

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

**Alexandria Division**

**MARIANO DIAZ-BONILLA, et al,** )

*Plaintiffs,* )

v. )

**RALPH NORTHAM, et. al.,** )

*Defendants.* )

Case No.: 1:20-cv-00377-AJT-IDD

**MEMORANDUM OF LAW IN  
SUPPORT OF RESTRAINING ORDER  
AND FOR ORDER TO SHOW CAUSE  
WHY PRELIMINARY INJUNCTION  
SHOULD NOT ISSUE**

DATE FILED: May 27, 2020

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## INTRODUCTION

Plaintiffs Mariano and Rebecca Diaz-Bonilla and their ten children are a devout Roman Catholic family. For Mariano and Rebecca, raising their children in the faith is of paramount importance—it is a matter of obedience to, and love for, God. That is why together, the Diaz-Bonilla family attend regular worship services at St. Catherine of Sienna Catholic Church in Great Falls, Virginia. As a family, Plaintiffs make visit to the Blessed Sacrament for prayer, seek daily mass, attend Sunday Mass weekly, go to the Sacrament of Reconciliation (Confession) weekly, and are present for other Sacraments including baptisms and weddings.

But Plaintiffs can no longer engage in religious expression as a family—in a manner that is consistent with their sincerely held religious beliefs.

Governor Northam’s Stay-at-Home Order prohibits public and private gatherings, of ten or more people, in “non-essential” locations. Churches, synagogues, mosques, temples, and other houses of worship are “non-essential” under the Governor’s Order. Therefore, because Plaintiffs are a nuclear family of twelve, they are prohibited from going to their local Catholic parish, as a family, to pray, worship, or receive the Sacraments.

Yet, the Governor’s Order does *not* prohibit the Diaz-Bonillas from going to secular institutions as a family. Plaintiffs are free to go to the grocery store; Costco; laundromats; beer, wine, and liquor stores; the Home Depot and other home improvement stores; automotive parts and accessory retailers; gas stations and convenience stores; and some department stores with a grocery component, such as Target. Under the Governor’s Order, Plaintiffs can spend an unlimited amount of time, together as a family, at these secular—and at times very crowded—institutions, but they may not attend their local parish to pray, confess, or worship if their priest or any other non-family member is present also.

Likewise, their priest is prohibited from visiting them and praying with them at Plaintiffs' home. On Plaintiffs' private property, they built a Stations of the Cross "prayer path." The path serves as a prayer guide and a gathering place, for religious expression, for members of their faith community. But for the size of Plaintiffs' nuclear family, their priest and members of their faith community would be able to meet for prayer at Plaintiffs' private property. Now, it is a criminal act for their priest, a member of their parish, or a friend to come to their home to pray—even if they abide by all Center for Disease Control social distancing guidelines.

Neither the United States Constitution nor the Constitution of the Commonwealth of Virginia tolerates such arbitrary and discriminatory restrictions thrust upon fundamental rights while less restrictive measures are available and are being allowed for entities the Government deems "essential." This Court should immediately enjoin Defendants from further violating Plaintiffs' First Amendment rights.

### **RELEVANT FACTUAL BACKGROUND**

Plaintiffs are Fairfax County, Virginia residents. Defendant Ralph Northam is the Governor of the Commonwealth of Virginia, and he is named as a defendant in his official capacity. As the chief executive of the Commonwealth of Virginia, the Governor issued the Executive Orders being challenged, and is responsible for their continued efficacy. Defendant Mark Herring is the Attorney General of the Commonwealth of Virginia and is named as a defendant in his official capacity. As the chief law enforcement officer in the Commonwealth of Virginia, the Attorney General exercises, delegates, and supervises all the powers and duties enforcing Governor Northam's Orders challenged herein.

### The Coronavirus Emergency

On March 13, 2020, President Donald J. Trump proclaimed a National State of Emergency as a result of the treat of the emergence of a novel coronavirus, COVID-19. On March 12, 2020, Virginia Governor Ralph Northam proclaimed a State of Emergency concerning COVID-19.

