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Re: NCLP and Cross Culture Christian Center cease-and-desist letter

Dear Mayor Kuehne, et al.:

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United has long fought to uphold the guarantees of the Religion Clauses of the First Amendment to the U.S. Constitution that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not detrimentally affect third parties.

It has come to our attention that you recently received a letter from the National Center for Law and Policy, on behalf of Cross Culture Christian Center, claiming that enforcement of state and county stay-at-home orders against this house of worship during the COVID-19 public-health emergency violates the First Amendment. We write to explain why that is not true. It has long been established that state and local governments have the power to impose reasonable restrictions on personal liberty to protect the public from contagious disease. Lodi therefore can and should continue to enforce the emergency orders equally against religious and nonreligious institutions.

OVERVIEW

It is natural that people, in difficult and scary times like these, will desire the comfort and support that their faith community provides. The freedom to worship in accordance with one's spiritual needs is a value of the highest order. But the legal guarantees of freedom of religion, speech, and assembly have never provided an absolute right to engage in conduct that can harm others. *E.g.*, *Virginia v. Black*, 538 U.S. 343, 359 (2003) (speech); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985) (religion); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (assembly). Therefore, though the orders at issue restrict some of the Christian Center's activities, they do not violate the First Amendment rights of the church or its members. Indeed, at least two courts have already rejected similar challenges to COVID-19-related orders. *See Nigen v. New York*, No. 1:20-cv-01576-EK-PK, ECF No. 7 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

The Christian Center seems to be under the mistaken impression that the First Amendment elevates personal religious beliefs over secular law. That is, unsurprisingly, not the case. The Supreme Court has rejected that exact premise, holding that the guarantee of religious freedom does not “permit every citizen to become a law unto himself.” *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). Rather, neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the constitutional right of free exercise of religion. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505 U.S. 520 (1993); *Smith*, 494 U.S. 872. Like the virus that causes COVID-19, the orders don't discriminate. They require all people to stay inside except for certain defined essential tasks, and they treat all gatherings the same regardless of their religious or expressive purpose. Put simply, “[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease.” *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

Nor does the Christian Center have a free-speech or freedom-of-assembly right to ignore the public-health orders at issue. The orders are content-neutral and directed at conduct rather than expressive activity, so—even if viewed as regulating inherently expressive conduct—they need not satisfy any level of scrutiny higher than intermediate. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62, 65–66 (2006). They easily do that.

But even if a court were to conclude for some reason that strict scrutiny should apply to the orders, they are still lawful because they are narrowly tailored to advancing the government's compelling interest in protecting residents from a deadly disease.

What is more, the First Amendment’s Establishment Clause forbids granting religious exemptions from the orders. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of the nonbeneficiaries. *See, e.g., Estate of Thornton*, 472 U.S. at 709–10. Allowing the Christian Center to flout the emergency public-health orders would do just that. A single contagious person at a church service can infect scores of fellow congregants, who may then expose countless family, friends, and strangers who did not attend the service.

THE ORDERS DO NOT VIOLATE THE FREE EXERCISE CLAUSE

“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). The U.S. Supreme Court has therefore explained that laws that burden religious conduct are constitutionally permissible—and need only satisfy rational-basis review—when they are neutral toward religion and generally applicable. *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 879.

The orders are neutral toward religion. The neutrality requirement means that a law must not “infringe upon or restrict practices because of their religious motivation.” *Lukumi*, 508 U.S. at 533 (emphasis added). That prohibition bars discrimination against religion both facially and through “religious gerrymanders” that target specific religious conduct. *Id.* at 534. The orders here evince no hostility toward religion or houses of worship because they apply equally to all gatherings—religious, political, recreational, and otherwise. That the orders, by virtue of barring people from leaving their homes except to engage in specific defined essential activities, happen to impede religious gatherings does not amount to impermissible religious targeting. Rather, the orders here result in precisely the sort of incidental burden on religion in service of legitimate governmental goals that does not offend the First Amendment’s Free Exercise Clause.

The orders are generally applicable. General applicability is closely related to neutrality. *Lukumi*, 508 U.S. at 531. It means that government, “in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.” *Id.* at 543. In other words, government cannot restrict religious conduct while allowing substantial “nonreligious conduct that endangers [the asserted governmental] interests in a similar or greater degree.” *Id.* COVID-19 spreads through person-to-person contact, so the challenged orders prohibit people to gather in person for any reason and require them to follow social-distancing protocols when they must go out. The orders plainly do not pursue the government’s interests “only against conduct with a religious motivation.” *See id.* at 546.

Excluding from the orders limited categories of essential activities does not negate the orders' general applicability. "All laws are selective to some extent" and need not be universal to be generally applicable (*see id.* at 542); the fundamental question is whether the categorical selections amount to discrimination against religion or religious motivations (*see id.* at 542–43). The orders treat religious gatherings and activities no worse than comparable nonreligious gatherings and activities.

