UNTO THE RIGHT HONOURABLE
LORDS OF COUNCIL AND SESSION

NOTE OF ARGUMENT
FOR THE PETITIONERS

In the Petition
of

REVEREND DR WILLIAM J U PHILIP
having an official address at 25 Tron Square,
Glasgow, G2 1HW
and OTHERS
PETITIONERS

for
Judicial Review of the closure of places of worship in Scotland

Motions: for declarator and reduction in terms of the prayers in statement 5 1), 2) and 3).

Propositions

The legal requirement to close places of worship set out in Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3) ("the Closure Regulations") is unlawful because:

a) **The requirement introduces an irreconcilable conflict between obedience of the Christian church to God and obedience to the state (religious unlawfulness).**
b) **Neither the Westminster Parliament, nor the Scottish Parliament (as a body exercising functions devolved to it by the Westminster Parliament) has the power to make this requirement (constitutional unlawfulness).**
c) **The requirement contravenes article 9 of ECHR, read with article 11 (Convention unlawfulness).**

The assertions in the Petition are adopted. This Note is intended to develop and focus, rather than repeat, the statements set out in the Petition. No issue is taken with the "Factual, Governmental & Legal Background" at §§7 - 30 of the Note of Argument ("NoA") for the Respondents and Lord Advocate, nor "Relevant Factual Background" and "Relevant Legislative Background" at sections 2 and 3 of the NoA for the Additional Party. In the interests of brevity the submissions of other parties in these sections are not repeated.

[1] Religious unlawfulness

[1.1] κύριος Ἰησοῦς – "Jesus is Lord" is the shortest and one of the most ancient credal affirmations of the church. It is also the motto of the World Council of Churches. It represents a radical challenge to any secular power that claims for itself what the Christian would regard as truly belonging to God (see 6/19 p7). In Scotland, apart from a short period in the 1680s, the necessity for the church's obedience to God and adherence to the Scriptures has been recognised expressly by law (see *eg* Church of Scotland Act 1921 and further submissions below).

[1.2] Dr Martin Parsons, in his report (at 6/4) explains the New Testament imperative of the regular physical gathering of the church. "Church" is not a building, or a people. It is an activity of the people of God. It is not merely to be watched, like "Songs of Praise" on the television. There are ten essential features of practice of the church, set out at §11 of Dr Parson's report. The Closure Regulations prevent four of these essential features (corporate worship, communion, baptism and congregational ministering through spiritual gifts). As Dr Parsons explains these are not optional extras. They are matters of direct obedience, if the New Testament is to be taken seriously.

[1.3] The letters at 6/9 – 6/17 and 6/24 explain the effect of the requirement to close places of worship on churches represented among the petitioners. While the devastating effect on individuals, and in some cases loss of life, as a result of loss of congregational ministry is deeply distressing, the loss is not primarily of 'social' support, but of 'spiritual' support. The church is not to be equated with a 'lunch club' (*cf* Professor Leitch at 6/2 col 25). The loss is at a much deeper and more fundamental level.

[1.4] The position of the petitioners may not be the position being advanced by all churchmen, but there is substantial support for their position, as can be seen from the letter at 6/6 to the respondents signed by hundreds of church leaders in Scotland, supported by hundreds more from other parts of the United Kingdom. Similar positions have been taken by Christians in other parts of the world (see eg decision in *Capitol Hill Baptist Church v Muriel Bowser, in Her Official Capacity as Mayor of the District of Columbia* (Case No. 20-cv-02710 (TNM) at 6/). The petitioners themselves represent churches ranging from large city centre churches with congregations of hundreds to smaller rural churches. They all maintain that assembly, or congregation, of the Christian community is of the very essence in which the being of the Christian Church is expressed. These churches seek in worshipping openly together to hold out the good news of hope to a fearful world (explained by the first-named petitioner at 6/9).

[1.5] Requiring Christians to act against conscience is thankfully rare in the Western world[1]. The last time this occurred in Scotland[2] was during the Covenanter's struggle in the 1680s (see 6/4 §§5.7 and 5.8). The most notorious time of the last century was when the National Socialists directed the doctrines and worship of the German Reich Church, resulting in the "Confessing Church" enunciating the Barmen Declaration (at 6/18).