On March 23, 2020, Governor Northam issued Executive Order 53 prohibiting “all public and private in-person gatherings of 10 or more individuals” and closing schools, dining (other than delivery or take-out), and many institute “not-essential” establishments. Executive Order 53 allowed “essential retail businesses” to “remain open during their normal business hours.” Per Executive Order 53, the following are “essential” businesses permitted to remain open:

- Grocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products, including dollar stores, and department stores with grocery or pharmacy operations;
- Medical, laboratory, and vision supply retailers;
- Electronic retailers that sell or service cell phones, computers, tablets, and other communications technology;
- Automotive parts, accessories, and tire retailers as well as automotive repair facilities;
- Home improvement, hardware, building material, and building supply retailers;
- Lawn and garden equipment retailers;
- Beer, wine, and liquor stores;
- Retail functions of gas stations and convenience stores;
- Banks and other financial institutions with retail functions;
- Pet and feed stores;
- Printing and office supply stores; and

- Laundromats and dry cleaners.

Executive Order 53 was originally set to expire on April 23, 2020, but has been extended multiple times and was last set to expire on May 28, 2020 in Northern Virginia (Executive Order 61 and 62). Other orders continue to detrimentally impact the Plaintiffs.

On March 30, 2020, Governor Northam issued Executive Order 55 directing “all individuals in Virginia” to “remain at their place of residence, except as provided below by this Order and Executive Order 53.” Executive Order 55 specifically prohibits “all public and private in-person gatherings of more than 10 individuals” including “parties, celebrations, religious, or other social events, whether they occur indoor or outdoor.” Executive Order 55 restrictions do “not apply” to “gatherings of family members living in the same residence.” However, Order does criminalize both a nuclear family of ten or more people from meeting in-person with clergy.

Violation of either Executive Order 53 or Executive Order 55 is a Class 1 misdemeanor, carrying a penalty of up to 12 months incarceration and/or a \$2500 fine. Va. Code § 18.2-11. Executive Order 55 remains in effect “until June 10, 2020, unless amended or rescinded by further executive order.”

#### Religious Obligation of Communal Worship

Although Defendants do not consider it “essential,” most of the world’s major religions consider congregate worship essential to practice of their faith. This is certainly the case for Plaintiffs—a devout Roman Catholic family.

Prior to the implementation of the Orders, Mariano and Rebecca Diaz-Bonilla and their 10 children exercised their sincerely held religious beliefs together as a family by, among other things: praying in church in front of the Lord present in the Holy Eucharist, going to the Sacrament of Reconciliation (Confession) at their church (John 20:21-23; James 5:16), seeking the Sacrament

of the Eucharist (Holy Communion) weekly as a family from their parish priest and often daily as well (John 6:53-58), praying on their private property with their Priest and other believers, studying the faith with a fellow believer, and studying the Catechism and the Bible with their priest or fellow believers at their home. (Catechism of the Catholic Church).

And for Plaintiffs Mariano and Rebecca Diaz-Bonilla, it is critically important that their children participate in these activities with them, as they believe they have a religious and moral duty to train their children in the ways of the faith. *See* Deuteronomy 6:6-9, Proverbs 22:6, Ephesians 6:4.

## **ARGUMENT**

### **I. LEGAL STANDARD**

A temporary restraining order preserves the status quo and prevents irreparable harm until a hearing can be held on a preliminary injunction application. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). A temporary restraining order may be issued without providing the opposing party an opportunity to be heard where “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition,” and “the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1).

