

May 4, 2020

The Honorable Bill Lee  
Governor of the State of Tennessee  
State Capitol, 1st Floor  
600 Dr. Martin L. King, Jr. Blvd.  
Nashville, TN 37243

Dear Governor Lee:

On March 22, you issued an executive order that limited mass gatherings in order to protect the people of Tennessee from the spread of COVID-19.<sup>1</sup> Unfortunately, on April 28, you issued a new executive order that prohibits secular gatherings of 10 or more people but exempts religious services, rites, and gatherings from the limitation.<sup>2</sup> Permitting religious gatherings to continue under circumstances deemed too dangerous for secular gatherings lacks justification and puts the public health at risk. As seven recent court opinions have recently recognized, the U.S. Constitution does not require such a religious exemption.<sup>3</sup> We write to explain why this exemption actually violates the U.S. Constitution 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> In Attorney General William Barr’s on religious practice and social distancing, he explained that the government can restrict religious gatherings in the same manner as secular gatherings and that “scrupulously observing” social distancing restrictions “is the best path to swiftly ending COVID-19’s profound disruptions to our national life and resuming the normal economic life of our country. Citizens who seek to do otherwise are not merely assuming risk

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<sup>1</sup> Tenn. Exec. Order No. 17.

<sup>2</sup> Tenn. Exec. Order No. 30.

<sup>3</sup> *Abiding Place Ministries v. Wooten*, Order Denying Mot. for TRO, No. 20-CV-683 (S.D. Cal. Apr. 10, 2020); *Gish v. Newsom*, Order Denying Emergency Request for TRO, No. 20-CV-755 (C.D. Cal. Apr. 23, 2020), available at <https://bit.ly/3c7YJAJQ>; *Binford v. Sununu*, Order on Pl.’s Pet. for Prelim. Inj. & Def.’s Mot. to Dismiss, No. 217-2020-CV-00152 (Merrimack Super. Ct. Mar. 25, 2020), available at <https://bit.ly/2KXQbR5>; *Legacy Church v. Kunkel*, Mem. Order & Op., No. 1:20-CV-327 (D.N.M. Apr. 17, 2020), available at <https://bit.ly/35sUyNy>; *Nigen v. Cuomo*, Order, No. 20-CV-1576 (E.D.N.Y. Mar. 29, 2020), available at <https://bit.ly/2xxjqja>; *Tolle v. Northam*, Order, No. 20-CV-363 (E.D. Va. Apr. 8, 2020); *Lighthouse Fellowship Church v. Northam*, Order, No. 2:20-CV-204 (E.D. Va. May 1, 2020).

<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://bit.ly/2L0nzGQ>.

<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://bit.ly/3fiPaRB>.

with respect to themselves, but are exposing others to danger.”<sup>6</sup> You too have recognized that houses of worship that gather during this pandemic are “risking people’s lives.”<sup>7</sup>

Indeed, houses of worship are just as likely as other places of mass gathering to spread COVID-19. For example, as of April 1 in California, “nearly a third of Sacramento County’s coronavirus cases [were] connected to churches.”<sup>8</sup> At that time, 71 Sacramento County residents who attend the same church tested positive, and public officials believe that other church members who live in surrounding counties tested positive as well.<sup>9</sup> One church revival last month in Hopkins County, Kentucky, “can be traced directly to about 50 confirmed COVID-19 cases and six deaths.”<sup>10</sup> At least three people died and 37 congregants tested positive after attending a children’s ministry event in Arkansas.<sup>11</sup> And 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>12</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>13</sup>

Of course, there are many more examples that demonstrate why houses of worship, like other entities, should suspend large, in-person gatherings for the public good. Hence, nearly two-thirds of other states temporarily suspended mass gatherings, including those at houses of worship.<sup>14</sup>

### **Tennessee 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>15</sup>

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<sup>6</sup> U.S. Dept. of Justice, Attorney General William P. Barr Issues Statement on Religious Practice & Social Distancing; Dept. of Justice Files Statement of Interest in Miss. Church Case (Apr. 14, 2020), <https://bit.ly/2YyEVCT>.

<sup>7</sup> Holly Meyer, *Gov. Bill Lee: Churches That Continue To Gather Amid COVID-19 Crisis Are ‘Risking People’s Lives’*, *The Tennessean*, Mar. 20, 2020, available at <https://bit.ly/3aWMSUJ>.

<sup>8</sup> Tony Bizjak & Dale Kasler, *Health Alert: One-third of Coronavirus Cases in Sacramento County Are Connected to Churches*, *Sacramento Bee*, Apr. 1, 2020, available at <https://bit.ly/35trC7Y>.

<sup>9</sup> Anita Chabria, Sean Greene, Rong-Gong Lin II, *Pentecostal Church in Sacramento Linked to Dozens of Coronavirus Cases*, *Los Angeles Times*, Apr. 2, 2020, available at <https://lat.ms/3ffl5Cq>.

<sup>10</sup> Renee Beasley Jones, *COVID-19 Claims Another Daviess County Resident*, *Messenger-Inquirer*, Apr. 12, 2020, available at <https://bit.ly/2L1kxCl>.

