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Citygate
95 Southampton Street
Reading, RG1 2QU

National Assembly for Wales
Crown Building
Cathays Park
CARDIFF
CF10 3NQ

My Ref: MP:MP4017

Date: 23 October 2020

Dear Sirs

Our clients: Rev Kevin Berthiaume et al

This letter is a formal letter before claim, in accordance with the pre-action protocol for judicial review under the Civil Procedure Rules.

The Claimants:

- | | |
|------------------------------------|---|
| 1. Pastor Kevin Berthiaume | Calvary Chapel, Cardiff |
| 2. Pastor Karen Cleverly | Bethel Community Church, Newport |
| 3. Dr Paul Corney | Immanuel Presbyterian Church, Cardiff |
| 4. Peter Davies | Treboeth Gospel Hall, Swansea |
| 5. Rev'd Edward Evans | Westgate Evangelical Chapel, Pembroke |
| 6. Darrin Gilchrist | St. Mellons Baptist Church, Cardiff |
| 7. Pastor Peter Greasley | Christchurch, Newport |
| 8. Rev'd Timothy Hodgins | Sandfields Presbyterian Church, Swansea |
| 9. Rev'd Richard Holst | Emeritus Professor of New Testament
Exegesis and Biblical Theology |
| 10. Pastor Math Hopkins | Thornhill Church, Cardiff |
| 11. Rev'd Iestyn ap Hywel | Townhill Baptist Church, Swansea |
| 12. Rev'd Mark Johnston | Bethel Presbyterian Church, Cardiff |
| 13. Pastor Ewan Jones | Bethel Baptist Church, Bedwas |
| 14. Rev'd Dr Peter Naylor | Immanuel Baptist Church, Cardiff |
| 15. Chris Owen | Baptist Minister (Ret'd) |
| 16. Rev'd Clyde Thomas | Victory Church, Cwmbran |
| 17. Dr Ayo & Pastor Moni Akinsanya | Deeper Christian Life Ministry |
| 18. Pastor Oliver Allmand-Smith | Trinity Grace Church, Manchester |
| 19. Rev'd Dr Gavin Ashenden | Former Chaplain to Her Majesty the Queen |

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- | | |
|--------------------------------------|---|
| 20. Paul Brown | Sheffield Evangelical Presbyterian Church |
| 21. Pastor Ian Christensen | New Life Christian Centre Int, Wembley |
| 22. Rev'd George Curry | Elswick Parish, St Peter & St Paul |
| 23. Pastor Christos Demetriou | Cornerstone the Church, Surrey |
| 24. Pastor Dennis Greenidge | Worldwide Mission Fellowship, London |
| 25. Rev'd Dr David Hathaway | President, Eurovision Mission to Europe |
| 26. Rev'd Nathan Hilton | Sunderland Evangelical Presbyterian Church |
| 27. Rev'd Matthew Jolley | Bury St Edmunds Presbyterian Church |
| 28. Pastor Thabo Marias | CRC International, London |
| 29. Rev'd Douglas McCallum | Cambridge Presbyterian Church |
| 30. Dr Brad Norman | Salvation for the Nations International |
| 31. Pastor Ade Omooba MBE | New Life Assembly, London |
| 32. Pastors John & Sally Quintanilla | Hebron Christian Faith Church, Coventry |
| 33. Rev'd Dr Matthew PW Roberts | Trinity Church, York |
| 34. Rev'd Dr Bill Schweitzer | All Saints Presbyterian Church, Newcastle |
| 35. Rev'd Aled Seago | Poynton Parish, Stockport |
| 36. Rev'd Melvin Tinker | Director of Theology, The Christ Church Network, Hull |
| 37. Rev'd Benjamin Wontrop | All Saints Presbyterian Church, Newcastle |

The proposed defendant: The Welsh Ministers

Defendant's ref: Coronavirus firebreak

The details of the claimants' legal advisers: see details at the top of this letter

Details of the matters being challenged:

On 19 October 2020, the First Minister announced the Defendant's intention to introduce a "firebreak lockdown" across Wales. The Defendant has published a guidance document titled *Coronavirus firebreak: frequently asked questions*, available at <https://gov.wales/coronavirus-firebreak-frequently-asked-questions> ("the Guidance"). The Guidance materially provides:

What are the rules for religious services?

Places of worship will not be open to the public, other than for wedding or civil partnership ceremonies or funerals, where people can attend at the invitation of the organiser. Please see the guidance on funerals for more information.



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Ministers may access the place of worship to broadcast (without a congregation) an act of worship or funeral, whether over the internet or as part of a radio or television broadcast.

It is anticipated that the formal legislation to that effect will be passed on or before Friday 24 October 2020. The proposed judicial review claim is against that legislation, insofar as it imposes a legally enforceable 'lockdown' on churches, and/or prohibits divine services in Wales.

