prioritize consideration of enjoining in-person services, with the admonition, "The breadth of the ban on religious services, together with a haven for numerous secular exceptions, should give pause to anyone who prizes religious freedom." *Id.*, at *5

Plaintiffs, their pastors, and their congregants have also been threatened with criminal sanctions and penalties if, at any time, a mere 11 individuals gathered together for in-person worship services at Plaintiffs' churches, and regardless of whether social distancing and personal hygiene practices were followed. Indeed, Plaintiffs are threatened with becoming criminals for merely having 11 people at church. Because of the government threat of criminal sanctions, Plaintiffs were forced not to host services on Easter Sunday, the most treasured day in Christianity. **Absent emergency relief from this Court, Plaintiffs, their pastors, and all congregants will**

suffer immediate and irreparable injury from the threat of criminal prosecution for the mere act of engaging in the free exercise of religion and going to church. A temporary restraining should issue.

Plaintiffs pray unto this Court to issue a TRO restraining and enjoining Governor Pritzker from similarly **enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on religious gatherings** of more than 10 people, as against Plaintiffs. Plaintiffs do not seek, at this emergent stage, to undermine the entirety of Governor Pritzker's efforts to prevent the spread of COVID-19 in the State. **Plaintiffs merely seek to be free from the unconstitutional application of the GATHERING ORDERS in such a way that they are threatened with criminal sanctions and suffer criminal penalties for simply going to church.** Absent emergency relief from this Court, Governor Pritzker and the State Police will continue to threaten Plaintiffs with criminal sanctions and other penalties, **including this Sunday**, by targeting Plaintiffs' religious gatherings for discriminatory treatment.

LEGAL ARGUMENT

To obtain a PI, a plaintiff must show that it has "(1) no adequate remedy at law and will suffer irreparable harm if the preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Once a plaintiff has demonstrated these factors, "the district court then must balance the harms that both parties would suffer in the event of an adverse decision" and "consider the public interest in granting or denying an injunction and weigh the threshold factors against each other." *Culp v. Madigan*, 840 F.3d 400, 405 (7th Cir. 2016). Under this test, "the 'sliding-scale' nature of the preliminary injunction inquiry means that the plaintiffs' precise chances of success on the merits are highly relevant to whether an injunction should issue." *Id.* Where, as here, "a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the

determining factor." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). "[T]he standards for granting a TRO and a preliminary injunction are functionally identical." *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1082-83 (C.D. Ill. 2001). Plaintiffs easily satisfy these factors both factually and legally, and the TRO should issue. (Plaintiffs hereby incorporate by reference the allegations of their Verified Complaint, filed contemporaneously herewith, as their statement of facts in support of this motion.)

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE GATHERING ORDERS ARE UNCONSTITUTIONAL AND SHOULD BE RESTRAINED.

A. The GATHERING ORDERS Violate Plaintiffs' First Amendment Rights to Free Exercise of Religion and Should Be Restrained.

Though the State might not view church attendance as fundamental to the religious beliefs of Plaintiffs, its opinion is irrelevant to the protections afforded to Plaintiffs' sincerely held religious beliefs. Plaintiffs' "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merits First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). Indeed, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or **regulates or prohibits conduct because it is undertaken for religious reasons**." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. As the *On Fire* court just noted, prohibiting Plaintiffs from hosting, and its members from attending, religious services where other non-religious gatherings are permitted under similar circumstances "**violat[es] the Free Exercise Clause beyond all question**." 2020 WL 1820249, at *6 (emphasis added).

This Court has recently opined that the exigencies of COVID-19 justify certain restrictions on constitutional liberties. *See Cassell v. Snyder*, No. 20 C 50153, 2020 WL 2112374, *6 (N.D. Ill. May 3, 2020). But, even in a time of crisis or disease, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the First Amendment does not evaporate. Indeed, "even under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose." *On Fire*, 2020 WL 1820249, at *8; *see also Terminiello v. City of Chicago*, 337 U.S. 1, 27, 31, 38 (1949).

1. Burdens on sincerely held religious beliefs are subject to strict scrutiny if neither neutral nor generally applicable.

As a matter of black letter law, "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. But, as here, "[a] law failing these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest," *id.* at 532, and "will survive strict scrutiny only in rare cases." *Id.* at 546. The GATHERING ORDERS are neither neutral nor generally applicable.

2. The GATHERING ORDERS are not neutral or generally applicable.

a. The GATHERING ORDERS are not neutral.