<sup>11</sup> Graig Graziosi, *Coronavirus: 91-Year-Old Church Goer Dies After Pastor Hosted Service That Infected 34*, *Independent*, Mar. 26, 2020, available at <https://bit.ly/2W3GiHK>.

<sup>12</sup> Joseph Spector & Jon Campbell, *Coronavirus Quarantine Lifted in New Rochelle as N.Y. Changes Statewide Policy*, *Lohud*, Mar. 28, 2020, available at <https://bit.ly/2Wtnl07>.

<sup>13</sup> Danielle Wallace, *New Rochelle Turns into Ghost Town Amid Coronavirus Outbreak Before National Guard’s Arrival*, *Fox News*, Mar. 12, 2020, available at <https://fxn.ws/35vEuKK>.

<sup>14</sup> See e.g. [Ga. Exec. Order 04.02.20.01](#) (Mar. 23, 2020); [Ill. Exec. Order 2020-10](#) (Mar. 20, 2020); [Ky. Cabinet for Health and Family Services Order](#) (Mar. 19, 2020); [La. Proclamation No. 41 JBE 2020](#) (Apr. 2, 2020); [Me. Exe. Order 14 FY19/20](#) (Mar. 18, 2020); [Md. Exec. Order 20-03-30-01](#) (Mar. 30, 2020); [Mass. COVID-19 Order No. 13](#) (Mar. 23, 2020); [Okla. Exec. Order 2020-13](#) (Apr. 8, 2020).

<sup>15</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.”); See also Attorney General William P. Barr Statement on Religious Practice and Social Distancing, <https://bit.ly/2z5JlW> (“In exigent circumstances, when the community as a whole faces an impending harm of this magnitude, and where the measures are tailored to meeting the imminent danger, the constitution does allow some temporary restriction on our liberties that would not be tolerated in normal circumstances.”)

There is no federal<sup>16</sup> or state<sup>17</sup> constitutional requirement that the state exempt houses of worship from such bans. 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 . . . to communicable disease.”<sup>18</sup> Indeed, courts in California,<sup>19</sup> New Hampshire,<sup>20</sup> New Mexico,<sup>21</sup> New York,<sup>22</sup> and Virginia<sup>23</sup> have recently rejected arguments that mass-gathering orders during this pandemic without exemptions for houses of worship violate the Free Exercise Clause of the U.S. Constitution. The New Hampshire court explained 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>24</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>25</sup> To avoid a constitutional violation, a religious exemption “must be measured so that it does not override other significant interests”<sup>26</sup> and may not “impose unjustified burdens on other[s].”<sup>27</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>28</sup>

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<sup>16</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>17</sup> The Tennessee Supreme Court has recognized that the government can limit religious practices in order to protect public health. See e.g. *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111, 113 (Tenn. 1975) (“[A] religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society...” Tennessee has “an interest in having a strong, healthy, robust...citizenry”); *Gamble v. State*, 333 S.W.2d 816, 822 (Tenn. 1960) (rejecting claim that mandatory vaccination requirements violate Art. I, Sec. 3 of the Tennessee Constitution).

<sup>18</sup> 321 U.S. 158, 166-67 (1944).

<sup>19</sup> *Abiding Place Ministries*, Order Denying Mot. for TRO, No. 20-CV-683; *Gish*, Order Denying Emergency Req. for TRO, No. 20-CV-755.

<sup>20</sup> *Binford*, Order on Pl.’s Pet. for Prelim. Inj. & Def.’s Mot. to Dismiss, No. 217-2020-CV-00152.

<sup>21</sup> *Legacy Church*, Mem. Order & Op., No. 1:20-CV-327.

<sup>22</sup> *Nigen*, Order, No. 20-CV-1576.

<sup>23</sup> *Tolle*, Order, No. 20-CV-363; *Lighthouse Fellowship Church*, Order, No. 2:20-CV-204.

<sup>24</sup> *Binford*, Order on Pl.’s Pet. for Prelim. Inj. & Def.’s Mot. to Dismiss, No. 217-2020-CV-00152; see also Attorney General William P. Barr Statement (explaining that the government may place restrictions on religious gatherings so long as religious institutions are not singled out for special burdens.).

<sup>25</sup> *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-5 (1987) (internal quotation marks omitted).

<sup>26</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>27</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>28</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.

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. In *Tolle v. Northam*, for example, the Court recognized the harm that could result from exempting houses of worship from Virginia's mass gathering ban: "Although the Court recognizes plaintiff's constitutional concerns, those concerns do not outweigh the severe harm defendants would suffer if they could not enforce the Executive Order. Moreover, it is no exaggeration to recognize that the stakes for residents of the Commonwealth are life-or-death."<sup>29</sup> The separation of church and state does not require a religious exemption but rather prohibits it.

Nor can the exemption be justified under Tennessee law. The Tennessee Religious Freedom Restoration Act requires religious exemptions when the burden on free exercise is "essential to further a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."<sup>30</sup> Courts in New Mexico<sup>31</sup> and Virginia<sup>32</sup> have rejected claims that mass-gathering restrictions without a religious exemption do not meet these criteria.