The Issues

Introduction

1. In the event the Welsh Ministers carry out their stated intention to impose a blanket ban on church services in Wales, our clients intend to apply for judicial review of any such legislation on the grounds that it is (a) in breach of Article 9 ECHR and/or (b) *ultra vires* the powers of the Welsh Ministers, and/or the National Assembly for Wales, under the domestic constitutional law.
2. Our clients readily acknowledge the seriousness of the Covid-19 epidemic, and the need for extraordinary precautions to prevent the spread of the virus. However, our clients' position is that, as a matter of principle, the imposition of appropriate anti-epidemic measures in the Church is ultimately a matter for Church authorities rather than secular state authorities.
3. Our clients contend that, since the outbreak of Covid-19 in March 2020, the churches' response to the epidemic has been eminently responsible and cautious. Most of the churches introduced a voluntary 'lockdown' before a UK-wide 'lockdown' was introduced by the secular authorities in March 2020; and were slower to lift that self-imposed 'lockdown' in or after July 2020 than the secular authorities. All churches introduced drastic precautions against the spread of the virus. All legal requirements were followed by the churches, and all advice and guidance carefully considered and appropriately applied. There can be no suggestion that the churches' response to the epidemic has been in any way inadequate, so as to justify an interference from secular authorities by means of binding legislation (rather than reasoned advice or guidance).
4. In a series of judicial review claims which the UK-wide lockdown in March-July 2020 entailed, the Courts repeatedly warned that the limitations imposed by the secular government upon the ancient liberties of the Church were arguably unlawful in the circumstances.

The principle of Church autonomy under Article 9 ECHR

5. The principle of Church autonomy is zealously protected in ECHR jurisprudence under Article 9 (see *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13

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December 2001, § 118). A public authority may not interfere with the internal workings of a church or religious organisation and may not impose rigid conditions on the practice or functioning of religious beliefs. See further: *Serif v. Greece*, No. 38178/97, Reports 1999-IX, 14 December 1999, §§ 51-53; *Manoussakis v. Greece*, No. 18748/91, Reports 1996-IV, 26 September 2000, § 82. So strong is this principle that it has been upheld three times by the Grand Chamber of the European Court of Human Rights. ECHR, *Hasan and Chaush v. Bulgaria* [GC], No. 30985/96, Reports 2000-XI, 26 October 2000, § 82; ECHR, *Case of Fernandez Martinez v. Spain* [GC], No. 56030/07, Judgment of 12 June 2014; ECHR, *Case of Sindicatul "Pastorul Cel Bun" v. Romania* [GC], No. 2330/09, Judgment of 9 July 2013. Most recently the Court again upheld the same principle regarding respect for the internal workings of religious organizations in a judgment against Hungary. ECHR, *Case of Karoly Nagy v. Hungary*, No. 56665/09, Judgment of 1 December 2015.

6. Article 15 ECHR gives member-states a right to derogate from the Convention in the event of a national emergency, by giving notice to the Secretary General of the Council of Europe. However, unlike several other member-states, the United Kingdom has chosen not to avail itself of that right in connection with Covid-19. Therefore, Article 9 applies to the government's anti-Coronavirus measures in the usual way.
7. The forced closure of churches by the state is an extreme interference with Article 9 rights. Such a far-reaching and large-scale intervention may only be justified by the most compelling scientific evidence of a resulting benefit to public health. The broader the impact of the Regulations on the Convention rights, the more compelling must be the justification: *R (on the application of UNISON) v Lord Chancellor*.
8. For interference with freedom of worship to be legitimate, the interference in question must be *necessary in a democratic society*. The term 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 § 116 (Eur. Ct. H.R. June 14, 2007). Fundamentally, only convincing and compelling reasons can justify restrictions on a fundamental Convention freedom, see *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, 1956.
9. Proportionality in relation to Article 9, and the supervisory authority over any restrictions imposed on the freedom to manifest all of the rights inherent in freedom of religion, call for "very strict scrutiny": ECHR, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 1354, § 44.
10. Proportionality under the Convention is an objective test for the Court to apply, not for the decision-maker: *R (British and American Tobacco and Others) v Secretary of State for Health* [2016] EWCA Civ 1182. It is for the Defendant to adduce evidence to justify interference as proportionate and necessary.



