IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FIRST BAPTIST CHURCH; PASTOR STEPHEN ORMORD; CALVARY BAPTIST CHURCH; PASTOR AARON HARRIS Plaintiffs,	)	
	)	Case No. 6:20-cv-01102
GOVERNOR LAURA KELLY, in her official capacity, Defendant.	)	

PLAINTIFFS' MOTION FOR EXPEDITED HEARING AND MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

This case is brought by two Kansas churches in rural communities who have put adequate social distancing measures in place to ensure the safety of churchgoers while holding in-person church services. These two churches file this action in order to be allowed the same discretion to operate as other exempt local secular businesses and libraries under Kansas Governor's Executive Order 20-18. Technological difficulties and logistical impediments for streaming, outdoor, and "drive-in" services, as well as unpredictable and inclement weather require that the church be allowed to conduct these indoors, in-person services.

Currently, in-person religious "mass gatherings" of more than 10 non-performing individuals have been criminalized by the State as described in Executive Order 20-18 (hereinafter "EO 20-18"). (*See* Pl.'s V. Compl. Ex. 1, ¶ 1.c, ECF No. 1-1, and K.S.A. § 48-939.) However, the same restrictions have not been placed on numerous secular organizations such as malls, retail stores, bars, restaurants, office buildings, and even libraries. (*See* Pl.'s V. Compl. Ex. 1, ¶ 1.c, ECF No. 1-1.)

STATEMENT OF FACTS

Five days before Easter Sunday, on April 7, 2020, Governor Kelly issued EO 20-18 restricting mass gatherings of more than 10 people in a confined space, excluding clergy and assistants conducting the service. (*See id.*) When issuing EO 20-18, the Governor publicly cited concerns with three "clusters" of COVID-19 associated with churches out of the eleven total clusters identified at the time.[1] Later, it was revealed that the majority of "clusters" were related to long-term care facilities but a similar number of clusters were related to "private businesses."[2]

[1] Jonathan Shorman, "Kansas Has 3 Church C-Related COVID-19 Clusters, state says amid scramble for Supplies," Wichita Eagle (April 6, 2020), https://www.kansas.com/news/coronavirus/article241810656.html.
[2] Michael Stavola, "Fifth Coronavirus Cluster Located in Sedgwick County," Wichita Eagle (April 14, 2020), https://www.kansas.com/news/coronavirus/article241999411.html. It was also revealed that at least one religion-

However, EO 20-18 primarily targeted churches while largely exempting gatherings in secular businesses.

The next day, on April 8, 2020, the Kansas Attorney General issued a five-page memorandum to Kansas prosecutors and law enforcement advising them not to enforce the ban on religious gatherings because it "likely violate[s] both state statute and the Kansas Constitution." (*See* Pl.'s V. Compl. Ex. 4 at 5, ECF No. 1-4). Later that day, the Legislative Coordinating Counsel (LCC)[3] revoked EO 20-18 pursuant to HCR 5025 citing the constitutional concerns with religious liberty raised by the Attorney General.[4] On April 10, 2020, the Governor filed a Petition in *Quo Warranto* with the Kansas Supreme Court citing concerns that widespread religious gathering would erupt across the state on Easter if the Court did not rule immediately to clarify the confusion. *See* Pl.'s Mot. to Expedite, *Kelly v. Legislative Coordinating Counsel*, No. 122,765 (Kan. 2020). The next day, after oral argument, the Kansas Supreme Court struck down the LCC's action, focusing on the text of HCR 5025 without making any ruling on the constitutional and religious liberties questions raised. The decision in this matter was issued by the Kansas Supreme Court late the day before Easter. This left the ban on religious gatherings intact.

Leading up to Easter Sunday, Plaintiffs in this action attempted to prepare their services based on the legal uncertainty involving religious mass gatherings. On Easter Sunday, April 12, Plaintiffs First Baptist Church, Dodge City, KS and Pastor Stephen Ormord attempted to hold an

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related cluster (an administrative conference for denominational staff) had occurred prior to the issuance of any statewide stay-at-home or mass gathering orders. See Katie Moore, "Church conference in Kansas City, Kansas, linked to 44 COVID-19 cases, five deaths," Kansas City Star (April 16, 2020), https://www.kansascity.com/news /coronavirus/article242066041 html.