The state's compelling interest at this moment in protecting public health by barring all mass gatherings is indisputable. The U.S. Department of Justice agrees: "prohibiting large gatherings to slow the spread of COVID-19 undeniably advances a compelling government interest."<sup>33</sup> And, according to the court in *Legacy Church v. Kunkel*: "When 'faced with a society-threatening epidemic,' state governments, pursuant to their Tenth Amendment police and public health powers, have an interest of the highest order in taking measures to protect the populace."<sup>34</sup>

Applying mass-gathering restrictions to houses of worship is also the least restrictive means to further the state's compelling interest. The *Legacy Church* court, for example, concluded that a similar mass gathering ban "does not restrict religious activity beyond what is necessary."<sup>35</sup> It rejected the plaintiff's claim that the state had a "'less restrictive' alternative"--it could have allowed religious mass gatherings with social distancing.<sup>36</sup> The Court noted that when the state mandated social distancing for essential businesses, "under these measures the number of deaths still doubled" and thus orders to "stay physically distant from each other do[] not further the compelling state interest."<sup>37</sup> The court also rejected claims that the mass gathering restrictions are not the least restrictive means even though grocery stores and farms can continue work under differently tailored restrictions: "[t]he government need not choose between doing nothing in the face of a pandemic and closing all of society. It may choose a middle ground, provided that it does so "without reference to the content of the regulated" activity."<sup>38</sup>

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<sup>29</sup> *Tolle*, Order, No. 20-CV-363.

<sup>30</sup> Tenn. Code § 4-1-407.

<sup>31</sup> *Legacy Church*, Mem. Order & Op., No. 1:20-CV-327.

<sup>32</sup> *Hughes v. Northam*, Order, Civ. Action No. CL20-415 (Russell County Cir. Ct, Apr. 9, 2020).

<sup>33</sup> *Lighthouse Fellowship Church*, The U.S.' Statement of Interest in Supp. of Pl.'s Mot. for an Inj. Pending Appeal, No. 2:20-CV-204. See also *Legacy Church*, Mem. Order & Op., No. 1:20-CV-327 (Legacy Church, the plaintiff in New Mexico, "conceded 'without question' that New Mexico's interest in protecting public health is a compelling interest," and the court agreed that mitigating a state pandemic is a compelling interest.).

<sup>34</sup> *Legacy Church*, Mem. Order & Op., No. 1:20-CV-327.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))).

## 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.”<sup>39</sup> They explained, “canceling in-person worship services is not the same as canceling worship.”<sup>40</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>41</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>42</sup>

Even after your April 28 order allowing in-person religious gatherings, many plan to continue virtual services. The Bishop of the Holston United Methodist Church Conference announced that no member churches, including in eastern Tennessee, will reopen,<sup>43</sup> and the Bishop of the Catholic Diocese of Knoxville announced that their 51 parishes will not reopen for at least another month “to ensure that we can do this safely.”<sup>44</sup> Houses of worship from a variety of denominations and traditions, ranging from the Episcopal Diocese of West Tennessee,<sup>45</sup> City Church in Knoxville,<sup>46</sup> Brentwood Baptist Church in Nashville,<sup>47</sup> and Temple Israel in Memphis<sup>48</sup> are continuing to worship virtually.

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.

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<sup>39</sup> Walter Kim & Timothy Dalrymple, *To Cancel or Not to Cancel: That is the Question*, *Christianity Today*, Mar. 23, 2020, <https://bit.ly/3fmh3YQ>.

<sup>40</sup> *Id.*

<sup>41</sup> Auburn Seminary, Petition: We Commit to #FaithfulDistance! <https://bit.ly/2SzLwJ8> (last visited Mar. 23, 2020).

<sup>42</sup> Union for Reform Judaism, How Reform Congregations Are Coping With Covid-19 (and Tools to Help) (Mar. 21, 2020), <https://bit.ly/3dgPxKF> (last visited Mar. 23, 2020).

<sup>43</sup> Wade Littleton, *Bishop Taylor: Holston UMC Churches to Remain Closed*, *Citizen Tribune*, Apr. 29, 2020, <https://bit.ly/2YwLYf5>.

<sup>44</sup> Kirstie Crawford, *Coronavirus: Churches Figure Out How to Reopen Following Knox County Guidelines*, *WATE ABC6*, Apr. 28, 2020, <https://bit.ly/2SA74We>.

<sup>45</sup> COVID-19 Update, Episcopal Diocese of West Tennessee, <https://episwtn.org> (last visited Apr. 30, 2020).

<sup>46</sup> *Id.*

<sup>47</sup> Shelby Stephens, *Churches Affected By Mayor's Plan to Reopen Nashville in Phases*, *NBC News 4 Nashville*, Apr. 26, 2020, <https://bit.ly/2L0K4LO>.

<sup>48</sup> Temple Israel, <https://bit.ly/2WtGQWn> (last visited Apr. 30, 2020).

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, appearing to read "Nikolas Nartowicz".

Nikolas Nartowicz  
State Policy Counsel  
Americans United for Separation of Church and State