

FREEDOM FROM RELIGION *foundation*

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OPEN MEMORANDUM

To: Government official
From: Freedom From Religion Foundation
Date: April 2020
Re: Appropriate protective measures must be enforced against churches

This memo was prepared by constitutional attorneys at the Freedom From Religion Foundation (FFRF), a national state/church watchdog, to explain why stay-at-home orders must apply equally to secular and religious gatherings. This means that the orders themselves and enforcement of the orders must include churches, synagogues, mosques, houses of worship, and other religious entities.

Prohibiting religious gatherings is not a ban on worship any more than speed limits are a ban on driving. And this is only temporary. Churches all over the country are worshipping together online. These short-term policies are guided by clear 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.

According to health officials, one third of all COVID cases in one large California county can be traced to church services.¹ The numbers are even bigger elsewhere. 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.”² That article documents the harrowing story of **one infected person attending two church services and spreading the virus 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.”³

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).

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

Stay-at-home orders that provide unnecessary exceptions for churches and religious gatherings will kill Americans. That alone should be enough. But there are three other reasons why such orders should apply to and be enforced against churches. **First**, religious freedom does not require exempting churches from these orders. **Second**, such exemptions themselves unconstitutionally favor churches. **Third**, such exemptions are immoral.

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. 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 also have limits.

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 religious gatherings due to a pandemic is even more crucial.

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 held 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 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” 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 worship does not include the right to risk others’ health and safety.

Kelly Shackelford runs First Liberty Institute and disagrees with the authors of this memo 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.”⁴

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. Church worship during the pandemic is immoral.

This exemption allows some citizens to risk the lives of every citizen. Preachers seeking such exemptions 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 Americans, immuno-compromised Americans, and other citizens 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.

If you or your legal counsel requires additional information or resources, please reach out to the Freedom From Religion Foundation legal team by sending an email to COVID@FFRF.org

⁴ April 3, 2020 op-ed. Available at <https://wapo.st/3dWT6Xv>.