

March 25, 2020

The Honorable Laura Kelly
Governor of the State of Kansas
Capitol, 300 SW 10th Avenue,
Suite 241S
Topeka, KS 66612

Dear Governor Kelly:

As our nation faces the massive challenge of responding to a global pandemic, you have demonstrated leadership in taking critical steps to curb the spread of COVID-19 in Kansas. As part of your efforts, you issued a March 24 executive order¹ to implement the recent guidance from the Centers for Disease Control and Prevention (CDC) by prohibiting mass gatherings of 10 people or more.² In it, you exempt “religious gatherings, as long as attendees can engage in appropriate social distancing.”³ This exemption allows religious gatherings to continue under circumstances deemed too dangerous for secular gatherings, putting the public health at risk. We write to explain why this exemption is not only detrimental to public health but also unconstitutional and to urge you to revoke it immediately.

Banning All Mass Gatherings Is Critical to Saving Lives

According to the CDC, “large events and mass gatherings can contribute to the spread of COVID-19 in the United States via travelers who attend these events and introduce the virus to new communities.”⁴ Attendance at these gatherings is dangerous not just for the individuals who attend, but for all of us. COVID-19 spreads exponentially, so it is critical that we “flatten the curve” by restricting mass gatherings.

When asked whether the CDC guidance on mass gatherings applied to houses of worship, Dr. Anthony Fauci, the Director of the National Institute for Allergy and Infectious Diseases, responded: “crowds in church are important...it makes common sense that it involves the church.”⁵ Houses of worship are just as likely as other places of mass gathering to spread COVID-19. For example, on March 20, there were 40 reported cases of COVID-19 in Bartow County, Georgia, and “health officials say a large number of cases are linked to one church

¹ Kan. Exec. Order No. 20-14 (Mar. 24, 2020).

² Centers for Disease Control and Prevention, Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready, Interim Guidance for Coronavirus Disease 2019 (COVID-19) (Mar. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf.

³ Kan. Exec. Order No. 20-14 at 2(c).

⁴ Centers for Disease Control and Prevention, Get Your Mass Gatherings or Large Community Events Ready, Interim Guidance for Coronavirus Disease 2019 (COVID-19) (Mar. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html>.

⁵ Jon Cohen, ‘I’m Going to Keep Pushing.’ Anthony Fauci Tries to Make White House Listen to Facts of Pandemic, *Science*, Mar. 22, 2020 https://www.sciencemag.org/news/2020/03/i-m-going-keep-pushing-anthony-fauci-tries-make-white-house-listen-facts-pandemic?fbclid=IwAR3VXnf4TPriyX9aumF5qYK-ntpkgRY_CrsvCUIL2fyBLI9a6_Y5Y4uijil.

event on March 1.⁶ At least one church member has died.⁷ A pastor in Kentucky “felt his church had taken necessary precautionary steps to protect his members” from COVID-19 and so, despite Kentucky Governor Andy Beshear’s request that houses of worship cancel in-person services, the church held a service for approximately 150 people. It was later discovered that a person who tested positive for COVID-19 attended the service and now the entire community is at risk.⁸ In New Rochelle, New York, the Governor had to send “National Guard troops to enforce a one-mile-radius ‘containment area’ surrounding the Temple Young Israel synagogue.”⁹ After a man who was carrying the virus attended events at the synagogue, his relatives, friends, and the Rabbi also tested positive. Many members of the synagogue are now quarantined.¹⁰ Of course, there are many more examples that demonstrate why houses of worship, like other entities, need to suspend large, in-person gatherings for the public good. Hence, nearly two-thirds of other states have temporarily suspended mass gatherings, including those at houses of worship.¹¹

Kansas Can—And Must—Include Houses of Worship in the Mass-Gathering Ban

More than a century of legal precedent from the United States Supreme Court makes clear that the government has the authority to protect the public health through appropriate measures such as mandating vaccinations, even when some people have religious objections to complying.¹² It is no surprise, therefore, that just last week, a New Hampshire district court denied a motion for a temporary restraining order¹³ in a challenge to Governor Chris Sununu’s order banning scheduled gatherings of 50 or more people.¹⁴ The judge stated that he “cannot

⁶ Portia Bruner, *Bartow County Reports Coronavirus Cases Stemming from Cartersville Church Event*, *Fox 5 Atlanta*, Mar. 21, 2020 <https://www.fox5atlanta.com/news/bartow-county-reports-coronavirus-cases-stemming-from-cartersville-church-event>.

