IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LIGHTHOUSE FELLOWSHIP CHURCH, Plaintiff, v. RALPH NORTHAM, in his official capacity of Governor of the Commonwealth of Virginia Defendant.	)	Case No. 2:20-cv-204-AWA-RJK

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

Pursuant to this Court's briefing order (dkt. 22), Plaintiff, Lighthouse Fellowship Church ("Lighthouse" or "Church"), by and through the undersigned counsel, hereby submits it reply in support of its Emergency Motion for Injunction Pending Appeal (dkt. 18, "IPA Motion").

INTRODUCTION

In his response opposing Lighthouse's IPA Motion (dkt. 36, Defendant's Memorandum in Opposition to Plaintiff's Motion for Injunction Pending Appeal ("IPA Response")), Governor Northam presents numerous arguments in support of his claim that the Constitution **somehow** permits him to treat Lighthouse differently than other similarly situated non-religious and so-called "essential" businesses, whose gatherings are of like kind to Lighthouse's worship services. The Governor contends that Lighthouse lacks standing to challenge the GATHERING ORDERS because (1) such orders—contrary to their plain text—do not apply to a church or an "entity," (2) that (contrary to binding law) the Eleventh Amendment somehow bars the unquestionably prospective relief that Lighthouse seeks in its IPA Motion, (3) that this Court should (contrary to binding law) abstain from determining Lighthouse's claims despite no state proceeding existing

against Lighthouse, and (4) that (contrary to an avalanche of mounting precedent saying otherwise) the First Amendment does not prohibit the Governor from treating Lighthouse differently during a pandemic in which "religious gatherings" somehow (yet, inexplicably) pose greater health risks than Walmart, Lowes, Home Depot, Target, or liquor stores pose to gatherings of more than 10 individuals at one time. (IPA Resp. 9–29). The Governor's contentions are not known to the law, and the IPA Motion should be granted. Indeed, the First Amendment demands nothing less.

If the Governor's contentions were correct, then the conclusions of numerous Article III courts throughout the country would somehow have missed what only he found—a constitutional pause button. Indeed, while—at times—"the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights." *American Communist Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 453 (1950) (Black, J., dissenting), where the fog of public excitement is at its apex, "the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). Without doubt, "[t]herein lies the security of the Republic, the very foundation of constitutional government." *Id.*

But, as the majority of such courts have held—including the highest court to date to consider such gathering prohibitions during COVID-19—prohibitions on religious gatherings that are not equally applied to similarly situated non-religious gatherings transgress the First Amendment and must be enjoined, as even the fog of COVID-19 does not and should not override the demands of our institutional charter. Indeed, several courts, including the Sixth Circuit **twice**, have issued injunctions in cases virtually identical to the instant matter. So, too, should this Court.

LEGAL ARGUMENT

I. LIGHTHOUSE INDISPUTABLY SEEKS PROSPECTIVE RELIEF, AND ITS CLAIMS ARE THUS NOT BARRED BY THE ELEVENTH AMENDMENT.

A. *Ex Parte Young* Specifically Permits Lighthouse's Claims for Prospective Relief, and Removes the Cloak of Eleventh Amendment Immunity From the Governor.

The Governor wrongfully contends he is immune from Lighthouse's suit in this matter because of the Eleventh Amendment. (IPA Resp. 10–13). The familiar *Ex parte Young* exception to Eleventh Amendment sovereign immunity "allows suits against state officers for **prospective** equitable relief from ongoing violations of federal law." *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001) (emphasis added). Indeed, "[a] court need only conduct a **straightforward inquiry** into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (emphasis added). Lighthouse easily satisfies this "straightforward" inquiry. The gravamen of Lighthouse's Verified Complaint makes it abundantly clear that its primary causes of action relate to ongoing violations of **federal** constitutional liberties. (V.Compl. ¶¶ 84–165 (alleging the GATHERING ORDERS violate the First and Fourteenth Amendment, and the Guarantee Clause). In fact, Lighthouse's IPA Motion focuses primarily on federal constitutional issues. (IPA Mot. ¶¶ 8–9).

The primary relief sought by Lighthouse in this action is entirely prospective. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965) ("injunctive relief looks to the future," and is thus prospective); *Antrican v. Odom*, 290 F.3d 178, 185–86 (4th Cir. 2002) (injunctions and temporary restraining orders constitute prospective injunctive relief satisfying *Ex Parte Young*); *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 292 (4th Cir. 2001) ("the Eleventh Amendment does not preclude individuals from bringing suit against State officials for prospective declaratory

and injunctive relief designed to remedy ongoing violations of federal law"). Lighthouse seeks a TRO, preliminary and permanent injunctions, and declaratory relief. All such requests are prospective and easily satisfy the straightforward inquiry relevant to its claims against the GATHERING ORDERS, and thus are not barred by the Eleventh Amendment. (V.Compl. 45–49). Indeed, if Lighthouse's claims for entirely prospective relief were somehow barred by the Eleventh Amendment, as the Governor contends, then *Ex Parte Young* would necessarily represent some constitutional anomaly unknow to the law. Such is not the case.

B. The Governor Has a Special Relationship With His Own Executive Orders, Which Only He Has the Authority to Issue, and the Governor Has Explicit Constitutional and Statutory Authority to Enforce His Own Executive Orders.

