Cause No. 2020-22609

STEVEN HOTZE, M.D., *et al.*	**IN THE DISTRICT COURT**
Plaintiffs,	
v.	**281th JUDICIAL DISTRICT**
LINA HIDALGO, in her official capacity and HARRIS COUNTY	
Defendants	**HARRIS COUNTY, TEXAS**

DEFENDANTS' PLEA TO THE JURISDICTION, ANSWER, AND RESPONSE TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

COMES NOW, Defendants Harris County and Harris County Judge Lina Hidalgo, who file this Plea to the Jurisdiction, Answer, and Response to Plaintiffs' Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and represents as follows:

INTRODUCTION

Millions of doctors, nurses, and first-responders are in harm's way as they treat 1.8 million victims—and counting—during the worst pandemic in a century. The SARS-CoVid-2 virus that causes COVID-19 has already killed more than 114,000 men and women in one of the most horrific ways possible—by drowning them in their own fluids. Protective equipment is in short supply, and the heroes working long hours to save lives knowingly expose themselves to the risk of a disease two to three times as contagious as influenza, 10 to 20 times more deadly, and for which there is no vaccine, no cure, and no approved treatment.[1]

[1] Exhibit 1, Affidavit of Dr. Umair Shah (submitted to the Texas Supreme Court in the last case filed by these Plaintiffs to challenge Harris County's "Stay Home, Work Safe" Order) at 3; Exhibit 2, Statement from Dr. Daniel Musher (submitted to the Texas Supreme Court in the last case filed by Plaintiffs challenging Harris County's "Stay Home, Work Safe" Order) at 3.

Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, warns that this scourge could kill 100,000 to 200,000 Americans,[2] and scientists with sophisticated epidemiological models have advised our leaders to invoke quarantine laws to save lives and prevent the catastrophic failure of our medical system.[3] We are in the early weeks of an event that will mark a generation and change society in ways we cannot foresee, and our actions today will determine how many funerals we attend in the coming months.

The leaders upon whose shoulders this burden falls show great courage as they make difficult decisions. Today, approximately half the world and 75 percent of Americans have been ordered to stay home until the worst of the pandemic passes.[4] As the third largest county in the United States, and a densely populated urban area, Harris County joined most of the nation on March 24 by signing a "Stay Home, Work Safe" Order[5] that complies with Centers for Disease Control and Prevention Guidelines.

On March 31, Governor Greg Abbott signed a similar "Stay Home" Executive Order GA-14 closing most businesses in Texas and imposing "a fine not to exceed $1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement" on anymore who disobeys his Order.[6] On April 3, Judge Hidalgo amended Harris County's "Stay Home, Work Safe" Order to declare churches to be essential businesses and make Harris County's Order nearly identical to Governor Abbott's Executive Order GA-14.[7]

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[2] Exhibit 1, Affidavit of Dr. Shah at 3-4. Dr. Fauci's estimates assume robust quarantine and social distancing measures are place throughout the country.

[3] Exhibit 1, Affidavit of Dr. Shah at 2-3; Exhibit 2, Statement from Dr. Daniel Musher, at 2-3.

[4] Exhibit 1, Affidavit of Dr. Shah at 7.

[5] Exhibit 3, Harris County's March 24 "Stay Home, Work Safe" Emergency Order.

[6] Exhibit 4, Governor Greg Abbott's Executive Order GA-14 at 2 (emphasis added).

[7] Exhibit 5, Harris County's April 3 Amendment to "Stay Home, Work Safe" Emergency Order bringing the County and State into alignment regarding churches as essential businesses.

Despite overwhelming evidence to the contrary, Plaintiffs dismiss this pandemic by comparing it to the flu. They submit an affidavit from a self-proclaimed "world-leading expert" who does not even have a medical degree—much less board certification in either internal medicine or infectious disease.[8] Plaintiffs provide grossly inaccurate (and dangerous) misinformation about the incidence, mortality, and morbidity of COVID-19. For example, they falsely claim there is a "coronavirus vaccine."[9] They also claim the virus does not kill people; instead, they blame COVID-19 deaths on those who have a "weakened and dysfunctional immune system" that could be solved "by food and nutrition."[10] Rather than protect vulnerable populations from COVID-19, Plaintiffs propose that they be given "nutritional interventions."[11]

Not only do Plaintiffs misrepresent the science behind the pandemic, but they also misrepresent their own claims. This is the second time Plaintiffs brought this case. On March 31, they filed an Emergency Writ of Mandamus in the Texas Supreme Court seeking to invalidate Harris County's "Stay Home, Work Safe" Order.[12] Harris County responded,[13] and the Supreme Court ordered the parties to file letter briefs explaining whether Plaintiffs' claims should be dismissed as moot following Governor Abbott's signing of Executive Order GA-14.[14] Harris County's letter brief confirmed that Executive Order GA-14 preempts Harris County's Order,

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[8] Plaintiffs' First Amended Petition at Exhibit C.

[9] Plaintiffs' First Amended Petition at 3.

[10] Plaintiffs' First Amended Petition at 17.

[11] Plaintiffs' First Amended Petition at 17.

[12] Exhibit 6, Plaintiffs' Emergency Petition for Writ of Mandamus in the Texas Supreme Court, seeking to invalidate Harris County's "Stay Home, Work Safe" Emergency Order in its entirety.

[13] Exhibit 7, Harris County's Response to Plaintiffs' Emergency Petition for Writ of Mandamus in the Texas Supreme Court. In the short time the case was active, Americans United for Separation of Church and State and Wolfgang Hirczy de Mino, Ph.D both submitted amicus briefs or letters to the Supreme Court strongly condemning Plaintiffs' attempts to force an end to the emergency restrictions.

[14] Exhibit 10, Supreme Court's April 2 Order requiring additional briefing on whether Governor Abbott's Executive Order GA-14 rendered Plaintiffs/Relators' claims moot.

and that if Plaintiffs believed their Constitutional rights were being violated, their claims are against Governor Abbott—not Judge Hidalgo.[15] Rather than admit this to the Supreme Court, Plaintiffs dismissed their case.[16] That should have ended this matter, but on the eve of Easter, Plaintiffs resurrected their claims against Judge Hidalgo in this Court.

Plaintiffs attempt to create a controversy by pretending there is a difference between Governor Abbott's Order and Judge Hidalgo's Order and manufacturing an allegation that Judge Hidalgo's efforts to control the spread of COVID-19 somehow subverts their right to buy guns and attend Easter church services. It is particularly telling that Plaintiffs fail to even attach Judge Hidalgo's April 3 Amended Order and are still seeking to enjoin the March 24 version of her Order that they know is no longer in effect.[17]

This Court should dismiss this case based on sovereign immunity, lack of standing to bring suit, failure to sue the correct defendants, failure to plead facts to show any violation of Constitutional rights, and failure to plead facts to show any violation of the Texas Religious Freedom Restoration Act. If this case is not dismissed outright, this Court should deny Plaintiffs' Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction.

PLEA TO THE JURISDICTION

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. A plea to the jurisdiction contests the trial court's power to determine the subject matter of the controversy. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d

[15] Exhibit 9, Harris County's April 5 Letter Brief to the Texas Supreme Court.

[16] Exhibit 10, Plaintiffs' Motion to Dismiss in the Texas Supreme Court.

[17] *See*, Exhibit 5. While Plaintiffs did not attach the April 3 Harris County Order being challenged, it did attach an order from Collin County—300 miles away on the other side of Dallas. Plaintiffs bizarrely assert that Collin County should dictate the scope of Harris County's "Stay Home, Work Safe" Emergency Order. Plaintiffs neglect to mention that Collin County revoked its order on March 31 because Governor Abbott's signed Executive Order GA-14 superseded Collin County's order. This only further establishes that Governor Abbott is an essential party to this case.

217, 226 (Tex. 2004). Subject matter jurisdiction is essential to the authority of a court to decide a case, and the plaintiff bears the burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear a case. *Tex Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). If a plaintiff pleads facts that affirmatively demonstrate an absence of jurisdiction and the defect is incurable, then the cause is properly dismissed. *Peek v. Equip. Serv. Co. of San Antonio*, 779 S.W.2d 802, 805 (Tex. 1989).

