

VIRGINIA :

IN THE CIRCUIT COURT OF RUSSELL COUNTY

LARRY HUGHES,	)	
	)	
Plaintiff,	)	Civil Action No. CL20-415
	)	
v.	)	
	)	
RALPH S. NORTHAM,	)	
	)	
Defendant.	)	

**DEFENDANT’S MEMORANDUM IN OPPOSITION  
TO MOTION FOR TEMPORARY INJUNCTION**

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## INTRODUCTION

*We are entering what is normally a very busy period for our faith communities. Easter, Passover, Ramadan, and other religious holidays fall this month. Normally, our faith communities would celebrate those important times together. But these are not normal times. We have developed additional guidance for our faith communities urging them to use alternative means of worship, such as virtual gatherings or drive-in services. I know the requirements of social distancing are hard on communities that rely on togetherness. It is hard on all of us. Whether you are of a particular faith or no faith, we all lean on the people around us. These relationships are more important now than ever.*

– Governor Ralph S. Northam, April 3, 2020<sup>1</sup>

Faced with a deadly virus that currently has no established treatment or cure and has the potential to overwhelm the Commonwealth’s healthcare system, Governor Northam has had to make difficult decisions to slow the disease’s spread and save lives. Among those decisions is the one challenged here: a temporary prohibition on in-person gatherings of more than ten people.

As a person of faith, the Governor recognized that the temporary gatherings restriction would be particularly hard on religious communities. But the orders challenged in this case neither require such communities to “shut their doors,” Pet. for Decl. Judgment (Pet.) ¶ 13, nor prevent in-person services. Instead, the Governor has issued guidance designed to help faith communities maintain their communion and worked with religious leaders to find creative solutions, including online and drive-in services.

Petitioner claims that the Governor’s orders do not go far enough in protecting religious liberty and seeks to enjoin the temporary gatherings restriction “as it relates to limiting religious services.” Pet. at 4 (wherefore clause). Such a ruling would seriously undermine the Commonwealth’s efforts to slow the spread of a once-in-a-century pandemic and threaten

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<sup>1</sup> Governor of Virginia Facebook Page, Apr. 3, 2020, Briefing at 18:00, <https://www.facebook.com/GovernorVA/videos/298787587943167>.

irreparable harm to an unknown (and unknowable) number of people. Virginia’s Constitution requires no such result, and petitioner fails to demonstrate his entitlement to the “extraordinary remedy” he seeks. *Levisa Coal Co. v. Consolidated Coal Co.*, 276 Va. 44, 60 (2008).

## STATEMENT

1. In January, Chinese authorities announced that a novel coronavirus was likely to blame for a mysterious, pneumonia-like illness. Oliver Aff. ¶ 3 (Exhibit E). In just three months, COVID-19 has become a global pandemic.<sup>2</sup> Tens of thousands of people have already died and more than a million cases have been confirmed worldwide. Oliver Aff. ¶ 8. Virginia’s death toll stands at 63—a number projected to reach the thousands in the coming months. Oliver Aff. ¶ 13.<sup>3</sup> More than 3,000 COVID-19 cases have already been confirmed in Virginia, with Russell County’s first confirmed case coming just yesterday. Oliver Aff. ¶ 12. Experts estimate that the true figures may be “11 times more than has been officially reported.”<sup>4</sup> And even perfectly accurate numbers become outdated almost immediately given the pace of the spread<sup>5</sup> and the fact that the disease currently has no known treatment or cure. Oliver Aff. ¶¶ 9–10; Order of Public

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<sup>2</sup> Bill Chappell, *Coronavirus: COVID-19 Is Now Officially a Pandemic, WHO Says*, NPR (Mar. 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

<sup>3</sup> See also *COVID-19 in Virginia*, Virginia Department of Public Health (updated April 7, 2020), <http://www.vdh.virginia.gov/coronavirus/> (*COVID-19 in Virginia*); IHME, *COVID-19 Projections: Virginia*, <http://covid19.healthdata.org/projections> (last visited Apr. 7, 2020) (*COVID-19 Projections*).

<sup>4</sup> James Glanz et al., *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, N.Y. Times (Mar. 20, 2020), <https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html>; see Emma Brown et al., *Coronavirus Death Toll: Americans Are Almost Certainly Dying of Covid-19 But Being Left Out of the Official Count*, Wash. Post (Apr. 5, 2020), [https://www.washingtonpost.com/investigations/coronavirus-death-toll-americans-are-almost-certainly-dying-of-covid-19-but-being-left-out-of-the-official-count/2020/04/05/71d67982-747e-11ea-87da-77a8136c1a6d\\_story.html](https://www.washingtonpost.com/investigations/coronavirus-death-toll-americans-are-almost-certainly-dying-of-covid-19-but-being-left-out-of-the-official-count/2020/04/05/71d67982-747e-11ea-87da-77a8136c1a6d_story.html).

