UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

TEMPLE BAPTIST CHURCH; ARTHUR SCOTT, *Plaintiffs*, v. **CITY OF GREENVILLE**, *et al.* *Defendants*.	Case No.: 4:20-cv-64 DMB-JMV

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

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INTRODUCTION

Last week, on April 8, the City of Greenville sent eight uniformed police officers to break up Plaintiffs' lightly attended, midweek "drive-in" church service. Even though all in attendance were sitting inside their cars with windows rolled up while listening to the service being broadcasted over low-power FM radio, the officers disrupted the pastor's sermon, demanded driver's licenses, and handed out citations carrying $500 fines. In other words, the City's police force caused precisely what the City has since said it was trying to prevent: person-to-person contact.

This was both unnecessary and unconstitutional. The Mississippi Governor's Executive Orders expressly allow Plaintiffs Temple Baptist Church and Pastor Arthur Scott (collectively, the "Church" or "Temple Baptist") to hold services of this sort. But the City believes its churches are too dangerous. And on April 7, it enacted an "EXECUTIVE ORDER REGARDING CHURCHES SERVICES," targeting churches and mandating the closure of all church buildings for even "drive-in" church services. Yet secular drive-in services remain open. Moreover, since the filing of the Complaint, the City has doubled down, announcing that the April 7 church-closure order still "stands."[1] Without a temporary restraining order from this Court, Temple Baptist Church, its parishioners, and its pastor will face more punishment for worshipping their God. Temple Baptist plans to keep holding "drive-in" services on Wednesdays and Sundays so that its parishioners can safely worship God from their cars without risking the spread of coronavirus.

[1] *See* Press Conference, City of Greenville, Facebook (Apr. 13, 2020), https://www.facebook.com/GreenvilleMS/videos/235793907622738/.

Several weeks ago, in response to COVID-19, Temple Baptist voluntarily decided to start holding "drive-in" worship services instead of traditional in-person services. Verified Complaint ("VC") ¶ 21. It did this even though no state or local governmental order prohibited in-person church services. Temple Baptist believed "drive-in" services would protect the health and safety of its parishioners and community, since those services entail no in-person contact. *Id.* ¶ 22. Attendees park their cars in the Church's parking lot, spaced beyond CDC guidelines, while listening to the service over FM radio. *Id.* ¶ 24. Service is conducted inside the empty church building and then broadcasted through a low-power FM radio transmitter. *Id.* ¶ 25. To ensure safety, Temple Baptist requires all attendees to stay inside their cars before, during, and after service. *Id.* ¶¶ 27–28. The Church also limits its production team to fewer than ten people. *Id.* ¶ 30. And the production team arrives early, locks the Church's doors, and allows no one else to access the building for any reason, including even to use the Church's bathrooms. *Id.* ¶¶ 31–32. The production team also follows CDC and Mississippi Department of Health guidelines while preparing for and producing the Church's "drive-in" services. *Id.* ¶ 33.

Despite these safety measures—which exceed those required under the Governor's Orders—the City of Greenville has cited and fined and will continue to cite and fine Temple Baptist's pastor and parishioners if they hold "drive-in" church services. Plaintiffs thus move, on an emergency basis, for a temporary restraining order to enjoin the City and all persons acting at the City's direction from applying

the City's "EXECUTIVE ORDER REGARDING CHURCH SERVICES" against Temple Baptist's "drive-in" services, which the Church plans to hold again this upcoming Wednesday and Sunday. Given the First Amendment rights at stake, Plaintiffs request that this temporary restraining order remain in effect until the Court rules on their motion for preliminary injunction (to be filed later) and that any bond request be waived. *See Gilmore v. Wells Fargo Bank N.A.*, 2014 WL 3749984, at *6 (N.D. Cal. July 29, 2014).

ARGUMENT

Under Rule 65, this Court may issue a temporary restraining order if Temple Baptist shows (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of the injunction will not disserve the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). All these factors are met here.