Despite Lighthouse's easily satisfying the straightforward prospective relief inquiry under the Eleventh Amendment test, the Governor nevertheless contends that Lighthouse's claims are still barred because Governor Northam has no "special relation" or enforcement capacity under the GATHERING ORDERS and is thus not subject to suit under the Eleventh Amendment. (IPA Resp. 10–11). This, too, is specious. As the Fourth Circuit has recognized, *Ex Parte Young* "permits a federal court to issue prospective, injunctive relief against state officers to prevent ongoing violations of federal law." *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010). "The requirement that the violation of federal law be ongoing is satisfied when a state officer's enforcement of an allegedly unconstitutional law is threatened, even if the threat is not yet imminent." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001). While "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials proper parties to litigation," *Waste Mgmt*., 252 F.3d at 331, where—as here—the Governor has specific **and explicit** constitutional and statutory authority to enforce his own GATHERING ORDERS, the Eleventh Amendment provides no refuge for him.

The Governor has much more than a mere general duty to enforce the GATHERING ORDERS. Under the Constitution of Virginia, "[t]he chief executive power of the Commonwealth shall be vested in a Governor." Va. Const. Art. V, § 1. The Governor is not only tasked with "faithfully execut[ing] the laws," which some courts have found too general to avoid Eleventh Amendment problems, but, **in the very section he purports to exercise his authority to issue the GATHERING ORDERS at all**, the Constitution of Virginia specifically grants him **enforcement** authority over the GATHERING ORDERS. *See* Va. Const. Art. V, § 7 ("The Governor . . . shall have the power to . . . **enforce** the execution of the laws" during times of emergency. (emphasis added)). Thus, the Governor's authority to enforce his GATHERING ORDERS is plainly contemplated, and indeed **mandated**, by the Constitution of Virginia, including by virtue of the specific provisions under which he claims authority to impose his onerous restrictions on Lighthouse's religious gatherings.

The Governor also has explicit and unquestioned enforcement powers under the Virginia Code. The Virginia Code makes the Governor the "Director of Emergency Management," and requires him to "take such action from time to time as is necessary." Va. Code § 44-146.17. In that statutory grant of authority, the Governor is responsible for ensuring that the provisions of the Emergency Operations Plan are **enforced** and effectuated. *Id.* The Governor is empowered to delegate enforcement authority, to take all measures necessary to aid in the Commonwealth's response to the declared emergency, and to direct state and local law enforcement and emergency agencies to coordinate the response to the declared emergency with the Commonwealth's emergency plans, which only he controls as the Director of Emergency Management. Va. Code § 44-146.17. This is a specific grant of authority to enforce the laws (or Executive Orders that only the Governor can make) during a public health emergency, which is plainly contemplated under

the GATHERING ORDERS. (V.Compl. ¶¶ 24–38). Indeed, in such times as these, it appears (while the General Assembly is absent and not in session) the Governor has contended that he—alone—is the authority to enforce and execute his GATHERING ORDERS, except when it is convenient in litigation to say otherwise.

In similar challenges to similar gathering restrictions during COVID-19, federal courts have rejected similar claims that a governor is immune from suit over executive orders that only a governor could issue. *See, e.g., First Baptist Church v. Kelly*, No. 20-11022-JWB, 2020 WL 1910021, *2 (D. Kan. Apr. 18, 2002) (granting temporary restraining order and holding that the Eleventh Amendment did not bar similar COVID-19 claims against the Governor of Kansas because the plaintiff church sought only prospective relief and the governor had statutory and constitutional authority to enforce laws during a public health emergency). The Kansas Governor requested modification of the TRO on Eleventh Amendment immunity grounds, but the district court rejected that argument. *See First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1984259, *3 (D. Kan. Apr. 27, 2020). Despite the Kansas Governor's similar arguments to those made here, the district court held that "it is not necessary that a duty to enforce [the challenged law] be declared in the same act which is to be enforced." 2020 WL 1984259, at *4. There, as here, the Kansas Constitution charged the Governor with not only the general duty to see that the law is "faithfully executed," but also granted him "express constitutional responsibility for '*enforcement* of the laws.'" *Id.*, at *6. Not only that, but, as here, the relevant emergency declaration statutes in Kansas gave him broad authority to see that executive orders and emergency declarations were enforced. *Id.* There, as here, the Kansas Governor was entitled to ensure that state and local emergency and law enforcement agencies cooperated in the response, to take action which may be necessary for the effectiveness of an emergency response plan, to delegate authority to enforce the

laws, and to take executive action concerning the declared emergency. *Id.* All these things, which are equally present under Virginia law here, led the district court to conclude that "the governor has sufficient connection with the enforcement of the relevant executive order to satisfy [*Ex Parte Young*]." *Id.*, at *7.

"The fact that the state officer by virtue of his office, has *some* connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material **so long as it exists**." *Ex Parte Young*, 2099 U.S. at 157 (emphasis added). The Governor clearly has enforcement authority under the Constitution of Virginia, and the Virginia Code specifically envisions his enforcement authority during times of declared emergencies, which the Governor's own GATHERING ORDERS specifically cite as the basis of authority for their own enactment. His connection to the GATHERING ORDERS is thus present and sufficient to remove the cloak of Eleventh Amendment protection.[1]

II. LIGHTHOUSE HAS ARTICLE III STANDING TO PURSUE ITS CLAIMS IN THIS COURT.

A. The GATHERING ORDERS Prohibit Lighthouse's Religious Activities, and Thus Impose Irreparable Injury on the Church.

The Governor contends that Lighthouse does not have standing to pursue its claims in this Court because the GATHERING ORDERS only apply to individuals, not churches. (IPA Resp. 14). This contention has no merit, and is belied by the plain text of the GATHERING ORDERS. First, as made plain by Lighthouse's Verified Complaint, the GATHERING ORDERS encompass