<sup>5</sup> See Brittany Shammass et al., *Trump Says Quarantine for New York Area ‘Will Not Be Necessary’; U.S. Coronavirus-Related Deaths Double in Two Days*, Wash. Post (Mar. 28, 2020), <https://www.washingtonpost.com/world/2020/03/28/coronavirus-latest-news/>.

Health Emergency Two (2020) (Northam & Oliver) (Exhibit B).

The toll extends beyond those infected. Virginia currently anticipates up to 6,500 COVID-19 related hospitalizations.<sup>6</sup> Depending on the speed of infection, the Commonwealth could face a shortage of hospital beds, compounding a projected shortage of intensive-care-unit beds.<sup>7</sup> Such shortages would place healthcare workers at even higher risk and prevent those needing treatment for unrelated reasons from accessing care.

2. One of the most deadly features of COVID-19 is the ease with which it spreads. Although much remains unclear, experts agree that the virus is transferred by in-person interactions, either “[b]etween people who are in close contact with one another” or “[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks.”<sup>8</sup> Public health officials likewise agree that infected persons may not become symptomatic—and thus may not realize they have contracted the virus—for days after being exposed. Oliver Aff. ¶ 5.

Time and again, large gatherings have provided fertile ground for transmission of this deadly virus—and in-person religious services have not been spared. Throughout the United States, “[c]hurches, temples and other places of worship”—“where congregants sit close, take Communion, share hugs and handshakes and pecks on the cheek—have served as hothouses for the virus.”<sup>9</sup> The early spread of the virus in Washington, D.C., was linked to a priest who

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<sup>6</sup> See *COVID-19 Projections*, *supra* note 3.

<sup>7</sup> *Id.*; see also Oliver Aff. ¶ 14.

<sup>8</sup> Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How Coronavirus Spreads: Person-to-Person Spread*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 7, 2020); accord Order of Public Health Emergency Two (2020) (Northam & Oliver); Oliver Aff. ¶ 5.

<sup>9</sup> Scott Wilson et al., *Coronavirus Creates Conflict for Churches, Where Gatherings Can Be Dangerous but Also Provide Solace*, Wash. Post (Apr. 5, 2020), <https://www.washingtonpost.com/national/coronavirus-church-services-outbreak/2020/04/05/7f5b63cc-7773-11ea-90ad-819c>

distributed Communion before testing positive.<sup>10</sup> The community believed to be “ground zero” of the outbreak in New York traced the virus’s spread to a single person’s attendance at a synagogue service.<sup>11</sup> And in Glenview, Illinois, “[f]orty-three people who attended a March 15 service at [the Life Church] are displaying symptoms of the illness” and one member of the church “recently died of the disease.”<sup>12</sup>

Both rural and urban communities have been impacted. When a church choir in Skagit County, Washington held an in-person practice on March 10, the county had not yet reported any cases. “[T]hree weeks later,” however, “45 [people had] been diagnosed with COVID-19 or ill with the symptoms, at least three ha[d] been hospitalized, and two [we]re dead.”<sup>13</sup> A funeral service was likely the source of the spread in Dougherty County, Georgia, where 521 people

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aa48d39f\_story.html; see also Jonathan Shorman, *Kansas Has 3 Church-Related COVID-19 Clusters, State Says Amid Scramble for Supplies*, Wichita Eagle (Apr. 6, 2020), <https://www.kansas.com/news/coronavirus/article241810656.html>.

<sup>10</sup> Fenit Nirappil, *D.C.’s Patient Zero: A Priest’s Journey from ICU to Reuniting with Family and Flock*, Wash. Post (Mar. 30, 2020), [https://www.washingtonpost.com/local/rev-timothy-cole-christ-church-coronavirus/2020/03/30/f027e02c-71dc-11ea-85cb-8670579b863d\\_story.html](https://www.washingtonpost.com/local/rev-timothy-cole-christ-church-coronavirus/2020/03/30/f027e02c-71dc-11ea-85cb-8670579b863d_story.html).

<sup>11</sup> Erin Ailworth & Alexandra Berzon, *How Coronavirus Invaded One New York Community: ‘We Weren’t Expecting It to Be Ground Zero,’* Wall St. J. (Mar. 30, 2020), <https://www.wsj.com/articles/how-coronavirus-invaded-new-rochelle-we-werent-expecting-it-to-be-ground-zero-11585583228>; Sharon Otterman & Sarah Maslin Nir, *New Rochelle, Once a Coronavirus Hot Spot, May Now Offer Hope*, N.Y. Times (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/nyregion/new-rochelle-coronavirus.html>.

<sup>12</sup> Anna Kim, *Glenview Church Hit by COVID-19 Is Now Streaming Service Online, as Pastor Remembers Usher Who Died of Disease*, Chicago Tribune (Mar. 31, 2020), <https://www.chicagotribune.com/suburbs/glenview/ct-gla-life-church-coronavirus-virtual-service-tl-0402-20200331-s4twslv2ynhk3padh7sjrxy3wi-story.html>.