[1.6] The point is that the respondents are requiring from the petitioners that which the petitioners maintain belongs to God.

[1.7] It is a matter for the respondents whether they claim this right. The petitioners maintain that (a) such a claim is unconstitutional and therefore unlawful and (b) in any event in violation of the petitioner's fundamental right to hold and manifest their religious beliefs in terms of ECHR and on that basis, even if constitutional, is unlawful.

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[1] The first day of this hearing, 11 March is the day when the Eastern Church remembers Pionius, who was martyred for refusing to act against his conscience when commanded by the secular authorities in the interests of civic society.

[2] In relation to the presbyterian tradition represented by the petitioners.

[1.8] For the avoidance of doubt, the petitioners have not, and will not, challenge the proposition that any assembly should in current circumstances take place under the safest possible conditions. They did not, and do not, challenge the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344) (the 'Local Levels Regulations') regulations 8 and 9, nor the inclusion of all or any area in Level 4, in so far as these regulations do not prevent corporate worship, communion, baptism and congregational ministering through spiritual gifts. The church can still exist and function under the restrictions imposed. The petitioners challenge the requirement to close places of worship and the resulting criminalisation of the activity that defines a church.

[2] Closure

[2.1] The respondents appear anxious to avoid the implication that SSI 2021/3 resulted in the closure of churches. They reject the reference to "Closure Regulations", preferring to use "No 11 Regulations". In Answer 28 in particular it is averred that these regulations "do not curtail the right to take part in collective public worship". With respect, that is incorrect.

[2.2] The Local Levels Regulations Schedule 5 applies to Level 4 areas. The whole of mainland Scotland has been designated Level 4 since 26 December 2020. With effect from 8 January 2021 the Closure Regulations inserted a new paragraph 1A in Schedule 5 of the Local Levels Regulations:

> "**A person who is responsible for a place of worship must close that place of worship**"

It is no longer permissible to attend a gathering which is "attending a place of worship". The exception permitting this, formerly in Schedule 5, §§ 11(b)(iii) and 12(d)(iii) is removed. What that means for the petitioners and their congregations is that they cannot be "the church". They are barred from assembly, communion, baptism and congregational ministry, whether indoors or outdoors.

[2.3] It is antithetical to the petitioners' beliefs to suggest individuals sitting in front of a computer screen are "the church". Assembly in person is fundamental to being "the church", both theologically, and practically, for the reasons explained above.

[2.4] It is not to the point that the Closure Regulations permit funerals and weddings. The primary purpose of a place of worship is exactly that – worship. Churches cannot be used for their primary purpose.

[2.5] It is offensive to propose, as the respondents do, that places of worship are "open for the purposes of providing essential voluntary services or urgent public support services". The most essential service and support the church provides is spiritual.[3] Further and in any event, it is the regular, week by week, contact with its members that allows the church to offer support, as part of its "congregational ministry".

[2.6] Regulation 5 of the Local Levels Regulations provides:

> **5.—(1) It is an offence for a person to contravene any of the restrictions or requirements in schedules 1 to 5 …**

The fine is up to the statutory maximum (ie £5,000, Criminal Procedure (Scotland) Act 1995, section 225). Were any of the petitioners to comply with the requirements of their faith with respect to church worship, they would be committing a criminal offence. This is deeply disturbing to the petitioners.

[2.7] Regulation 4 of the Local Levels Regulations permit the police and persons designated by local authorities to take:

> **"such action as is necessary to enforce any requirement imposed by these Regulations"**

Were the church to assemble, it could be required to disperse. Were any members of a congregation to resist, they could potentially be forcibly removed to their homes.

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[3] Cf Respondents's Equality Impact Assessment referred to at §2.7 of additional party's NoA – opportunities for leaving home "*are limited to only the most essential activities*"

[3] Constitutional unlawfulness

[3.1] It is fundamental to the constitution of Scotland that the civic authorities have no authority over the worship of the church. The issue of conscience explained above should not arise, because public worship is controlled by the church and not by the state.