Church autonomy under the domestic constitutional law

11. In the domestic law of England and Wales, the principle of church autonomy is of a much greater antiquity than, and at least as important constitutional status as, under the Convention. It is enshrined in c. 1 of Magna Carta 1297. The martyrdom of Thomas Beckett for that very principle is of enormous significance in the Anglican Tradition. The Acts of Supremacy were necessary to establish the status of the Monarch as the Supreme Governor of the Church of England precisely because ecclesiastical authority is recognised by the common law as distinct from the temporal authority. Henry VIII could dissolve monasteries only after, and because, he had assumed the supreme ecclesiastical office; the measure would have been *ultra vires* the temporal powers of the Crown.
12. The 1559 Church-State Settlement still has legal force and is specifically affirmed by every English sovereign in their coronation oath. This sets out separate spheres for church and state. Broadly speaking, the state may not interfere in either the interpretation of Scripture or the sacraments i.e. in effect worship, while the church must be subject to the law in other matters. The government of the realm and the government of the Church of England were always distinct in our Constitution, despite the same Monarch being ultimately at the head of both.
13. *Articles of Religion 1562* provide in Article 37: “*Where we attribute to the King’s Majesty the chief government... we give not to our Princes the ministering either of God’s Word, or of the Sacraments*”. The government of the Church of England is subject to its own constitutional law, currently governed by the *Church of England Assembly (Powers) Act 1919*.
14. The Church of Wales has been disestablished by the *Welsh Church Act 1914*. S. 13(1) of that Act relevantly provides:

“Nothing in any Act, law, or custom shall prevent the bishops, clergy, and laity of the Church in Wales from holding synods or electing representatives thereto, or from framing, either by themselves or by their representatives elected in such manner as they think fit, constitutions and regulations for the general management and good government of the Church in Wales and the property and affairs thereof”
15. The use of the words “nothing in any Act, law or custom” reveals the legislative intention (consistent with the pre-existing law on the Church-State separation of power) to protect the self-government of the Church of Wales from *any* form of interference by secular state authorities.
16. Whatever difficulties may sometimes arise in drawing a precise boundary between temporal and ecclesiastical matters, there is no doubt, and has never been any doubt, that closure and opening of churches for services and rites is a matter for ecclesiastical authorities and not for



temporal ones. The only historical precedent for a 'lockdown' of churches similar to the one introduced in the present Regulations is the suspension of all the church services and sacraments (except baptism) from 23 March 1208 to 1214 pursuant to the Interdict of Pope Innocent III. The services were suspended by the English bishops pursuant to an Interdict from Vatican. The suspension was expressly against the wishes of the temporal government and contrary to its interests. However, the lawfulness of that suspension was never questioned; nor has it ever been suggested that the temporal government had legal power simply to order a re-opening of churches.

17. Conversely, in the long history of epidemics and anti-epidemic measures in this country, up to and including the Spanish influenza in early 20th century, there is no precedent for state legislation which in any degree prohibits and criminalises church services or sacraments.
18. There is no basis for suggesting that this constitutional principle has become obsolete in modern times. On the contrary, the principle has been reinforced by Article 9 of the ECHR and the jurisprudence on Church autonomy which developed under it. It was further reinforced by s. 13 of the Human Rights Act 1998. Further, under the modern anti-discrimination law, the principle must apply equally to the Church of England, Church of Wales, and various other churches and denominations.
19. In the circumstances where the Church has responded adequately to the public health threat, there was no lawful basis for the state to interfere with its rights and liberties in this drastic fashion. If it was necessary to supplement the Church self-regulation with any degree of state regulation, that interference had to be proportionate, and confined to exercising the powers which have a proper basis in law. A blanket ban imposed by the state on all church services does not meet those requirements.
20. While the short-term practical difference between state regulation and church self-regulation may be limited in present circumstances, the principle of Church autonomy is extremely important in the broader constitutional context and must be protected for the benefit of present and future generations.

Rationale behind the principle

21. The principle identified above is important for the simple reason that a believer's worldview is radically different from a non-believer's worldview. It may seem natural for a temporal authority, well-meaning and intending no disrespect to religion, to see a church service as simply an example of a 'public event' which attracts a peculiar kind of people interested in it – roughly similar to entertainment. In that worldview, church services are important for welfare of those who need them, but obviously less important than things like steady food supplies and protection of health.



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22. By contrast, in a believer's worldview, church services are part of our means for achieving eternal salvation of the soul, which is infinitely more important than even a survival of the body. The Bible and centuries of tradition oblige Christians to gather weekly for worship and witness around the Word of God and sacraments; we need one another to flourish in our service to Christ (Ex. 20: 9-11; 1 Cor. 16: 1-2; Heb. 10:24-25; Acts 2:42, 20:7). Neither confessional Christian faith nor the Church as an institution can *faithfully exist* without a Lord's Day gathering. The Church has adhered to that obligation through long periods of persecution, where fulfilling it meant a risk of death at the hands of temporal authorities. The church does not exist by *permission* of the state, for its establishment and rule is found in Jesus Christ himself.
23. The restrictions imposed on the Church activity principally affect the believers. Hence it is important that the decisions about them are taken by believers – not by people who, in their minds and/or as a matter of professional duty, live in a wholly different world. If churches are to be closed, that must not be done by people who may well have never been to a church in their lives, or at least, have little understanding of the role, functioning, and ministries of the church.

