

FREEDOM FROM RELIGION *foundation*

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April 16, 2020

SENT VIA FAX ONLY: 304-342-7025

The Honorable Jim Justice
Office of the Governor
1900 Kanawha Blvd. E
Charleston, WV 25305

Re: Protective measures for gatherings must apply to churches

Dear Governor Justice:

We are writing on behalf of the Freedom From Religion Foundation's 31,000 members, including members in West Virginia, to ask that you modify West Virginia's stay-at-home order to include church and other religious gatherings. FFRF protects the constitutional separation between state and church, and educates about nontheism. We have taken complaints by members and concerned citizens over the fact that your state's stay-at-home order exempts religious gatherings.

We understand that your current stay-at-home order lists "going to and from an individual's place of worship" as an "essential activity" exempted from its main provision. This exemption will needlessly endanger West Virginians.

One-third of all COVID cases in one large California county can be traced to church services. The numbers are even greater elsewhere.¹ Reuters reported: "South Korea announced thousands of coronavirus cases in the space of only a few days in late February. The surge in cases centered mostly around one main cluster from a church in Daegu city."² That article documents the harrowing story of ***one infected person attending two church services and spreading COVID to another 1,200 people*** and that a single "church cluster accounts for at least 60 percent of all cases in South Korea."

Even small gatherings can be deadly. For instance, "Lee County [Alabama] had 105 confirmed cases and three deaths related to the virus. The surrounding counties had a combined total of 119 cases." Health officials believed that "church gatherings have

¹ Hilda Flores, "One-third of COVID-19 cases in Sac County tied to church gatherings, officials say," [NBC News KCRA](#) (April 1, 2020).

² [Reuters](#), "The Korean clusters: How coronavirus cases exploded in South Korean churches and hospitals," (March 20, 2020).

been tied to a swell in new cases across the area, explaining that even groups smaller than 10 people can spread the coronavirus.”³ Your safer-at-home order is not safe enough.

We know that your order encourages churches to still practice proper social distancing of six feet between persons to the greatest extent possible, but that falls short for three reasons. **First**, religious freedom does not require exempting churches from these orders. **Second**, such exemptions themselves unconstitutionally favor churches. **Third**, these exemptions are immoral and deadly.

1. There is no legal reason to exempt churches from these orders.

Americans have rights to worship and to assemble, but neither of those rights is unlimited and neither includes the right to risk other peoples’ lives. Our First Amendment rights are limited. Freedom of speech does not include defamation or true threats. Political speech—a quintessential example of constitutionally protected speech—is even limited near polling places. Free assembly, and the free exercise of religion, are similarly limited.

States *already* regularly limit worship gatherings that jeopardize public health. For instance, the government prohibits churches from cramming too many people into a building in violation of fire codes and also requires that church buildings comply with necessary building codes. *See, e.g., Christ College, Inc. v. Bd. of Sup’rs, Fairfax Cty.*, 944 F.2d 901 (4th Cir., 1991) (rejecting the argument that “zoning and fire safety policies of the [local government] impinged on [a church’s] first amendment rights to the free exercise of religion.”). The congregants’ right to gather and worship is limited by the government’s need to protect those congregants from being trampled to death and the community from a fire. Preventing large gatherings due to a pandemic is even more crucial.

There is no doubt that states have the authority to take necessary measures to protect public health. It is hard to imagine a clearer need for prohibiting church services and gatherings than a highly infectious global pandemic. More importantly, the Supreme Court and many lower federal courts have repeatedly held that burdening the First Amendment rights to worship and assemble is perfectly permissible to prevent the spread of diseases.

More than 100 years ago, in a 7-2 opinion, the Supreme Court explained that society and other citizens’ interest in stopping the spread of smallpox was greater than one individual’s religious rights. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11

³ Jack Helean, “East Alabama Medical Center says surge in COVID-19 cases likely due to church gatherings,” [ABC 33](#) (April 5, 2020).

(1905). The Supreme Court reiterated this again and again. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). *See also, Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

The right to worship does not include the right to risk others' health and safety. Or, as the Supreme Court put it, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Mass.*, 321 U.S. 158, 166–67 (1944).

Kelly Shackelford runs First Liberty Institute and disagrees with FFRF on nearly everything related to religion and the law. But not on this matter. He wrote an op-ed for the *Washington Post*, co-authored with R. Albert Mohler, a theologian and president of Southern Baptist Theological Seminary. The headline says it all: "Mandatory social distancing is not a threat to religious liberty. It's essential for humanity." They write, "asking houses of worship to briefly suspend large gatherings is neither hostile toward religion nor unreasonable in light of the threat. Rather, this is a time for all of us to exercise prudence over defiance."⁴

Prohibiting large gatherings is not a ban on worship any more than speed limits are a ban on driving. And this order is only temporary. The short-term ban is guided by science: The more people who gather, the more viruses spread. Viruses do not respect boundaries or holy ground, they simply travel from person to person.

2. These exemptions unconstitutionally favor churches.

The Supreme Court has said time and again that the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson v. Ark.*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947). Courts have long ruled that the Establishment Clause of the First Amendment bars the government from preferring one religion over another, or religion over non-religion. *Everson*, 330 U.S. at 8 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27–28 (1997) ("government may not favor religious belief over disbelief") (Blackmun, J., concurring).

The exemption for church services does not uphold First Amendment values, it unnecessarily favors churches and, therefore, violates the First Amendment.

⁴ April 3, 2020 op-ed. Available at <https://wapo.st/3dWT6Xy>.

3. Exempting churches from these orders is immoral.

Preachers seeking exemption from social distancing orders are not simply asking for a right to gather and worship, they are also asking for a right to risk the health and lives of every other member of the community and country. They are risking the lives of responsible West Virginians, immuno-compromised West Virginians, and other people who are, for instance, only risking exposure to get necessary groceries or medicine. These churches are also overburdening the health care system. Doctors are already working overtime and are already rationing beds and ventilators. Churches that hold services are contemptuously disregarding the efforts of these heroes.

Please revise the stay-at-home order to remove the exemption for religious gatherings in order to safeguard state citizens.

Very truly,



Annie Laurie Gaylor & Dan Barker

Co-presidents

ALG/DB:cal