[3.2] The argument is set out in the report of Dr Martin Parsons at 6/4. There is a division of authority between church and state. Regular worship, preaching and the ministry of the sacraments (communion and baptism) falls within the province of the church. This is clear from the General Assembly Act 1592 (see 6/19 §§30 – 34). That which falls within the province of the church is to be governed by the church, notwithstanding any civil law to the contrary. While the Stuart monarchs attempted to interfere in the life of the church (resulting in the persecutions of the 1680s) the church-state settlement was restored in the Confession of Faith Ratification Act of 1690, as explained by Parsons at §37.

[3.3] The right of the church to self-government, independent of the state was set out in the Act for Securing of the Protestant Religion of 1706. This extends to "government, worship and discipline". It was followed through in the Union Settlement (see Union with Scotland Act 1706 and Union with England Act 1707). The Acts of Union did not pass to the Westminster government the power to make an alteration to the law with respect to the church in Scotland. That power was expressly excluded. The freedom from any imposition contrary to the Protestant Religion was assured (see preamble, parts II, IV and V). This was, in effect, a bar on legislating for the church in Scotland.

[3.4] The effective bar on legislation was recognised in the Church of Scotland Act 1921. That Act did not legislate for the church. It recognised Articles prepared by the church. The legislation was merely to remove any possible doubt as to their lawfulness. The 1921 Act confirmed that "matters spiritual" were within the exclusive jurisdiction of the church. The point was discussed in *Ballantyne v Presbytery of Wigtown* 1936 SC 625 with respect to election of a minister. That case concerned a

matter of 'governance'. Doctrine and worship are at least equally, and potentially *a fortiori*, matters within the exclusive jurisdiction of the church. The state cannot tell the church what its doctrines are in relation to assembly, sacraments or ministry. The state cannot rule the church on matters of worship. These are ecclesiastical and spiritual matters, within the sole jurisdiction of the church.

[3.5] Given that the Westminster Parliament has no power to legislate for the church in Scotland, it could not devolve any power to do so to the Scottish Parliament. Albeit the Union with Scotland Act 1706 and Union with England Act 1707 are said in section 37 of the Scotland Act 1998 to have effect subject to the 1998 Act, this cannot be construed so as to override the fundamental right of the church to autonomy, for the reasons explained by Lord Reed in *AXA v Lord Advocate* 2012 SC (UKSC) 122 at [151] – [153].

[3.6] It follows that the Coronavirus Act 2020 cannot authorise regulations which relate to matters within the exclusive jurisdiction of the church, and the Local Levels Regulations and the Closure Regulations are unlawful, in so far as they purport to require the closure of places of worship. By completely preventing the church carrying out essential spiritual and ecclesiastical functions in the form of assembly, communion, baptism and congregational ministry, they trespass into matters that are in law, the sole province of the church.

[3.7] In response to the respondents' argument on this point, the reason that the requirement of the Closure Regulations has trespassed from "civil" to "spiritual" is that it has imposed a blanket ban on the central and fundamental aspect of the being of the church, namely its public corporate worship. This is quite different from the civil law affecting a particular building, or an issue extraneous to the core being of the church. The state has purported to use regulatory functions to preclude that which the petitioners' believe to be their core spiritual 'activity' anywhere, in any building at any time. The "system and principles of worship" (respondents' NoA §49) is affected in the most profound way possible – worship as understood by the petitioners is banned.

The line between civil and spiritual has been crossed. The state has exceeded its constitutional authority.

3.8] The petitioners do not raise this point lightly. It is of fundamental importance to them that the historic settlement between church and state is upheld. Absent constitutional safeguards the church is vulnerable.

[4] Convention unlawfulness

[4.1] Were the requirement in the Closure Regulations to close places of worship within the competence of the Parliaments, they would still be unlawful under both the Human Rights Act 1998 and the Scotland Act 1998.

[4.2] The respondents accept that for the purposes of the Human Rights Act 1998 they are a public authority and that it is unlawful in terms of section 6 for them to act in a way that is incompatible with the petitioners' article 9 rights. They accept that the United Kingdom has not notified any derogations from the Convention in relation to Covid-19. They deny the import of section 13, which singles out article 9 rights for particular protection. Section 13 is there for a purpose. There is no other Convention right singled out in this way[4]. Section 13 undoubtedly applies. The petitioners respectfully ask this court to "have particular regard to the importance" of their Article 9 rights (cf respondents' NoA §39).[5]

[4] As the Bishop of Truro says in his Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians, freedom of religion and belief is perhaps the most fundamental human right because so many others depend upon it. If freedom of religion and belief are removed so many other rights are put in jeopardy too.