⁷ Jeremy Redmon, *North Georgia Couple Hit With Coronavirus After Attending Church*, *The Atlanta Journal-Constitution*, Mar. 19, 2020 <https://www.ajc.com/news/breaking-news/north-georgia-couple-hit-with-coronavirus-after-attending-church/D1Ijw0blUvY2CTQ1ZiZIM/>.

⁸ Liam Niemeyer, *Murray Church Says Visitor Tested Positive for Coronavirus*, *91.3 FM WKMS Murray State’s NPR Station*, Mar. 19, 2020 <https://www.wkms.org/post/murray-church-says-visitor-tested-positive-coronavirus#stream/0>.

⁹ Danielle Wallace, *New Rochelle Turns into Ghost Town Amid Coronavirus Outbreak Before National Guard’s Arrival*, *Fox News*, Mar. 12, 2020 <https://www.foxnews.com/us/new-rochelle-ghost-town-coronavirus-outbreak-national-guard>.

¹⁰ *Id.*

¹¹ See e.g. [Conn. Exec. Order 7D](#) (Mar. 16, 2020); [Ill. Exec. Order 2020-10](#) (Mar. 20, 2020); [Iowa Proclamation of Disaster Emergency](#) (Mar. 17, 2020); [Ky. Cabinet for Health and Family Services Order](#) (Mar. 19, 2020); [La. Proclamation No. 33 JBE 2020](#) (Mar. 22, 2020); [Me. Exe. Order 14 FY19/20](#) (Mar. 18, 2020); [Md. Exec. Order 20-03-19-01](#) (Mar. 19, 2020); [Mass. COVID-19 Order No. 13](#) (Mar. 23, 2020); [Tenn. Exec. Order 17](#) (Mar. 22, 2020); [Tex. Exec. Order GA 08](#) (Mar. 19, 2020).

¹² *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (“Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”); *People ex rel. Hill v. Board of Ed.*, 195 N.W. 95, 99 (Mich. 1923) (“When we consider that one child may innocently communicate the disease to all its playmates in school, and realize how quickly the scourge spreads, unless restrained, it becomes evident that courts ought not to stay the hands of an administrative board, seeking to protect the public health, unless clearly convinced that the board is acting arbitrarily and in abuse of discretion. Courts ought not to under such circumstances with pencil and paper figure out percentages and probabilities, and say to such board we will substitute our judgment for yours, and, unless a certain percentage of the population is stricken, you may not act.”)

¹³ Holly Ramer, *New Hampshire Ban on Large Gatherings Challenged in Court*, *Courthouse News* (Mar. 19, 2020) <https://www.courthousenews.com/new-hampshire-ban-on-large-gatherings-challenged-in-court/>.

¹⁴ *Binford v. Sununu*, Order on Plaintiff’s Emergency Request for Preliminary Injunction & Permanent Injunction, No. 217-2020-CV-00152 (Merrimack Super. Ct. Mar. 18, 2020),

imagine a more critical and important public objective than protecting the citizens of this state and this country from becoming sick and dying from this pandemic.”¹⁵ It is clear that the state has the power to broadly enforce restrictions during a pandemic—even at houses of worship.