<sup>13</sup> Richard Read, *A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead*, LA Times (Mar. 29, 2020), <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak>.

tested positive for the virus and 30 people have died.<sup>14</sup> Experts predict that COVID-19's impact may be particularly severe in rural areas because of a comparatively greater percentage of citizens "particularly vulnerable to serious outcomes," greater distances between homes and hospitals, and a general lack of hospital facilities.<sup>15</sup>

3. Lacking a cure or established treatment plan, officials have focused on slowing COVID-19's spread. The federal government has urged avoiding gatherings of more than ten people. Oliver Aff. ¶ 17. Such gatherings are currently prohibited in at least some localities in all 50 States and most States have prohibited them state-wide.<sup>16</sup> One gatherings restriction has been challenged—and upheld—on First Amendment grounds. See *Binford v. Governor Sununu*, No. 217-2020-cv-00152 (N.H. Merrimack Sup. Ct. Mar. 25, 2020) (*Binford Order*) (Exhibit F).

4. Virginia's government has taken a series of steps to limit COVID-19's spread. As early as February 7, 2020, the State Health Commissioner identified COVID-19 as a public health threat.<sup>17</sup> Over the next five weeks, the Governor declared a state of emergency, the Chief Justice declared a judicial emergency, and the Governor and State Health Commissioner announced a public health emergency.<sup>18</sup> On March 13, the Governor ordered all K-12 schools closed for two weeks, and, on March 17, the Governor and State Health Commissioner limited

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<sup>14</sup> Haisten Willis & Vanessa Williams, *A Funeral is Thought to Have Sparked a Covid-19 Outbreak in Albany, Ga. — and Led to Many More Funerals*, Wash. Post (Apr. 4, 2020), [https://www.washingtonpost.com/politics/a-funeral-sparked-a-covid-19-outbreak--and-led-to-many-more-funerals/2020/04/03/546fa0cc-74e6-11ea-87da-77a8136c1a6d\\_story.html](https://www.washingtonpost.com/politics/a-funeral-sparked-a-covid-19-outbreak--and-led-to-many-more-funerals/2020/04/03/546fa0cc-74e6-11ea-87da-77a8136c1a6d_story.html).

<sup>15</sup> Christopher Curley, *Rural America Could Be the Region Hardest Hit by the COVID-19 Outbreak*, Healthline (Mar. 29, 2020), <https://www.healthline.com/health-news/rural-america-hardest-hit-by-covid-19-outbreak#Is-telemedicine-the-answer?>.

<sup>16</sup> Council of State Governments, COVID-19 Resources for State Leaders, <https://web.csg.org/covid19/executive-orders/> (last visited Apr. 7, 2020).

<sup>17</sup> See Order of Public Health Emergency Two (2020) (Northam & Oliver).

<sup>18</sup> See Executive Order Fifty-One (2020) (Northam); Order Declaring a Judicial Emergency in Response to COVID-19 Emergency, Supreme Court of Virginia (Mar. 16, 2020); Order of Public Health Emergency Two (2020) (Northam & Oliver).

all restaurants, fitness centers, and theaters to no more than 10 patrons per establishment.<sup>19</sup> The virus, however, continued to spread.

a. On March 23, 2020, the Governor issued Executive Order 53 (EO 53) (Exhibit A). Emphasizing that “person-to-person contact increases the risk of transmission and community spread,” the Order took steps to minimize such contacts. EO 53, p. 1. EO 53 first imposed a general rule by temporarily prohibiting “*all* public and private in-person gatherings of 10 or more individuals,” *id.* ¶ 1 (emphasis added), while the remainder imposed additional (and unchallenged) restrictions on particular entities. Some entities were required to cease “in-person instruction” or “public access” entirely. *Id.* ¶¶ 2, 4. Restaurants were directed to close “all dining and congregation areas” but permitted to continue “delivery or take-out services.” *Id.* ¶ 3. Most “brick and mortar retail businesses” were required to “limit all in-person shopping to no more than 10 patrons per establishment,” with certain “[e]ssential retail businesses” being exempted from that requirement. *Id.* ¶¶ 5, 6. “All businesses” were admonished to “adhere to social distancing recommendations, enhanced sanitizing practices on common surfaces, and other appropriate workplace guidance from state and federal authorities while in operation.” *Id.* ¶ 8.

b. A week later, the Governor imposed additional restrictions. See Executive Order Fifty-Five (2020) (Northam) (EO 55) (Exhibit C). Implementing the Governor’s frequent admonitions to stay at home, the first paragraph of EO 55 directed that “[a]ll individuals in Virginia shall remain at their place of residence, except as provided below by this Order and Executive Order 53.” *Id.* ¶ 1.

EO 55 also addressed the temporary gatherings restriction first announced in EO 53. Whereas EO 53 stated that the restriction would last through April 23, 2020, see EO 53 ¶ 1,

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<sup>19</sup> See Executive Order Fifty-Three (2020) (Northam) (discussing earlier measures).