[5] Richards J in *R (Amicus and others) v Secretary of State for Trade and Industry*[2004] EWHC 860 Admin at §§41 – 44 did not require to make a decision on the effect of section 13 of the Human Rights Act 1998. Parties accepted in the context of a case relating to employment rights no greater weight should be given to article 9 rights than the weight enjoyed under the Convention. It was acknowledged that article 9 rights are important rights and that a church is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance. The present case strikes at the core of freedom of religion.

[4.3] If the requirement to close places of worship is a violation of article 9 of the Convention then regulations 4(b), (e)(i) and (f)(i) of the Closure Regulations are outwith the competence of the respondents. The logic is set out in the petition. Briefly, a provision that is incompatible with Convention rights is outwith the legislative competence of the Scottish Parliament (Scotland Act 1998, section 29(2)). It is outside devolved competence to make or approve subordinate legislation that would be outside the legislative competence of the Scottish Parliament (section 54(2)). The respondents have no power to make subordinate legislation that is incompatible with any Convention rights (section 57(2)). The question of incompatibility is a "devolution issue", as identified in the petition, which was in consequence served on the Lord Advocate and the Advocate-General.

[4.4] Articles 9 and 11 of ECHR are set out in the petition. Addressing whether there has been a violation of Article 9 (read with Article 11) involves consideration of:

- The scope of the Convention right;
- Whether there has been interference with that right;
- Whether the interference was lawful;
- Whether the interference had a legitimate aim;
- Whether the interference was necessary in a democratic society.

[4.5] Scope is undeniable. Reference is made to the case of *Metropolitan Church of Bessarabia v. Moldova* (2002) 35 E.H.R.R. 13. That case sets out the principles:

- Freedom of thought, of conscience and of religion, as safeguarded by Article 9, is one of the foundations of a "democratic society" within the meaning of the Convention.
- Religious communities traditionally exist in the form of organised structures, therefore Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards freedom of association against any unjustified interference by the State.

- The autonomy of religious communities is indispensable to pluralism in a democratic society and is therefore at the very heart of the protection afforded by Article 9.

The principles here are clear and obvious, without the necessity for extensive citation of authority.[6]

[4.6] Freedom of belief is absolute (*Williamson v Secretary of State* [2005] 2 AC 246 *per* Lord Nicholls of Birkenhead at §16). There is no discretion on the part of the state to determine whether religious beliefs, or the means used to express such beliefs, are legitimate (*Mannoussakis and Others v Greece* (1997) 23 EHRR 387 at §47). The respondents do not challenge the genuineness of the petitioners' beliefs. It is irrelevant that others do not hold the same belief about the nature, or expression, of the beliefs of the church. Article 9 exists to protect all genuinely held religious beliefs. It protects pluralism. It protects even minorities against the tyranny of a more powerful majority who might hold to a different view. The respondents cannot say that other religious persons think differently, and therefore that the petitioners' fundamental freedoms are not protected by article 9.

[4.7] That there is interference is undeniable. The respondents have imposed a blanket ban on opening churches for public worship. The petitioners have no choice in the matter. The situation of a blanket ban distinguishes this case from other cases under article 9, where there might be an alternative means of accommodating manifestation of religious belief (see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 *per* Lord Bingham of Cornhill at §§23 and 24). The respondents' NoA at §37 fails to acknowledge that the effect of a blanket ban is that there is nowhere, no time and no manner in which the petitioners can manifest their core religious beliefs. The petitioners cannot be "church". They are forbidden, on pain of prosecution.

[6] The petitioner has had regard to the UKSC discouragement in *S v L* 2013 SC (UKSC) 20 §67 of citation of numerous ECtHR cases.

[4.8] The petitioners maintain that this interference is unlawful. The respondents lack the constitutional power to make them cease to worship.