[1] The Governor has also raised sovereign immunity under the Eleventh Amendment as to Lighthouse's claims under the Virginia Act for Religious Freedom. (IPA Resp. 13). Given the emergent nature of the instant motion and that the requested relief primarily arises from Lighthouse's federal constitutional claims, Lighthouse has omitted refutation of that incorrect argument and hereby expressly preserves it for subsequent briefings.

all of the Executive Orders and directives that have arisen out of COVID-19. (V.Compl. ¶ 38). In the plain text of the GATHERING ORDERS, not only are "all public and private gatherings of more than 10 individuals," prohibited, but schools, businesses, and many other **entities** were likewise forced to close. (Dkt. 1-3, V.Compl. Ex. B, at 2–3). Further, the GATHERING ORDERS specifically contemplate an express prohibition on "religious . . . **events**," which Lighthouse's worship services unquestionably and plainly encompass. Finally, and most importantly, the Governor has issued "guidance" as to religious entities that host in-person worship services. That directive specifically states that "**[p]laces of worship** that conduct in-person services must limit gatherings to 10 people. (Dkt. 1-6, V.Compl. Ex. E, at 1 (emphasis added)). The guidance directive further states that these directives apply to "various **religious institutions**" (*id.* (emphasis added)), such as Lighthouse. The Governor's notion that Lighthouse is in no way harmed or even implicated by the GATHERING ORDERS is plainly wrong. If the GATHERING ORDERS restrict "religious events" and "religious institutions," then they do not merely restrict the constitutional liberties of individuals, but—by their plain text—restrict Lighthouse as well.

Even if the GATHERING ORDERS only applied to individuals, which is belied by the plain text of the GATHERING ORDERS themselves, a religious organization or church, such as Lighthouse, is nothing more than a composition of its people. Indeed, the term "church" "can and may be used to denote the whole body of Christian believers, [and] a body of men united together by the profession of the same Christian Faith." *Medina v. Catholic Health Initiatives*, 146 F. Supp. 3d 1190, 1199 (D. Col. 2015). Properly understood, then, the relevant definition makes "manifest that the suggestion that a church is no more than a physical place to worship evidences a profound misunderstanding and understatement of the nature of religious devotion and service." *Id.* Put simply, "**there would be no need for a house in which to worship if there were no worshippers**

to gather there. **In other words, a church is defined principally by its people—the body of the faithful who profess a similar set of guiding religious principles**." *Id.* (emphasis added). *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (noting that a religious corporation is merely the conduit through which its owners and members exercise their own personal religious beliefs).

The notion that Lighthouse has no standing because there is no prohibition on entities is false. If Lighthouse had no members who wished to gather it would have no need to exist, and no worshippers would be prohibited from gathering together under the GATHERING ORDERS. Lighthouse has standing to bring the instant claims, as a matter of fact and law, and this Court has jurisdiction to entertain them.

B. Even If the GATHERING ORDERS Only Applied to Individuals, Which They Do Not, Lighthouse Would Have Associational Standing to Bring Its Claims on Behalf of Its Members.

1. Lighthouse satisfies the threshold requirement for associational standing by alleging that it has members.

Even if the Governor's contention that the GATHERING ORDERS only apply to individuals and not churches was correct, a contention contradicted by the plain terms of the GATHERING ORDERS (*see supra* Section II.A), Lighthouse would still have associational standing to bring its claims on behalf of its members. That a church has associational standing to bring claims on behalf of its members is a relatively uncontroversial proposition. *See, e.g.*, *Oklevueha Native American Church of Haw., Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012) (granting church associational standing to bring Free Exercise claims on behalf of its members); *Heartland Academy Cmty. Church v. Waddle*, 427 F.3d 525 (8th Cir. 2005) (church had associational standing to pursue Fourth Amendment claims on behalf of its members); *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272 (5th Cir. 1981) (granting associational standing of church to bring free

exercise claims under the First Amendment); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998) (recognizing church's ability to raise claims on behalf of its members). Indeed, "**churches may certainly deserve associational standing in certain cases, for example, those involving religious issues**." *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427, 431 (S.D.N.Y. 1993) (emphasis added).

"**The threshold requirement for even applying this test is that the organization has actual members or indicia of membership**." *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 50 n.12 (D.D.C. 1998) (emphasis added) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977). There is no question Lighthouse crosses this threshold. (*See, e.g.*, V.Compl. ¶ 4 (noting that Lighthouse's **members** were threatened with criminal sanctions if they attended a worship service with more than 10 people); ¶ 7 ("Lighthouse's **members** were also threatened with criminal sanctions" (emphasis added)); ¶ 9 (noting that many of Lighthouse's **members** do not have access to an online worship service); ¶ 10 (noting that absent emergency relief from this Court, Lighthouse's **members** would continue to be threatened with criminal sanctions); ¶ 51 (noting that law enforcement threatened to impose sanctions on Lighthouse **members** and attendees); at 46 (requesting relief on behalf of Lighthouse and its **members**)). Lighthouse has alleged it has members, and that its claims are similar to those of its members. It thus crosses the threshold to reach the traditional three-part test for associational standing. *See Am. Legal Found. v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987) ("The assumption that an organization litigates on behalf of its members is, after all, implicit in the three-part test.")

2. Lighthouse satisfies the Supreme Court's traditional three-part test for associational standing.

Once past the threshold requirement of having members, the traditional test for associational standing is well known:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

United Food & Comm. Workers Union, Local 751 v. Brown Grp., Inc., 517 U.S. 544, 553 (1996) (internal quotation marks omitted) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Lighthouse and its members easily satisfy these elements.

a. Lighthouse's members would have their own Article III standing to bring claims against the GATHERING ORDERS.