I. Plaintiffs' claims against Harris County must be dismissed based on sovereign immunity.

Plaintiffs seek injunctive relief against Harris County and Harris County Judge Lina Hidalgo to modify an Emergency Order during a federal, state, and local disaster declaration and public health emergency. Harris County is protected from this suit by the doctrine of sovereign immunity. In Texas, sovereign immunity deprives a court of subject-matter jurisdiction against certain government units unless the State consents to suit. *Miranda*, 133 S.W.3d at 224.

In the *Mr. W. Fireworks* case, a fireworks stand sued Collin County and the Collin County Judge over an emergency order prohibiting the sale or transportation of fireworks during a drought. The Austin Court of Appeals concluded that Comal County had sovereign immunity, and that the proper party was the county judge in his official capacity:

> Mr. W raised three claims in its petition that are, in substance, ultra vires claims. Specifically, Mr. W sought declarations that: (1) the County Order exceeded the scope of the Governor's Order and the Act; (2) the Governor's Order exceeded the scope of the Act; and (3) the County Plan exceeded the scope of the Act and the Governor's Order. Based on *Heinrich,* Mr. W should have brought each of the claims against the respective government officials in their official capacity. However, Mr. W brought suit only against Comal County. Thus, the claims are barred by sovereign immunity.

Mr. W. Fireworks, Inc. v. Comal Cty., No. 03-06-00638-CV, 2010 WL 1253931, at *4 (Tex. App. Mar. 31, 2010). Similarly, Plaintiffs claim against Harris County should be dismissed based on sovereign immunity.

Plaintiffs also filed an ultra vires claim against Judge Hidalgo in her official capacity. An ultra vires claim is a claim seeking to require state officials to comply with statutory or constitutional provisions. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Such a claim is not barred by sovereign immunity because the claim alleges that a government official acted outside her discretion and without legal authority. *Id.* Thus, the official capacity claim against Judge Hidalgo is not subject to sovereign immunity, but should still be dismissed for the reasons provided below.

II. Plaintiffs' claims against Harris County and Harris County Judge Hidalgo must be dismissed based on Plaintiffs' failure to establish standing or injury.

In Texas, a court lacks subject matter jurisdiction if a party cannot show standing. Standing "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018), *quoting Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing is a constitutional prerequisite to suit which derives from the Texas Constitution's provision for separation of powers, which denies judicial authority to decide issues in the abstract. Standing also derives from the open courts provision, which provides court access only to a "person for an injury done him." *Id.*

Standing requires that a plaintiff personally suffer an "injury in fact," which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Standing also requires the injury to be "fairly … trac[able] to the challenged action of the defendant, and not … th[e] result [of] the independent

action of some third party not before the court." *Id*, 548 S.W.3d at 485, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For an individual to establish standing to challenge an executive order, he must show more than some government actor who acted outside of his authority. He must also show "he has suffered an injury distinct from the general public." *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001).

Plaintiffs fail to show concrete, particularized, actual injury distinct from the general public. The State and County Emergency Orders affect all of society in a similar manner and temporarily prohibit all large gatherings of people to prevent the spread of COVID-19. These orders are applied equally to the general public, and even if Judge Hidalgo had acted outside the scope of her authority, Plaintiffs fail to show how they have particularized injury distinct from the general public sufficient to provide them standing to sue.

Plaintiffs waited until the eve of Easter to file this lawsuit, and they provided scant details about the Easter services they planned to hold. They never explained how many people they expected to attend or whether they intended to practice social distancing in compliance with Governor Abbott's Executive Order GA-14. Plaintiffs never explained whether it was possible to perform services remotely, or why they are incapable of practicing their religion without violating federal, state, and local public health regulations during this pandemic. Now that Easter has passed, presumably those services have already occurred, and these claims are moot.

The pastors also never supported their Second Amendment claim by verifying under oath when they tried to purchase firearms during Easter week, what firearms they tried to purchase, where they tried to purchase them, or why they were prevented from doing so.

It is even less clear how the non-pastors have standing. Steven Hotze and Thomas Delay never explained how they have been prevented from exercising their religious rights (it is not

even clear what churches they belong to) or when, where, and how they were prevented from purchasing firearms since April 3. Upon information and belief, Delay does not even live in Harris County, and while Hotze claims to be a medical doctor, he provides no evidence to support the assertions made in Plaintiffs' petition about COVID-19 and no explanation of his particularized injury.

One of the pastors, Juan Bustamante, claimed in Plaintiffs' Supreme Court case that he was approached by a Houston Police Officer and "threatened with a thousand dollar fine and incarceration if he did not stop preaching the gospel to his congregation."[18] His own evidence contradicted him—it was a statement by a fire inspector asking him to maintain social distance when he had a group of 10 or more in his church.[19] There was no fine imposed, no arrest made, and no charges filed. No one shut down his church or prevented him from preaching the gospel. He was simply asked not to infect his congregation. This fire inspector's statement was Pastor Bustamante's first exhibit to the Supreme Court, but once it was shown to disprove his claim, he chose not to even attach it to this suit.

Plaintiffs have no particularized standing to bring suit and fail to even explain their injuries. They also fail to explain how an injunction against Judge Hidalgo will address those alleged, unspecified injuries—especially when Governor Abbott has imposed the same regulations upon them. Plaintiffs' case should be dismissed for lack of standing.

III. Plaintiffs' claims against Harris County and Harris County Judge Hidalgo should be dismissed because Plaintiffs fail to name the State of Texas and Governor Greg Abbott as defendants.

Under Texas law, the governor is responsible for meeting "the dangers to the state and people presented by disasters." Tex. Gov't Code § 418.003. During a disaster, the Governor may

[18] Exhibit 6, Plaintiffs' Emergency Petition to the Supreme Court at 1.

[19] Exhibit 6, Plaintiffs' Emergency Petition to the Supreme Court at Tab 1.

issue or rescind executive regulations that "have the force and effect of law." Tex. Gov't Code § 418.012. "The governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." Tex. Gov't Code § 418.017. The governor may even "commandeer or use any private property if the governor finds it necessary to cope with a disaster…" Tex. Gov't Code § 418.017(c).

At the local level, the presiding officer (county judge) of a county is the designated emergency management director for that county. The emergency management director "serves as the governor's designated agent" and "may exercise the powers granted to the governor" on a local scale. Tex. Gov't Code § 418.1015(b). Thus, it is under Governor Abbott's authority that Harris County Judge Hidalgo may issue executive regulations that have the force of law, control the ingress and egress of people, and control the movement of persons and occupancy of buildings as necessary to cope with this disaster. *See*, Tex. Gov't Code § 418.018(c); *United States v. Ferguson*, No. 1:07-CR-70, 2007 WL 4146319, at *5 (E.D. Tex. Nov. 16, 2007).

Violations of either Governor Abbott's Order or Judge Hidalgo's Order carry the same penalties under the same statute. Local Government Code § 418.173 provides for a possible fine of $1,000, or 180 days in jail.

As noted, Governor Abbott's Order imposes restrictions on Plaintiffs' ability to attend church in person, and on April 2, the Texas Supreme Court recognized that the lynchpin of Plaintiffs' case is whether Governor Abbott's Executive Order GA-14 moots their claim against Judge Hidalgo.[20] It does. On March 31, Governor Abbott acknowledged the potential for "hundreds of thousands of deaths" and ordered that "**every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gathering and minimize**

[20] Exhibit 8, The Texas Supreme Court's April 2 Order for Additional Briefing.

in-person contact with people who are not in the same household."[21] Governor Abbott's Order identified the same businesses for closure as Judge Hidalgo's Order—a decision that Plaintiffs' refer to as unconstitutionally picking "winners and losers."