[4.9] The petitioners do not dispute "legitimate aim." That said, in referring to article 2 of ECHR (i) the respondents cannot be taken to be aiming to be prevent all death. As the first petitioner says in his letter at 6/9 death is a certainty for all of us (and the church has a message of hope, not merely survival); (ii) the extent to which governments take steps to prevent premature death is political. It is reflected in political choices, for example about availability of medical care and drugs, and on issues such as road safety.[7] Governments do effectively adopt a policy reflective of the comment of Chief Justice Burger in *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al*. 448 US 607 (1980) at 664: "… *Perfect safety is a chimera, regulation must not strangle human activity in the search for the impossible*."[8]

[4.10] If it is within the power of the respondents to require the closure of churches, then (as the respondents accept) they require to demonstrate that to do so is "necessary in a democratic society". That is not just that the respondents consider church closure "necessary". It is not just that there is a public health crisis. This case is about interference with what is arguably the most precious and sacred of the fundamental freedoms in Scotland. This submission is not lightly made. It has a firm foundation on:

- The constitutional history of Scotland.
- The wider recognition of the insidious effects of state interference in church in matters of religion and belief. [9]

[7] 7,638 people were injured on Scotland's roads in 2019, 2016 seriously, with 165 fatalities. The roads have not been closed.

[8] Additional party's NoA at 5.4.

[9] *Eg* ECtHR in *Metropolitan Church of Bessarabia v. Moldova,* Barmen Declaration 6/18, Bishop of Truro in 6/19.

- That restrictions on the freedom to manifest religion calls for "very strict scrutiny", ie a narrow "margin of appreciation" (*per Mannoussakis and Others v Greece* (1997) 23 EHRR 387 at §44)
- The singling out of this right above others in the Human Right Act 1998.

Interference with freedom to manifest religion and belief should in the circumstances (if lawful at all) be a last resort.

[5] Necessity in a democratic society

[5.1] The petitioners respectfully challenge the assertion that it was and is "necessary in a democratic society" to take the extreme, and until the last year unprecedented, step of requiring the closure of places of worship.

[5.2] The petitioners are not irresponsible. They are ministers of religion and church elders. They recognise the dangers of Covid-19. If permitted to open their churches for worship they will operate under the severe restrictions and safeguards of §§ 8 and 9 of Schedule 5 of the Local Levels Regulations. They have had regard to responsible professional advice from Dr Ian Blenkhorn, an independent healthcare, occupational and environmental microbiologist which is supportive of their position (see report at 6/5).[10] The court is not asked to devise some alternative to the blanket ban on corporate public worship. The alternative is already there, in the respondents' own Regulations.

[5.3] As the respondents' National Clinical Director Professor Jason Leitch advised the Covid-19 committee on 8 January 2021 it is not possible to assert that if a person

[10] The respondent's reference to *Beghal v DPP* [2016] AC 88 does not assist them. The case involved an article 8 challenge to being questioned at an airport under the Terrorism Act 2000. Lord Neuberger and Lord Dyson continued at §79: "*Of course, in many cases, it may be inappropriate to allow even the likelihood of an increase in the prospects of successfully achieving a legitimate aim to justify an interference with human rights. However in this case the interference is slight…the independent justification convincing… the supervision impressive … there are procedural safeguards … the benefits are potentially substantial … and no equally effective but less intrusive proposal has been forthcoming. In those circumstances, we conclude that the appeal, in so far as it is based on proportionality , should fail*." The present case contrasts.
Beghal was in any event distinguished as applying to article 8 as opposed to article 10 and not applied by a court of appeal including Lord Dyson in *R (Miranda) v SSHD* [2016] 1 WLR 1505 at §§108 – 111.

attends in person church worship under such restrictions and safeguards that person will contract, or transmit, Covid-19.[11] The currently available figures do not contradict this proposition. As the committee recognised complete isolation is unattainable and undesirable. In making choices about permissible human interaction the respondents have overlooked the petitioners' fundamental rights.[12]

[5.4] The categorisation of worship as "non-essential indoor social contact" (see respondents' Answer 30) clearly shows that the respondents have failed to recognised that manifestation of religious belief is a fundamental right and freedom.