"Although a law targeting religious beliefs as such is never permissible . . . if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. To determine neutrality, courts look to the text of the law "for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* But, "[f]acial neutrality is not determinative. The Free Exercise Clause extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 534. This is so because, as here, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with facial neutrality." *Id.* For the First Amendment prohibits hostility that is "masked,

as well as overt." *Id.* The GATHERING ORDERS are not facially neutral, and even if they were, they represent subtle departures from neutrality by treating Plaintiffs' religious gatherings of more than 10 individuals differently than similar non-religious gatherings.

The GATHERING ORDERS fail even cursory facial examination. They expressly target "faith-based" gatherings for disparate treatment. (V.Compl. ¶¶ 30, 31, EX. C.) Yet, in the very same text of the GATHERING ORDERS, **23 categories of businesses** are exempted from this prohibition, including alcoholic beverage stores, cannabis stores, gas stations, hardware stores, law firms and professional businesses, labor unions, and hotels. (V.Compl. ¶¶ 39, 43, EX. H.) Yet, religious gatherings are not granted such an exemption and must continue to comply with a 10-person limit. When the government "has targeted religious worship" for disparate treatment—such as attending religious worship services—while "not prohibit[ing] parking in parking lots more broadly—including, again, the parking lots of liquor stores," it simply fails the test of neutrality. *On Fire*, 2020 WL 1820249, at *6. Furthermore, here, as in *First Baptist*, the "orders begin with a broad prohibition against mass gatherings [but] proceed to carve out broad exemptions for a host of secular activities, **many of which bear similarities to the sort of personal contact that will occur during in-person religious services**." 2020 WL 1910021, at *5 (emphasis added). Under such a system of carve-outs for everyone but religious assembly, the GATHERING ORDERS are simply not neutral. *Id.*

This Court recently opined that the GATHERING ORDERS were not facially discriminatory by imposing more stringent restrictions on religious gatherings of more than 10 people while not imposing that restriction on Walmart and other "supercenter" or "big box" stores. *Cassell*, 2020 WL 2112374, *9. As this Court contended, "retailers and food manufacturers are

not comparable to religious organizations." *Id.* But, this is plainly erroneous. Indeed, as the Sixth Circuit stated:

> [R]estrictions inexplicably applied to one group and exempted from another do little to further these goals ["to lessen the spread of the virus or . . . protect the Commonwealth's citizens"] and do much to burden religious freedom. **Assuming all of the same precautions are taken**, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? **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.**

Maryville Baptist, 2020 2111316, at *4 (emphasis added).

This Court's recent *Cassell* decision focused on an erroneous contention that "the purpose of shopping is not to gather with others or engage them in conversation." 2020 WL 2112374, *9. But, as the Sixth Circuit articulated, the explanation of religious gatherings as "intentional worship" or congregating together misses the point entirely. *Maryville Baptist*, 2020 WL 211316, *4. Indeed,

> [t]he Governor claims, and the district court seemed to think so too, that the explanation for these groups of people to be in the same area—intentional worship—distinguishes them from groups of people in a parking lot or a retail store or an airport or some other place where the orders allow many people to be. **We doubt that the reason a group of people go to one place has anything to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another**.

Id. (emphasis added).

Governor Pritzker expressly targets churches and churchgoers, threatening criminal prosecution, and sending State Police to people attending a religious worship service. At the same time, no similar action is directed towards people in liquor stores, in Walmart, in cannabis stores, or other stores where the "threat" is equally present. If that is neutral, the term has no meaning.

b. The GATHERING ORDERS are not generally applicable.

In determining general applicability, the courts focus on disparate treatment of similar conduct. *See Lukumi*, 508 U.S. at 542. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* The textbook operation of a law that is not generally applicable is one where "inequality results" from the government's "decid[ing] that the governmental interests it seeks to advance are worthy of being pursued **only against conduct with religious motivation**." *Id.* at 543 (emphasis added). In *Lukumi*, the Supreme Court held that a law "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

This is precisely the effect of the GATHERING ORDERS. First, they purport to prohibit "all public and private gatherings of any number of people." (V. Compl. ¶ 39, EX. H.) But, the Governor "benevolently" permits religious gatherings to have 10 people or less while not applying such restrictions to the **23 categories of businesses** exempted from such prohibitions. (V.Compl. ¶¶ 39, 42–43, EX. H.) Their text makes it plain that "religious" gatherings of more than 10 people are prohibited, but large numbers of people may gather at grocery stores, alcoholic beverage stores, hardware stores, cannabis stores, gas stations, law firms and professional businesses, labor unions, and hotels, and also at warehouse, supercenter, and 'big box' stores combining several categories.. (*Id.*).