One of the few difference between the two orders is that Harris County had previously required many religious services (like other large gatherings) to be conducted remotely. The Governor's Order similarly asks that religious services be conducted remotely, but notes that "[i]f religious services cannot be conducted from home or through remote services, they should be conducted consistent with the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, and by implementing social distancing to prevent the spread of COVID-19."[22]

On April 3, 2020, Judge Hidalgo modified Harris County's Order to permit in-person religious services, subject to the same guidelines referenced in Governor Abbott's Order. In fact, Judge Hidalgo's Order expressly cited the State's guidelines on this topic.[23] Thus, the two orders are the same. When a party challenges the constitutionality of both the Governor and a county judge's disaster orders, he is required to name both as defendants. In the *Mr. W. Fireworks* case, the Austin Court of Appeals explained:

> Mr. W's remaining claims challenge the constitutionality of the Act, the Governor's Order, the County Order, and the County Plan under the Texas and U.S. Constitutions. For such claims, the Uniform Declaratory Judgments Act requires that the relevant governmental entities be made parties to the suit. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."); *Heinrich,* 284 S.W.3d at 373 n. 6; *Texas Educ. Agency v. Leeper,* 893 S.W.2d 432, 446 (Tex.1994)

[21] Exhibit 4, Governor Abbott's March 31 Executive Order GA-14 at 2 (emphasis added).

[22] Exhibit 4, Governor Abbott's March 31 Executive Order GA-14 at 3.

[23] Exhibit 5, Judge Hidalgo's April 3 Amendments to "Stay Home, Work Safe" Emergency Order at 2.

> ("The DJA expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be-indeed, must be-joined in suits to construe their legislative pronouncements.").
>
> Although Mr. W raised claims seeking declarations that the Act, the Governor's Order, the County Order, and the County Plan violate both the Texas and U.S. Constitutions, it named only Comal County as a defendant. Given Mr. W's failure to make the State or Governor's office parties to this suit, we dismiss Mr. W's claims regarding the constitutionality of the Act and the Governor's Order under the Texas and U.S. Constitutions. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b); *Heinrich,* 284 S.W.3d at 373 n. 6; *Leeper,* 893 S.W.2d at 446.

Mr. W. Fireworks, Inc. v. Comal Cty., No. 03-06-00638-CV, 2010 WL 1253931, at *4 (Tex. App. Mar. 31, 2010). Any finding by this Court that Harris County's "Stay Home, Work Safe" Emergency Order is unconstitutional is also a finding that Governor Abbott's Executive Order GA-14 is unconstitutional. Accordingly, the State of Texas and Governor Abbott are essential parties to this suit. They must be named and served, and the Texas Attorney General must also be served before this suit can proceed. If Plaintiffs are unwilling to do that, the Court should dismiss this case.

IV. Plaintiffs' claims against Harris County and Harris County Judge Hidalgo must be dismissed because this Court lacks jurisdiction over criminal ordinances.

This Court also lacks subject matter jurisdiction because Plaintiffs have not been prosecuted and are not in imminent fear of prosecution. In the *Mr. W. Fireworks* case, the Austin Court of Appeals noted there are only two scenarios when a party may challenge the constitutionality of the criminal portion of a government's emergency order: (1) when the statute is enforced and the party is prosecuted or (2) when the statute is enforced and the threat of prosecution is imminent. *Mr. W. Fireworks, Inc. v. Comal Cty.*, No. 03-06-00638-CV, 2010 WL 1253931, at *7 (Tex. App. Mar. 31, 2010).

Plaintiffs do not fall into either category. No one is prosecuting Plaintiffs, and their own websites suggest they are following Governor Abbott's Executive Order GA-14 and Judge Hidalgo's "Stay Home, Work Safe" Emergency Order. Thus, there is also no imminent prosecution, and this Court lacks jurisdiction over this case.

Even if Plaintiffs were being prosecuted for violating these orders, they must still show that a particular statute would cause irreparable injury to a vested property right. *Id., citing State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994). A "property right" refers to any type of right to specific property, whether tangible or intangible. The term "vested right" must have "some definitive, rather than merely potential existence." *City of La Marque v. Braskey*, 216 S.W.3d 861, 864 (Tex.App.—Houston [1st Dist.] 2007, pet denied). Plaintiffs have not properly pleaded or explained this.

V. Plaintiffs' claims against Harris County and Harris County Judge Hidalgo should be dismissed because Plaintiffs fail to plead facts sufficient to show any violation of their First or Second Amendment rights.

A. The COVID-19 pandemic is a major public health crisis.

As explained by the declaration of Dr. Umair Shah[24] and the statement of Dr. Daniel Musher, the COVID-19 pandemic is unlike anything modern society has experienced. There is no natural immunity to the virus that causes the disease, no "herd immunity" to the virus, no vaccine for the virus, and no approved treatment for the virus.[25] While influenza (the flu) kills approximately 0.1% of those it infects, COVID-19 may kill as many as one to two percent of those it infects. Six percent of those over the age of 60 die from COVID-19, and nearly one in five of those over the age of 80 die from COVID-19.[26]

[24] Exhibit 1, Affidavit of Dr. Shah at 2-4.

[25] Exhibit 1, Affidavit of Dr. Shah at 2-3.

[26] Exhibit 1, Affidavit of Dr. Shah at 2-3.

This is compounded by the fact that the SARS-CoV-2 virus is extremely contagious. A patient with seasonal flu will transmit the disease to an average of 1.3 other people, while preliminary estimates suggest a patient with SARS-CoV-2 may transmit the virus to an estimated 2 to 3 other people. Assuming that each COVID-19 patient spreads the disease to only two other people, the number of infected people will grow exponentially.[27]

The World Health Organization data on March 15 showed the number of infected people was doubling every four days in Italy, France, and the United States. It doubled every three days in Spain and Germany. The United States had its first case on January 20. By March 30, it led the world with 164,248 confirmed cases, as the World Health Organization reported infections in 177 countries. (By comparison, only 28 countries had cases of MERS during the 2012 epidemic, and only 29 countries had cases of SARS during the 2002 epidemic.)[28]

Plaintiffs claim society has overreacted to this pandemic. As support, they point to the fact that approximately 50,000 people die per year from influenza, while, between January 21 and April 3, there were only 6,593 deaths from COVID-19.[29] The problem, of course, is that influenza had a full year to work through populations (most of whom had the opportunity to be vaccinated), while COVID-19 has been around only a few months and has not even reached all parts of the United States. The concern is not what ***has*** happened in the first few weeks of this pandemic, but what ***will*** happen if we do not take action. Plaintiffs claim that on April 3, there