[5.5] The respondents 'permit' to remain open those aspects of society that they regard as essential or important. The respondents accept that this is a 'political' decision (NoA §§9 and 55 f). The work of the courts, schools, shops, banks and transport services continues, subject to measures to limit the transmission of Covid-19. In the choice of which human interaction to 'permit' the fundamental right to manifest religion and belief has not been afforded priority. This is inconsistent with the Convention and the importance attached to article 9 by section 13 of the HRA 1998.

[5.6] The respondents 'permit' churches to open as food banks, support for the vulnerable, blood donation or vaccination centres, but not for their primary purpose of worship (under the conditions specified in regulations 8 and 9 of the Local Levels Regulations). They 'permit' the same buildings to be used for weddings and funerals. They have failed to recognise that the primary function of places of worship is exactly that 'worship'. They have failed to prioritise the fundamental right to manifest religion and belief.

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[11] The respondents accept in their NoA §18 that there is a "lack of evidence for the precise mechanisms involved". There is still no clear evidence to link corporate worship under the conditions proposed by the petitioners with the spread of coronavirus.

[12] It is apparent that this has in part arisen from a limited understanding of the breadth of article 9 freedom of belief. See comments of John Swinney 6/2 at col 32.

[5.7] It is noted that certain churches agree that they should not open for worship. This does not make it proportionate to close all churches. If certain church leaders for theological, or practical, reasons choose to remain closed that does not justify the closure of those who require for theological and practical reasons to remain open. It could be argued that the reduction in the numbers of open places of worship as a result of voluntary closure reduces risk and bolsters the argument that a 'blanket' closure is not necessary.

[5.8] Proportionality requires to be assessed having regard to international consensus and common values (*Batatyan v Armenia* (2012) 54 EHRR 15 at §122). While the independent decision-making power of the respondents is not disputed, in a case such as this, where they have a narrow margin of appreciation, they require to justify the necessity for restricting the fundamental freedom to manifest religious belief in Scotland, when this does not exist in any other part of the United Kingdom and international consensus does not support a ban on in-person assembly for worship as a manifestation of the fundamental freedom of religious belief.

[5.9] Covid-19 affects all parts of the United Kingdom. No other part of the United Kingdom currently requires places of worship to close. No other part of the United Kingdom criminalises the opening of a place of worship for the purpose of worship, or the attendance at the place of worship for the purpose of worshipping together with others. Closure of places of worship in England and in Wales in the first part of 2020 was challenged by judicial review. There were two applications for review at the instance of Rev Ade Omooba and others, one against the Secretary of State for Health and Social Care and the other against the Secretary of State for Health and Social Care and the Welsh Ministers. Both were withdrawn as churches had been permitted to open. The case of *Hussain v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin) involved a refusal of interim relief, but permission was granted to apply for judicial review. There is to date no substantive decision available. The claim in *Dolan v Secretary of State for Health and Social Care and Secretary of State for Education* was refused permission for judicial review as the repeal of regulations closing

churches made the point academic and in any event the judicial review in *Hussain* was pending. Such reviews did not require to be argued because the restrictions were repealed and not re-imposed. It is material that, having been challenged, the Secretary of State for Health and Social Care has chosen not to reimpose church closure.

[5.10] There is a growing international case law rejecting restrictions on the freedom to worship in the context of Covid-19, including rejection of measures falling short of a blanket ban. Reference is made to:

- *MW et al* (case nos 440366, 440380, 440410, 440531, 440550, 440562, 440563 and 440590, Administrative Court, France, 18 May 2020). A general and absolute ban on religious services in France was a "serious and manifestly illegal infringement" of religious rights under Article 9 and other French and international provisions
- *F* (1BvQ 44/20), 29 April 2020. Interim relief granted permitting Friday prayers in a mosque. A complete prohibition with no mechanism to apply for exceptions in individual cases subject to conditions and restrictions specific to the situation was a disproportionate interference with constitutional rights.
- *Roman Catholic Diocese of Brooklyn v Cuomo* (592 US (2020), 25 November, Supreme Court of the United States). Immediate interim relief granted against limits of 10 or 25 on numbers attending religious services. Denying relief would lead to irreparable injury to constitutional freedoms.
- *County of Los Angeles, et al. v. The Superior Court of Los Angeles County; Grace Community Church of the Valley, et al., Real Parties in Interest* (Case No. B307056) 25 August 2020. In barring in-person indoor services the state had intruded on a subject matter that belonged to the church, violating the threshold jurisdictional barrier to the to the state's power in respect of free exercise of religion.
- *Capitol Hill Baptist Church v Muriel Bowser, in Her Official Capacity as Mayor of the District of Columbia* (Case No. 20-cv-02710 (TNM)) on 9 October 2020. Immediate relief against refusal of consent to weekly services out of doors. The loss of First Amendment freedoms for even minimal periods "unquestionably constitutes irreparable injury".