The Court should reject Governor Northam's contention that Lighthouse has made no showing that its members would independently have standing to challenge the GATHERING ORDERS on their own. (IPA Resp. 15). As its Verified Complaint demonstrates, Lighthouse **and its members** were threatened with criminal sanction under the unconstitutional GATHERING ORDERS. (V.Compl. ¶¶ 4 (noting that Lighthouse's members were threatened with criminal sanctions if they attended a worship service with more than 10 people); ¶ 7 ("Lighthouse's members were also threatened with criminal sanctions"); ¶ 9 (noting that many of Lighthouse's members do not have access to an online worship service); ¶ 10 (noting that absent emergency relief from this Court, Lighthouse's members would continue to be threatened with criminal sanctions); ¶ 51 (noting that law enforcement threatened to impose sanctions on Lighthouse members and attendees); at 46 (requesting relief on behalf of Lighthouse and its members)).

That threat of criminal sanction is alone sufficient to establish standing for Lighthouse's members under the First Amendment. *See, e.g., Church of Scientology*, 638 F.2d at 1279 ("If, as claimed by the Church, its members were harassed and abused to the extent that they could not freely exercise their religious beliefs, **then certainly the members would have standing to sue in their own right**." (emphasis added)); *Oklevueha*, 676 F.3d at 839 (noting that because the

church challenged a restriction on free exercise that was a regular part of its members' practices, "the members are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had one of the members themselves brought suit").

In fact, given the allegations of Lighthouse's Verified Complaint that **its members have been threatened with criminal sanction under the GATHERING ORDERS for merely going to church**, it is a black letter principle of First Amendment law that they would have standing to bring their own claims in this Court. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) ("The Constitution can hardly be thought to deny one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands."); *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) ("We have recognized that, 'to demonstrate injury in fact, it [is] sufficient . . . to show that [one's] First Amendment activities ha[ve] been chilled.'" (alterations in original) (quoting *Smith v. Frye*, 488 F.3d 263, 272 (4th Cir. 207)). The threat of criminal sanction here, which was plainly imposed on Lighthouse's members (V.Compl. ¶¶ 4, 7, 9, 10, 51), is unquestionably sufficient to impute Article III injury to Lighthouse's members in their own right.

b. The interests Lighthouse seeks to protect are germane to its members.

The Governor does not contest, and therefore concedes, that the interests sought to be protected by Lighthouse are germane to its members. (IPA Resp. 14–15). Nor could the Governor contest the point. As numerous courts have held, where the church "can fulfill its purpose only if its members are allowed to engage in the free exercise of their religion," the interest sought to be

protected is unquestionably germane to its members' interests. *Church of Scientology*, 638 F.2d at 1279–80; *see also Oklevueha*, 676 F.3d at 839 (where church sought to protect its members' practices in religious worship, the interests were germane and satisfied the second element of *Hunt*).

As Lighthouse has plainly alleged, its members have sincerely held religious beliefs, rooted in Scripture's commands 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. ¶ 87 (citing *Hebrews* 10:25)). Indeed, as Lighthouse alleges: **the entire purpose of the Church (in Greek "ekklesia," meaning "assembly") is to assemble together Christians to worship Almighty God**. (V.Compl. ¶ 87). Also, as mentioned *supra*, "there would be no need for a house in which to worship if there were no worshippers to gather there. In other words, **a church is defined principally by its people—the body of the faithful who profess a similar set of guiding religious principles**." *Medina v. Catholic Health Initiatives*, 146 F. Supp. 3d 1190, 1199 (D. Col. 2015) (emphasis added). Lighthouse's efforts to secure injunctive relief against the GATHERING ORDERS' prohibitions on religious assembly and worship of more than 10 people is plainly germane to the *raison d'etre* of Lighthouse and its members. Indeed, as both the Verified Complaint (V.Compl. ¶ 87) and relevant precedent dictate, there would be no need for Lighthouse if there were not members of Lighthouse to gather together for religious worship that is currently and unconstitutionally prohibited by the GATHERING ORDERS. Lighthouse easily satisfies the second element of *Hunt*'s associational standing test.

c. Injunctive relief and a determination of the constitutionality of the GATHERING ORDERS do not require the participation of Lighthouse's members.

The relief requested in Lighthouse's Verified Complaint does not require the individual participation of its members. The Governor does not (and could not) contest this point either, and therefore concedes it, too. (IPA Resp. 14–15). "If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members." *United Food & Comm. Workers*, 517 U.S. at 553 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). Thus, when injunctive relief is sought—such as Lighthouse seeks here—there is no need for individual participants to seek the requested relief. *See Oklevueha*, 676 F.3d at 839 (church's members not necessary to grant the requested injunctive relief); *Church of Scientology*, 638 F.2d at 1280 ("because the claims asserted and the relief requested affect the membership as a whole, we conclude that the claim does not require individual participation"). As mentioned *supra*, Lighthouse seeks a temporary restraining order, injunctive relief, and declaratory relief. (V.Compl. at 45–49). Determinations of such relief do not require individual member participation as a matter of law.

As the Supreme Court has recognized, a "suit rais[ing] a pure question of law" does not require the participation of individual members of an organization or association. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288 (1986). Here, the principal thrust of Lighthouse's Verified Complaint is the unconstitutionality of the GATHERING ORDERS and their discriminatory treatment of religious gatherings. (V.Compl. ¶¶ 84–165). Thus, the participation of individual members of Lighthouse is simply not required.

3. The Governor's own argument demonstrates that Lighthouse is a proper party to bring its members' claims because they face a hindrance to bringing them.