“The standard for granting either a TRO or a preliminary injunction is the same.” *U.S. ex rel. \$12,642.00 U.S. Currency v. Com. of Va.*, 2003 WL 23710710, \*1 (E.D.Va.2003). The Fourth Circuit follows a four-pronged analysis in determining whether a party is entitled to a preliminary injunction. The plaintiff must show, (1) that he or she is likely to succeed on the merits; (2) that he or she will likely suffer irreparable harm absent an injunction; and (3) that the balance of hardships

weighs in his or her favor; and (4) that an injunction is in the public interest. See *Bruce & Tanya & Associates, Inc. v. Board of Supervisors of Fairfax County, Virginia*, 355 F.Supp.3d 386 (E.D. Va. 2018) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014)). Plaintiff need “need not show a certainty of success,” but merely “make a ‘clear showing’” that he or she is “likely to succeed at trial.” See *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

## **II. PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF**

### **A. Plaintiffs are likely to succeed on the merits.**

#### **1. Governor Northam’s Orders violate Plaintiffs’ Free Exercise of Religion**

The rights guaranteed by 42 U.S.C. Section 1983 are to be “liberally and beneficently construed. *Dennis v. Higgins*, 498 U.S. 439 (1991), quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 684 (1978). The First Amendment to the U.S. Constitution prohibits government actors from enforcing any “law respecting an establishment of religion, or prohibiting the free exercise thereof.” U. S. Const. amend. I; see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the States through the Fourteenth Amendment). Plaintiffs assert facial and as-applied challenges pursuant to (1) 42 U.S.C. Section 1983 on the grounds that defendants’ Orders violate the Free Exercise Clause of the First Amendment to the U.S. Constitution.

The Orders and defendants’ enforcement of them violate the First Amendment, both facially and as-applied to plaintiffs. In order to avoid strict scrutiny, a law substantially burdening religious practice must be neutral and generally applicable. “Neutrality and general applicability

are interrelated, and, as becomes apparent...failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508, U.S. 520, 531-32 (1993).

“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Id.* at 532.

There are, of course, many ways of demonstrating that the objector purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

*Id.* at 533.

“Even if found to be facially neutral, official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.” *Id.* at 534. Faith-based discrimination can come in in multiple forms; it is not limited to “animus” or “subjecting religious activity alone for regulation.” *Roberts v. Neace*, No. 20-5465, 2020 U.S. App. LEXIS 14933, at \*6-7 (6th Cir. May 9, 2020). Rather, “a law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities.” *Id.* “[T]he more exceptions to a prohibition, the less likely it will count as a generally applicable, nondiscriminatory law. *Id.*

Here, Governor Northam’s orders do discriminate against religion or religious conduct both on its face and through the extensive list of exceptions for comparable secular activities. Executive Order 55 expressly criminalizes “religious” events of more than 10 individuals while

many similar types of gatherings are exempted from this requirement. For example, “beer, wine, and liquor stores” were exempted from Executive Order 55 despite having no life-sustaining value (in fact, one could assert the opposite is true taking into account deaths related to drunk driving and alcohol abuse). Dry cleaners are exempted under Executive Order 55 even though such services are hard to justify as “essential.” In a time when the Governor is mandating residents stay home, exempting dry cleaners while closing houses of worship is perplexing. Home improvement stores; convenience stores and shops that sell junk foods, lawn and garden retailers; electronic retailers that sell or service cell phones; and printing and office supply stores are additional examples of business that are exempted from Executive Order 55 without advancing public health. “Professional” rather than retail oriented employers also have significantly more freedom to operate under Executive Orders 53 and 55 than religious entities, whether or not they are deemed essential. *Compl.* ¶ 142. As the Sixth Circuit explained in enjoining the similar Kentucky executive orders, “What [the Governor] can't do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings. . . . [R]estrictions inexplicably applied to one group and exempted from another do little to further [public health] goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? *Roberts*, 2020 U.S. App Lexis 14933, at \*10.

In the same way, the Orders prevent the Diaz-Bonilla family from exercising their faith while allowing the same individuals to come in contact with others in numerous comparable secular activities. Such a policy is not neutral or generally applicable, it must be subjected to strict scrutiny, and it will fail that test as being far from the least restrictive means to advance any compelling state interest.