EO 55 extended the temporary gatherings restriction to June 10, see EO 55, p. 3. EO 55 reiterated that the temporary gatherings restriction applied to “[a]ll public and private in-person gatherings of more than ten individuals,” and specifically stated that “[t]his includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor.” EO 55 ¶ 2 (emphasis added).<sup>20</sup> EO 55 clarified, however, that “[t]his restriction does not apply” to “the operation of businesses not required to close to the public under Executive Order 53” or “the gathering of family members living in the same residence.” *Id.* ¶¶ 2 & 2(a)–(b).

c. The Governor has been careful to preserve religious liberty while protecting public safety. None of the Governor’s Orders requires a place of worship to close or prevents public access, and EO 55 specifically permits people to “leave their residence for the purpose of” “[t]raveling to and from one’s . . . place of worship.” EO 55 ¶ 1(f). Virginia’s official coronavirus website also identifies ways that people may continue to practice their faith, including collectively: “Attendees may travel to their place of worship, park in the parking lot, and listen to the religious message while remaining in their cars” so long as there are “no more than 10 individuals leading the religious ceremony or functioning outside of the church in support of the religious ceremony.”<sup>21</sup> It also identifies ways religious leaders may continue to administer sacraments and obtain collections. Consistent with these recommendations, “faith leaders are leaning on unorthodox modes to engage their followers at a time when they need their faith the most,” including “using livestreams, recorded sermons on Facebook, personal outreach,

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<sup>20</sup> EO 53 referred to gatherings of “10 or more,” EO 53 ¶ 1, whereas EO 55 refers to “gatherings of more than ten,” EO 55, p. 2. That minor wording change does not bear on relevant legal analysis and petitioner does not argue otherwise.

<sup>21</sup> “What about religious services? Can I still go to my church, synagogue, or mosque?”, *Virginia’s Statewide Stay at Home Order: Frequently Asked Questions* (Exhibit D).

drive-in services in parking lots and videoconference bible study.”<sup>22</sup>

5. Last Thursday, petitioner filed an action in this Court and emailed a copy of the complaint to the Attorney General’s Office the next day. On Monday, the Governor removed that case to federal court. Later that day, petitioner attempted to non-suit the removed action and filed a new action in this Court, specifically omitting any federal claim.<sup>23</sup>

Petitioner claims that the temporary gatherings restriction violates his rights under the Virginia Constitution to the extent it “limit[s] religious services to no more than ten (10).” Pet. at 1. As relevant here, petitioner seeks “a temporary injunction as it relates to EO(2)[’s] prohibition of more than ten (10) persons at religious services.” *Id.* at 5 (wherefore clause).

#### LEGAL STANDARD

“No Virginia Supreme Court case has definitively set out standards to be applied in granting or denying a [temporary] injunction.” *School Bd. of Richmond v. Wilder*, 73 Va. Cir. 251, at \*2 (City of Richmond Cir. Ct. 2007). Virginia courts, therefore, have generally “followed [the] standards delineated in the four-part test used by the federal courts.” *Id.* Under those standards, such an “injunction is an extraordinary remedy never awarded as of right.” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party seeking injunctive relief “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in

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<sup>22</sup> Matt Chittum, *From Livestreamed Services to Drive-in Worship, Faith Communities Find Their Way Amid Pandemic*, Roanoke Times (Apr. 4, 2020), [https://www.roanoke.com/news/local/from-livestreamed-services-to-drive-in-worship-faith-communities-find-their-way-amid-pandemic/article\\_34bf76eb-5fa6-550e-8e55-1493f814feda.html](https://www.roanoke.com/news/local/from-livestreamed-services-to-drive-in-worship-faith-communities-find-their-way-amid-pandemic/article_34bf76eb-5fa6-550e-8e55-1493f814feda.html) (also noting that some places of worship have closed).

<sup>23</sup> Petitioner has since moved in federal court to dismiss the removed action. See ECF No. 4, *Hughes v. Northam*, No. 1:20-cv-14 (W.D. Va. Apr. 7, 2020). This Court’s docket also reflects a third suit filed by petitioner, No. CL20-409, which was never sent to the Governor and which it appears petitioner has also attempted to non-suit.

the public interest.” *Id.* at 20.

## ARGUMENT

Petitioner’s request for a temporary injunction fails for two independent reasons: (1) he fails to establish likelihood of success on the merits; and (2) both the balance-of-equities and public-interest factors tip decisively against granting the requested injunction.