Furthermore, unlimited non-religious **gatherings at the 23 categories of exempt businesses are permitted** for employees and non-customer persons if distancing and hygiene guidelines are followed. (*Id.*) But "religious" gatherings of 11 people are still prohibited, no matter how large the facility or how long the gathering lasts, even if social distancing, enhanced

sanitizing, and personal hygiene guidelines are followed religiously. If large gatherings at liquor stores, warehouse, supercenter, and cannabis stores are not prohibited—and distancing and hygiene practices are only required "to the greatest extent possible"—even though endangering citizens (or not) to an equal degree, then it is obvious "religious" gatherings have been targeted for discriminatory treatment. Such a blatant discriminatory application of the GATHERING ORDERS "falls well below the minimum standard" the First Amendment demands. *Lukumi*, 508 U.S. at 543. Indeed, as the Sixth Circuit just pointed out—and as is equally true here—

> Keep in mind that [Plaintiffs] do not seek to insulate themselves from the [State's] general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They are not asking to share a chalice. **The Governor has offered no good reason so far for refusing to trust congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same**.

Maryville Baptist, 2020 WL 2111316, *4 (emphasis added); *see also On Fire*, 2020 WL 1820249, at *6 (holding that government regulation is not generally applicable when it targets religious gatherings with "orders and threats" but does not apply the same orders and threats to similar non-religious conduct). The GATHERING ORDERS are not generally applicable.

B. The GATHERING ORDERS Violate Plaintiffs' First Amendment Rights to Be Free From Government Hostility and Disparate Treatment Under the Establishment Clause.

"**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Where, as here, Plaintiffs seek to be free from disparate treatment by the State, the very core of the Establishment Clause is at issue. "An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—**the purpose of ensuring governmental**

neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971) (emphasis added). Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). That prohibition on hostility towards religion is equally present in times of exigent circumstances, such as COVID-19. For, as "[a]n instrument of social peace, **the Establishment Clause does not become less so when social rancor runs exceptionally high**." *Lund v. Rowan Cnty.*, 863 F.3d 268, 275 (4th Cir. 2017) (emphasis added).

But, the principle of neutrality requires that the government's motive in applying disparate treatment to religious gatherings, as opposed to non-religious gatherings of like kind, is not merely a pretext or a sham. *See, e.g.*, *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (holding that the government's motive for its actions "has to be genuine, not a sham"); *Gonzales v. N. Tp. of Lake Cnty.*, 4 F.3d 1412, 1419 (7th Cir. 1993) (same). In determining whether the government's motive represents a sham, courts often look to the progression of the government's actions. *See McCreary*, 545 U.S. at 866 (declining to accept the government's proposition that "the last in a series of government actions" is determinative for whether its actions offend the Establishment Clause). Here, the progression of the State's actions demonstrates that religious gatherings were "targeted for stricter treatment due to the nature of the activity involved, rather than because such gatherings pose unique health risks that mass gatherings at commercial and other facilities do not," and "the disparity has been imposed without any apparent explanation for the differing treatment of religious gatherings." *First Baptist*, 2020 WL 1910021, at *7.

Indeed, the State started with the general position that "all public and private gatherings [of] 50 or more people" were prohibited, and specifically included "faith-based events" in that prohibition. (V.Compl. ¶¶ 30, 31, EX. C.) But, in the next breath, the Government opened a broad

category of exemptions for certain "essential" stores. (V.Compl. ¶ 32.) On March 20, the State enhanced the prohibitions by prohibiting "all public and private gatherings of any number of people." (V.Compl. ¶ 34, EX. D.) Yet, in same text, the Governor created a massive hole of exemptions for the **23 categories of businesses** that need not comply with the restrictions, including grocery stores, alcoholic beverage stores, hardware stores, cannabis stores, gas stations, law firms and professional businesses, labor unions, and hotels, and also including warehouse, supercenter, and 'big box' stores combining several categories, so long as they abided by social distancing "to the greatest extent feasible" and "where possible." (*Id.*) Then, on April 8, the State made it abundantly clear that it would enforce Governor Pritzker's GATHERING ORDERS against churches and religious gatherings by having the Illinois State Police release the ISP Enforcement Guidance threatening criminal penalties and sanctions for violation of the GATHERING ORDERS. (V.Compl. ¶¶ 51–54, EX. K.)

Perhaps sensing that arresting pastors, imposing criminal sanctions on them, and hailing them into court for the act of hosting worship was problematic, Governor Pritzker modified his GATHERING ORDERS on April 30, 2020, stating that people may "engage in the free exercise of religion, provided that such exercise must comply with Social Distancing Requirements and the limit on gatherings of more than ten people." (V.Compl. ¶¶ 39–41, EX. H.) Yet, the **23 categories of so-called "essential" businesses** may continue to operate without a 10-person limit and provided only that—"to the greatest extent feasible" and "when possible"—they adhere to social distancing. (V.Compl. ¶¶ 42–43, EX. H.)