I. Temple Baptist is likely to succeed on the merits of its claims.

To satisfy the "likelihood of success" inquiry, a plaintiff does not have to show ultimate success at trial. Instead, it must present a prima facie case. *Id.* at 596. Temple Baptist easily meets that standard.

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

Laws that facially target religious groups for disfavored treatment are *always unconstitutional*. Indeed, the Supreme Court has stated that government action "targeting religious beliefs as such is *never permissible*." *Church of the Lukumi*

Babalu Aye. Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (emphasis added). And just three years ago, the Supreme Court reiterated that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*, 508 U.S. at 533).

The City's church-closure order cannot clear even facial neutrality's low hurdle. The plain language of the City's order, titled "EXECUTIVE ORDER REGARDING CHURCH SERVICES," singles out churches such as Temple Baptist for disfavored treatment. In fact, the order applies to *no* secular entities at all. *See* Ex. 1 to VC. What is more, the City crafted its church-closure order in direct defiance of the Governor's Executive Orders 1463 and 1466, which classify churches as "Essential Businesses and Operations" and allow them to remain open to offer religious services like those Temple Baptist seeks to offer here. VC ¶¶ 35–43. Simply put, the City went out of its way—to the point of contradicting state law—to shut down Temple Baptist's small "drive-in" church services.[2] This is unconstitutional.

Indeed, another federal district court just issued a temporary restraining order based on similar facts. The court in *On Fire Christian Center, Inc. v. Fischer*,

[2] As alleged in the Verified Complaint, the City's actions were *ultra vires* because the Governor's Executive Orders preempt a local city order that reclassifies churches as "non-essential" and forces them to stop performing even limited "drive-in" services. VC ¶¶ 100–06. A temporary restraining order is warranted for this reason as well.

No. 3:20-cv-264-JRW (W.D. Ky. Apr. 11, 2020), temporarily enjoined the City of Louisville from enforcing its ban on religious services, which prohibited "drive-in" services like those here. *Id.* at *7.[3] In so doing, the court noted that, while Louisville's Mayor said it was "not really practical or safe to accommodate drive-up services," the city still allowed drive-through restaurants and liquor stores to remain open. *Id.* The city therefore was "substantially burdening [the church's] sincerely held religious beliefs in a manner that is not 'neutral' between religious and non-religious conduct, with orders and threats that are not 'generally applicable' to both religious and non-religious conduct." *Id.* at *11.

So too here. The City of Greenville's church-closure order is neither neutral nor generally applicable; it applies only to *church* drive-in services and to no others. Such religious targeting is "odious to our Constitution" and "cannot stand." *Trinity Lutheran*, 137 S. Ct. at 2025; *see also On Fire Christian Ctr., Inc.*, No. 3:20-cv-264-JRW, at *12 ("[The City] has targeted religious worship by prohibiting drive-in church services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs.").

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

Religious speech is protected under the First Amendment. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Lovell v. City of Griffin,* 303 U.S. 444 (1938). And the government may not restrict private speech on private

[3] A copy the TRO ruling in *On Fire Christian Center* is attached to this motion as Exhibit 1.

property, religious or otherwise, without satisfying strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (town's sign ordinance restricting speech "on private property or on a public right of way" subject to strict scrutiny).

Here, the City has categorically banned Temple Baptist from holding "drive-in" services on its *own* property. Because the Church's services consist entirely of protected expression and speech, such as praise and worship and religious preaching and teaching, the City's church-closure order restricts speech and triggers strict scrutiny. As explained below, the City cannot satisfy that rigorous standard.

C. The church-closure order violates Mississippi's Religious Freedom Restoration Act.

The City's church-closure order also violates Mississippi's Religious Freedom Restoration Act (MRFRA). Under MRFRA, the City may not substantially burden the Church's religious exercise unless it can show that the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann. § 11-61-1(5).[4]

The church-closure order undeniably burdens Temple Baptist's religious beliefs because it forbids the Church's "drive-in" services, which is an expression and exercise of their religious beliefs. *See* VC ¶¶ 19–20, 65–67. The order also

[4] MRFRA applies to "all state laws, rules, regulations and any municipal or county ordinances, rules or regulations and the implementation of those laws." Miss. Code Ann. § 11-61-1(7).

threatens fines and penalties if the Church is unwilling to comply. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981) (a substantial burden exists when the government exerts "substantial pressure on an adherent to modify his behavior and to violate his beliefs"). Further, as explained below, the City cannot provide a compelling reason for its actions, nor can the City establish that it has pursued its purported interests with the least restrictive means. *See On Fire Christian Ctr.*, No. 3:20-cv-264-JRW, at *16 (holding that church had likelihood of success on state RFRA claim).