UK court decisions in relation to 'lockdown' of churches in 2020

24. The *Health Protection (Coronavirus Restrictions) (England) Regulations SI202/350*, as in force in March-July 2020, imposed a similar blanket ban on church services to the one currently proposed in Wales. Several judicial review claims against that aspect of the Regulations were given consideration by the High Court:
25. In *R (Hussein) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin), Mr Justice Swift granted permission for judicial review of the Regulations on the grounds that the Regulations were in breach of Article 9 ECHR.
26. Similarly, Mr Justice Lewis granted permission for judicial review in relation to the challenge to the church closure (albeit not other aspects of the national 'lockdown') in *R (Dolan, Monks et al) v SSHSC* [2020] EWHC 1786 (Admin).
27. In *R (Omooba et al) v SSHSC*, which raised very similar argument to this pre-action letter, Mr Justice Swift observed that the claim "raises significant issues", which required an proper response from the Secretary of State following consultation with church leaders within the framework of Places of Worship Taskforce.
28. Following those judicial decisions and observations, the Secretary of State amended the Regulations to lift the legally enforceable 'lockdown' on the places of worship, thereby



rendering the claims obsolete. Our clients respectfully suggest that if any of the claims were to proceed to a full hearing, the chances of success are high.

Foreign judicial decisions in relation to 'lockdown' of churches

29. The proportionality of similar 'lockdowns' of places of worship in other jurisdictions was also repeatedly questioned by the relevant foreign courts.
30. In *MW et al* the highest Administrative Court in France, the Council of State, found that the blanket ban on religious services in France was a "serious and manifestly illegal infringement" of the religious rights under Article 9 and other French and international provisions.
31. The same issue was analysed by the Federal Constitutional Court of Germany in *F* (1BBQ 44/20), 29 April 2020, a challenge by a Muslim religious association. The Court granted interim relief permitting Friday prayers in a mosque, on the grounds that a blanket ban with no mechanism to apply for exemptions was a disproportionate interference with constitutional rights.
32. Similarly, the Circuit Court of Oregon in *Elkhorn Baptist Church, et al v. Katherine Brown, Governor of the State of Oregon* granted a temporary injunction suspending the 'lockdown' of religious services. The Court observed: "*The Governor's orders are not required for public safety when Plaintiffs can continue to utilize social distancing and safety protocols at larger gatherings involving spiritual worship, just as grocery stores and businesses deemed essential by the Governor have been authorized to do.*"
33. A similar claim was brought in Texas by *Steven Horze et al (Case 20-0249)*. In response to the claim, the Governor of Texas issued the Executive Order which included churches in the list of "essential services" which were permitted to remain open. The claim was then withdrawn.
34. A further insight may be gained from the decision of the High Court of South Africa in *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (2 June 2020). The challenge was against the 'lockdown' generally. In analysing the proportionality of the interference with constitutional rights (similar to the Convention analysis in this jurisdiction), the Court found (para 7) that "in an overwhelming number of instances" (para 7.21) the regulations were not even 'rationally connected' to the legitimate aims. See in particular the observations in paras 7.5-7.6 in relation to funerals. Religious services were exempted from the South African 'lockdown' in the first place (see para 8.1 of the judgment), but had they not been, similar criticisms would no doubt apply to the prohibition of religious services.
35. There is an emerging international judicial consensus to the effect that a blanket ban on church services is a disproportionate interference with the freedom of religion. In these circumstances, an Article 9 ECHR challenge to the proposed legislation in Wales has high prospects of success.



Action(s) that the defendant is expected to take

For those reasons, we respectfully invite your client to desist from introducing any binding legislation banning or restricting church services in Wales as part of the proposed 'firebreak lockdown'.

For the avoidance of doubt, our clients do not dispute the right of your clients to issue advice or guidance to churches about the protection of public health during the epidemic. Any reasonable advice or guidance would be gratefully considered.

ADR proposals

Our clients have no specific ADR proposals at present, but are open to dialogue with your clients about the issues raised in this pre-action letter in whatever form your clients consider appropriate.

Details of any information sought / details of any documents that are considered relevant and necessary

Please disclose all scientific and other evidence the Welsh Ministers rely upon to justify the proposed legislation under Article 9(2) ECHR.

Proposed reply date

Given the Ministers' stated intention to ensure the passage of legislation by no later than this Friday 23 October 2020, with immediate effect, this matter is extremely urgent.

We therefore request a substantive response to this pre-action letter as soon as possible, and in any event, by **4pm Monday 26 October 2020**.

In the event the proposed legislation is introduced, our clients intend to file the claim without further notice.

We look forward to hearing from you.

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Yours faithfully,



Andrew Storch Solicitors



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