There is no federal constitutional requirement that the state exempt houses of worship from such bans.¹⁶ On the contrary, the Establishment Clause of the First Amendment to the United States Constitution prohibits the government from exempting houses of worship from this general public-safety ban. The government’s ability to issue religious exemptions is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion” that violates the Establishment Clause.¹⁷ To avoid a constitutional violation, a religious exemption “must be measured so that it does not override other significant interests”¹⁸ and may not “impose unjustified burdens on other[s].”¹⁹ In other words, when deciding whether to grant religious exemptions, the government must do no harm to others; and it therefore is forbidden to grant a religious exemption that puts people at risk.²⁰ The separation of church and state does not require a religious exemption but rather prohibits it.²¹

There is no question that an exemption for mass gatherings at houses of worship causes a significant and unjustified danger to all. The exemption undermines the effectiveness of efforts to contain the spread of the virus through social distancing and puts everyone, particularly the elderly and other vulnerable populations in houses of worship and throughout their communities, in harm’s way. It is true that the exemption only applies to religious gatherings where attendees

<https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/031720Sununu-complaint.pdf> (This case included the claim that the order violated the religious freedom rights of the plaintiffs who wanted to attend religious gatherings and worship God along with other church members).

¹⁵ Kathy McCormack, *Judge Upholds New Hampshire’s Ban on Large Gatherings During Coronavirus*, CBS Boston (Mar. 20, 2020), <https://boston.cbslocal.com/2020/03/20/coronavirus-lawsuit-new-hampshire-gatherings-ban/>.

¹⁶ Under the Free Exercise Clause, neutral and generally applicable laws are permissible even if they result in a substantial burden on religious exercise. *Employment Division of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

¹⁷ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-5 (1987) (*internal quotation marks omitted*).

¹⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interest” violates Constitution).

¹⁹ *Cutter*, 544 U.S. at 726. *See also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *Jacobson*, 197 U.S. at 26 (“Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”).

²⁰ The exemption also violates the Establishment Clause by preferring religious gatherings over nonreligious gatherings of similar size. The cardinal rule of the Establishment Clause is that governmental entities cannot take any action that “has the purpose or effect of ‘endorsing’ religion.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). Instead, “governmental neutrality between religion and religion, and between religion and nonreligion” must be maintained. *McCreary Cty. v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (*quoting Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This exemption is not neutral: religious gatherings are given preferential treatment—religious gatherings are exempted from the mass gatherings ban so long as attendees maintain social distance, but their secular counterparts are not.

²¹ What is more, the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment similarly protect against the content and viewpoint discrimination and differential treatment inherent in preferring religious services and gatherings over other gatherings of similar size, be they political, philosophical, or social.

can social distance. But if applying that requirement to all mass gatherings were an effective public health solution, the state wouldn't be barring similar non-religious gatherings.

Nor can the exemption be justified under Kansas law. Kansas law requires religious exemptions only when state action places a substantial burden on a sincerely held religious belief and either that burden is not furthered by a compelling state interest or the burden is not the least restrictive means of furthering that compelling government interest.²² The state's compelling interest at this moment in protecting public health by barring all mass gatherings is indisputable. Public-health experts have made clear that the only way to "flatten the curve" is to self-quarantine and restrict mass gatherings. And religious gatherings are not immune to COVID-19 transmission. Applying the mass-gathering ban to religious gatherings in the same manner as secular gatherings, therefore, is necessary to meet the state's interest in protecting the lives of the people of Kansas.

People of Faith Are Rising to the Challenge and Do Not Need an Exemption

We understand that in these difficult and scary times, many people look to their faith for comfort and guidance. But, as the National Association of Evangelicals and *Christianity Today* said in a joint statement: The pandemic is requiring people "temporarily to convene remotely, not to deny our faith or to cease worshiping God."²³ They explained, "canceling in-person worship services is not the same as canceling worship."²⁴ Indeed, many religious and denominational organizations are doing valuable work to serve the needs of congregants by encouraging them to shift to online services and by providing tools to enable the congregations to do so.