Finally, Governor Pritzker's Restore Illinois plan, which "can and will be updated" and is "subject to change" at any time and in the Governor's discretion, only contemplates religious gatherings of more than 10 people in Phase 4, when and if Governor Pritzker determines it is

appropriate to permit such gatherings. (V.Compl. ¶¶ 45–49, EX. J.) And, to have religious gatherings of more than 50 people, Plaintiffs' churches must wait until "a vaccine is developed to prevent additional spread of COVID-19" or "a treatment option is readily available," which the Governor has indicated can take from 12 to 18 months from now. (V.Compl. ¶¶ 48, 49 EX. J.)

The progression of the State's actions was a sham at the start and remains unconstitutional even after its "benevolent" instructions for "proper" worship during COVID-19. Its purpose in treating religious gatherings differently from the start was a sham because there is no evidence that religious gatherings "pose unique health risks that mass gatherings at commercial and other facilities do not," *First Baptist*, 2020 WL 1910021, at *7, or "because the risks at religious gatherings uniquely cannot be adequately mitigated with safety protocols" such as those at liquor stores, cannabis stores, or other "essential" stores that may continue to operate without the 10-person limitation. *Id.* Thus, treating Plaintiffs and other religious gatherings differently was a sham from the start and remains constitutionally infirm even now. **Indeed, the government does not have the authority to, with the stroke of a pen, declare churches and attendance at church to be "non-essential" and impose criminal sanctions on Plaintiffs for failing to abide by that government-imposed prescription of orthodoxy.** The Constitution demands more. So, too, should this Court.

C. The GATHERING ORDERS Restrict Plaintiffs' First Amendments Rights to Speech and Assembly and Should Be Restrained.

1. The GATHERING ORDERS discriminate against Plaintiffs' speech rights and rights to assemble on the basis of content.

"Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). "Some facial distinctions based on a message are obvious, defining regulated

speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* S. Ct. at 2227 (emphasis added). Put simply, the Supreme Court handed down a firm rule: **laws that are content based on their face must satisfy strict scrutiny**. *Id.* Importantly, this firm rule mandating strict scrutiny of facially content-based restrictions of speech applies regardless of the government's alleged purpose in enacting the law, even if the alleged purpose arises from a time of purported emergency. *See id.* ("On its face, the [law] is a content-based regulation of speech. **We thus have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny**.") "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.*

This Court need look no further than the text of the GATHERING ORDERS to determine that they are content-based restrictions on constitutionally protected liberties. The GATHERING ORDERS purport to prohibit "all public and private gatherings of any number of people," except a religious gathering of no more than 10 people is permissible. (V.Compl. ¶¶ 39, 41, EX. H.) But, the State found **23 categories of exempted so-called "essential" businesses**, including, *inter alia*, grocery stores, alcoholic beverage stores, cannabis stores, gas stations, hardware stores, law firms and professional businesses, labor unions, and hotels, that are not subject to a 10 person limitation. (V.Compl. ¶¶ 42, 43, EX. H.) Indeed, as this Court has found, a system of exemptions makes it likely that a law is content-based. *See ACLU of Ill. v. White*, 2009 WL 5166231, *4 (N.D. Ill. Dec. 23, 2009); *see also H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009) (holding that a system where some forms of speech are exempted while others are not is content-

based and subject to strict scrutiny). The State's broad swath of exemptions for all but religious gatherings is textbook content discrimination and subject to strict scrutiny.

2. The GATHERING ORDERS are an unconstitutional prior restraint.

It is axiomatic that prior restraints are highly suspect and disfavored. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Indeed, "**[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity**." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (emphasis added). "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965).

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. **[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition**.

Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 165–66 (2002) (emphasis added); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938) ("While this freedom from previous restraint . . . upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the [First Amendment]."); *Carroll v. President & Comm'r Princess Anne, et al.*, 393 U.S. 175, 181 (1968) ("**Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect from abridgment**." (emphasis added)).

The Supreme Court has consistently permitted facial challenges to prior restraints without requiring a plaintiff to show that there is no conceivable set of facts where the application of the particular government regulation might or would be constitutional. *See, e.g., Horton v. City of St.*

Augustine, 272 F.3d 1318, 1331–32 (11th Cir. 2001) ("the Supreme Court itself in *Salerno* acknowledged [that prior restraints are the] exception to the 'unconstitutional-in-every-conceivable-application' rule") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987));

While prior restraints are not per se unconstitutional, they "are highly disfavored and presumed invalid." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002). One form of a prior restraint that is particularly intolerable is "a procedure that places unbridled discretion in the hands of a government official and might result in censorship." *Id.* Here, there is no question the GATHERING ORDERS place unbridled discretion in the hands of the State and its officials.