[3] The LCC is a 7-member council of legislative leadership. *See* K.S.A. § 46-1201.

[4] A press release from Kansas House leadership is quoted by KWCH News. "Lawmakers Overturn Religious Worship Size Limits in KS, Rule Sticks in Sedgwick County," KWCH News (April 8, 2020), https://www kwch. com/content/news/Kansas-AG-says-religious-restrictions-not-enforceable-569479791.html.

outdoor "drive-in" church service with approximately 20 of their congregants parked in cars in front of the church. (*See* Pl.'s V. Compl. at ¶ 12, ECF No. 1.) Due to high winds and technological difficulties, the congregants were unable to hear or participate in the service. (*Id.*) The church had already adopted rigorous social distancing and health safety protocol to protect individuals gathered for worship, and the congregation was able to safely conduct the service within the sanctuary space pursuant to that protocol. (*Id.*) Given this experience, First Baptist Church has cited concerns with the availability of internet streaming and the logistics involved in "drive-in" services. (*See* Pl.'s V. Compl. Ex. 7, ECF No. 1-7 [Letter to Governor].) Additionally, concerns were raised about church members having low bandwidth or no internet access. (*Id.*)

On Easter Sunday, April 12, 2020, in Junction City, Kansas, Plaintiffs Calvary Baptist Church and Pastor Aaron Harris held an indoor church service with 21 of their congregants while adopting rigorous social distancing and health safety protocol to protect individuals gathered for worship. (*See* Pl.'s V. Compl. at ¶ 13.) These safeguards included:

- Splitting out pews and marking designated sitting areas to keep non-cohabitating congregants at least six feet apart before, during, and after the worship service;
- Marking multiple entrances to encourage socially distanced foot traffic;
- Propping doors open to prevent the need for congregants to touch doors while entering and exiting the church or sanctuary;
- Suspending passing offering plates and bulletins;
- Actively discouraging handshaking or other social touching;
- Offering hand sanitizer throughout the building;
- Providing face masks to offer to any interested persons.

(*Id.* at ¶ 50.) A member of local law enforcement briefly monitored the service inside the building. (*Id.* at ¶ 13.) In the days following, Pastor Harris was contacted by the Geary County Sheriff and informed that he would be subject to criminal enforcement of Governor's Executive Order 20-18 should his church hold an in-person service with more than 10 congregants in the pews in following weeks. (*Id.* at ¶ 14.) Furthermore, Kansas law enforcement officials, including the Geary County Sheriff, have publicly stated they intend to criminally enforce EO 20-18, despite the Kansas Attorney General's legal recommendations against criminal enforcement.[5]

On April 15, 2020, in an effort to avoid conflict and in the spirit of cooperation, First Baptist Church sent a letter through counsel to Clay Britton, the Governor's Chief Counsel. (*See* Pl.'s V. Compl. Ex. 7, ECF No. 1-7 [Letter to Governor].) In the letter, First Baptist Church implored the Governor to narrowly tailor EO 20-18 taking into account the following factors:

- The location of a religious gathering;
- The presence of COVID-19 in the particular community at issue;
- Whether certain personal protective gear (PPE) is used;
- Whether additional safety protocols are used;
- Whether enhanced social distancing measures are employed at both the gathering and in the particular church community at issue (including the adherence to personal social distancing outside the gathering by participants by staying at home as well as the exclusion of "at-risk" individuals as identified by the Center for Disease Control);
- Challenges faced by church communities in rural areas such as the unavailability of internet services and streaming capacity, the importance of in-person religious gatherings

[5] Nicole Asbury, "Kansas Police say they will Enforce Gov. Kelly's Order Limiting Religious Gatherings," Kansas City Star (April 16, 2020), https://www.kansascity.com/news/politics-government/article241999171.html.

on the mental health of already relatively isolated individuals, and other factors particular to various communities across the state.