For example, Auburn Seminary has created a campaign called #FaithfulDistance. As they explain it: "we now have an obligation to act to mitigate the worst impacts of the global COVID-19 pandemic. This obligation includes canceling large group gatherings and encouraging community members to stop unnecessary travel and stay at home."²⁵ The Union for Reform Judaism has various resources to help its congregations cope with COVID-19, including helping its synagogues to "prioritize your community's health, safety, and spiritual wellbeing" by holding virtual gatherings.²⁶ On March 17, the Archdiocese of Kansas City in Kansas, in conjunction with the bishops of Kansas, suspended all public Masses.²⁷ Houses of worship from a variety of denominations and traditions, ranging from the Ebenfeld Mennonite Brethren Church in Hillsboro²⁸ and the Messiah Lutheran Church in Emporia,²⁹ to the Metropolitan Baptist Church in

²² Kan Stat. § 60-5301; see also *Stinemetz v. Kansas Health Policy Auth.*, 252 P.3d 141, 161 (Kan. Ct. App. 2011) (applying strict scrutiny in free exercise cases brought under Kan Const. Bill of Rights, § 7); *State v. Evans*, 796 P.2d 178 (Kan. Ct. App. 1990) (same).

²³ Walter Kim & Timothy Dalrymple, *To Cancel or Not to Cancel: That is the Question*, *Christianity Today*, Mar. 23, 2020, <https://www.christianitytoday.com/ct/2020/march-web-only/walter-kim-nae-timothy-dalrymple-cancel-church-or-not.html>.

²⁴ *Id.*

²⁵ Auburn Seminary, Petition: We Commit to #FaithfulDistance! <https://action.groundswell-mvmt.org/petitions/faithful-distance-commit-to-church-social-distance> (last visited Mar. 23, 2020).

²⁶ Union for Reform Judaism, How Reform Congregations Are Coping With Covid-19 (and Tools to Help) (Mar. 21, 2020), <https://urj.org/blog/2020/03/21/how-reform-congregations-are-coping-covid-19-and-tools-help> (last visited Mar. 23, 2020).

²⁷ Statement of Archbishop Joseph F. Naumann Regarding Cancellation of Public Masses in the Archdiocese of Kansas City in Kansas (Mar. 17, 2020), <https://archkcks.com/coronavirus/holy-mass> (last visited Mar. 23, 2020).

²⁸ Ebenfeld Mennonite Brethren Church, <http://ebenfeldmb.com/> (last visited Mar. 23, 2020).

²⁹ Messiah Lutheran Church, <https://www.messiahlutheran.org/> (last visited Mar. 23, 2020).

Wichita³⁰ and Congregation Beth Shalom in Overland Park,³¹ have all taken action to suspend in-person religious services.

Many faiths teach that in circumstances like the ones that we all now face, protecting people's lives comes first, and that it is an act of charity, justice, and love to stay home and to worship through alternative means. To protect people who attend religious worship services as well as those who don't, we should be encouraging these efforts, not exempting houses of worship from the penalties that apply to all other mass gatherings.

Conclusion

We are all making our way through an unprecedented and difficult time. We recognize that many people find solace in attending religious services. Our hearts go out to those who are unable to attend religious services and hope that they will find comfort participating in online or broadcast services, reflecting on religious texts, and praying at home with family, if they choose. But at this moment, the Constitution not only permits, but demands that the safety and health of every single person must take precedence. In order to protect the lives and health of those who attend religious services and those who might be in contact with them, we urge you to rescind immediately the exemption for religious gatherings.

Sincerely,

A handwritten signature in cursive script that reads "Rachel Laser".

Rachel Laser
President and CEO
Americans United for Separation of Church and State

³⁰ Metropolitan Baptist Church, Online Services <https://metrobaptist.com/> (last visited Mar. 23, 2020).

³¹ Congregation Beth Shalom, <https://www.bethshalomkc.org/2020/03/team-beth-shalom/> (last visited Mar. 23, 2020).