### **I. Petitioner has not established that he is likely to succeed on the merits**

Petitioner insists that the temporary gatherings restriction is unconstitutional because it is not “the least restrictive” means of accomplishing “a compelling state interest.” Pet. ¶ 14. That argument fails for three reasons. *First*, recent and well-established precedent demonstrates that the familiar tiers of scrutiny are inapplicable in the context of a fast-moving and rapidly evolving emergency. *Second*, even under traditional free exercise principles, the temporary gatherings restriction would be subject to (and comfortably survive) rational-basis review because it is a neutral rule of general applicability. *Third*, the Governor’s careful and measured efforts to slow the spread of a once-in-a-century global pandemic would survive any level of judicial scrutiny.

#### **A. The temporary gatherings restriction represents a good-faith, evidence-based emergency measure that warrants this Court’s deference**

Courts have long emphasized that the elected branches of government must be able to take decisive and targeted action to address matters of urgent concern. See *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971) (“Dealing with . . . an emergency situation requires an immediacy of action that is not possible for judges.”). For that reason, in evaluating measures taken during an emergency, “the scope of [a court’s] review . . . must be limited to a determination of whether the [executive’s] actions were taken in good faith and whether there is some factual basis for [the Governor’s] decision that the restrictions he imposed were necessary to maintain order.” *Id.* That framework reflects the reality that “governing authorities must be

granted the proper deference and wide latitude necessary for dealing with . . . emergenc[ies].” *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996), abrogated on other grounds by *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998).

The current emergency presents a particularly appropriate moment for such deference. The Governor indisputably acted in good faith in issuing Executive Orders 53 and 55. Authorities estimate that 1.5 to 2.2 million Americans could die if governments did nothing to stop the virus,<sup>24</sup> and a battery of evidence supports the conclusion that prohibiting gatherings of more than ten people is necessary to curb the spread of COVID-19. The Governor’s reasoned approach—which tracks measures by other state executives and local officials—refutes any suggestion that he acted rashly or without due consideration of the difficult issues involved. Accordingly, the Governor’s chosen strategy for slowing the spread of COVID-19 and saving lives warrants deference. See *Binford Order* at 15 (so holding).

**B. Petitioner’s constitutional claims also fail under the standards that would govern outside the emergency context**

For the reasons just explained, this Court’s review of petitioner’s constitutional claims should reflect the exigency under which the Governor acted. But those claims would still fail under the standards of judicial review that would apply outside an emergency setting.

**1. Petitioner’s free exercise challenge fails**

The core of petitioner’s plea for a temporary injunction is his allegation that the gatherings restriction “substantially interferes with [his] exercise of his Christian faith” by infringing on his “religious liberties.” Pet. ¶¶ 11, 12.

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<sup>24</sup> William Wan et al., *Experts and Trump’s Advisers Doubt White House’s 240,000 Coronavirus Deaths Estimate*, Wash. Post (Apr. 2, 2020), <https://www.washingtonpost.com/health/2020/04/02/experts-trumps-advisers-doubt-white-houses-240000-coronavirus-deaths-estimate/>.

That challenge fails. Neither EO 53 nor EO 55 prohibits petitioner from observing Easter or any other religious obligation—the only limitation is that he may not do so at an in-person gathering of more than ten people. And that limitation is precisely the sort of neutral rule of general applicability that triggers (and comfortably survives) rational-basis review.

***The Smith standard applies.*** Although petitioner’s current pleading carefully omits any claim under the United States Constitution, Virginia courts look to federal case law for guidance when interpreting Article I, § 16 of the Virginia Constitution. See *In re Episcopal Church Prop.*, 76 Va. Cir. 884, at \*8 (Fairfax Cnty. Cir. Ct. 2008) (“If a statute satisfies the Establishment and Free Exercise Clauses of the U.S. Constitution, it is also consistent with the Virginia Constitution’s corresponding religious freedom provisions.”); accord *Habel v. Industrial Dev. Auth. of City of Lynchburg*, 241 Va. 96, 100 (1991) (describing language in Article I, § 16 of the Constitution of Virginia as “analogous” to the Establishment Clause in the United States Constitution); *Mandell v. Haddon*, 202 Va. 979, 989 (1961) (analyzing together Article I, § 16 and the First Amendment).

Despite briefly stating that the right of religious liberty is “more clearly amplified” in the Virginia Constitution than in the United States Constitution, Pet. ¶ 12, petitioner never actually asserts that his rights under Article I, § 16 are more expansive than those afforded by the First Amendment. Indeed, in asserting that the temporary gatherings restriction “is not a ‘religiously neutral’ law,” Pet. ¶ 11, petitioner paraphrases language widely associated with the United States Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *id.* at 881 (explaining “that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability” (internal quotation marks and citation omitted)). That makes sense, because Virginia courts have specifically cited *Smith* in

considering claims under both the Federal and State Constitutions. See, *e.g.*, *Horen v. Commonwealth*, 23 Va. App. 735, 742–43 (1997) (stating that “a religiously neutral law of general applicability that substantially burdens the free exercise of religion will survive free exercise challenge where the law rationally advances a legitimate state interest” (citing *Smith*)).