3. The GATHERING ORDERS unconstitutionally vest unbridled discretion in the hands of State officials.

The danger inherent in the viewpoint discriminatory policies and application here is only increased by the unbridled discretion given to government officials. "When a city allows an official to ban [speech] in his unfettered control, it sanctions a device for suppression of free communication of ideas." *Saia v. People of State of N.Y.*, 334 U.S. 558, 562 (1948). "[E]ven if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, **it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion**." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988) (emphasis added). The danger of viewpoint discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. This is precisely why "**[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official**." *Forsyth Cnty.*, 505 U.S. at 133 (emphasis added).

Binding precedent from the Seventh Circuit also mandates that prior restraints not impermissibly vest government officials with unbridled discretion. *See, e.g.*, *Weinberg*, 310 F.3d at 1042 (prior restraint particularly intolerable where it vests unbridled discretion in hands of government official). This is so because "**[w]e cannot presume that officials will act in good faith and follow standards not explicitly contained in the ordinance**." *Id.* at 1046 (emphasis added).

Here, the GATHERING ORDERS lack specific and definite checks on the discretion of government authorities. "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty.*, 505 U.S. at 133 n.10. Here, the GATHERING ORDERS' vesting of unbridled discretion is not only unconstitutional because there are no checks on the State, but is even worse because the State has **actually exercised** its unchecked discretion to prohibit religious gatherings of more than 10 people while not prohibiting similar non-religious gatherings. Nothing in the GATHERING ORDERS limits the authority of State officials to target church services or religious gatherings that are abiding by social distancing and personal hygiene practices while not equally targeting non-religious gatherings doing the same. In fact, that is precisely what the GATHERING ORDERS demand of State officials. Indeed, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). The GATHERING ORDERS have instituted a total prohibition on "faith-based" gatherings of more than 10 people throughout the entire forum of the State without any standards or objective criteria for why Plaintiffs' religious gatherings should be treated differently than the

gathering of large numbers of people occurring daily at liquor, warehouse, supercenter and cannabis stores. The First Amendment demands more, and so should this Court.

D. The GATHERING ORDERS Violate the Illinois Religious Freedom Restoration Act.

The Illinois Religious Freedom Restoration Act, 775 ILCS § 35/15 ("IRFRA"), prohibits the government from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest."

1. The exercise of Plaintiffs' religion requires them not to forsake the assembling of themselves together.

The exercise of religion under IRFRA means "act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." 775 ILCS § 35/5. Plaintiffs have adequately demonstrated they have sincerely held religious beliefs, rooted in Scripture's commands (*e.g.*, *Hebrews* 10:25), that followers of Jesus Christ are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. (V.Compl. ¶¶ 85, 169, 204, 215.) And, as *On Fire* recognized, "many Christians take comfort and draw strength from Christ's promise that 'where two or three are gathered together in My name, there am I in the midst of them.'" 2020 WL 1820249, at *8 (quoting *Matthew* 18:20). Indeed, "the Greek work translated church . . . literally means **assembly**." *Id.*

2. The GATHERING ORDERS substantially burden Plaintiffs' exercise of religion.

Binding precedent from the Seventh Circuit has noted that a "substantial burden" under IRFRA exists when the government "necessarily bears direct, primary, and fundamental

responsibility for rendering religious exercise effectively impracticable," *Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003), or when "it puts substantial pressure on an adherent to modify his behavior or violate his beliefs." *Koger v. Bryan*, 523 F.3dd 789,799 (7th Cir. 2008). Here, it is beyond cavil that the GATHERING ORDERS impose such a substantial burden on Plaintiffs' religious beliefs. (V.Compl. ¶ 217 (alleging that the GATHERING ORDERS, substantially burden Plaintiffs' sincerely held religious beliefs, compel Plaintiffs to either change those beliefs or to act in contradiction to them, and force Plaintiffs to choose between the teachings and requirements of their sincerely held religious beliefs in the commands of Scripture and Defendant's imposed value system)); (*id.* ¶ 89 (the GATHERING ORDERS put substantial pressure on Plaintiffs' to violate their sincerely held religious beliefs)).