To make matters worse, on May 8, 2020, Governor Northam announced Executive Order 61, “Phase One Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19).” Phase One contains separate guidance for “Religious Services.” In it, the Governor restricts the manner in which Plaintiffs and members of their faith can receive the Sacrament of the Eucharist (Holy Communion) by stating, “no items must be passed to or between attendees, who are not family members.”

Plaintiffs, consistent with the beliefs of the Roman Catholic Church, sincerely believe that the elements of Communion are the body and blood of Jesus. As an act of reverence to God, Plaintiffs believe in kneeling to receive the Sacrament of the Eucharist and having the elements of it placed on their tongue by their parish priest. The Plaintiffs have no objection to sanitization practices or social distancing protocols to provide some distance between families in receiving communion. However, the direct impact of Executive Order 61 is that the Diaz-Bonilla family and other members of their parish are not lawfully allowed to receive Communion, an “essential” element of their faith if there ever was one.

Whether under Phase 1 or what is now called Phase 0, the Plaintiffs religious and constitutionally protected freedom is impermissibly given second-class status at best. *See* Compl. ¶ 55-66.

## **2. Governor Northam’s orders violate Plaintiffs’ Free Speech Rights**

“Religious worship and discussion are protected speech under the First Amendment.” *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6 (1981). Here plaintiffs assert facial and as-applied challenges to the Orders pursuant to 42 U.S.C. Section 1983 on the ground that the Orders violate the Free Speech Clause of the First Amendment to the U.S. Constitution. The Orders—by acting as a prior restraint to protected speech—are unconstitutional facially and as-applied because they

impermissibly burden plaintiffs' right to freedom of speech under the First Amendment. The term prior restraint is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted).

Here, the Orders ban all but the smallest in-person religious meetings. Though there is a long list of protected and exempted activities, religious gatherings are subjected to the strict 10-person limit. These Orders constitute a prior restraint on speech because they were issued before the protected speech was to occur and are thus facially unconstitutional.

Defendants cannot demonstrate that in-person religious gatherings, prayer, and religious conduct, a form of protected speech, are more dangerous when conducted by one nuclear family of 12—all of whom are residing in the same home and are exposed to the same germs at home—and their parish priest than when conducted by 9 total strangers—who each have unique exposures to COVID-19 and other germs—and a parish priest. The Governor's order presumes a smaller family size than Plaintiffs' family and unfortunately burdens their First Amendment rights because of their family size.

As the court explained in *Kuba v. I-A Agr. Ass'n*, 387 F.3d 850 (9th Cir. 2004), a regulation meant to ensure safety by burdening person-to-person communication must be based on the hard work of establishing the specifics of crowd control and traffic flow as applied to the specific danger meant to be ameliorated or prevented:

Different areas of a parking lot fill to different densities with individuals walking to or from the building. The closer one gets to the entrance, the more crowded the walkways and driveways will be. Such measures as prohibiting protestors within a certain distance from the entrance to the building, or limiting the overall number of demonstrators in certain areas closer to the entrance, or requiring that protestors stand a certain distance from each other, are all measures that directly respond to the nature of congestion and traffic safety issues in parking lots. The present policy, which relegates communication activity to three small, fairly peripheral areas, does

not “sufficiently match” the stated interest of preventing congestion.

*Id.* at 862 (policy to limit communication to specific areas was “not narrowly tailored to serve the government’s interest”).

Similarly, in *Blair v. City of Evansville, Ind.*, 361 F. Supp. 2d 846 (S.D. Ind. 2005), the court found a 500-foot exclusion zone around a presidential motorcade an insufficiently narrow tailoring of the government interest – protecting the Chief Executive and Vice President – given the actual dimensions and configurations of the space, and crediting the First Amendment speech imperative of being able to actually communicate in person:

[A]lthough Defendants need not have chosen the least restrictive means for effectuating their security purpose, even locations that they suggested were open to Blair as alternatives, were in fact closed to him by Defendants' application of their definitive protest zone. This is further indication that the protest zone was not narrowly tailored to serve Defendants' concern about safety.