***The temporary gatherings restriction is a neutral rule of general applicability.*** Under the *Smith* analysis, the threshold question is whether the temporary gatherings restriction is “a valid and neutral [rule] of general applicability.” *Smith*, 494 U.S. at 879 (internal quotation marks and citation omitted). If so, even if the temporary gatherings restriction “substantially burdens the free exercise of religion,” it survives constitutional scrutiny so long as it “rationally advances a legitimate state interest.” *Horen*, 23 Va. App. at 742–43.

Petitioner does not (and could not) plausibly allege that the Orders prohibit gatherings of more than ten people “because” such gatherings are “undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). To the contrary, EO 53 and EO 55 apply to “[a]ll public and private in person gatherings of” the requisite number of people. EO 53 ¶ 1 (emphasis added); accord EO 55 ¶ 2. And both Orders provide a reason for the restriction that has nothing to do with the religious motivations of any gathering: slowing the spread of COVID-19. See EO 53, p. 1; EO 55, p. 1.

At one point, petitioner objects that EO 55 specifically mentions “religious” gatherings. Pet. ¶ 5. But that reference is explained by the fact that the word “religious” is contained in a sentence whose whole purpose is to emphasize that “[a]ll public and private in-person gatherings” really means *all* such gatherings. EO 55 ¶ 2; see *id.* (“All public and private in-person gatherings of more than ten individuals are prohibited. This includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor.”). The temporary

gatherings restriction draws no distinction between religious and non-religious “gatherings,” which is precisely what makes it religiously neutral.<sup>25</sup>

At other points, petitioner references the Orders’ collective treatment of certain businesses and non-religious activities. Petitioner points to EO 55’s statement that the temporary gatherings restriction “does not apply . . . [t]o *the operation of* businesses not required to close to the public under Executive Order 53,” EO 55 ¶¶ 2 & 2(a) (emphasis added); see Pet. ¶ 6, and the fact that EO 53 “lists various businesses deemed to be *essential*,” “contemplates all other businesses remaining open,” and states it is not intended to limit other types of conduct, including the provision of health or medical services or the operation of the media, see Pet. ¶¶ 7–9 (citing EO 53 ¶¶ 5, 8, 9). These provisions, petitioner insists, establish that “EO 55, taken as a whole, and in relationship to EO 53, is not a ‘religiously neutral’ law.” Pet. ¶ 11.

Those arguments fail for a different reason: petitioner misreads the Orders. Petitioner’s cursory assertions elide the distinction between the temporary gatherings restriction (which applies to religious gatherings) and the separate business-related provisions (which do not). The overarching purpose of both Orders is “minimizing the spread of COVID-19” by limiting “[u]nnecessary person-to-person contact.” EO 53, p. 1. Both EO 53 and EO 55 implement that purpose in two steps: first, by announcing a globally applicable restriction; and second, by announcing more targeted restrictions that apply only to *certain* organizations or activities.

EO 53, for example, begins by announcing a rule that applies to all people and organizations in Virginia: for a limited time, “*all* public and private in person gatherings” of a certain size are prohibited *regardless* of the nature of the gathering or the identity of the people

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<sup>25</sup> Petitioner’s suggestion that religious gatherings “are treated the same as sporting events, parties, etc.,” Pet. ¶ 5, is also wrong. The Governor has taken special care to ensure that people are able to practice their faith. See pp. *supra* 7–8 & n.21.

participating. EO 53 ¶ 1 (emphasis added). EO 53 then creates separate frameworks that govern *particular* businesses, organizations, and activities—many of which impose additional restrictions that sweep far beyond the general restrictions that apply to all gatherings. See, e.g., EO 53 ¶ 3 (requiring “[c]losure of all dining . . . areas in restaurants,” regardless of the number of people present); *id.* ¶ 6 (requiring all non-essential “brick and mortar retail businesses” to “limit all in-person shopping to no more than 10 patrons per establishment”).

The distinction between the temporary gatherings restriction and the business-related provisions in the Orders is crucial, because only the former says anything about Easter (or any other religious) services. Although petitioner is correct that EO 53 identifies various “[e]ssential retail businesses,” EO 53 ¶ 5, the definition of essential retail business is entirely separate from—and has nothing to do with—the generally applicable temporary gatherings restriction. The text of EO 53 makes this clear: an Easter service does not implicate any restriction on “retail business[es],” nor do worshippers engage in “in-person shopping.” EO 53 ¶ 6. Accordingly, any quarrels petitioner has with EO 53’s list of “[e]ssential retail businesses” are irrelevant to his free exercise claim.<sup>26</sup> The same is true of EO 53’s statement (at ¶ 8) that “business operations offering professional rather than retail services may remain open” so long as they “adhere to social distancing requirements,” because no one is suggesting that churches or other faith communities “offer[] professional . . . services.” Furthermore, the social distancing requirements are the same ones relevant to churches, further emphasizing that the restrictions are truly a

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<sup>26</sup> Petitioner’s objections are overheated and without merit in any event. The Governor’s list of essential retail businesses—including the presence of “[b]eer, wine, and liquor stores,” EO 53 ¶ 5—is consistent with orders issued by other States. See Thomas Johnson & Angela Fritz, *You’re Under a Stay-at-Home Order? Here’s What That Means in Your State.*, Wash. Post (Apr. 6, 2020), <https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state/>. And the vast majority of businesses so listed are obviously “essential” under any conceivable definition, including “[g]rocery stores,” “pharmacies,” and “[m]edical, laboratory, and vision supply retailers.” EO 53 ¶ 5.