D. The church-closure order fails strict scrutiny.

Because strict scrutiny applies for the reasons above, the City must prove that shutting down Temple Baptist's "drive-in" services "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546. The City cannot satisfy this "highest level of review." *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016).

While enacting safety measures to curb the spread of the COVID-19 may generally be considered a compelling interest, courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Burwell v. Hobby Lobby*, 573 U.S. 682, 726–27 (2014) (cleaned up). Even "plausible hypotheses are not enough to satisfy strict scrutiny," *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1008 (3d Cir. 1993), and "ambiguous proof will not suffice," *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800 (2011). Thus, "broadly formulated" interests and generalized speculations or assertions, like those raised by the City here, are not compelling. *See Gonzales v. O Centro Espirita Beneficente*

Uniao do Vegetal, 546 U.S. 418, 431 (2006). Moreover, "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

Here, the City's decision to ban Temple Baptist's "drive-in" services is not narrowly tailored to serve any legitimate, let alone compelling, state interest. This is true for at least three reasons.

First, as noted, the State of Mississippi has designated churches as "Essential Businesses and Operations" and thus allows them to keep holding religious services, including "drive-in" services. The Governor's Executive Orders 1463 and 1466 also prohibit the City from exercising any local emergency power in a way that conflicts with the State's Orders, which the church-closure order does.

Second, the Church's "drive-in" services do present the type of risk the City is purportedly trying to prevent. The Church's parishioners will not spread COVID-19 merely by listening to a radio broadcast while sitting in their cars, with their windows up. *See* VC ¶¶ 21–34; *accord On Fire Christian Ctr.*, No. 3:20-cv-264-JRW, at *13 (city's interest in preventing spread of COVID-19 likely to be "achieved by allowing churchgoers to congregate in their cars as [the church] proposes").

And third, the City is not pursuing whatever interest it may have evenhandedly. The City allows individuals and businesses to engage in virtually identical activity with no threat of punishment. For instance, the church-closure order does not prohibit individuals from parking at a drive-in restaurant and eating a meal inside their cars, nor does any other City rule or order. *See Lukumi*, 508 U.S.

at 536–38 (concluding that when the same conduct "in almost all other circumstances [goes] unpunished," religious conduct has been unconstitutionally "singled out for discriminatory treatment"); *accord On Fire Christian Ctr.*, No. 3:20-cv-264-JRW, at *12 (strict scrutiny not satisfied because city's actions are "underinclusive" and "overbroad" in that they "don't prohibit a host of equally dangerous (or equally harmless) activities that [the city] has permitted on the basis that they are 'essential'").[5]

II. COVID-19 does not justify the shutting down Temple Baptist's "drive-in" church services.

The government's exercise of emergency powers "is not conclusive or free from judicial review." *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971). "A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict … with any right which [the U.S. Constitution] gives or secures." *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 25 (1905); *accord On Fire Christian Ctr.*, No. 3:20-cv-264-JRW, at *15 ("[E]ven under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose.").

The *Jacobson* Court looked at three factors for evaluating government actions that infringe fundamental rights: (1) Does the government action have a "real or substantial relation" to the public health crisis?; (2) Is the government action

[5] This is not a hypothetical. For example, a Sonic Drive-In is just 0.2 miles away from Temple Baptist and is not subject to any City closure order. *See* Google Maps, Directions from Temple Baptist Church to Sonic, https://cutt.ly/1tXutMR.