(*Id.*) Additionally, counsel for First Baptist Church offered to assist the Governor's Chief Counsel in drafting a narrowly tailored Executive Order. (*Id.*) In the same letter, First Baptist Church proposed to hold an in-person service with numerous safeguards as follows:

- Prior to and following the in-person service, the facility will be deep-cleaned;
- Invitations will be directed to regular church attendees for this in-person service;
- Individuals will be advised to continue to engage in "stay at home" protocols as directed by EO 20-16 in order to attend the service;
- No church members are known to have had any contact with known COVID-19 confirmed cases;
- Attendees will be advised to perform temperature checks at home on all attendees prior to attending the service. Individuals that are ill or have fevers will not attend;
- High-risk individuals will be advised not to attend the in-person service;
- Attendees will be advised to bring their own PPE, including masks and gloves;
- Attendees will be advised not to engage in hand shaking or other physical contact;
- Hand sanitizer will be available for use throughout the facility;
- The in-person service will be limited to 50 individuals in a space that has a capacity for 300 individuals (a cross-shaped auditorium 50 feet by 74 feet at the center; 2,950 square feet total, allowing almost 57 square feet available to each attendee at maximum social distancing);

- Co-habituating family units may sit closer together but otherwise the maximum social distancing possible will be used, however, at a minimum, the CDC-recommended protocol will be observed with a minimum distance of at least 6 feet;
- A single point of entry and single point of exit on opposite sides of the building will be used, establishing a one-way traffic pattern to ensure social distancing;
- Ventilation will be increased as much as possible, opening windows and doors, as weather permits;
- These procedures will be communicated to church members in advance of the service;
- Church bulletin and offering plates will not be used during the service;
- Attendees will be advised to wash their clothes following the service;
- If Church leadership becomes aware of a clear, immediate, and immanent threat to the safety of the attendees or cannot follow the protocols listed above, the gathering will be immediately disbanded.

(*Id.*)

The parties continue to negotiate but have not resolved the dispute at the time this Motions was filed. *See* Exhibit 1.

ARGUMENT

Under Rule 65 of the Federal Rules of Civil Procedure, this Court may issue a temporary restraining order if Plaintiffs show a (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4)

that the grant of the injunction will not disserve the public interest. *See Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). All these factors are met here.

I. Plaintiffs are likely to succeed on the merits of their claims.

To satisfy the "likelihood of success" inquiry, a plaintiff does not have to show ultimate success at trial. Instead, it must present a prima facie case. *Automated Mktg. Sys., Inc. v. Martin*, 467 F.2d 1181, 1183 (10th Cir. 1972). Plaintiffs easily meet this standard.

A. The church-closure order violates the Free Exercise Clause.

Laws that target religious groups for disfavored treatment are not neutral and generally applicable, and are thus *always unconstitutional*. Indeed, the Supreme Court has stated that government action "targeting religious beliefs as such is *never permissible*." *Church of the Lukumi Babalu Aye., Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (emphasis added). And just three years ago, the Supreme Court reiterated that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*, 508 U.S. at 533).

EO 20-18 is not neutral on its face because it bans religious gatherings outright instead of allowing churches and church members to practice responsible cleanliness and social distancing, as is permitted for other exempt secular facilities. Plaintiffs here have voluntarily adopted procedures more than adequate to this end. But because the state has banned the gatherings, "First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation." *Lukumi*, 508 U.S. at 539. That is, "narrower regulation would achieve the [state's] interest in preventing" the spread of the virus. *Id.*

Because the order is granting secular, but not religious, exemptions, it is underinclusive and thus not generally applicable. The plain language of the EO singles out churches such as the Plaintiffs here for disfavored treatment. While a strict 10-person limit is placed on religious gatherings (excluding service participants), 26 exceptions are made for secular gatherings including "shopping malls," "retail establishments," "libraries," and "restaurants and bars." (*See* Pl.'s V. Compl. Ex. 1, ECF No. 1-1.)