THE ORDERS DO NOT VIOLATE THE FREE SPEECH OR FREEDOM OF ASSEMBLY CLAUSES

The Christian Center cannot obtain a different result by invoking the freedoms of speech and assembly. The First Amendment freedoms of speech and assembly are cognate rights subject to the same protections. *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *cf.* John D. Inazo, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565, 609–11 (2010) (explaining that freedom of assembly has largely been subsumed under free-speech doctrine governing expressive association).

Conduct-oriented laws that incidentally burden some expressive activity do not violate the freedom of speech. *See, e.g., Rumsfeld*, 547 U.S. at 62. Thus, "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because" it might involve some amount of speech. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Even if the orders are viewed as limiting inherently expressive conduct (*see Rumsfeld*, 547 U.S. at 65–66 (describing rule from *United States v. O'Brien*, 391 U.S. 367 (1968)) and might therefore trigger intermediate scrutiny (*Holder*, 561 U.S. at 26–27 (describing *O'Brien* test)), they are still constitutionally enforceable. Intermediate scrutiny requires that a regulation (1) be content-neutral, (2) advance an important governmental interest, and (3) not burden more expressive conduct than necessary. *Id.* at 26–27 (citing *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)). The State's and County's orders fully comply.

First, the justifications for the orders—to reduce person-to-person transmission of a deadly virus—"have nothing to do with content." *See Boos v. Barry*, 485 U.S. 312, 320 (1988). Hence, contrary to the Christian Center's claim, the orders are content-neutral. Second, the government's interest in stemming the tide of disease is of utmost importance and far surpasses other interests that the Supreme Court has deemed sufficient to satisfy intermediate scrutiny in free-speech cases. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (public event being both loud enough and not too loud); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (keeping park clean and accessible); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984) (avoiding aesthetic visual clutter from signs and billboards). Third, the orders burden only the expressive conduct that they must to prevent the spread of the virus because *any* gathering poses a risk of transmission, as discussed below.

THE ORDERS SATISFY STRICT SCRUTINY

Even if a court were to conclude for some reason that strict scrutiny should apply to the orders, the Christian Center's arguments would still fail, because the orders are narrowly tailored to achieving a compelling governmental interest. *See Lukumi*, 508 U.S. at 531.

More than a century of constitutional jurisprudence demonstrates that restrictions on religious exercise tailored to containing contagious diseases withstand strict judicial scrutiny. Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of the strict-scrutiny standard whenever religious exercise was substantially burdened by governmental action. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *see also* 42 U.S.C. § 2000bb(b) (stating that the purpose of the federal Religious Freedom Restoration Act was “to restore the compelling interest test as set forth in” *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The Court's pre-*Smith* free-exercise decisions routinely recognized that there is no constitutional right to a religious exemption from laws that, like the orders here, were tailored to protect public health from serious threats. (The test is the same for burdens on speech (*see, e.g., Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)), so the same analysis applies.)

Preventing the spread of dangerous disease is a compelling interest. A compelling interest is one “of the highest order.” *Lukumi*, 508 U.S. at 546. The government has a compelling interest in protecting the health and safety of the public; and in particular, it has a compelling interest in preventing the spread of disease. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20; *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655–56 (4th Cir. 1995). Indeed, an extensive body of case law reflects the overriding importance of the government's interest in combatting communicable diseases.

Citing “the authority of a State to enact quarantine laws and ‘health laws of every description,’” the Supreme Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox more than a century ago. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The Court rejected the idea that the Constitution barred such compulsion, citing the “fundamental principle” that personal liberty is subject to restraint “in order to secure the . . . health . . . of the state.” *Id.* at 26 (quoting *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). That is because “[r]eal liberty for all could not exist” in a system that allows “each individual person to use his own [liberty] . . . regardless of the injury that may be done to others.” *Id.*

Since then, the Supreme Court has reaffirmed that public-health measures like mandatory immunizations that burden religious exercise withstand strict scrutiny. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in

Jacobson as example of burden on religion that is permissible under strict scrutiny); *Yoder*, 406 U.S. at 230 (same). Lower federal courts have also routinely recognized that the governmental interest in preventing the spread of communicable disease is compelling. *See, e.g., Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011) (“[T]he state’s wish to prevent the spread of communicable diseases clearly constitutes a compelling interest.”); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997) (“[T]he prison’s interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling.”); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases showing compelling governmental interest in fighting the spread of contagious disease). Lodi’s interest here in stanching the spread of COVID-19 is no less compelling. And it calls for limiting all gatherings, including religious ones, because all gatherings necessarily undermine the government’s interest in reducing transmission.

The orders are narrowly tailored. A law “is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (citing *Taxpayers for Vincent*, 466 U.S. at 808–10); accord *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984). The Christian Center’s suggestion that orders with a wide scope necessarily fail this test is incorrect. Even “[a] complete ban can be narrowly tailored . . . if each activity within the proscription’s scope is . . . appropriately targeted.” *Frisby*, 487 U.S. at 487; *see Roberts*, 468 U.S. at 628–29 (ban on all gender discrimination is narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (*see Jacobson*, 197 U.S. at 26–27) and many other courts (*see, e.g., Whitlow*, 203 F. Supp. 3d at 1089–90 (collecting cases)) have upheld against strict judicial review *blanket* prohibitions on refusing immunizations.