E. The GATHERING ORDERS Cannot Withstand Strict Scrutiny.

Because the GATHERING ORDERS substantially burden Plaintiffs' sincerely held religious beliefs under the First Amendment and IRFRA, are neither neutral nor generally applicable, and are a content-based restriction on Plaintiffs' speech and assembly rights (*see supra* sections I.A–D), there is no question they must survive strict scrutiny. The State is therefore subject to "the most demanding test known to constitutional law." *Deida v. City of Milwaukee*, 176 F. Supp. 2d 859, 869 (E.D. Wis. 2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). In fact, "**it is the rare case in which a . . . restriction withstands strict scrutiny**." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2236 (Kagan, J., concurring) (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015)) (emphasis added). *See also Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("we readily acknowledge that a law rarely survives such scrutiny"); *Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 366 (2009) (Breyer, J., concurring) ("strict scrutiny" is "a categorization that almost always proves fatal to the law in question"). This is not that rare case.

1. The GATHERING ORDERS' discriminatory treatment of "religious" gatherings is not supported by a compelling interest.

When "[a] speech-restrictive law with widespread impact" is at issue, "**the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights**." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Here, because the GATHERING ORDERS infringe upon Plaintiffs' First Amendment rights, the government "must do more than simply posit the existence of the disease sought to be cured. **It must demonstrate that the recited harms are real, not merely conjectural**." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Illinois*, 435 U.S. 829, 843 (1978).

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire*, 2020 WL 1820249, at *7. Plaintiffs do not doubt the sincerity of the State's assertion of such an interest. But where the State permits regular gatherings of more than 10 persons in grocery stores, alcoholic beverage stores, cannabis stores, gas stations, hardware stores, law firms and professional businesses, labor unions, and hotels (V.Compl. ¶ 43, EX. H), while expressly prohibiting Plaintiffs' "religious" gatherings of like kind, the government's assertions of a compelling interest are substantially diminished. Put simply, the GATHERING ORDERS "cannot be regarded as protecting an interest of the highest order . . . **when [they] leave[] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (same). Indeed, where—as here—the government creates a large system of **23 categories** of exceptions (V. Compl. ¶ 43), the Supreme Court has recognized that such

exceptions "can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011)). The GATHERING ORDERS thus "have every appearance of a prohibition that society is prepared to impose upon [Plaintiffs' religious gatherings] but not on itself." *The Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring). In fact, the GATHERING ORDERS suggest that the State is prepared to accept the risk of gatherings at liquor, warehouse, supercenter, and cannabis stores, but cannot stomach Plaintiffs' assembly for a church service, even with strict social distancing that is good enough for others when practiced "to the greatest extent possible." The State cannot permit broad swaths of gatherings, carrying the same (if not greater) risk than that posed by Plaintiffs' church services, and still claim constitutional compliance. "Such a prohibition does not protect an interest of the highest order." *Id.*

2. The State cannot satisfy its burden of proving narrow tailoring because the GATHERING ORDERS are not the least restrictive means.

Plaintiffs "**must be deemed likely to prevail unless the government has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than enforcing the act**." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added). Indeed, to prove narrow tailoring, the State is required to demonstrate that there are no less restrictive means capable of achieving its desired result. *See, e.g.*, *Boos v. Berry*, 485 U.S. 312, 329 (1988) (when content-based restrictions on speech are analyzed under strict scrutiny, an ordinance "is not narrowly tailored [where] a less restrictive alternative is readily available"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (noting that under "the most exacting scrutiny" applicable to content-based restrictions on speech, the government must employ the least restrictive alternative to pass narrow tailoring). The State bears the burden of demonstrating narrow tailoring as a matter of law, and that is a burden it

simply cannot satisfy here. Less restrictive means are available, and that alone condemns the State's application of the GATHERING ORDERS to failure under strict scrutiny.

a. The State bears the burden of demonstrating narrow tailoring and least restrictive means.

Even on a motion for TRO or PI, the State unquestionably bears the burden of demonstrating that the GATHERING ORDERS are narrowly tailored. As the Supreme Court has held: "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 such, on a PI motion, **the government—**not the movant—bears the burden of proof on narrow tailoring, because **the government** bears that burden at trial. *See Ashcroft*, 542 U.S. at 665 (on PI motion, "**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute." (emphasis added)).

The State indisputably bears the burden of proving narrow tailoring at trial. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *id.* at 2540 ("To meet the requirement of narrow tailoring, **the government must demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." (emphasis added)). Thus, the State also bears—and falls woefully short of meeting—the burden of proving narrow tailoring here. *See Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 665.

b. The State cannot demonstrate that it seriously considered less speech restrictive alternatives and ruled them out for good reason.

The State flunks the narrow tailoring strict scrutiny test for a simple reason. In connection with its narrow tailoring burden, the State must show that it "**seriously** undertook to address the

problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. Thus, the State "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added).