This religious targeting also stands in stark contrast to the Governor's earlier Executive Order 20-16, which classifies in-person church gatherings as "essential." (*See* Pl.'s V. Compl. Ex. 2 at ¶ 12.b, ECF No. 1-2.) Simply put, EO 20-18 specifically targets religious institutions for unfair treatment while allowing other secular "essential" organizations to operate with wide latitude. "Despite the [state's] proffered interest in preventing [the coronavirus], the [order is] drafted with care to forbid few [gatherings] but those occasioned by religio[n]." *Lukumi*, 508 U.S. at 543. This is unconstitutional.

Others agree. The court in *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020), temporarily enjoined the City of Louisville from enforcing its ban on religious services, which prohibited "drive-in" services. *Id.* at *4.[6] In so doing, the court noted that, while Louisville's Mayor said it was "not really practical or safe to accommodate drive-up services," the city still allowed drive-through restaurants and liquor stores to remain open. *Id.* at *4. The city therefore was "substantially burdening [the church's] sincerely held religious beliefs in a manner that is not 'neutral' between religious and non-religious conduct, with orders and threats that are not 'generally applicable' to both religious and non-religious conduct." *Id.* at *6.

[6] A copy the TRO ruling in *On Fire Christian Center* is attached to this motion as Exhibit 2.

A similar action is pending against the City of Greenville's church-closure order alleging it is neither neutral nor generally applicable in that it applies only to *church* drive-in services and to no others. *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV (N.D. Miss. Apr. 10, 2020). The United States Attorney General filed a Statement of Interest in *Temple Baptist*. (*See* Pl.'s V. Compl. Ex. 6 [Attorney General's Statement of Interest].)

For these reasons, the order is subject to strict scrutiny, the highest standard of review.

B. The church-closure order violates the Free Speech Clause.

Religious speech is protected under the First Amendment. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Lovell v. City of Griffin,* 303 U.S. 444 (1938). And the government may not restrict private speech on private property, religious or otherwise, without satisfying strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (town's sign ordinance restricting speech "on private property or on a public right of way" subject to strict scrutiny).

Here, the State has categorically banned Plaintiffs from holding services on their own property. Because the Church's services consist entirely of protected expression and speech, such as praise and worship, participation in biblical ordinances and rites, and religious preaching and teaching, the State's church-closure order restricts speech and triggers strict scrutiny. As explained below, the State cannot satisfy that rigorous standard.

C. The church-closure order is subject to strict scrutiny under both Kansas law and the State Constitution because it substantially burdens Plaintiffs' religious exercise.

Kansas statute and the Kansas Constitution's Bill of Rights each forbid the Governor from criminalizing participation in worship gatherings by executive order. The Kansas Preservation of Religious Freedom Act, K.S.A. § 60-5302 *et seq.,* ("Religious Freedom Act") provides:

> Government shall not substantially burden a person's civil right to exercise of religion even if the burden results from a rule of general applicability, unless such government demonstrates, by clear and convincing evidence, that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

See K.S.A. § 60-5303(a).

The Religious Freedom Act applies to restrain actions by the "government," which specifically includes both the state executive branch and local governments and officials. *See* K.S.A. § 60-5302(e). It protects the "exercise of religion," which is defined broadly and expressly includes "the right to act . . . in a manner substantially motivated by a sincerely-held religious tenet or belief." K.S.A. § 60-5302(c). Attending church, synagogue, temple, or mosque for the purpose of worship falls within the core of that definition. Further, the Religious Freedom Act the restrains government from "substantially burden[ing]" the exercise of religion, and "burden" specifically includes "assessing criminal . . . penalties." *See* K.S.A. §§ 60-5302(a), 60-5303(a). There can be no doubt that imposing a criminal penalty of up to 1 year in jail and/or a $2,500 fine is a "substantial burden."