It is for this latter reason that the Court also concludes that the protest zone was not an adequate alternative channel for communication by protestors. Although an adequate alternative channel for communication need not be the speaker's first or best choice, it “must be more than merely theoretically available. It must be realistic as well. Furthermore, an adequate alternative cannot totally foreclose a speaker's ability to reach one audience even if it allows the speaker to reach other groups.” *Gresham [v. Peterson]*, 225 F.3d 899, 906-07 [(7th Cir. 2000)] (citations omitted). In the case at bar, the protest zone was 500 feet from the entrance for attendees, and well over 500 feet from the parking lot where the majority of attendees would park for the event. This limitation significantly curtailed Blair's ability to convey his message to one of his major targets: the event patrons.

*Id.* at 859. Defendants’ ten person limitation on “non-essential” gatherings bear no known relationship to any “metrics” based on the size of such groupings, and the lack of relationship between the number of people and amount of space available to accommodate them can hardly be considered adequate under the narrowly-tailored test.

Relatedly, the Orders are also facially unconstitutional because they are substantially overbroad. “The [Supreme] Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression

of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.” *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129–30, (1992) (citations omitted). Unconstitutional overbreadth does not require that a party challenging state action show that he can conceive of some impermissible applications of the order, but where one can show a significant number of situations where an order could be applied to prohibit constitutionally protected speech. *Houston v. Hill* (“*Houston*”), 482 U.S. 451 (1987) (ordinance outlawing interruption of police officers while carrying out their duties was unconstitutionally overbroad because it criminalized substantial amount of constitutionally protected speech and allowed police unfettered discretion in enforcement of the ordinance).

Even under Phase 1 Plaintiffs will still be prohibited from celebrating Mass and receiving the Sacrament of Communion under Executive Order 61, an element of expression demonstrating a message of faith and hope in God during a time of fear and danger. Compl. ¶ 103. Also under Phase 1 the Plaintiffs are still prohibited from receiving a priest, parishioner, or other believer on their property to gather for a Bible study or pray through the stations of the cross to the extent these are not considered a formal “religious service” under Executive Order 61.

Plaintiffs do not contest the fact that the purpose of the Orders is to slow the transmission rate of the COVID-19 pandemic in Virginia. Nonetheless, the Orders are a substantial burden because they prohibit the protected speech that every Virginians who attends churches, mosques, temples, synagogues, gurdwaras, and churches regularly, usually would enjoy. Because the Orders criminalize a substantial amount of protected speech that is unnecessary for their underlying purpose, the Orders are unconstitutionally overbroad, and this Court should grant injunctive relief.

### **3. Governor Northam’s orders violate the Freedom of Assembly Clause**

“The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights.” *Whitney v. New York*, 274 U.S. 357, 373 (1927). The First Amendment of the Constitution protects the “right of the people peaceably to assemble.” The Freedom of Assembly Clause was incorporated against the states in *De Jonge v. Oregon*, 299 U.S. 353 (1937). When a government practice restricts fundamental rights, it is subject to “strict scrutiny” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

The Orders and defendants’ enforcement of them violate the First Amendment, both facially and as-applied to Plaintiffs. By denying Plaintiffs the ability to attend religious services at their parish and to conduct religious services on their private property that comply with both Virginia and CDC guidelines for social distancing, defendants are in violation of the Freedom of Assembly Clause. Defendants cannot meet the no-less-restrictive-alternative test; there is no basis for them to assert that that CDC’s social distancing guidelines are insufficient to limit the spread of COVID-19, and defendants’ “10” group-size limitation do not appear to be based on the CDC’s guidance – at least not to the extent that they bear no relation to specific space and configuration specifications. Imposing more restrictive requirements that target all gatherings, including carefully-managed and CDC-compliant religious services, while at the same time allowing people to attend beaches and parks, as well as indoor retail facilities, to gather in close groups for extended periods, is not the least restrictive means of achieving defendants’ laudable public safety goals. Requiring plaintiffs to abstain from religious gatherings, despite their willingness to follow CDC

social distancing guidelines, violates plaintiffs' Constitutional right to assemble peaceably.