Beyond the traditional elements for associational standing, some courts impose the additional condition that the association's members be hindered in bringing their own claims. To satisfy this requirement, courts have required that an associational plaintiff demonstrate that its members "face [some] obstacle to litigating their rights themselves," *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 209 (6th Cir. 2011), that its members "might be deterred from suing" on their own behalf, *id.*, or that its members encounter some sufficient impediment to bringing their own claims. *Penn. Psychiatric Ass'n v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002); *see also Freilich v. Upper Chesapeake Health, Inc.*, 313 F3d 205, 215 (4th Cir. 2002) (noting that a hindrance showing is required under third-party (not associational) standing).

Interestingly, in contending that the plight of Lighthouse's Pastor Wilson precludes associational standing (IPA Resp. 15), the Governor concedes the hindrance element. There is no question that some of Lighthouse's members face hindrances to litigating the instant claims on their own behalf. For example, Pastor Wilson—who is also a member of Lighthouse—cannot bring his own claims at this time because the Commonwealth has ongoing criminal proceedings against him (IPA Resp. 15), which would require this Court to abstain. If the abstention doctrine closes the doors of this Court to Pastor Wilson, albeit temporarily, it is hard to imagine what additional hindrance to his individually bringing suit would suffice. And many of Lighthouse's other members face their own hindrances—they are recovering drug addicts, former prostitutes, and others simply trying to put their lives back together, who cannot summon the resources to even watch a church service online, much less summon the strength to take on the full might of the

Commonwealth of Virginia to vindicate their constitutional rights. (V.Compl. ¶ 9). These hindrances are plainly sufficient to warrant Lighthouse's bringing the claims of its members via associational standing.

The Governor goes even farther, however, and claims this Court must abstain from hearing Lighthouse's claims under *Younger v. Harris*, 401 U.S. 37 (1971), because of the Commonwealth's criminal prosecution of its member, Pastor Wilson. (IPA Resp. 15). **Such is not the law**. The operative facts in the case the Governor cites for support of its argument, *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245 (8th Cir. 2012), are so far afield from the relevant facts here that it is plainly inapposite. For one, **unlike here**, the plaintiff church in *Tony Alamo* was **joined** in its lawsuit by the individual plaintiffs who were the subjects of the ongoing state proceedings concerning the termination of parental rights for abuse and neglect. 664 F.3d at 1247 (noting that the church **and** two of its members brought suit in federal court while the state court custody proceedings were ongoing). Moreover, **unlike here**, the church in *Tony Alamo* was inextricably intertwined with the ongoing state court custody proceedings because (1) the minor children who were taken into state custody due to allegations of abuse "**lived on [the church's] property**," along with their parent members, and (2) much of the alleged abuse ws found to have occurred **on the church's property** where the children lived. *Id.* (emphasis added). Furthermore, the parents involved in the state court proceedings suggested that the alleged abuse and neglect was required by their church. *Tony Alamo Christian Ministries v. Selig*, No. 09-CV-4031, 2010 WL 435635, *3 (W.D. Ark. Feb. 2, 2010). The Governor can find no support in *Tony Alamo* for the notion that Pastor Wilson's criminal proceedings require this Court's abstention from hearing Lighthouse's claims.

To be sure, *Younger* abstention requires continuity of the parties in the state-court proceeding and the federal litigation in which the government seeks the application of abstention. *See, e.g.*, *Joseph v. Blair*, 482 F.2d 575, 578 (4th Cir. 1973) (holding that "*Younger* **neither authorized nor required the non-exercise of federal jurisdiction**" where, as here, "there is neither criminal nor civil litigation pending in a state court in which questions sought to be raised in federal litigation **by the same parties** or those in privity with them are present" (emphasis added)); *Hogge v. Hedrik*, 391 F. Supp. 91, 100 (E.D. Va. 1974) (noting that *Younger* abstention is appropriate "where **the party** seeking a declaration that a statute or ordinance was unconstitutional was **the object** of a pending prosecution under the statute or ordinance" (emphasis added)); *id.* at 101 ("*Younger* does not apply . . . when there is no pending state civil or criminal litigation **between the parties**" (emphasis added)); *Yang v. Tsui*, 416 F.3d 199, 204 n.5 (3d Cir. 2005) (noting that the first prong of *Younger* abstention requires the relevant state proceeding to involve "**the same parties**" (emphasis added)); *Bates v. Van Buren*, 122 F. App'x 803, 805 (6th Cir. 2004) (abstention involves "a parallel case **between the same parties**" (emphasis added)); *Lemings v. Eastridge*, No. 4:12CV00342 JLH, 2012 WL 3811797, 3 (E.D. Ark. Sept. 4, 2012) ("abstention is inappropriate, as the parties in the two actions are not the same"). The Supreme Court itself has made it clear that *Younger* abstention applies in a situation, **unlike here**, where "it appears the state has already instituted proceedings in the state court to enforce the challenged statute against **the federal plaintiff**," *Trainor v. Hernandez*, 431 U.S. 434, 440 (1977) (emphasis added), and where—unlike here—the "litigation [is] **between the same parties**." *Id.* (emphasis added).

Here, there is simply no continuity of parties. Lighthouse seeks injunctive relief from this Court prohibiting the Governor from enforcing the GATHERING ORDERS in a prospective

manner, and Lighthouse is not currently a party in a Virginia criminal proceeding. As the Governor plainly concedes, **Lighthouse is not and could not be party to such a criminal action currently pending in Commonwealth courts**. (IPA Resp. 14). Therefore, under the controlling authorities, even the Governor's own arguments prove abstention cannot apply to Lighthouse.

III. NUMEROUS FEDERAL COURTS HAVE ENJOINED ENFORCEMENT OF SIMILAR COVID-19 GATHERING ORDERS BECAUSE THEY TRANGRESS THE FREE EXERCISE CLAUSE "BEYOND ALL DOUBT."