The State utterly fails this test. The State tried nothing else. It considered nothing else but a complete prohibition. The State jumped straight to a purported ban on "all public and private gatherings of any number of people," and merely permitted "religious organizations" to have a 10-person limit. (V.Compl. ¶¶ 39, 41.) But the State drove a Mack Truck through its prohibition by expansively exempting numerous businesses and non-religious entities, such as liquor, warehouse, supercenter, and cannabis stores, along with numerous other gatherings in its **23 exempt categories**. (V.Compl. ¶¶ 42, 43.) The State has not and cannot state why or how gathering with a large number of persons at a warehouse or supercenter store (*i.e.*, browsing, shopping, coughing, sneezing, and touching surfaces, all while moving in the midst of crowds and masses that turn over by the hundreds throughout a day, with distancing and hygiene practiced only "to the greatest extent possible") is any less "dangerous" to public health than attending a time-limited worship service, where distancing and hygiene are strictly observed, in a space used for no more than a few hours. And, **the State is threatening to continue such prohibitions for at least 12 to 18 months, while Plaintiffs' churches suffer a prohibition on their cherished constitutional liberties**. (V.Compl. ¶¶ 45–49, EX. J.) Yet, the State exempted the non-religious gatherings and prohibited

Plaintiffs' church services. Quite simply, the State imposed a draconian religious gathering prohibition "not reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The State tried nothing else, and for that reason alone, fails the narrow tailoring analysis required under *McCullen*.

c. The numerous other COVID-19 orders specifically exempting religious gatherings or treating them equally to non-religious gatherings demonstrates less restrictive and non-discriminatory alternatives exist.

Even if the State could substantiate compelling interests for the GATHERING ORDERS' discriminatory application to religious gatherings of more than ten people, which it cannot, the State could not meet its burden of showing that the GATHERING ORDERS are narrowly tailored. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). There must be a 'fit between the . . . ends and the means chosen to accomplish those ends.'" *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity, government may regulate the area of First Amendment freedoms only with narrow specificity." *Ward*, 491 U.S. at 794.

The Supreme Court has clearly established that "[t]he government may not regulate ['a mode of speech'] based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (internal quotation marks omitted). The GATHERING ORDERS impose discriminatory and disparate treatment on "religious" gatherings that are not applied to similar or larger non-religious gatherings. Where other, content-neutral alternatives exist, such as here, government cannot fulfill its narrow tailoring burden by ignoring those alternatives. *See id.* at 395 ("The existence of adequate content-neutral alternatives thus undercut significantly any defense of such a statute, casting considerable doubt on the

government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law." (internal quotation marks and citation omitted)).

As shown in the Verified Complaint, the State has ignored numerous other, less restrictive means of achieving its purported interest. One option tried successfully in other jurisdictions is to exempt religious gatherings from gathering prohibitions altogether. The States of Arizona, Florida, Indiana, Ohio, and Texas have declared religious gatherings essential activities which may continue, instead of declaring such constitutionally protected activities "non-essential" with a stroke of a pen. (V.Compl. ¶¶ 61–63, 67, 68, EXS. M– P, T, U.) **The State has refused to consider or attempt it**. Another less restrictive alternative would be to allow churches to continue in-person services provided they agree to maintain adequate social distancing, enhanced sanitizing, and personal hygiene practices, like those allowed at other non-religious gatherings of more than ten individuals. Alabama, Arkansas, and Connecticut have all permitted such an exception for religious gatherings. (V.Compl. ¶¶ 64-66, EXS. Q–S.) Plaintiffs have demonstrated thy already engage in the recommended social distancing, enhanced sanitizing, and personal hygiene practices recognized by the State as sufficient for non-religious gatherings, and have specifically committed to doing so going forward. (V.Compl. ¶¶ 55–59, EX. L.) There is no justification for depriving Plaintiffs of the same benefits afforded to non-religious gatherings that are permissible under the GATHERING ORDERS.

Indeed, as the court in *On Fire* has already exquisitely stated, the State is unlikely to be able to demonstrate that it deployed the least restrictive means because the GATHERING ORDERS

> are **"underinclusive"** ***and*** **"overbroad."** They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that the State has permitted . . . . Those . . . activities include driving through a liquor store's pick-up window, parking in a liquor store's parking lot, or walking into a liquor

> store where other customers are shopping. The Court does not mean to impugn the perfectly legal business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is "essential," **so is [church]**.