#### **4. Governor Northam's Orders Violate Substantive Due Process**

##### **Rights Under the Fourteenth Amendment.**

The Orders and Defendants' enforcement thereof violate Plaintiffs' substantive due process rights secured by the Fourteenth Amendment to the U.S. Constitution. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. *See Duncan v. Louisiana*, 391 U.S. 145, 147–149 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486 (1965).

Plaintiffs' rights to freedom of religion, assembly, and speech are fundamental rights protected by the U.S. Constitution. *See, e.g., Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964); *Kent v. Dulles*, 357 U.S. 116, 127 (1958). When a government practice restricts fundamental right, as is the case here, it is subject to "strict scrutiny" and can be justified only if it furthers a compelling government purpose, and, even then, only if no less restrictive alternative is available. *See, e.g. Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250, 257-258 (1974); *Dunn*, 405 U.S. at 339-341; *Shapiro v. Thompson*, 394 U.S. 618, 660 (1969); *Maher v. Roe*, 432 U.S. 464, 488 (1977).

Strict scrutiny applies to Plaintiffs' claims because the Governor's Orders mandate that Plaintiffs stay at home because Plaintiffs desired actions are not deemed essential, impinging on their fundamental rights to freedom of religion, assembly, speech, and travel. Defendants'

mandates are not “narrowly tailored” to further any compelling governmental interest. Defendants’ have granted numerous special exemptions to their bans on public gatherings, including for purportedly “essential” businesses and activities, provided that social distancing practices are observed. Since these gatherings are permitted, there can be no doubt that Defendants may, and therefore must, permit Plaintiffs to engage in equivalent constitutionally-protected activities provided that Plaintiffs also adhere to the social distancing guidelines.

**5. Governor Northam’s Orders Violate the Equal Protection Clause of the Fourteenth Amendment.**

The Orders and defendants’ enforcement of them also violate the Fourteenth Amendment, both facially and as applied to Plaintiffs. The Fourteenth Amendment of the Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Equal protection requires the state to govern impartially—not draw arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Defendants intentionally and arbitrarily categorize individuals and conduct as either “essential” or “non-essential,” without proper nexus to public health. Compl. ¶¶ 135-145. Those persons whose activities are classified as “essential,” or as participating in essential services, are permitted to go about their business and activities provided established social distancing practices are employed. *Id.* Those classified as “nonessential,” or as engaging in non-essential activities, are required to stay in their residence, unless it becomes necessary for them to leave for one of the enumerated “essential” activities. *Id.* The Orders provide no system, procedure or mechanism by which persons affected by these fiat designations may appeal them or have them otherwise reviewed, notwithstanding the profound effect to which their liberties may be affected. Even under

Phase 1 Churches are subjected to requirements that essential businesses are not, such as the 50% capacity requirement. This requirement is in excess of the guidance from the Center for Disease Control and Prevention for reopening religious services. Order also does not create an exception to the 10-person limit for outdoor religious services. While religious gatherings continue to have significant restrictions on their capacity and the actions they may take (for instance, Communion), all employers are exempted from many of those same requirements. Employers are not subjected to the 10-person limit at all under Executive Order 61. “The presence of more than 10 individuals performing functions of their employment is not a ‘gathering.’” Executive Order 61 (B)(2)

Strict scrutiny under the Equal Protection Clause applies where, as here, a classification impinges on a fundamental right, including the right to practice religion freely, to right to free speech and assembly, and the right to travel, among others. “[I]f the law is not neutral (*i.e.*, if it discriminates against religiously motivated conduct) or is not generally applicable (*i.e.*, if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.” *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (citations omitted); *see, e.g. Memorial Hospital*, 415 U.S. at 257-258.