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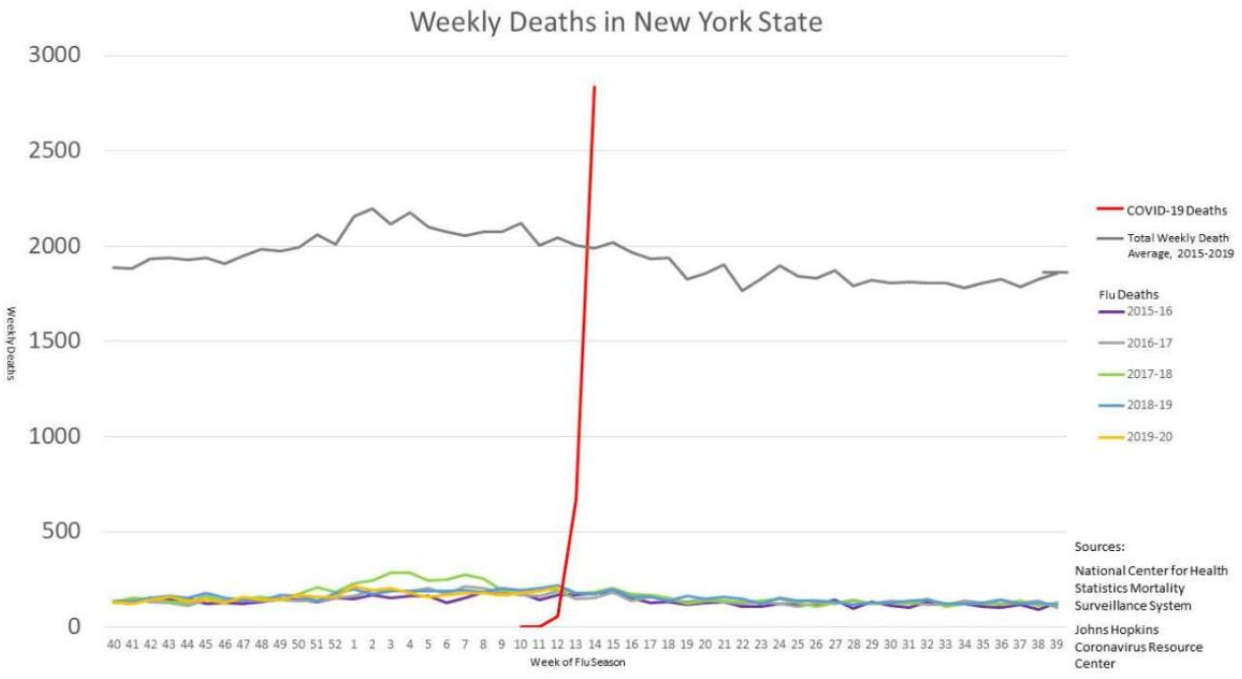
[27] Exhibit 1, Affidavit of Dr. Shah at 3. In the last few days, a new study suggests SARS-CoVid-2 may be far more contagious than initially believed. A disease's transmission to unexposed vaccinated populations is measured by a variable known as R0 (basic reproductive number, pronounced "R-nought"). Early indications were that SARS-CoVid-2 had an R0 value of 2 or 3. However, a new study reports it may be as high as 5.7. *See*, https://wwwnc.cdc.gov/eid/article/26/7/20-0282_article

[28] Exhibit 1, Affidavit of Dr. Shah at 3.

[29] Plaintiffs' First Amended Petition at 15-16. To illustrate how fast this disease is spreading, when Plaintiffs filed their Petition, the number of deaths was 6,593. As of April 11, it is 106,662. By the time the Court reads this brief, it will certainly be higher.

were "91 deaths per day" from COVID-19. [30] As of the April 11 writing of this brief, that figure has ballooned to more than 2,000 deaths per day in the United States.[31]

Using data from the National Center for Health Statistics Mortality Surveillance System and Johns Hopkins Coronavirus Resource Center, we can plot weekly flu deaths in New York State every year between 2015 and 2020, which are represented by the lines near the bottom of the chart below. The average number of weekly deaths from *all causes* between 2015 and 2019 is represented by the gray horizontal line in the middle of the chart. The red line, which shoots almost straight up, represent deaths from COVID-19 in New York in the first *three weeks* of the pandemic. By the second week, COVID-19 had already far eclipsed all other causes of death. The red COVID-19 line demonstrates why this unprecedented surge has crippled New York—it looks nothing like any of the flu plots on the bottom of the chart:



Weekly flu deaths versus weekly COVID-19 deaths in New York State (Max Roser/OurWorldInData)

[30] Plaintiffs' First Amended Petition at 15-16.

[31] If the United States were to maintain 2,000 deaths per day, it would have 730,000 deaths from COVID-19 in the next year.

Plaintiffs' cavalier attitude toward this public health crisis is akin to someone standing on the edge of a beach the day before a Category 5 hurricane landfall and boasting that they will not evacuate because the water has only risen a foot. When a person refuses to evacuate from a hurricane, he risks his own life, and perhaps the lives of first responders who choose to later rescue him. In this case, Plaintiffs risk the lives of their entire communities.

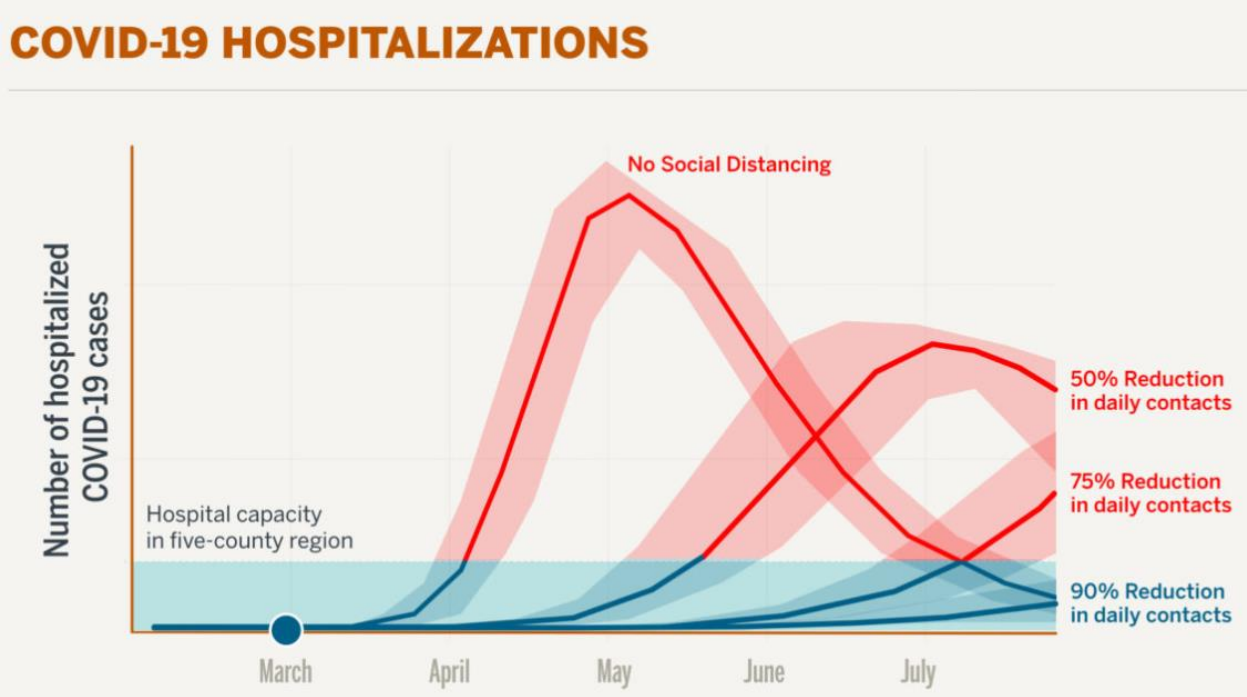
This disease spreads so quickly and virulently that it often overwhelms the health care systems in the communities it strikes. There are a limited number of hospital beds, nurses, doctors, face masks, hand sanitizers, and ventilators. When there is a sudden surge of sick people, there are not enough resources to care for patients—not only with COVID-19, but also for accidents, cancer, surgeries, heart disease, and other medical problems.[32] Resources in Italy and Spain have been so strained by this new disease that hospitals stopped intubating patients over the age of 60—instead allowing them to die.[33] In New York, hospitals are so overcrowded that Central Park is being filled with tents to house patients in a mass field hospital, and a floating hospital is tied up at Pier 90 in Manhattan.[34]

There is only one way to reduce this healthcare burden. Society must work to slow the transmission of the virus and "flatten the curve" so that hospitals can keep up with the volume of patients coming in. This is depicted on the following diagram for the Austin region created by The University of Texas at Austin:

[32] Exhibit 1, Affidavit of Dr. Shah at 4-5.

[33] Exhibit 1, Affidavit of Dr. Shah at 4.

[34] Exhibit 1, Affidavit of Dr. Shah at 4-5.



The blue shading represents the capacity of the healthcare system. If the virus spreads quickly, the pandemic will cause a sudden surge of illness reflected by the first curve. Patients below the blue line have an opportunity to receive medical care, while those above may not.[35]

With quarantine controls, such as the closure of businesses and elimination of large gatherings, the curve can be "flattened" and the number of cases developed over a slower period, which assures that a higher percentage of those who get sick will have an opportunity to be treated. This will result in a massive protection of life and public and private resources.