A. Since This Court Denied Lighthouse's Requested TRO, the Highest Federal Court to Address Similar COVID-19 Orders Prohibiting Religious Gatherings, Including In-Person Gatherings, Has Twice Held That the Orders Violate the Free Exercise Clause.

When this Court denied Lighthouse's TRO it did not have the benefit of the substantial circuit and district precedent subsequently developed on the identical issues. Most problematic now for the Governor's position (IPA Resp. 18–24) is that the Sixth Circuit—the highest court to consider similar COVID-19 restrictions—has twice rejected the Governor's arguments and enjoined such restrictions, conclusively determining that restrictions on drive-in **and in-person** worship services violate the First Amendment and a state RFRA. *See Roberts v. Neace*, No. 20-5465, slip op. (6th Cir. May 9, 2020) (enjoining enforcement of COVID-19 restrictions on **in-person** worship services) (attached here to as EXHIBIT A); *Maryville Baptist Church, Inc.*, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (enjoining enforcement of COVID-19 restrictions on drive-in worship services).

In *Roberts*, the Sixth Circuit **granted an injunction pending appeal prohibiting the Governor of Kentucky from treating religious gatherings—including in-person worship services—differently from other so-called "essential" businesses**. The court noted that the Kentucky COVID-19 executive orders prohibiting religious gatherings "likely fall on the prohibited side of the line" that the Free Exercise Clause draws. *Roberts*, slip op. at 5. Indeed, "[a]s

a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Id.* As such, the Sixth Circuit held that the COVID-19 orders, similar to those at issue in the instant litigation, likely violate the First Amendment, and should be enjoined.[2]

Just as Lighthouse has requested here, the Kentucky church merely sought to be treated equally with similar non-religious gatherings that are not subject to the same outright prohibition on gatherings of more than 10 people—under threat of criminal sanction—as that imposed on churches. As the Sixth Circuit noted,

> Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth'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 do not ask to share a chalice. **The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same**.

Roberts, slip op. at 6 (emphasis added).

> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

Id. (bold emphasis added).

Though Governor Northam asserts he is not hostile towards religious gatherings, his self-serving statements are irrelevant. "The constitutional benchmark is government *neutrality*, **not**

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[2] Although the *Roberts* decision was issued after the Governor's IPA Response, the Governor was aware of the Sixth Circuit's *Maryville Baptist* decision, but relegated it to a footnote. (IPA Response at 29 n. 30). In so doing, the Governor failed to apprehend that the Sixth Circuit's analysis in *Maryville Baptist*, on which it enjoined prohibitions on drive-in worship services, applies equally to in-person services, as made clear in *Roberts* which "incorporate[d] some of the reasoning (and language) from [its] earlier decision." *Roberts*, slip op. at 5.

government avoidance of bigotry." *Roberts*¸ slip op. at 7 (emphasis added) (internal quotation marks omitted). In so holding, the Sixth Circuit found that COVID-19 orders, virtually identical to those here, simply fail the constitutional standard. It therefore enjoined the Commonwealth of Kentucky from enforcing the discriminatory prohibitions against religious gatherings. *Id.*

B. Other Federal Courts Have Likewise Granted Blanket Injunctions Against Prohibitions on Religious Gatherings.

The Governor's IPA Response ignores reality that numerous courts considering COVID-19 restrictions and prohibitions on religious gatherings have enjoined the restrictions as violative of the Free Exercise Clause. (IPA Resp. 18–24). On May 8, 2020, the United States District Courts for both the Eastern and Western Districts of Kentucky held that prohibitions on religious gatherings (whether drive-in or in-person) simply do not pass muster under the First Amendment. *See Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, slip op. (W.D. Ky. May 8, 2020) [hereinafter *Maryville* W.D. Ky.] (attached hereto as EXHIBIT B); *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, slip op. (E.D. Ky. May 8, 2020) (attached hereto as EXHIBIT C).

In the case consolidated with *Roberts* before the Sixth Circuit, *Maryville Baptist Church, Inc. v. Beshear*, the Western District of Kentucky entered an order Friday granting an injunction pending appeal and a preliminary injunction prohibiting the enforcement of Kentucky's COVID-19 orders against in-person worship services. *Maryville* W.D. Ky., slip op. at 1, 6. The district court had previously denied the plaintiffs' motion for temporary restraining order, 2020 WL 1909616 (W.D. Ky. April 18, 2020), but ruled for the plaintiffs Friday after finding the Kentucky Governor failed to meet his burden to prove narrow tailoring under the strict scrutiny standard. *Id.* at 4–6 ("The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals.") ("He still 'has offered no good

reason . . . for refusing to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the same.'").

In *Tabernacle*, the Eastern District of Kentucky issued a temporary restraining order enjoining Kentucky from enforcing its COVID-19 orders prohibiting religious gatherings. Slip op. at 12. In that order, the court noted that—even in times of emergency—the First Amendment does not "mean something different because society is desperate for a cure or prescription." *Id.* at 1. There, the court noted that it was tasked with "identifying precedent in unprecedented times," *id.* at 7, and that COVID-19 was a different yard stick. *Id.* However, the court noted precisely what Lighthouse pointed out in its TRO motion here, that "**even under *Jacobsen*, constitutional rights still exist**." *Id.* at 8 (quoting *On Fire Christian Ctr, Inc v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820248, *15 (W.D. Ky. Apr. 11, 2020) (emphasis added)). In fact, "while courts should refrain from second-guessing the efficacy of a state's chosen protective measures" a government very well may "go so far beyond what was reasonably required for the safety of the public as to authorize or **compel the courts to interfere**." *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (emphasis added)). **The Governor's actions here have transgressed that line**. Indeed,

> It follows that the prohibition on in-person services should be enjoined as well. . . . There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, *benefit from constitutional protection***.