Defendants cannot satisfy strict scrutiny; their arbitrary “essential” and other classifications are not narrowly tailored measures that further a compelling government interest. If the gatherings and commerce allowed under the Orders can be permitted, and they are, defendants must permit plaintiffs to engage in equivalent constitutionally-protected activities provided that plaintiffs also adhere to the social distancing guidelines, which, as attested in the Verified Amended Complaint filed herein, they are willing, able, and eager to do.

## 6. Governor Northam's Orders Violate the Constitution of the Commonwealth of Virginia

Both facially and as applied to Plaintiffs, the Governor's Orders violate protected religious liberty rights under the Virginia Constitution. The Constitution of the Commonwealth of Virginia protects the religious liberty of its citizens. It reads:

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, **nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief**; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

(Emphasis Added)

Plaintiffs have a sincerely held religious belief that as a family, they seek the Sacrament of the Eucharist (Holy Communion) from a priest on a daily basis and at a minimum receive the Sacrament as a family on a weekly basis; engage in prayers of adoration at their parish in front of the Blessed Sacrament; and assemble with other believers to pray.

As a family of more than 10 people, the Governor's Orders are a total preclusion of Plaintiffs from attending Mass or the like. Even if they wear masks, gloves, keep six-feet of distance from other family units, and adhere to all CDC-recommended social distancing guidelines, Plaintiffs are prohibited from attending religious services at their parish, receiving Communion from their parish priest, whether at their parish or their home, and hosting prayer

walks on their private property. Unfortunately, even in Phase 1, Plaintiffs will continue to be prohibited from receiving communion under Executive Order 61, a central component of the Mass

For the reasons already articulated herein and in the Verified Amended Complaint, the Orders violate the Plaintiffs freedom of speech and assembly under the Virginia Constitution as well.

### **7. The Governor's Orders Violate VA. Code § 57-2.02**

The threshold inquiry, whether to apply strict scrutiny, in the free exercise claims above is unnecessary under claims made under Virginia law. No law may “substantially burden a person’s exercise of religion . . . unless it demonstrates that application of the burden to the person is (1) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest. Va. Code § 57-2.02.

The Diaz-Bonilla family’s free exercise of religion has been substantially burdened and as previously demonstrated, such burdening is not the least restrictive means of achieving a compelling governmental interest. As another federal district court found

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.

*Tabernacle Baptist Church v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 U.S. Dist. LEXIS 81534, at \*14 (E.D. Ky. May 8, 2020).

#### **B. Plaintiffs will likely suffer irreparable harm absent an injunction.**

“Irreparable harm is suffered ‘when monetary damages are difficult to ascertain or are inadequate.’ *Lab. Corp. of Am. Holdings v. Kearns*, 84 F. Supp. 3d 447, 463 (M.D.N.C. 2015).

“The Supreme Court has explained that “loss of First Amendment freedoms, for even minimal

periods of time, unquestionably constitutes irreparable injury.” *Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Here, Plaintiffs’ First Amendment rights have been violated for nearly two months with no end in sight. While Governor Northam has unveiled his plan to reopen churches under Executive Order 61, churches and religious gatherings continue to be subjected to harsher standards than similarly situated “essential” retail businesses despite the same risk. Moreover, at will, the Governor can simply reinstitute the unequally applied restrictions on religious gatherings at any time during a forecasted “second wave” of the virus later this summer or in the fall until the important legal issues involved in this case are resolved.