Dr. Daniel Musher is board certified in internal medicine and infectious diseases and has treated patients for 49 years. He was chief of the Infectious Disease Section of the Veterans Affairs Medical Center in Houston from 1971 until 2012, and he states in a letter supporting the "Stay Home, Work Safe" Order that there is no comparison between seasonal flu and COVID-19, and that Judge Hidalgo's Order must stand:

[35] Exhibit 1, Affidavit of Dr. Shah at 5.

> … I have personally diagnosed and cared for many patients with influenza pneumonia on medical wards and in intensive care units…but in my 49 years as an infectious disease specialist, I have never seen anything that remotely resembles the spread and lethality of COVID-19…This kind of pandemic has not occurred in my lifetime with Asian flu, Swine flu, avian flu or any other major influenza outbreak. The only viral pneumonia that resembled what we are now seeing with COVID-19 was the influenza pandemic of 1918-19 that killed 2% of the world's population…Judge Hidalgo has made a difficult decision, but one that will be truly life-saving for the citizenry. It would be a grave error to overturn it.[36]

B. Religious gatherings are a common vector for COVID-19, and in-person services are being lawfully restricted throughout the country.

Defendants agree that the free exercise of religion is a bedrock of American liberty, and Plaintiffs—like most of us—understandably want the comfort of their faith and congregation during these difficult times. One of the sad ironies of this pandemic is that it has turned congregations into vectors for infection. The Shincheonji Church of Jesus is believed to be the epicenter of the COVID-19 outbreak in South Korea—with 60 percent of the country's cases connected to a single branch in one city. Because the church refused to comply with public health guidelines, prosecutors may file criminal charges, including "murder through willful negligence." The church's leader initially blamed the epidemic on "evil" people jealous of the church, but has since gone on television to "offer my word of deep apology to the people."[37]

A large gathering of the Christian Open Door church in February "set a virus time bomb" in France. By March 30, France had 10,000 cases of the virus, with a quarter of them in the community where the church had just held a large gathering. According to the local public health

[36] Exhibit 2, Statement of Dr. Musher, at 2-3.

[37] Sang-Hun, Choe, "He Blames 'Evil' for South Korea's Coronavirus Surge. Officials Blame Him." *The New York Times,* March 2, 2020. https://www.nytimes.com/2020/03/02/world/asia/coronavirus-south-korea-shincheonji.html

official, "[t]he very great majority" of those 2,500 cases "could be traced to the church." This was a "key factor" in Germany closing its border with France.[38]

Many of New York's deaths have been linked to synagogues and schools that continued to hold large gatherings on religious grounds. Grand Rabbi Aharon Teitelbaum defied Governor Andrew Cuomo's social distancing recommendations by explaining, "[t]hey don't understand what a Jewish family is." He has since tested positive for COVID-19 and now presides over a community with one of the highest infection rates in the world.[39]

In Baton Rouge, Louisiana, Pastor Tony Spell continued to hold services with as many as 1,825 people despite Louisiana's ban on public gatherings, because he claims he can cure COVID-19 through "the healing hand of Jesus."[40] Louisiana now has the third highest infection rate per capita in the United States, and Governor Greg Abbott has set up road blocks on the Louisiana border to prevent these infections from entering Texas.[41]

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[38] Salaun, Tangi, "Special Report: Five days of worship that set a virus time bomb in France." https://www.reuters.com/article/us-health-coronavirus-france-church-spec-idUSKBN21H0Q2

[39] Pink, Aiden, "Grant rabbi of Satmar Hasidic dynasty tests positive for coronavirus," https://forward.com/fast-forward/442146/grand-rabbi-of-satmar-hasidic-dynasty-tests-positive-for-coronavirus/

[40] Rocha, Abbi, "Central church hosts more than 1,800 people amid covid-19 outbreak." https://www.brproud.com/health/coronavirus/central-church-hosts-1800-people-amid-covid-19-outbreak/

[41] Exhibit 11. Executive Order GA-12 states: "Every person who enters the State of Texas through roadways from Louisiana…shall be subject to mandatory self-quarantine for a period of 14 days from the time of entry into Texas or the duration of the person's presence in Texas…The Texas Department of Public Safety (DPS) shall enforce this executive order along the Texas-Louisiana border." Every vehicle is now being stopped at the border, with DPS troopers collecting "a completed form from a covered person" and verifying it against driver's license or passport information. "DPS Special agents will conduct unannounced visits to designated quarantine locations to verify compliance by confirming the physical presence of covered persons. Any failure to comply with this order to self-quarantine shall be a criminal offense punishable by a fine not to exceed $1,000, confinement in jail for a term not to exceed 180 days, or both."

The Glenview Church in Illinois currently has 43 parishioners sick after they attended a March 15 service. An usher has already died, and the church—now aware of the error in continuing to promote large gatherings during the outbreak—held a virtual funeral for him.[42]

At least 70 infected people have been linked to a single church in California. The Sacramento County Department of Health Services director Dr. Peter Beilenson identified the church "to really hammer home the importance of not congregating…"[43]

This weekend, the State of Kentucky sent State Police to churches suspected of holding gatherings for Easter. They planned to record attendees' license plates and notify those who attended that they were in violation of that state's criminal laws. According to Governor Andy Beshear, "[l]ocal health officials then will contact the people associated with those vehicles and require them to self-quarantine for 14 days. This is the only way we can ensure that your decision doesn't kill someone else…What we're asking is for you to love your neighbor as yourself. We shouldn't have to do this."[44]

B. Harris County's Order is narrowly tailored and does not violate any religious freedoms.

The purpose of limiting social gatherings is not to infringe on the rights of churches—the purpose is to keep worshipers alive so they may continue to worship. The free exercise of religion includes the right to believe and profess whatever religious doctrine one desires, but it does not permit a person to flaunt public health and safety regulations and jeopardize the lives of others under the guise of religion. The grant of religious freedom under Article I, Section 6 of the

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[42] Kim, Anna, "Glenview church hit by COVID-19 is now streaming service online, as pastor remembers usher who died of disease." https://www.chicagotribune.com/suburbs/glenview/ct-gla-life-church-coronavirus-virtual-service-tl-0402-20200331-s4twslv2ynhk3padh7sjrxy3wi-story.html

[43] Becker, Stephanie, "At least 70 people infected with coronavirus linked to a single church in California, health officials say." https://www.cnn.com/2020/04/03/us/sacramento-county-church-covid-19-outbreak/index.html

[44] https://www.cnn.com/2020/04/11/us/kentucky-easter-quarantine-trnd/index.html

Texas Constitution is coextensive with the federal Free Exercise Clause. *See, e.g., Tilton v. Marshall,* 925 S.W.2d 672, 677 & n.6 (Tex. 1996).

The United States Supreme Court has long held that states can impose reasonable laws to protect public health and safety, even if they restrict religious worship. For example, states may criminalize drugs considered essential to the bona fide religious ceremonies of churches. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878–79, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990).

States can also criminalize activities such as polygamy, even when a person's religion "commanded the practice." *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878). The Supreme Court warned that allowing "the professed doctrines of religious belief superior to the law of the law" would "permit every citizen to become a law unto himself," and that under those circumstances, "[g]overnment could exist only in name." *Reynolds v. United States*, 98 U.S. 145, 167, 25 L. Ed. 244 (1878).

In the *Prince* case, a child's mother was convicted of permitting her two children to join her in distributing magazines and preaching on the sidewalk, in violation of child labor laws. The mother contended she was providing her children with religious training and allowing them to exercise their "God-given right and her constitutional right to preach the gospel." The Supreme Court held that states can regulate the ability to street preach, and that while parents "may be free to become martyrs themselves…it does not follow they are free, in identical circumstances, to make martyrs of their children…" *Prince v. Massachusetts*, 321 U.S. 158, 162, 64 S. Ct. 438, 440, 88 L. Ed. 645 (1944).

The case at bar is similar—the question is not whether those who attend church during the COVID-19 pandemic are free to make martyrs of themselves by catching the virus—the

question is whether, once they leave the gathering, they should be permitted to make martyrs of those they come in contact with.