The orders here operate in the same way. No vaccine for COVID-19 yet exists, so the only way to slow its spread is to limit the number of opportunities for person-to-person transmission. Temporarily barring all in-person gatherings and enforcing social-distancing guidelines in permitted activities is how the government achieves that objective. And because we cannot know who is infected at any given time, the order is no broader than necessary to ensure that the targeted evils—physical gatherings that create opportunities for transmission of the virus—are curtailed.

THE ESTABLISHMENT CLAUSE FORBIDS EXEMPTING HOUSES OF WORSHIP

The rights to believe and practice one’s faith do not extend to imposing the costs and burdens of one’s beliefs on others. The federal Religion Clauses “mandate[] governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). That neutrality requirement forbids the government to grant religious exemptions that would detrimentally affect nonbeneficiaries because to do so would be to prefer the religion

of the benefited over the rights, beliefs, and interests of the nonbeneficiaries. *See Estate of Thornton*, 472 U.S. at 709–10 (invalidating law requiring employers to accommodate employees’ Sabbath day in all instances because of burden imposed on employers and other employees); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (invalidating sales-tax exemption for religious periodicals in part because it would increase tax burden on nonbeneficiaries).

The Supreme Court’s pre-Smith Free Exercise Clause jurisprudence is consistent with this principle, demonstrating that even strict scrutiny cannot require religious exemptions that harm others. *See Lee*, 455 U.S. at 261 (rejecting religious exemption from social-security taxes because it would impose employer’s beliefs on employees and deny them social-security benefits); *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (rejecting religious exemption from Sunday-closing laws because it would give Jewish businesses an economic advantage over competitors); *Prince*, 321 U.S. at 170 (rejecting religious exemption from child-labor laws because it would allow parents to put children in danger).

In short, a religious accommodation “must be measured so that it does not override other significant interests” (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) and must not “impose substantial burdens on nonbeneficiaries” (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

In only one narrow set of circumstances (in two cases) has the U.S. Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. *See Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012) (holding that antidiscrimination law could not be enforced in a way that would interfere with a church’s selection of its ministers); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339–40 (1987) (upholding, under Title VII’s statutory religious exemption, a church’s firing of an employee who was not in religious good standing). This narrow doctrine does not apply here. The Christian Center asserts a constitutional right not to control internal matters but to put countless people *outside* the church at greater risk of exposure to a deadly virus.

Exempting houses of worship would increase everyone’s risk. The Christian Center and others who are determined to hold in-person religious gatherings do not put only their congregants in danger—they also increase the risk of contagion for everyone with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness. Deciding not to enforce the order against the Christian Center or other houses of worship would elevate the religious beliefs of some over the health of the entire community.

Religious gatherings are just as likely as any other gathering to spread COVID-19, and the examples are sadly piling up across the country. Of 40 early cases in Bartow County, Georgia, “a large number . . . [were] linked to one church event.”¹ In Washington, D.C., some of the earliest cases were linked to a church, where the rector, the organist, and at least one congregant tested positive, and hundreds of other congregants were asked to self-quarantine.² And several cases in New Rochelle, New York, have been linked to attendance at a Jewish synagogue.³ The Christian Center’s sincere belief in its cleanliness does not negate this risk. After a choir rehearsal at a church in Mount Vernon, Washington—during which the members used hand sanitizer and attempted to adhere to public-health guidance—45 of the 60 attendees have fallen ill and two have died from the virus.⁴

A single unwitting carrier in the Christian Center’s congregation could cause a ripple effect through the entire community: That one carrier might pass the virus to the worshippers next to him, who might then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members then go to the doctor’s office, or to the grocery store for milk, they may potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources. It is thus essential that Lodi enforce these orders broadly. And the Establishment Clause forbids, specifically, granting special religious exemptions for conduct that threatens to harm so many.

To protect the public health, we urge you to enforce the orders against the Christian Center the same way you would against any other institution. Enforcement during this unprecedented emergency will not violate the constitutional rights of the Christian Center or its members but will instead help make sure that they and the rest of the community are alive to enjoy the full exercise of those precious rights once the emergency passes.

¹ Portia Bruner, *Bartow County reports coronavirus cases stemming from Cartersville church event*, FOX 5 N.Y. (updated Mar. 21, 2020), <https://bit.ly/2w6DXls>.

² Michelle Boorstein, *The Georgetown church quarantined by D.C.’s coronavirus outbreak*, WASH. POST (Mar. 9, 2020), <https://wapo.st/2X4s2zo>.

³ Sheena Jones & Christina Maxouris, *New York Officials traced more than 50 coronavirus cases back to one attorney*, CNN (updated Mar. 11, 2020), <https://cnn.it/2JtqAPb>.

⁴ Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), <https://lat.ms/340CWbd>.

Very truly yours,

A handwritten signature in blue ink, consisting of two distinct parts. The first part is a cursive 'Alex' and the second part is a more complex, stylized signature, likely 'Grubel'.

Alex J. Luchenitser, Associate Legal Director
Patrick Grubel, Madison Legal Fellow