“neutral [rule] of general applicability.” *Smith*, 494 U.S. at 879 (internal quotation marks and citation omitted).

Likewise, the second paragraph of EO 55 underscores that “[a]ll public and private in-person gatherings of more than ten individuals” really means *all* such gatherings. EO 55 ¶ 2. That provision also clarifies that the temporary gatherings restriction does not impact the *separate* framework created by EO 53 to govern Virginia’s businesses by stating that it “does not apply . . . [t]o *the operation of* businesses”—whether retail or not—that are “not required to close to the public under Executive Order 53.” EO 55 ¶ 2(a) (emphasis added).<sup>27</sup>

***The temporary gatherings restriction survives rational basis review.*** Because the temporary gatherings restriction is “a neutral government decision of general applicability,” it “is subject to rational basis review, even where it has the incidental effect of burdening religious exercise.” *Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty.*, 915 F.3d 256, 265 (4th Cir. 2019); accord *Horen*, 23 Va. App. 742–43. That bar is easily cleared here.

“To pass muster under rational basis review, [government action] need only be rationally related to a legitimate government interest.” *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 210 (4th Cir. 2019) (internal quotation marks and citation omitted). It is difficult to imagine a more legitimate government interest than the preservation of life and health during a global pandemic. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (“[T]he Government [] has a significant interest in protecting the health, safety, and welfare of its citizens.”); *Workman v. Mingo Cty. Bd. of Educ.*, 419 Fed. Appx. 348, 353 (4th Cir. 2011) (noting that a “state’s wish

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<sup>27</sup> Petitioner’s contrary understanding of paragraph 2(a) of EO 55 must be wrong because it would single-handedly undo much of EO 53. The *only* businesses that EO 53 requires to fully “close to the public,” Pet. ¶ 6, are the “recreational and entertainment businesses” specifically listed in paragraph 4. See EO 53 ¶ 4 (requiring “[c]losure of all public access to” such businesses). EO 55 was not intended to exempt from the temporary gatherings restriction every other business in Virginia.

to prevent the spread of communicable diseases . . . constitutes a compelling interest”). And the temporary gatherings restriction is rationally related to that interest because all available evidence supports the commonsense proposition that minimizing in-person gatherings helps prevent the spread of a respiratory disease that has proven to be particularly deadly in crowds.<sup>28</sup>

## **2. Petitioner’s remaining constitutional claims fail**

Without providing any evidence, argument, or explanation, petitioner simply *asserts* that the temporary gatherings restriction also runs afoul of three other provisions of the Virginia Constitution: Article I, § 1; Article I, § 2; and Article I, § 7. See Pet. at 1, 4. Such conclusory allegations are wholly insufficient to meet petitioner’s burden to “*establish* that he is likely to succeed on the merits” of such claims. *Winter*, 555 U.S. at 20 (emphasis added). Petitioner identifies no “inherent right[,]” Va. Const. art. I, § 1, that the temporary gatherings restriction violates. Petitioner does not explain how Executive Orders issued pursuant to both the Virginia Constitution, see Va. Const. art. V, § 7, and a statute enacted by the General Assembly, see Va. Code Ann. § 44-146.17, violate the principles that “all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them,” Va. Const. art. I, § 2. Nor has petitioner identified any “laws” the Governor has “suspend[ed]” within the meaning of Article I, § 7.

### **C. The Governor’s measured, evidence-based efforts to contain a once-in-a-century pandemic survive strict scrutiny**

For the reasons already explained, the temporary gatherings restriction is not subject to strict scrutiny. In any event, that standard is amply satisfied here because the temporary

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<sup>28</sup> Petitioner insists that the temporary gatherings restriction is not “the least restrictive” way of accomplishing the desired governmental ends. Pet. ¶ 14. That gets the governing standard wrong because the “least restrictive means” test applies to actions subject strict scrutiny, not those subject to rational-basis review. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). In any event, the temporary gatherings ban survives even strict scrutiny. See Part I(C), *infra*.

gatherings restriction is “necessary to advance a compelling government interest and does so in the least restrictive manner.” *Horen*, 23 Va. App. at 743. Even petitioner appears willing to “[a]ssum[e],” Pet. ¶ 14, that the government’s interest in protecting life and health during a global health crisis is a compelling state interest. Accord *Workman*, 419 Fed. Appx. at 353 (holding that a “state’s wish to prevent the spread of communicable diseases . . . constitutes a compelling interest”). And, contrary to petitioner’s bare assertions, the temporary gatherings restriction is also the “least restrictive means” of furthering that interest because it limits *only* the specific form of in-person worship that has already been shown to provide a particularly lethal mode of transmission. See *supra* pp. 3–4. Indeed, it is difficult to imagine a more tailored means of limiting the spread of COVID-19 than by temporarily prohibiting large gatherings. Accord *Workman*, 419 Fed. Appx. at 353–54 (“assuming for the sake of argument that strict scrutiny applie[d]” and holding that “West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe [petitioner’s] right to free exercise”).