The Religious Freedom Act applies to provisions of EO 20-18 that impose restrictions on religious facilities, services, or activities. Consequently, EO 20-18 can survive scrutiny only if the government demonstrates that the application of EO 20-18 to persons gathering in such facilities or for such services or activities: "(1) Is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." *See* K.S.A. § 60-5303(a). This is a "strict scrutiny" standard of review, which is the highest standard applied in the law and which governments rarely satisfy.

As described above, Plaintiffs do not contest that the restrictions on religious gatherings in EO 20-18 may serve a compelling governmental interest of protecting the public health by

slowing the spread of COVID-19. But the executive order also must be the "least restrictive means" of furthering that compelling interest. And the burden is on the government to prove by clear and convincing evidence that no less-restrictive means is available. *See* K.S.A. § 60-5303(a). It is impossible for the government to meet that burden here.

First, the State cannot show by clear and convincing evidence that it is currently necessary to subject *every* church or other religious services or activities throughout the state to the requirements in EO 20-18 to slow the spread of COVID-19. Current Centers for Disease Control guidance for faith-based organizations recommends a graduated approach based on community risk.[7] Such an individually tailored, less-restrictive means is absent from the blanket statewide approach of EO 20-18.

Second, EO 20-18 exempts 26 categories of activities or facilities from its mass-gathering prohibitions, *see* Pl.'s V. Compl. Ex. 1 at ¶ 2.a–z, just as the prior version of the mass-gatherings order (Executive Order 20-14) had also exempted religious activities. Indeed, *only* religious activities (and non-religious funerals) are singled out for increased regulation under EO 20-18, while other indoor gatherings that invite similar interpersonal interaction and thus pose similar public health risk (such as gathering in shopping malls or other retail establishments or in libraries) remain unregulated, except by the less-restrictive means of general social distancing and hygiene guidelines.

Third, EO 20-18 offers *no* justification—much less clear and convincing evidence—for why voluntary compliance had failed to satisfy the compelling public health interest or why criminal penalties are now necessary to promote compliance by Kansans engaged in religious services or activities (but not, e.g., by those engaged in shopping, child care, providing

[7] *See* "Resources for Community- and Faith-Based Leaders," Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/index html (last accessed April 7, 2020).

government or legal services, or being detoxified). Indeed, the continued reliance on social-distancing and hygiene restrictions for mass gatherings in at least 26 other categories suggests the new burdens on religious services or activities – under penalty of arrest, imprisonment or criminal fine – are not the least-restrictive option to satisfy the State's compelling interest.

The Kansas Supreme Court has also recognized similar religious freedom protections in the Kansas Constitution's Bill of Rights that exceed the religious freedom protections in the federal Constitution. *See State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942); *see also Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) (recognizing that the Kansas Constitution's limits on government action may exceed federal limits). Section 7 of the Kansas Bill of Rights provides:

> The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief.

Kan. Const., Bill of Rights, § 7. Kansas courts interpreting this provision have adopted a version of a strict scrutiny test substantially similar to that in the Religious Freedom Act. *See Stinemetz v. Kansas Health Policy Authority.*, 45 Kan. App. 2d 818, 849–50, 252 P.3d 141, 160 (2011). As such, Kansas' constitution independently requires the order to pass strict scrutiny, which it cannot do.

D. The church-closure order fails strict scrutiny.

Because strict scrutiny applies, the State must prove that banning Plaintiffs' church services "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546. (cleaned up) The State cannot satisfy this "highest level of review." *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016).

While enacting safety measures to curb the spread of the COVID-19 may generally be considered a compelling interest, courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Burwell v. Hobby Lobby*, *Stores, Inc.* 573 U.S. 682, 726–27 (2014) (internal markings omitted). Even "plausible hypotheses are not enough to satisfy strict scrutiny," *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1008 (3d Cir. 1993), and "ambiguous proof will not suffice," *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800 (2011). Thus, "broadly formulated" statewide interests and generalized descriptions of health risk, like those referenced in EO 20-18, are not compelling. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Moreover, "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. (internal markings omitted)

Here, the State's decision to ban Plaintiffs' church services involving more than 10 non-performing congregants is not narrowly tailored to serve any legitimate, let alone compelling, state interest. This is true for at least three reasons.