Id. at 10 (emphasis added).

As Lighthouse pointed out in its original TRO motion, the District of Kansas's *First Baptist* opinion is particularly instructive here as well. The *First Baptist* court issued a TRO enjoining Kansas officials from enforcing the state's 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* 2020 WL 1910021, at *6–7. The TRO specifically states that the government's disparate treatment of religious gatherings is a violation of the Free Exercise Clause because it shows 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 Northam'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," *Id.*, 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 its disparate prohibitions against churches.

As these cases demonstrate, injunctions against COVID-19 prohibitions on religious gatherings are not mere outliers, but are instead the better-reasoned results reached by multiple district courts and **twice** by the Sixth Circuit. This Court should similarly hold. For "[h]istory reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. **But the ultimate strength of our constitutional guarantees lies in the unhesitating application in times of crisis and tranquility alike**." *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring) (emphasis added).

IV. AN ORDER THAT SAYS "AT NO TIME, IN NO PLACE, AND IN NO MANNER" IS SIMPLY NOT A REASONABLE TIME, PLACE, AND MANNER RESTRICTION.

The Governor contends that his GATHERING ORDERS are merely a reasonable time, place, and manner restriction on Lighthouse's constitutionally protected expression.[3] (IPA Resp. 25). But the Governor's total prohibition on religious sermons given to in-person religious gatherings and expressed during a worship service that is completely prohibited under the GATHERING ORDERS cannot be a reasonable time, place, and manner restriction under the Constitution or any other measure. **Indeed, binding precedent requires this Court reject the Governor's contention**. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002) (holding that a government regulation warrants lesser scrutiny "if it is a time, place, and manner regulation **and not a ban**" (emphasis added)); *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) (holding that only those regulations that are not total bans warrant to a time, place, and manner analysis). The GATHERING ORDERS have imposed a total ban (V. Compl. ¶¶ 31, 32, 37), and thus necessarily cannot be a time, place, and manner restriction. *See Frisby v. Schultz*, 487 U.S. 474, 489 (1988) ("complete bans" are "not a constitutional time, place and manner regulation of speech" (White, J., concurring)); *see also ACLU v. Mote*, 423 F.3d 438, 445 (4th Cir. 2005) ("This case does not involve a total ban of speech [but] merely involves a time, place, manner restriction."); *Child Evangelism Fellowship of Md., Inc. v Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 389 n.9 (4th Cir. 2006) (contrasting "time, place, and manner restriction" with a "total ban"); *Multimedia Pub. Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991

[3] The sermons at Lighthouse's religious gatherings (worship services) are protected speech under the First Amendment. *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971) (noting that "sermons," such as those delivered by Lighthouse's pastor "come under the protection of free speech").

F.2dd 154 (4th Cir. 1993) (noting that a total ban on protected speech cannot satisfy the time, place, and manner restrictions); *Zebulon Enter., Inc. v. DuPage Cnty.*, 2020 WL 1888928, 3 (N.D. Ill. Apr. 16, 2020) (noting that a "total ban" is not subject to a time, place, and manner regulation); *BBL, Inc. v. City of Angola*, No. 1:13-v-76-RLM, 2014 WL 26903, *12 (N.D. Ind. Jan. 2, 2014) ("An ordinance that results in a total ban is invalid."); *Chicago Joe's Tea Room, LLC v. Vill.. of Broadview*, No. 07 C 2680, 2009 WL 3151856, *2 (N.D. Ill. Sept. 25, 2009) (noting that Supreme Court precedent that "an outright ban requires **more** than a time, place, and manner analysis" (emphasis added)); *Illinois One News, Inc. v. City of Marshall*, 2006 WL 449018, *11 (S.D. Ill. Feb. 22, 2006) ("A regulation that appears on its face to be a time place and manner restriction but that in practice is effectively a total ban will receive strict scrutiny.").

V. THE GOVERNOR'S SELF-SERVING AFFIDAVITS AND NEWSPAPER ARTICLES, AMOUNTING TO LITTLE MORE THAN GOVERNMENTAL *IPSE DIXIT*, DO NOT SATISFY STRICT SCRUTINY.

Many courts addressing COVID-19 executive orders have held that disparate treatment of religious gatherings mandates the application of strict scrutiny under the First Amendment. *See supra* Section III. The Governor's only answer to that is that his GATHERING ORDERS are merely time, place, and manner restrictions and not subject to "the most demanding test known to constitutional law." *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). But, as that contention also has proved incorrect as a matter of law, *see supra* Section IV, the Governor's last stand is self-serving affidavits and newspaper articles claiming—without scientific or evidentiary support—that somehow churches are more dangerous than other similar non-religious gatherings that are permissible under the GATHERING ORDERS. These cannot suffice as a matter of law.

A newspaper article is not evidence. Yet, the Governor urges this Court to consider the mere musings of newspaper journalists in considering whether its orders survive strict scrutiny. (IPA Resp. 3 n.4 (citing two newspaper articles for the notion that churches pose a greater threat to the spread of COVID-19 than do the hundreds of cars and people that congregate daily at Walmart, Lowes, Home Depot, or Target)). This plainly must fail because, under the First Amendment, the Governor is required to produce **evidence**, not media reports. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (the Governor "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (regulation of speech must still demonstrate that the alleged harm is not "mere speculation or conjecture"). The unsupported conjecture of media reporters plainly does not suffice. Indeed, "**media reports are not *evidence***." *Gross v. Jackman*, No. 2:06-v-00072, 2008 WL 2001754, *49 (S.D. Ohio May 6, 2008) (emphasis added); *Owens v. Guida*, No. 2:00-2765-BR, 2005 WL 8168434, *27 (W.D. Tenn. June 23, 2005) (same).