In another analogous case, a child developed an infectious disease (whooping cough). The illness grew worse, but her father never sent for a doctor "because he believed in Divine healing, which could be accomplished by prayer" under the doctrine of his church. He further stated that he "believed in disease, but believed that religion was a cure of disease." The court analyzed the history of medicine and religion and ultimately concluded that, despite his legitimate belief, he could be prosecuted for neglecting his daughter's medical care. *People v. Pierson*, 176 N.Y. 201, 204, 68 N.E. 243, 244 (1903).

Harris County and Governor Abbott impose far fewer restrictions, for a far greater social purpose, than any of these cases. Plaintiffs face reasonable, temporary, content-neutral regulations applied to all large gatherings to protect the public during an emergency. Churches are not the target of this order, and they are not disproportionately impacted. In fact, churches have been declared essential services and enjoy more liberal regulations than other gatherings, such as ballets, symphonies, theatres, sporting events, concerts, conventions, and other meetings, which are completely shut down in Texas and throughout much of the world.

Plaintiffs are even free to have in-person services if they cannot minister their faith remotely for any legitimate reason (technology, a tenet of their theology, etc.). However, when services are conducted in person, congregants are required to maintain social distancing and follow State and Federal guidelines.

Religious leaders around the world are using technology such as Zoom, Facebook, and Skype in the same way as courts, corporations, and classes. Pope Frances, head of the Catholic

Church held the first virtual Easter Mass in 2,000 years of Catholic history.[45] The Pope praised the "creativity" of priests who are finding "unique and effective ways to be with their people." One Italian priest asked his parishioners to send photos of themselves and taped them to the pews while he held virtual Mass. He explained that the experience brought his congregation together and "I am receiving hundreds of messages from the faithful, and phone calls from throughout Italy."[46] Other priests are providing drive-through communion and holding remote Masses.

Other faiths have also adjusted their practices to protect their followers, and even religions that require visitation to certain physical locations have relaxed their rules. Although Saudi Arabia has few reported case of COVID-19, it has closed holy sites. Islamic leaders throughout the world have halted prayers and instructed faithful to wear masks and not to take Hajj or other pilgrimages.[47]

D. Plaintiffs' churches are successfully ministering to their congregations in what appears to be compliance with Federal, State, and local regulations.

While Plaintiffs' court pleadings disseminate dangerous information that minimizes the risk of COVID-19, the pastors themselves are being far more responsible. Each plaintiff-pastor has a website, and each website indicates that their churches adopted well to life during the pandemic and ministered successfully and safely to their congregations over Easter.

City on a Hill Church does not appear to be set up to offer live remote services, but its website notes that Sunday services are now via "Drive-In Church" at 11 a.m.:

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[45] Bongarra, Francesco, "Vatican's Easter rituals go 'virtual' as Italy battles coronavirus outbreak," https://www.msn.com/en-ae/news/other/vatican-e2-80-99s-easter-rituals-go-e2-80-98virtual-e2-80-99-as-italy-battles-coronavirus-outbreak/ar-BB12pdNo

[46] Allen, Elise Ann, "As coronavirus empties churches, Italian priest fills pews with photos of parishioners," https://cruxnow.com/church-in-europe/2020/03/as-coronavirus-empties-churches-italian-priest-fills-pews-with-photos-of-parishioners/

[47] Al Jazeera English, "COFID-19: Coronavirus changing way Muslims across world worship." https://www.msn.com/en-us/news/world/muslims-are-being-advised-on-how-to-stop-coronavirus-spread/ar-BB10KTL1

[48]

This appears to be in compliance with relevant regulations.

The Power of Love Church does not appear to be set up to offer live remote services, but it uploads a video of services after-the-fact. At the time this brief is being written, the last broadcast service was March 29. The pastor openly required that congregants maintain social distancing and explained the many efforts being made to keep the church thoroughly sanitized.[49] If these practices are being followed, the Power of Love Church appears to be ministering its faith in compliance with federal, state, and local regulations.

The World Faith Center of Houston Church's Facebook page notes that its families are "uniting together" to watch services online:

[48] https://www.thecityonahill.org/events-updates. The website even provides suggestions for washing hands and maintaining social distancing during the pandemic.

[49] http://www.thepoweroflovechurch.org/. The pastor also told her congregation: "The only thing you're going to get infected with this morning is faith. Faith. The only thing you're going to get infected with is the faith of God that is going to put a fire inside you to keep fighting the good fight of faith." "As far as I'm concerned, we have a constitutional right…freedom to congregate together. Before the law, we have the call of God." Putting this rhetoric aside, the pastor appears to be in compliance.

[50]

The Glorious Way Church issued an online statement advising: "we respect the seriousness of the COVID-19 crisis and strive to be a good community partner in defeating the virus and its effects."[51] The church moved its Wednesday night services to online only and replaced Sunday night services with Facebook Live updates. The church professes to be unable to minister without once-per-week in-person church services, so it regularly sanitizes the church and has created extensive rules to maintain social distancing. Although Glorious Way appears to be in compliance with all relevant regulations, its website inaccurately asserts that the Governor "allows churches to assemble in person so long as they follow distancing measures" but that "the

[50] https://www.facebook.com/World-Faith-Center-224988434279632/

[51] https://gwc.cc/covid-19-a-statement/#.XpIDWcCSkuV

Harris County Judge…does not allow" them to assemble.[52] Glorious Way has received inaccurate legal advice; as noted, Harris County and the State regulations are the same.

The Harvest Christian Fellowship Church had a successful Facebook Live broadcast with 303 viewers last Sunday. The pastor provided an excellent remote service where he noted: "We are continuing to keep up with the structure we have been given through our government in trying to avoid COVID-19, but we're preparing to welcome you back here soon."[53] Although it was clear that only volunteers and staff were present in person, the congregation was present in spirit. The church successfully provided music and a robust online interaction with congregants.

The pastors whose names appear on this suit seem to disagree with their expert's suggestion that the virus is not dangerous. They are taking COVID-19 seriously and preaching their faith through technology and social distancing. Religion is thriving in Harris County, and the First Amendment is alive and well.

D. Harris County's Order does not affect gun stores, or violate the Second Amendment.

Contrary to Relators' claim, Harris County's Order does not affect gun stores at all. Plaintiffs were made aware of this when they were served in the Supreme Court with a declaration by Kathryn Kase, legal counsel to the Honorable Lina Hidalgo. That declaration makes clear that Harris County is fully complying with Texas Attorney General Opinion No. KP-0296 and considers gun shops to be essential businesses.[54] Gun stores are advised by the County Judge's Office that they may operate.[55] Plaintiffs know this, yet they continue repeating—in one court after another—the false claim that Judge Hidalgo has closed gun stores.

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[52] *Id.*

[53] https://www.facebook.com/HarvestcfcCatchTheWave

[54] Exhibit 12, Declaration of Kathryn Kase at 1-2.

[55] Exhibit 12, Declaration of Kathryn Kase at 2.

E. Plaintiffs claims should be dismissed because there is no Constitutional violation, and even if there was, the pandemic orders survive strict scrutiny.

For the reasons provided, Plaintiffs Constitutional right to exercise their religious views and purchase guns have not been impeded. Assuming, *arguendo,* those rights were impeded, the Governor and County Judge's orders are a reasonable, necessary, and narrowly drafted response to the most compelling governmental interest of saving hundreds of thousands of lives. Without a vaccine, cure, or even approved treatment, the least restrictive means of slowing the spread of COVID-19 is to restrict large gatherings of people. Accordingly, Plaintiffs fail to state a cause of action, and their case should be dismissed.

VI. Plaintiffs fail to plead facts sufficient to show any violation of the Religious Freedom Restoration Act.

For the reasons provided regarding Plaintiffs' First Amendment claim, Plaintiffs also fail to state a claim under the Texas Religious Freedom Restoration Act. That Act states that a government agency "may not substantially burden a person's free exercise of religion" unless it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Tex. Civ. Prac. & Rem. Code § 110.003. As explained, there is no more compelling interest, or least restrictive means of furthering that interest. Accordingly, this claim should be dismissed as well.

