

March 30, 2020

The Honorable Kathyleen M. Kunkel  
Cabinet Secretary  
New Mexico Department of Health  
1190 S. St. Francis Drive  
Santa Fe, NM 87505

Dear Secretary Kunkel:

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 New Mexico. As part of your efforts, you issued a March 24 public health order<sup>1</sup> that is in line with the recent Centers for Disease Control and Prevention (CDC) guidance on mass gatherings. In it, you prohibit all gatherings of 5 people or more.<sup>2</sup> Yet, it exempts gatherings in houses of worship entirely from the restriction: “‘mass gathering’ does not include ‘individuals’ congregated in a church, synagogue, mosque, or other place of worship.”<sup>3</sup> 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.

### **Mass Gathering Bans Are 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.”<sup>4</sup> 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.”<sup>5</sup> Houses of worship are just as likely as other places of mass gathering to spread

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<sup>1</sup> N.M. Public Health Order, Dept. of Health, Public Health Emergency Order Closing All Businesses and Nonprofit Entities Except Those Deemed Essential and Providing Additional Restrictions on Mass Gatherings Due to COVID-19 (Mar. 23, 2020), <https://cv.nmhealth.org/wp-content/uploads/2020/03/SignedPHO03-24-2019.pdf>.

<sup>2</sup> 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](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf).

<sup>3</sup> N.M. Public Health Order at Definitions § 6.

<sup>4</sup> 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>.

<sup>5</sup> 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>

COVID-19. For example, after attending a church event in Arkansas, nearly three dozen people tested positive for COVID-19, including the pastor and his wife.<sup>6</sup> After a March 15 church service for 80 people in Illinois, 43 people have become sick and 10 people have tested positive for COVID-19.<sup>7</sup> In New Rochelle, New York, 100 people, most of whom were members of the same synagogue, were forced into quarantine, after a man who was carrying the virus attended events at the synagogue.<sup>8</sup> The threat was so great that the Governor had to send “National Guard troops to enforce a one-mile-radius ‘containment area’ surrounding the Temple Young Israel synagogue.”<sup>9</sup> 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.<sup>10</sup>

### **New Mexico 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.<sup>11</sup>

There is no federal constitutional requirement that the state exempt houses of worship from such bans.<sup>12</sup> As explained by the United States Supreme Court in *Prince v. Massachusetts*: “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.”<sup>13</sup> Indeed, a court in New Hampshire recently rejected the arguments of three people who claimed the current New Hampshire mass-gathering order, which does not exempt houses of worship, violated the Free Exercise Clause of

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[-anthony-fauci-tries-to-make-white-house-listen-to-facts-on-pandemic?fbclid=IwAR3VXnf4TPriyX9aumF5gYK-ntpkgRY\\_CrsvCUIL2fyBLI9a6\\_Y5Y4uipjl](https://www.washingtonpost.com/news/health/wp/2020/03/26/anthony-fauci-tries-to-make-white-house-listen-to-facts-on-pandemic/?hpid=hp_hp-top-table-main-coronavirus%3Afauci%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-coronavirus%3Afauci%3Ahomepage%2Fstory).

<sup>6</sup> Janelle Griffith, *Nearly 3 Dozen Who Attended Ark. Church Event Test Positive for Coronavirus*, NBC News (Mar. 26, 2020), <https://www.nbcnews.com/news/us-news/nearly-3-dozen-who-attended-arkansas-church-event-test-positive-n1169471> (last visited Mar. 30, 2020).

<sup>7</sup> Diane Pathieu & Will Jones, *Glenview Coronavirus: 43 Sick, 10 Positive COVID-19 Cases After Churchgoers Attend Service at Life Church*, ABC 7 Chicago News (Mar. 27, 2020), <https://abc7chicago.com/health/more-than-40-people-report-symptoms-after-attending-service-at-church-in-glenview-/6055024/> (last visited Mar. 30, 2020).

<sup>8</sup> Joseph Spector & Jon Campbell, *Coronavirus Quarantine Lifted in New Rochelle as N.Y. Changes Statewide Policy*, Lohud (Mar. 28, 2020), <https://www.lohud.com/story/news/politics/2020/03/28/coronavirus-quarantine-lifted-new-rochelle-ny-changes-state-policy/2933424001/> (last visited Mar. 30, 2020).

<sup>9</sup> 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> (last visited Mar. 30, 2020).

<sup>10</sup> 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).

<sup>11</sup> *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.”).

<sup>12</sup> 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). A ban on *all* mass gatherings is neutral and generally applicable.