Even the declarations provided by the Governor fail to meet this standard. For one, the Declaration of M. Norman Oliver is completely self-contradictory, which indicates its self-serving nature. (Dkt. 36-1, Oliver Decl. ¶¶ 21–22). Dr. Oliver claims that "[i]ndoor areas pose an even greater risk of transmission because of the way the virus spreads—through respiratory droplets from an infected person." (Oliver Decl. ¶ 21). But, then, in the next breath he claims that such "indoor areas" are less dangerous if such people are merely shopping. (*Id.* ¶ 22). If the danger is indoor proximity to other individuals (as Dr. Oliver claims), then why is that different depending on the **reason** someone comes into close contact with others in an indoor area? Indeed, as the Sixth Circuit succinctly queried, "**Why can someone safely walk down a grocery store aisle but not a pew**?" *Maryville Baptist Church*, 2020 WL 2111316, *4 (emphasis added). Or, as the Eastern

District of Kentucky just noted, "[i]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services." *Tabernacle*, slip op. at 10. In fact,

> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one**

Roberts, slip op. at 6 (emphasis added).

More importantly, Dr. Oliver's declaration at best seems to represent nothing more than the government's *ipse dixit* concerning COVID-19. In fact, Dr. Oliver plainly admits he knows little about the virus and little about whether religious gatherings pose more risks than other indoor gatherings. (Oliver Decl. ¶¶ 23–24 (testifying that the Governor is "still studying this coronavirus" and that "[p]redicting the spread and mortality rate of a novel virus like COVID-19 is **extremely difficult**" (emphasis added)). Indeed, he further concedes that the government "may underestimate" certain things related to the coronavirus and that it is "**impossible to know how many people would be infected but asymptomatic**." (Oliver Decl. ¶¶ 26–27 (emphasis added)). Yet, despite these damning admissions that the Governor knows little, is still learning, and that it may be impossible to understand it all, Dr. Oliver has no problem contending that—despite not having concrete understanding of the current virus—he can say with certainty that religious gatherings are materially different from others. (Oliver Decl. ¶ 22). This Court is neither required nor empowered to accept the pure *ipse dixit* of a government official who admits lack of knowledge concerning his contentions. *See, e.g.*, *Gen. Elec. Corp. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that "**nothing**" "requires a district court to admit opinion evidence that is only connected to existing data by the *ipse dixit* of the expert" (emphasis added)); *Kumho Tires Co., Ltd. v. Carmichael*, 526 U.S. 137, 157 (1999) (same); *Cooper v. Smith & Nephew, Inc.*, 2599 F.3dd 194,

203 (4th Cir. 2001) (mere *ipse dixit* of proffered scientific testimony is plainly insufficient to establish its reliability). Indeed, "**it is still a requirement that the expert opinion evidence be connected to existing data by something more than the 'it is so because I say it is so' of the expert**." *Holesapple v. Barrett*, 5 F. App'x 177, 180 (4th Cir. 2001) (emphasis added). But, here, as in *Holesapple*, Dr. Oliver's declaration "presents almost the perfect example of an *ipse dixit* opinion," *id.*, and therefore does not suffice to satisfy the Governor's burden under strict scrutiny. Claiming that the Commonwealth knows little except the "fact" that religious gatherings pose a greater danger than other gatherings that are currently permitted defies logic and simply cannot be accepted by this Court. Indeed, given that Lighthouse has constitutional protection for its religious gatherings, the proper course is to err on the side of treating them equally to similar non-religious gatherings, not to proffer self-serving affidavits untethered to any scientific evidence in an attempt to avoid constitutional scrutiny. The First Amendment was designed to preclude precisely this, and the Court should demand compliance with it.

VI. MANDATING "WORSHIP AS I TELL YOU AND PERMIT YOU TO WORSHIP" IS NOT THE ROLE OF THE GOVERNMENT AND IS, ITSELF, IRREPARABLE HARM.

The Governor contends that Lighthouse cannot suffer irreparable harm here because "alternative forms of worship" are available under the GATHERING ORDERS, and because it can hold in-person services if limited to 10 people, can host online services, and can do drive-in or parking lot services. (IPA Resp. 29). This is offensive on its face, and irrelevant under the Constitution. "**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). Here, the Governor has

purported to inform Lighthouse ***how***, ***when***, and in ***what manner*** it may worship the Lord. If this is not a government prescription of orthodoxy, then nothing qualifies. Indeed, the Governor has taken "upon [himself] authority to prescribe what shall be orthodox" in Plaintiffs' religious services, *Catholic League for Religious and Civil Rights v. City and Cnty. of San Francisco*, 624 F.3d 1043, 1059 (9th Cir. 2010), and that is plainly unconstitutional under the First Amendment. *See Hefferman v. City of Patterson*, 136 S. Ct. 1412, 1417 (2016) ("The basic constitutional requirement reflects the First Amendment's hostility to government action that prescribes what shall be orthodox."). The Governor's orders have crossed the line, and it is incumbent on this Court to remedy their excess. The GATHERING ORDERS impose irreparable harm by imposing the State's prescribed method of worship on Plaintiffs and their religious beliefs.

CONCLUSION

For the foregoing reasons, the injunction pending appeal should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2020, I cause a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated via this Court's ECF/electronic notification system.

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