## **II. The balance of equities and public interest factors independently foreclose preliminary equitable relief**

Even if petitioner had shown likelihood of success on the merits, the Court should still refuse a temporary injunction because both “the balance of equities” and “the public interest” factors weigh decisively against one. *Winter*, 555 U.S. at 20.

1. It is important to define the precise “harm” petitioner seeks to prevent. Neither Executive Order prevents petitioner from celebrating Easter. Neither Executive Order prevents petitioner from participating in an online Easter service, attending a worship service that does not exceed ten people, or attending an Easter service of any size so long as participants stay in their cars and observe social distancing. See *supra* pp. 7–8. As the Governor has acknowledged, that does not mean that petitioner—like many others who would normally celebrate Easter in larger

in-person groups—will experience no loss. But it does mean that any harm petitioner will experience “in the absence of preliminary relief,” *Winter*, 555 U.S. at 20, will be limited to his inability to attend an in-person Easter service involving more than ten people.

2. The harm petitioner will experience if this Court denies a temporary injunction must be balanced against the catastrophic and permanent harm that others could suffer if the Court grants one. See *Winter*, 555 U.S. at 24 (“courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief” and “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”) (internal quotation marks and citation omitted).

Here, the almost inevitable result of granting the requested relief would be increased transmission of a deadly disease for which there is currently no cure. As petitioner emphasizes (Pet. ¶ 10), neither church-goers nor faith leaders will be able to anticipate how many will attend any given in-person public worship service, making adherence to social-distancing requirements all-but-impossible. And, absent such protections, the very services to which people turn for comfort may transform into the kind of “hothouses for the virus” that have “exacerbate[ed] outbreaks” across the country. *Wilson et al.*, *supra* note 9; see *supra* pp. 3–4 & nn.9–12.

Petitioner insists that the decision whether to conduct traditional, in-person services should “be left to the leadership and congregation of the church.” Pet. ¶ 13. But the risk of public gatherings is not restricted to any worshipers who interact during in-person services. As tragic experience in other communities has already shown, the virus spreads rapidly throughout communities, and, as healthcare systems become overrun, patients and healthcare workers

suffer.<sup>29</sup> Because “the granting . . . of the requested relief” could seriously undermine efforts to protect public health and easily inflict massive and permanent irreparable harm on numerous third parties, the balance of equities and public interest factors tip decisively against granting the “extraordinary remedy” petitioner seeks. *Winter*, 555 U.S. at 24.

\* \* \*

It is obvious that petitioner “disagrees with the [Governor’s] assessment” about the need for a temporary gatherings restriction and the lack of a religious exemption. *Freemason Street Area Ass’n v. City of Norfolk*, 100 Va. Cir. 172, at \*12 (City of Norfolk Cir. Ct. 2018). But this Court should “seriously heed the [Governor’s] conclusion that public safety” requires such a step and be especially “reluctant” to discount the careful assessments upon which it was made—particularly given the complete lack of evidence “produced in support of [petitioner’s] request for preliminary relief.” *Id.*

### CONCLUSION

The motion for a temporary injunction should be denied.

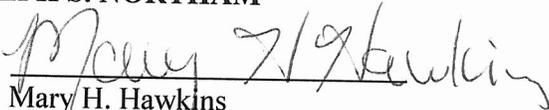
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<sup>29</sup> Lenny Bernstein et al., *Covid-19 Hits Doctors, Nurses and EMTs, Threatening Health System*, Wash. Post (Mar. 17, 2020) (explaining that “the virus is picking off doctors, nurses and others needed in the rapidly expanding crisis”), [https://www.washingtonpost.com/health/covid-19-hits-doctors-nurses-emts-threatening-health-system/2020/03/17/f21147e8-67aa-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/health/covid-19-hits-doctors-nurses-emts-threatening-health-system/2020/03/17/f21147e8-67aa-11ea-b313-df458622c2cc_story.html).

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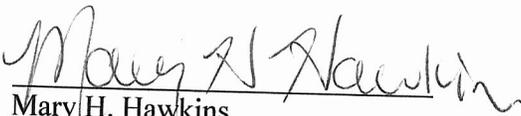
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2020, a true and accurate copy of the foregoing Memorandum in Opposition was transmitted by both first-class mail and email to:

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