

FREEDOM FROM RELIGION *foundation*

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April 9, 2020

SENT VIA EMAIL ONLY

**Legislative Coordinating Council
Kansas State Capitol
300 SW 10th St.
Topeka, KS 66612**

**The Honorable Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612**

Re: Protective measures for large gatherings must apply to churches

Dear Legislative Coordinating Council members and Attorney General Schmidt:

I am writing on behalf of the Freedom From Religion Foundation to explain that executive orders prohibiting mass gatherings must include, not exempt, church and other religious gatherings. FFRF is a national nonprofit organization with more than 31,000 members across the country, including in Kansas. FFRF protects the constitutional separation between state and church, and educates about nontheism.

We sent Gov. Kelly a March 26 letter explaining that gubernatorial orders banning large gatherings must include worship services. Executive Order 20-18 did so, though it failed to fully meet this legal standard and exempted church gatherings of less than ten people. That lethal shortcoming is irrelevant because the Legislative Coordinating Council, on bad advice from the Attorney General, overturned the order in a 5-2 vote, at about the same time the state crossed the ominous threshold of 1,000 confirmed cases.

The LCC's vote *will* kill Kansans. Data doesn't lie. One-quarter of Kansas's confirmed cases trace to church gatherings.¹ The numbers are bigger elsewhere and Kansas's number will get much worse for the very reason the LCC held this vote: Easter and Passover are just days away. Exempting churches from these orders is unconstitutional and deadly. The LCC's vote should be rescinded immediately.

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 And these are really due to 3 church clusters. Jonathan Shorman, "Kansas has 3 church-related COVID-19 clusters, state says amid scramble for supplies," *The Kansas City Star* ([April 6, 2020](#)).

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. Most importantly, neither right includes the right to risk or threaten the lives of other citizens. To claim a right to worship in a large crowd during a pandemic is to claim a right over the health and welfare of other citizens. It is untenable.

The Attorney General has argued that religious freedom requires exempting churches from temporary bans on large gatherings. He has little support in the law, or even among his friends. Kelly Shackelford runs First Liberty Institute and disagrees with FFRF on nearly everything related to religion and the law. But not this. 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.”²

More specifically, Attorney General Schimdt claims that the Kansas Constitution and Preservation of Religious Freedom Act require the state to exempt churches from EO 20-18 because applying the ban to churches is not the least restrictive means of furthering a compelling governmental interest.³

The argument then devolves into farce: “the government cannot show by clear and convincing evidence that it is currently necessary to subject *every* church or other religious services or activities throughout the state to the requirements in EO 20-18 to slow the spread of COVID-19.” This unreasonable standard would require the government test every citizen before formulating a plan to combat COVID. The science is clear and not difficult. The short-term ban is on gathering together, even for church, because the more people who gather, the more viruses spread. Viruses do not respect boundaries or holy ground, they simply travel from person to person. If people get together, even to worship, the virus will spread.

² April 3, 2020 op-ed. Available at <https://wapo.st/3dWT6Xv>.

³ Attorney General Derek Schmidt [April 8, 2020 memorandum](#) to Kansas Prosecutors and Law Enforcement, pp3-5. Schmidt at least admits that there is “no doubt the restrictions on religious gatherings in EO 20-18 may serve a compelling governmental interest of protecting the public health by slowing the spread of COVID-19”

This is already obvious because according to your own health officials, 25 percent of the state's cases can be traced to three church clusters. Those numbers will grow because of this vote. One third of all COVID cases in one large California county can be traced to church services.⁴ Reuters reports: "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."⁵ That article documents the harrowing story of **one infected person attending two church services and spreading COVID to another 1,200 people** and how that "Church cluster accounts for at least 60% of all cases in South Korea."

Even small gatherings can be deadly. According to "officials at East Alabama Medical Center . . . church gatherings have been tied to a swell in new cases across the area, explaining that even groups smaller than 10 people can spread the coronavirus." As those doctors explained, "There were only 10 people at a time in the building, but the infection still spread."⁶

That was the only true concern with EO 20-18. It did not go far enough. The exemption for church services with 10 or fewer people was similarly problematic. 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 (1905). The Supreme Court reiterated this again and again. The "Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when the regulated conduct "posed some substantial threat to public safety." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). *See also, Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Put another way, the right to express deeply-held belief does not include the right to risk others' health and safety. *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (religious freedom does not include physical force or threats of such force).

In fact, one federal court recently explained, "society has a compelling interest in fighting the spread of contagious diseases," to the point of overriding other rights. *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016). The court went on, "[a]ll courts, state and federal, have so held either explicitly or implicitly for over a century," and then listed the cases dating back to 1903. *Id.* at 1090.

The Kansas Attorney General is wrong on the religious freedom issue. Exempting churches is also unconstitutional.

⁴ Hilda Flores, "One-third of COVID-19 cases in Sac County tied to church gatherings, officials say," [NBC News KCRA](#) (April 1, 2020).

⁵ [Reuters](#), "The Korean clusters: How coronavirus cases exploded in South Korean churches and hospitals," (March 20, 2020).

⁶ Jack Helean, "East Alabama Medical Center says surge in COVID-19 cases likely due to church gatherings," [ABC 33](#) (April 5, 2020).

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.

3. Exempting churches from these orders is immoral.

This order is unpatriotic, unconstitutional, and, above all, immoral—because it will kill people. Clerics 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 threaten the lives of every other member of the community and country. They are risking the lives of responsible Kansans, immuno-compromised Kansans, 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.

In summary, your vote is unconstitutional, immoral, and deadly. You now know that exempting churches from these orders will spread the pandemic. Data backs this up. Science tells us so. If you do not apply this temporary ban to churches, you are as responsible for the deaths as the egomaniacal cleric who insists on holding packed services despite knowing the catastrophic risk to the community.

Sincerely,



Andrew L. Seidel
Attorney, Director of Strategic Response
Freedom From Religion Foundation