If the Plaintiffs were permitted, they would seek to exercise their rights immediately, like the Plaintiffs at issue in the Sixth Circuit cases, who were granted an injunction for a handful of religious services between the time of decision and the Governor’s agreed date of reopening religious gatherings absent any judicial injunction. *Roberts v. Neace*, No. 20-5465, 2020 U.S. App. LEXIS 14933, at \*5-6 (6th Cir. May 9, 2020). “Lost time means lost rights.” *Id.*

Without an injunction preventing Defendants from further enforcing the Orders will suffer irreparable harm in the form of deprivation of fundamental freedoms secured by the First and Fourteenth Amendment to the U.S. Constitution and the Virginia Constitution. Plaintiffs’ irreparable injuries cannot adequately be compensated by damages or any other remedy available at law. Thus, irreparable injury is clearly shown, necessitating the relief Plaintiffs seek in this Application.

**C. The balance of hardships weighs in favor of Plaintiffs.**

An injunction in this matter will protect the very rights the Supreme Court has characterized as “lying at the foundation of a free government of free men.” *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The granting of a TRO (or preliminary injunction) enjoining enforcement of the Orders on the Diaz-Bonilla’s religious practices will impose no harm on the Commonwealth. Indeed, the Commonwealth “is in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions.” *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). *See also Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (the government “is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional”). On the other hand, even a temporary and minimal infringement upon First Amendment rights constitutes irreparable injury sufficient to justify injunctive relief. *Legend Night Club*, 637 F.3d at 302. There can be no comparison between the irreparable and unconscionable loss of First Amendment freedoms suffered by the Diaz-Bonilla family absent injunctive relief and the non-existent interest the Commonwealth has in enforcing unconstitutional Orders.

By the evidence and justifications put forth by the Commonwealth, the Commonwealth can enforce a narrowly tailored Order to achieve its interests without subjecting constitutionally protected rights to worse treatment than similar general, secular, and economic activities. The Constitution demands no less. The balance of the hardships tips decidedly in Plaintiffs’ favor, and the TRO and ultimately a PI should issue.

**D. An injunction is in the public interest.**

Like other circuits, the Fourth Circuit has held that “upholding constitutional rights serves the public interest.” *Newsom ex rel. Newsom v. Albemarle Cnty. Pub. Schs.*, 354 F.3d 249, 261 (4th Cir.

2003) (emphasis added); *Legend Night Club*, 637 F.3d at 303 (“upholding constitutional rights is in the public interest”). In fact, “Injunctions protecting First Amendment freedoms are **always in the public interest.**” *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added). This protection is *ipso facto* in the interest of the general public because “First Amendment rights are not private rights [but] rights of the general public [for] the benefits of all of us.” *Machesky v. Bizzell*, 414 F.2d 283, 288–90 (5th Cir. 1969) (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

Only one Court of Appeals has ruled in a published opinion on Executive Orders limiting religious gatherings and conduct in light of the coronavirus and that Court has already upheld the TRO and ruled that a preliminary injunction is appropriate. *Roberts v. Neace*, No. 20-5465, 2020 U.S. App. LEXIS 14933, at \*14-15 (6th Cir. May 9, 2020). Like here, such an injunction “appropriately permits religious services with the same risk-minimizing precautions as similar secular activities and permits the Governor to enforce social-distancing rules in both settings.” The Court ruled that as to the public interest factor the “treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees.”

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a temporary restraining order, and issue an order to show cause why a preliminary injunction should not be issued restraining them from enforcing or otherwise requiring compliance with any prohibition on Plaintiffs’ engagement in religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed, and ordering Defendants to show cause why a preliminary injunction should not issue requiring Defendants to act as described in above, the temporary restraining order remaining effective until the Court rules on whether a preliminary injunction should issue.

Dated: May 27, 2020

/s/ William R. Thetford Jr.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2020, I will electronically file the foregoing Memorandum with the Clerk of Court using the CM/ECF system, which will send a Notice of Electronic Filing (NEF) to all counsel of record.

/s/ William R. Thetford Jr.