- *South Bay United Pentecostal Church v Newsom* (592 US (2021), 5 February 2021, Supreme Court of the United States). Injunctive relief granted against prohibition on indoor worship services, California being the only state banning all indoor religious services.
- *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (High Court of South Africa, Case No 21542/2020, 2 June 2020) Challenge against lockdown generally sustained, where this could not be shown to be rationally connected to legitimate aims. The court criticised an approach that disregarded constitutional rights (see §§7.17-21).

[5.11] In response to the respondents' NoA at §47:

1. The respondents are not "imposing limitations" within the meaning of the relevant case law. They are prohibiting public corporate worship (see [4.7] above).

2 and 3. The coronavirus emergency has emerged with unprecedented rapidity. Courts across the world have required to respond rapidly. The petitioners can point to 7 decisions, at variance with the respondents' stance. The consensus is material.

4. The facts and circumstances are similar throughout the UK. Scotland is currently the only place where a blanket ban is imposed.

5. France and Germany are members of the Council of Europe and bound by ECHR. The US constitution derives from fundamental freedoms developed in the UK.[13]

[5.12] It should be added that the respondents' choice of sanction (fines up to the maximum permitted level) is material (*Biblical Centre of the Chuvash Republic v Russia* (Application no. 33203/08) 12 June 2014). The petitioners and their congregations are exposed not just to severe financial sanction, but to loss of reputation and employment, were they to practice their genuinely held religious beliefs, even under the severe restrictions and safeguards of §§ 8 and 9 of Schedule 5 of the Local Levels Regulations. In a genuinely democratic society they should not be exposed to such consequences save in cases of dire necessity.

[13] As noted in the additional party's NoA at §6.12.

[5.13] In summary, and addressing the "standard approach" explained in *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 at §90:

(i) the objective of preventing the spread of coronavirus is recognised to be important, but it is disputed for the reasons given above that it is sufficiently important to justify a blanket ban on the exercise of public corporate worship, which is central to the petitioners' ECHR protected fundamental right to freedom of religion and belief;

(ii) the rational connection between the objective and the blanket ban is not established, it is vague and speculative;

(iii) in the circumstances less intrusive measures are available, namely the measures in the Local Levels Regulations, regulations 8 and 9, there being no evidence that these are insufficient;

(iv) the balance should fall in favour of the fundamental right of corporate public worship, the infringement of this right by a blanket ban being in all the circumstances disproportionate.

[6] Remedies

[6.1] It is accepted that if the petitioners are correct that the Closure Regulations are unlawful, in so far as they purport to require the closure of churches in Scotland and to criminalise in-person public worship, declarator and reduction should be granted in terms of the prayers at 5.1) and 5.2).

[6.2] In order for the church doors effectively to be open, congregations must be permitted to attend public worship. Attendance at public worship should be recognised a good reason for a person to leave the place where he is living. Declarator in terms of statement 5.3) is sought to ensure that the remedies in 5.1) and 5.2) are effective (in the context of the Local Levels Regulations, Schedule 5, §§ 17 and 18, inserted by SSI 2021/1).

[6.3] If the petitioners are correct in their arguments then they should be able to resume worship immediately. Fundamental rights are at stake. As recognised in *Capitol Hill Baptist Church v Muriel Bowser* what has occurred constitutes "irreparable injury". And

as Gorsuch J remarked in *Roman Catholic Diocese of Brooklyn v Cuomo* "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical". There are already protective measures in place. The petitioners waited for a substantive hearing. Relief should be immediate.