"beyond all question, a plain palpable invasion of rights secured by the fundamental law"?; and (3) Is the government action arbitrary and oppressive? 197 U.S. at 31, 38. The City's church-closure order, and its enforcement against Temple Baptist, cannot meet any of these factors.

A. The City's prohibition of Temple Baptist's "drive-in" services does not have a real or substantial relation to the public health crisis.

The City cited no authority in its closure order that being parked in a church parking lot listening to your pastor's sermon on the radio would pose a unique and unacceptable threat to public health and safety. In fact, that factual scenario is better than eating at the Sonic down the road from this church, where people sit in their cars with windows down and Sonic employees bring food directly to the cars. Unlike the City, the Governor's Orders properly recognize this, allowing "religious and faith-based facilities, entities and groups, religious gatherings" to remain open and "operate at such level as necessary to provide essential services and functions."

B. The City's order is a plain, palpable invasion of Temple Baptist's constitutional rights.

The City's church-closure order precludes Plaintiffs from assembling and worshiping together, even in such a safe, no-contact manner as a drive-in service. For the reasons discussed in this motion, the City's order is a plain, palpable invasion of constitutional rights.

C. The City's decision to shut down Temple Baptist's "drive-in" church services is arbitrary and oppressive.

Although Courts may be reluctant to decide between reasonable measures taken by legislative or executive branches in emergency situations, this Order is

beyond unreasonable—it is arbitrary and oppressive. Churches were targeted. The closure order is titled "EXECUTIVE ORDER REGARDING CHURCH SERVICES." It does not pertain to other businesses or situations with more personal contact, such as drive-in or drive-thru restaurants. Criminalizing parking in a church lot with zero personal contact is non-sensical, does not further the interest at hand, and more importantly here, is unconstitutional.

III. Temple Baptist has already suffered irreparable harm and will continue to suffer irreparable harm without an injunction.

The Fifth Circuit has held that deprivation of constitutional freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Temple Baptist's constitutional rights have been violated by the City and will continue to be violated absent immediate relief.

IV. The balance of equities sharply favors Temple Baptist.

The equities favor Temple Baptist because the law places a premium on protecting constitutional rights. The City's church-closure order irreparably harms the Church's constitutional freedoms and significantly hinders its ministry to its parishioners and community. Meanwhile, an injunction will not harm the City at all. The City can achieve any valid interest through other orders already issued. It need not apply an unconstitutional order targeting churches. The City is free to enact permissible and reasonable regulations pertaining to drive-in services, but a flat ban serves no government interest and is not narrowly tailored.

V. An injunction would serve the public interest.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quotations omitted). This is particularly true for First Amendment freedoms. Because the requested injunction will accomplish this, the public interest also favors an order protecting Temple Baptist.

CONCLUSION

Plaintiffs Temple Baptist Church and Pastor Arthur Scott respectfully request that this Court grant their request for a Temporary Restraining Order, allowing them to continue their Wednesday and Sunday "drive-in" church services.

Respectfully submitted this 13th day of April 2020.

By: s/ Nathan W. Kellum

Kristen K. Waggoner
AZ Bar No. 032382*
Ryan J. Tucker
AZ Bar No. 034382*
Jeremiah Galus
AZ Bar No. 030469*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
kwaggoner@adflegal.org
rtucker@adflegal.org
jgalus@adflegal.org

David A. Cortman
GA Bar No. 188810*
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE
Ste. D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@ADFlegal.org

Nathan W. Kellum
MS Bar No. 8813
Center for Religious Expression
699 Oakleaf Office Lane, Suite 107
Memphis, TN 38117
Telephone: (901) 684-5485
nkellum@crelaw.org

ATTORNEYS FOR PLAINTIFFS

*Motions for *Pro Hac Vice* admission forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2020, a courtesy copy of this motion was delivered to the City's attorney.

s/ Nathan W. Kellum
Nathan W. Kellum
MS Bar No. 8813
Center for Religious Expression
699 Oakleaf Office Lane, Suite 107
Memphis, TN 38117
Telephone: (901) 684-5485
nkellum@crelaw.org