SPECIAL DENIALS

Defendants assert there is a defect in joinder of parties because Governor Greg Abbott, who issued Executive Order GA-14 (a nearly identical order affecting Plaintiffs' rights in an identical manner) is a necessary party who has not been joined as a defendant in this case.

"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties." Tex. R. Civ.

P. 39(a)(1). A necessary party who is subject to the court's jurisdiction must be joined in the action, or the case will be dismissed. Tex. Rule Civ. P. 39(a); *Longoria v. Exxon Mobil Corp.,* 255 S.W.3d 174, 184 (Tex. App.—San Antonio 2008, pet. den.)

Even if Plaintiffs could prove that Harris County's "Stay Home, Work Safe" Order somehow violated their constitutional rights, their injunction would no effect, and their rights would continue to be violated because they would still be subject to the same restrictions by Governor Abbott's Executive Order GA-14. While Plaintiffs' disingenuously claim they are suing only to the extent that Harris County's Order differs from the State Order, they can point to no difference. In fact, Harris County's April 3 Amended Order specifically references and adopts the Governor Abbott's Order with respect to churches and gun shops. Thus, Governor Abbott is a necessary party to this case.

GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant denies each and every material allegation contained in Plaintiffs' Original Petition, Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and demands strict proof thereof. Harris County further responds to several particularly significant misrepresentations in Plaintiffs' First Amended Petition.

RESPONSE TO APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

As explained above, the Court lacks subject matter jurisdiction and should dismiss this case in its entirety. But if the Court concludes otherwise, each of Plaintiffs' requests for injunctive relief should be denied. Defendants incorporate the arguments above, and further address Plaintiffs' request for injunctive relief as follows.

I. Standard for injunctions.

To obtain a temporary restraining order, a plaintiff must show that he "is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1980); 44 Tex. Jur. 3d *Injunctions* § 12 (3d ed.). Plaintiffs may not use a request for a temporary restraining order as a means "to obtain an advance ruling on the merits." *Id.* If an order does more than merely maintain the status quo, then it is not a temporary restraining order at all. *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 n. 2 (Tex. 1992).

To obtain a temporary injunction, a plaintiff must plead and prove three specific elements: (1) a cause of action against the defendants; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); 44 Tex Jur. 3d *Injunctions* § 13 (3d ed.); *see also In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d at 204 (noting a request for a temporary injunction "has more stringent proof requirements" than a request for a temporary restraining order). Moreover, "the proof required to support a judgment issuing a writ of temporary injunction may not be made by affidavit." *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 687 (Tex. 1968). Instead, a temporary injunction may issue only after the court conducts a hearing and only if the plaintiff offers evidence that "establishes a probable right of recovery" on the merits. *Id.* at 687. Absent that showing, "no purpose is served" by the issuance of a temporary injunction because its purpose is likewise to maintain the status quo pending a trial on the merits. *In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002).

To obtain a permanent injunction, a plaintiff must actually succeed on the merits at final judgment. 44 Tex. Jur. 3d *Injunctions* § 15 (3rd ed.).

Plaintiffs cannot establish the elements necessary for any of the three forms of relief they seek. They are not entitled to a temporary restraining order because no one is threatening the status quo. They are not entitled to a temporary or permanent injunction because they have not stated a cause of action, not shown a probable right to the relief sought, and there is no probable, imminent, and irreparable injury in the interim.

II. Plaintiffs' requests for injunctive relief are defective and should be denied.

Plaintiffs' "Temporary Restraining Order and Order Setting Hearing for Temporary Orders" seeks to enjoin Judge Hidalgo from enforcing four items, which are purportedly part of the "Stay Home, Work Safe" Emergency Order. Defendants respond to each of Plaintiffs' requests as follows:

1. <u>First item to be enjoined</u>:

> "Faith leaders may minister and counsel in individual settings, so long as social distance protocols are followed. Religious and worship services may only be provided by video and teleconference. Religious institutions must limit in-person staff to those necessary for preparing for or conducting video or teleconference services, and all individuals must follow the Social Distancing guidelines, including the six-foot social distancing."[56]

Response to first item to be enjoined:

The first reason this request should be denied is because this provision (which came from Judge Hidalgo's March 24 Order) has been amended and <u>is no longer in effect</u>. <u>Plaintiffs cannot receive injunctive relief to restrain an order that does not exist</u>. As Plaintiffs are aware, this provision has been replaced by the following:

A. <u>Governor Abbott's Executive Order GA-14</u>:

> "In particular, all services should be provided through remote telework from home unless they are essential services that cannot be provided through remote telework. If religious services cannot be conducted from home or through remote

[56] Plaintiffs' Proposed Order at 2.

> services, they should be conducted consistent with the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, and by implementing social distancing to prevent the spread of COVID-19."[57]
>
> B. Judge Hidalgo's April 3 Amended "Stay Home, Work Safe" Order:
>
> "Faith leaders may minister and counsel in individual settings, so long as social distancing protocols are followed. Per the Texas Attorney General's guidelines on this topic, if religious services cannot be conducted from home or through remote services, then religious services may be conducted in churches, congregations, and houses of worship. Such services should be conducted consistent with the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, sanitation, and implementing social distancing."[58]

Plaintiffs do not have a cause of action against Defendants as to the first item. Even if the portion of the March 24 order cited above was in effect, Plaintiffs' injunction should still be denied. Plaintiffs do not have a cause of action against defendants because (as discussed in Defendants' Plea to the Jurisdiction): (1) Plaintiffs fail to meet their burden to establish jurisdiction, (2) Plaintiffs fail to meet their burden to establish standing, (3) Plaintiffs fail to meet their burden to establish constitutional harm or a violation of the Religious Freedom Restoration Act, and (4) Plaintiffs' fail to name Governor Abbott as an essential party.

Plaintiffs do not have a probable right to the relief sought. Even if Plaintiffs' First Amended Petition could survive Defendants' Plea to the Jurisdiction, Plaintiffs certainly have no probable right to the relief sought for the reasons explained in that plea.

Plaintiffs do not have a probable, imminent, and irreparable injury in the interim. Finally, assuming Plaintiffs could survive all of the above, they make no showing of any probable, imminent, and irreparable injury in the interim. The order they cite is no longer in

[57] Exhibit 4 at 1-2.

[58] Exhibit 5, Harris County's April 3 Amended Order at 2.

effect, and even if it was, Plaintiffs fail to show how they would have been imminently and irreparably harmed by working remotely until the worst of the pandemic passes.

2. <u>Second item to be enjoined</u>:

> "Faith leaders may minister and counsel in individual settings, so long as social distancing protocols are followed. If religious services cannot be conducted from home or through remote services, then religious services may be conducted in churches, congregations, and houses of worship. Such services should be conducted consistent with the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, sanitation, and implementing social distancing."[59]

Response to second item to be enjoined:

Unlike Plaintiffs' first item, this provision is in effect. However, Plaintiffs' omitted a crucial portion of the second sentence of Judge Hidalgo's Amended Order, which actually reads:

> **<u>"Per the Texas Attorney General's guidelines on this topic</u>**, if religious services cannot be conducted from home or through remote services, then religious services may be conducted in churches, congregations, and houses of worship."[60]

Plaintiffs altered this sentence to deceive this Court into believing the regulation above was promulgated by Judge Hidalgo, when it was actually drafted by Governor Abbott and the Attorney General and adopted by Harris County. In fact, Judge Hidalgo's April 3 Amended "Stay Home, Work Safe" Order defines Essential Critical Infrastructure to include everything in the "Texas Division of Emergency Management's (TDEM) online list of additional essential services as they are approved by TDEM (www.tdem.texas.gov/essentialservices)..." According to the Texas Division of Emergency Management:

> 2.) Are you providing a religious service in a church, congregation, or house of worship?

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[59] Plaintiffs' Proposed Order at 2.

[60] Exhibit 5, Harris County's April 3 Amended Order at 2 (emphasis added).

> A.) This sector is considered "essential service" under Texas Executive Order GA-14. If religious services cannot be conducted from home or through remote services, they should be conducted consistent with the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, and by implementing social distancing to prevent the spread of COVID-19.[61]

Thus, even if Plaintiffs were to succeed on the merits, nothing would change, and they would still be subjected to Governor Abbott's Executive Order.