<sup>13</sup> 321 U.S. 158, 166-67 (1944).

the U.S. Constitution.<sup>14</sup> The court concluded that the order’s impact on religion “is merely incidental to the neutral regulation and is otherwise reasonable given the limited duration of the order and the public health threat facing the citizens of this State.”<sup>15</sup>

On the contrary, the First Amendment to the United States Constitution prohibits the government from exempting houses of worship from this general public-safety ban. Under the Establishment Clause, 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.<sup>16</sup> To avoid a constitutional violation, a religious exemption “must be measured so that it does not override other significant interests”<sup>17</sup> and may not “impose unjustified burdens on other[s].”<sup>18</sup> 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.<sup>19</sup> The separation of church and state does not require a religious exemption but rather prohibits it.<sup>20</sup>

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.

Nor can the exemption be justified under New Mexico law. The New Mexico Religious Freedom Restoration Act<sup>21</sup> law requires religious exemptions when the restriction on free exercise is “essential to further a compelling governmental interest and is the least restrictive means of

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<sup>14</sup> *Binford v. Sununu*, Order on Plaintiff’s Petition for Preliminary Injunction & Defendant’s Motion to Dismiss, No. 217-2020-CV-00152 (Merrimack Super. Ct. Mar. 25, 2020), <https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/032520Sununu-order.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-5 (1987) (*internal quotation marks omitted*).

<sup>17</sup> *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).

<sup>18</sup> *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.”).

<sup>19</sup> 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—events at houses of worship are exempted from the mass gatherings ban, but events at their secular counterparts are not.

<sup>20</sup> 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.

<sup>21</sup> N.M. Stat. § 28-22-1.

furthering that compelling governmental interest.”<sup>22</sup> 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. Applying mass-gathering restrictions to houses of worship is also the least restrictive means of meeting the state’s goal: religious gatherings are not immune to COVID-19 transmission and public health experts have made clear that mass gatherings aren’t just a risk to those who attend the event, but to everyone in the community. 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 New Mexico.

### **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 worshipping God.”<sup>23</sup> They explained, “canceling in-person worship services is not the same as canceling worship.”<sup>24</sup> 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.”<sup>25</sup> 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.<sup>26</sup> On March 13, the Archdiocese of Santa Fe suspended all public Masses, noting that “as members of the Body of Christ... we care for one another by staying home.”<sup>27</sup> Houses of worship from a variety of denominations and traditions, ranging from Albuquerque’s Citizen Church with nearly 2,500 regular attendees,<sup>28</sup> and the Albuquerque Temple of the Church of Jesus Christ of Latter-Day Saints,<sup>29</sup> to the Las Cruces First Assemblies of God

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<sup>22</sup> N.M. Stat. § 28-22-3.

<sup>23</sup> 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>.

<sup>24</sup> *Id.*

<sup>25</sup> 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).

<sup>26</sup> 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).

<sup>27</sup> Pastoral Letter of Archbishop Most Rev. John C. Wester on COVID-19 Crisis, Archdiocese of Santa Fe, New Mexico (Mar. 15, 2020), <https://d2y1pz2y630308.cloudfront.net/17613/documents/2020/3/200316%20Pastoral%20Letter%20on%20COVID-19%20Crisis%20PR.pdf>.

<sup>28</sup> Citizen Church Albuquerque COVID-19 Update, <https://citizen.church/abqhealth> (last visited Mar. 30, 2020).

<sup>29</sup> Albuquerque New Mexico Temple, The Church of Jesus Christ of Latter-Day Saints, <https://www.churchofjesuschrist.org/temples/details/albuquerque-new-mexico-temple?lang=eng> (last visited Mar. 30, 2020).

Church<sup>30</sup> and the Taos Jewish Center,<sup>31</sup> 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,



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

cc: Governor Michelle Lujan Grisham

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<sup>30</sup> Las Cruces First Assemblies of God, Las Cruces First Coronavirus (COVID-19) Update (Mar. 17, 2020), [https://www.lascrucesfirst-updates.com/?fbclid=IwAR27ak3CFAPy71tMZi6G-tYVoLiXBGg4xPWAC9Tx6CNJoHYchPzK\\_3lh2g0](https://www.lascrucesfirst-updates.com/?fbclid=IwAR27ak3CFAPy71tMZi6G-tYVoLiXBGg4xPWAC9Tx6CNJoHYchPzK_3lh2g0) (last visited Mar. 30, 2020).

<sup>31</sup> Taos Jewish Center, <https://www.taosjewishcenter.org/> (last visited Mar. 30, 2020).