First, as noted, under the Governor's current and previous stay-at-home orders, she designated "perform[ing] and attend[ing] religious or faith-based services or activities" as part of the essential function of "Preserv[ing] Constitutional or Legal Rights." However, under EO 20-18, religion is now singled out as a *banned* large group activity. This Order does not provide a scientific or public health basis for singling out religion. The constitution's strict scrutiny standard, however, requires the articulation of a legitimate state interest in denying churches rights and privileges otherwise permitted for certain secular facilities.

Second, the Plaintiffs' church services, when conducted with adequate social distancing and public health protocol, do not present the type of risk the State is purportedly trying to

prevent. The Church's parishioners will not spread COVID-19 merely by sitting in a church building. There is no circumstance unique to traditional church functions, activities, or rites that has been cited by the Governor as posing a particular risk to public health that do not exist in other similar settings such as libraries or office building, yet these facilities are exempt under EO 20-18.

And third, the State is not pursuing its purported public interest evenhandedly. The State allows individuals and businesses to engage in virtually identical activity in non-church settings with no threat of punishment. For instance, the church-closure order does not prohibit large groups of individuals from sitting inside a bar, library, shopping mall, or other retail establishment. However, it does prohibit congregants from gathering in a church. *See Lukumi*, 508 U.S. at 536–38 (concluding that when the same conduct "in almost all other circumstances [goes] unpunished," religious conduct has been unconstitutionally "singled out for discriminatory treatment"); *accord On Fire Christian Ctr.*, No. 3:20-cv-264-JRW, 2020 WL 1820249 at *7 (strict scrutiny not satisfied because State's actions are "underinclusive" and "overbroad" in that they "don't prohibit a host of equally dangerous (or equally harmless) activities that [the State] has permitted on the basis that they are 'essential'").

II. Public Health Emergency in Kansas regarding COVID-19 does not justify shutting down Plaintiffs' church services.

Defendant Kelly may argue that the COVID-19 crisis poses a unique circumstance that justifies the extraordinary restrictions imposed by EO-18. However, the government's exercise of emergency powers "is not conclusive or free from judicial review." *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971). "A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict … with any right which [the U.S. Constitution] gives or secures." *Jacobson v. Commonwealth of Mass.*, 197 U.S.

11, 25 (1905); *accord On Fire Christian Ctr.*, No. 3:20-cv-264-JRW, 2020 WL 1820249, at *8 ("[E]ven under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose.").

The *Jacobson* Court looked at three factors for evaluating government actions that infringe fundamental rights: (1) whether the government action has a "real or substantial relation" to the public health crisis; (2) whether the government action is, "beyond all question, a plain palpable invasion of rights secured by the fundamental law;" and (3) whether the government action is arbitrary and oppressive. 197 U.S. at 31, 38. The Governor's church-closure order, and its enforcement by state and local law enforcement against Plaintiffs, fails to withstand scrutiny under each of these factors.

A. The State's targeted prohibition of Plaintiffs' worship services does not have a real or substantial relation to the public health crisis.

In EO 20-18, the Governor cited no authority that merely being present in a church building with more than 10 non-performing congregants would pose a unique and unacceptable threat to public health and safety. The Governor's order cites no scientific, public health, or other authority that explains why churches and religious services or activities pose a special health risk in a way that other exempt secular facilities—such as libraries, shopping malls, restaurants, and bars—do not. Contrary to her initial public gathering ban in EO 20-16, EO 20-18 makes no allowance for churches to hold services with 10 or more non-performing congregants *while practicing social distancing protocol*. Without explanation, however, EO 20-18 allows libraries, shopping malls, restaurants, and bars to remain open to unlimited amounts of individuals as long as social distancing protocol is followed.