Plaintiffs fail to state their requested relief with specificity. Plaintiffs fail to establish which portions of this Order they find objectionable. For example, do Plaintiffs object to practicing good hygiene within their congregations? Cleanliness? Sanitation? Do they object to ministering individually, or to implementing social distancing? Plaintiffs must prove each element of their injunction with respect to each of these items. Without this specificity, the Court cannot issue an injunction.

Plaintiffs do not have a cause of action against Defendants. As explained in Defendants' Plea to the Jurisdiction, Plaintiffs do not have a cause of action against defendants because: (1) Plaintiffs fail to meet their burden to establish jurisdiction, (2) Plaintiffs fail to meet their burden to establish standing, (3) Plaintiffs fail to meet their burden to establish constitutional harm or a violation of the Religious Freedom Restoration Act, and (4) Plaintiffs' fail to name Governor Abbott as an essential party.

Plaintiffs do not have a probable right to the relief sought. Even if Plaintiffs' First Amended Petition could survive Defendants' Plea to the Jurisdiction, Plaintiffs certainly have no probable right to the relief sought for the reasons explained.

Plaintiffs do not have a probable, imminent, and irreparable injury in the interim. Finally, assuming Plaintiffs could survive all of the above, they make no showing of any

[61] Exhibit 13, retrieved from http://www.tdem.texas.gov/essentialservices

probable, imminent, and irreparable injury in the interim. These pastors fail to show how they will fall from grace or lose their faith by maintaining good hygiene and social distancing from their congregants. While they vaguely assert that they believe calls to a domestic abuse hotline have increased since the world-wide quarantine for COVID-19, they do not allege they have been victims of domestic abuse, or show any proof of causation between that and Harris County's Emergency Order that would be sufficient to overcome the compelling government interest in saving hundreds of thousands of lives from a deadly virus.

3. <u>Third item to be enjoined</u>:

> "Any provisions in the March 24, 2020 Order purporting to define 'Essential Businesses' or making any provision in the Order, or Governor Greg Abbott's March 31, 2020 Order dependent upon or guided by any such definitions, specially as it relates to firearms stores."[62]

Response to third item to be enjoined:

Once again, Plaintiffs have manufactured a complaint by seeking an injunction against an order not even in effect. The March 24 Order has been amended, and Judge Hidalgo's April 3 Amended "Stay Home, Work Safe" Order specifically amends Section 2.b.i. of the March 24 Order to define Essential Critical Infrastructure to include everything in the "Texas Division of Emergency Management's (TDEM) online list of additional essential services as they are approved by TDEM (www.tdem.texas.gov/essentialservices)..."[63] This list includes firearms manufacturers and dealers.

Plaintiffs were also served in The Texas Supreme Court with the Declaration of Kathryn Kase, which clearly states that Harris County interprets Texas Attorney General Ken Paxton's Opinion No. KP-0296 to require firearm or ammunition product manufacturers, retailers,

[62] Plaintiffs' Proposed Order at 2.

[63] Exhibit 5, Harris County's April 3 Amended Order at 3.

importers, distributors and shooting ranges to be essential to continued critical infrastructure viability. Accordingly, Harris County has not closed any gun stores or threatened gun stores with closure. Only two gun stores—Locked and Loaded Gun Gear, LLC and Haro Weapon Systems, have sought opinions from Harris County. Both were advised that they could stay open.[64] It is unclear what additional remedy Plaintiffs could possibly want.

Plaintiffs do not have a cause of action against Defendants. Putting aside the fact that Plaintiffs have sought relief again from an order that does not exist, they also do not have a cause of action against defendants for the reasons explained in their Plea to the Jurisdiction. In particular: (1) Plaintiffs fail to meet their burden to establish jurisdiction, (2) Plaintiffs fail to meet their burden to establish standing (none of Plaintiffs have presented evidence that they were denied the right to purchase a firearm Easter week due to Judge Hidalgo's Order), (3) Plaintiffs fail to meet their burden to establish constitutional harm, and (4) Plaintiffs' fail to name Governor Abbott as an essential party.

Plaintiffs do not have a probable right to the relief sought. Even if Plaintiffs' First Amended Petition could survive Defendants' Plea to the Jurisdiction, Plaintiffs certainly have no probable right to the relief sought for the reasons explained.

Plaintiffs do not have a probable, imminent, and irreparable injury in the interim. Finally, assuming Plaintiffs could survive all of the above, they make no showing of any probable, imminent, and irreparable injury in the interim. These pastors and two non-pastor plaintiffs fail to show how they will be denied their right to purchase guns and ammunition because of Judge Hidalgo's Emergency Order. Further, they have no showing that if they had

[64] Exhibit 12, Declaration of Kathryn Kase. Harris County's emergency management website invites: "Any business, church, or other entity or person with questions can contact Harris County and apply for a waiver from these regulations at: www.readyharris.org/stay-home."

been denied the right to purchase guns this week, that would be sufficient to overcome the compelling government interest in saving hundreds of thousands of lives from a deadly virus.

4. <u>Fourth item to be enjoined</u>

> "Any provision preventing Plaintiffs from holding or attending in-person services, including Easter Sunday Services, or any in person services held thereafter."[65]

Response to fourth item to be enjoined:

Plaintiffs fail to state their requested relief with specificity. Plaintiffs fail to even identify which portions of which order they contend would prevent them from attending in-person services. As discussed, Governor Abbott has established guidelines under which Plaintiffs can attend in-person services, and Harris County has adopted those guidelines. Plaintiffs have an obligation to point to which portion of which order they find objectionable and want to have enjoined. They have not even attempted to do that.

Plaintiffs do not have a cause of action against Defendants as to this item. Putting aside the fact that Plaintiffs have not even identified what they want enjoined, they do not have a cause of action against defendants for the reasons explained in their Plea to the Jurisdiction. In particular: (1) Plaintiffs fail to meet their burden to establish jurisdiction, (2) Plaintiffs fail to meet their burden to establish standing, (3) Plaintiffs fail to meet their burden to establish constitutional harm, and (4) Plaintiffs' fail to name Governor Abbott as an essential party.

Plaintiffs do not have a probable right to the relief sought. Even if Plaintiffs' First Amended Petition could survive Defendants' Plea to the Jurisdiction, Plaintiffs certainly have no probable right to the relief sought for the reasons explained.

Plaintiffs do not have a probable, imminent, and irreparable injury in the interim. Finally, assuming Plaintiffs could survive all of the above, they make no showing of any

[65] Plaintiffs' Proposed Order at 2.

probable, imminent, and irreparable injury in the interim. Easter has already passed, and none of the Plaintiffs have shown how they will fall from grace or lose their faith by honoring Governor Abbott and Judge Hidalgo's temporary measures to slow the spread of a deadly virus during this pandemic.

III. Plaintiffs' request for injunctive relief should be denied.

Plaintiffs' case should be dismissed in its entirety, but if the Court reaches the merits of Plaintiffs' requests for injunctive relief, these requests should be denied for the reasons explained.

NOTICE

Defendant gives notice that it will use any and all documents produced by Plaintiffs in discovery at the trial of this cause or any pretrial proceeding. Defendant reserves the right to object to the authenticity of any document produced within 10 days of receiving actual notice from Plaintiff that the documents will be used in a pre-trial proceeding or trial.

PRAYER

Wherefore, premises considered, Defendants pray that this Court grant their Plea to the Jurisdiction and dismiss Plaintiffs' case in its entirety. In the alternative, Defendants pray that this Court deny Plaintiffs' request for a temporary restraining order, temporary injunction, and permanent injunction, award Defendants attorneys' fees and costs as allowed under Civil Practices & Remedies Code § 125.068, and any further relief to which Defendants may be entitled in law or equity.

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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on the 12th day of April, 2020, a true and correct copy of the foregoing instrument was served by electronic transmission to all counsel of record.

/s/ Seth Hopkins

SETH HOPKINS