2020 WL 1820249, at *7 (emphasis added) (footnote omitted). Further, as *First Baptist* held, "where comparable secular gatherings are subjected to much less restrictive conditions" than "the broad prohibition against in-person religious services," the government is not likely to meet its burden that it deployed the least restrictive means. 2020 WL 1910021, at *8.

Put simply, the State's failure to try other available alternatives that have worked and are working in other jurisdictions across the country demonstrates that it has not and cannot satisfy its burden to demonstrate that its actions are narrowly tailored. It thus fails strict scrutiny, and the TRO and PI are warranted.

II. PLAINTIFFS HAS SUFFERED, IS SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT A TRO AND PI.

Governments are not empowered to create "First Amendment Free Zones" within their borders, like the State has done here. *See, e.g.*, *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (striking local government's attempt to prohibit protected expression within a "First Amendment Free Zone."); *United States v. Stevens*, 559 U.S. 460, 470 (2010) (government in not empowered to create First Amendment free zones with respect to certain categories of speech). Saying that Plaintiffs may avoid irreparable injury by simply "watching church services online" or doing "drive-through" or "drive-in" services while foregoing established constitutional rights is simply insufficient under the First Amendment. "[V]iolations of First Amendment rights are presumed to constitute irreparable injury." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006); *see also Joelner v. Vill. Of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (same). *See also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice*

& Procedure §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that **no further showing of irreparable injury is necessary**." (emphasis added)).

This is because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, the High Court "has characterized the freedom of speech and that of the press as fundamental personal rights and liberties." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161 (1939) (citations omitted). As such, denial of such rights represents indisputable irreparable injury. Moreover, "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (quoting *Kikumara v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). Thus, demonstrating irreparable injury in this matter "**is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added).

III. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW TO PROTECT THEIR CHERISHED CONSTITUTIONAL LIBERTIES.

When First Amendment rights are at stake, there can be no adequate remedy at law. Indeed, given the unquestionable injury appurtenant to the loss of First Amendment freedoms for even minimal periods of time, "the quantification of injury is difficult and damages are therefore not an adequate remedy." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)). Plaintiffs have plainly alleged significant First Amendment injuries that are immediate, irreparable, and ongoing. (V.Compl. ¶¶ 73–78.) Thus, no adequate remedy at law is sufficient to protect Plaintiffs' cherished constitutional liberties. *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("money damages

are therefore inadequate" when First Amendment rights are at stake). A TRO and injunctive relief are the only mechanism for protecting Plaintiffs' First Amendment freedoms.

IV. THE BALANCE OF THE EQUITIES TIPS DECIDEDLY IN PLAINTIFFS' FAVOR.

An injunction in this matter will protect the very rights the Supreme Court has characterized as "lying at the foundation of a free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The granting of a TRO and PI enjoining enforcement of the GATHERING ORDERS on Plaintiffs' worship services will impose no harm on the State. Indeed, the State "is in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." Indeed, "there can be no irreparable harm to [the government] when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (internal quotation marks omitted). "Moreover, if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012). The balance of harms favors injunctive relief. Absent a TRO, Plaintiffs and their congregants "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On Fire*, 2020 WL 1820249, at *9. The balance of the equities tips decidedly in Plaintiffs' favor, and the TRO and PI should issue.

IV. THE PUBLIC INTEREST WARRANTS A TRO AND PI.

"Injunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012); *Joelner v. Vill. of Washington Park*,

378 F.3d 613, 620 (7th Cir. 2004) ("it is always in the public interest to protect First Amendment liberties"). Here, the public interest is best served in guaranteeing that Plaintiffs' worship services are entitled to First Amendment protection. Indeed, "[w]e believe that the public interest is better served by protecting core First Amendment rights." *Id.* (quoting *Homans v. Alburquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001)). There is no "evidence that churches are less essential than every other business that is currently allowed to be open," *On Fire*, 2020 WL 1820249, at *9, and "**the public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *Id.* (emphasis added).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court issue the TRO and PI as set forth in the Prayer for Relief in Plaintiffs' Verified Complaint (V.Compl. at 40–43.)

Respectfully submitted,

John W. Mauck
Ill. Bar No. 179732
Sorin A. Leahu
Ill. Bar No. 6315515
Mauck & Baker, LLC
1 N. LaSalle Street, Suite 600
Chicago, IL 60602
312-726-1243
Jmauck@mauckbaker.com
Sleahu@mauckbaker.com

/s/ Horatio G. Mihet
Mathew D. Staver*
Horatio G. Mihet*
Roger K. Gannam*
Daniel J. Schmid*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: court@lc.org
hmihet@lc.org
rgannam@lc.org
dschmid@lc.org

*Pro hac vice applications pending

Attorneys for Plaintiffs