In her public comments when issuing EO 20-18, the governor stated that three of eleven "clusters" of COVID-19 infections in the state had been traced to religious gatherings.[8] However, she made no attempt to explain the particular local circumstances or conditions (e.g. urban, rural, size of gathering, type of religious gathering, worship service, informal social gathering, etc.) surrounding such "clusters," whether social distancing protocol had been followed at such gatherings, or whether any of the facility conditions *unique to churches* were known to have contributed to the cluster outbreaks.

B. The State's order is a plain, palpable invasion of Plaintiffs' constitutional rights.

The State's church-closure order precludes Plaintiffs from assembling and worshiping together with more than 10 non-performing congregants, even if ALL social distancing and public health recommendations of KDHE and local county orders are followed. For the reasons discussed in this motion, the State's order is a plain, palpable invasion of constitutional rights.

C. The State's decision to shut down Plaintiffs' church services is arbitrary and oppressive.

EO 20-18 is beyond unreasonable—it is arbitrary and oppressive. Churches and religious gatherings were specifically targeted. The closure order includes particularized language clarifying the broad ban on church gatherings of over 10 people. The closure order goes to particular lengths to ban gatherings of *congregants* and *parishioners* within the same building or confined or enclosed space. It makes a limited exception to the 10-person limit solely for persons performing a religious service but makes no attempt to explain or justify its blanket prohibition, even if social distancing is practiced.

[8] Shorman, *supra* note 1.

EO 20-18's arbitrary and oppressive targeting of churches can also be clearly seen when compared to the Governor's previous mass gathering order, EO 20-14, in which religious gatherings were categorically *exempt* from the mass gathering prohibition "as long as attendees can engage in appropriate social distancing."

Notably, the allowance for persons to gather in particular contexts was carried over from EO 20-14 to EO-18 for **libraries** with no express requirement that such persons do so only if they can "engage in appropriate social distancing." Under EO 20-18, persons can gather in **shopping malls and retail establishments** "where large numbers of people are present but are generally not within arm's length of one another for more than 10 minutes." Under EO 20-18, as under EO 20-14, persons can gather at **restaurants and bars** provided only that the facilities "preserve social distancing of 6 feet between tables, booths, bar stools, and ordering counters; and cease self-service of unpackaged food, such as in salad bars or buffets."

None of these particularized conditions expressly allowed for libraries, shopping malls, restaurants, or bars are available to Plaintiffs when gathering with their congregations. For churches, there is only a blanket ban on 10 or more non-performing attendees.

Criminalizing religious gatherings without regard to local conditions or the presence of adequate social distancing protocol does not further the interest at hand, and more importantly here, is unconstitutional.

III. Plaintiffs have already suffered irreparable harm and will continue to suffer irreparable harm without an injunction.

The Supreme Court recognizes that the deprivation of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs' constitutional rights have been violated by the State and will continue to be violated absent immediate relief.

IV. The balance of equities sharply favors Plaintiffs.

The equities favor Plaintiffs because the law places a premium on protecting constitutional rights. The State's church-closure order irreparably harms Plaintiffs' constitutional freedoms and significantly hinders their ministry to their parishioners and community. Meanwhile, an injunction will not harm the State at all. The State can achieve any valid interest through other orders already issued. It need not apply an unconstitutional order targeting churches. State and local health officers can subject known persons and "clusters" to orders of isolation and quarantine. The State is free to enact permissible and reasonable regulations on church services, including narrowly-tailored social distancing and gathering conditions precedent. But a flat ban on more than 10 non-performing attendees serves no governmental interest and is not narrowly tailored.

V. An injunction would serve the public interest.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd' sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (quotations omitted). This is particularly true for First Amendment freedoms. Because the requested injunction will accomplish this, the public interest also favors an order protecting Plaintiffs.

CONCLUSION

Plaintiffs First Baptist Church, Pastor Stephen Ormord, Calvary Baptist Church, and Pastor Aaron Harris respectfully request that this Court grant their request for a Temporary Restraining Order, allowing them to continue their in-person, indoor church services with ten or more non-performing people while practicing adequate social distancing and public health protocol.

Respectfully submitted this 17th day of April 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, a courtesy copy of this motion was delivered to counsel for Governor Laura Kelly.

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