June 8, 2020

Re: Oppose HB 2530—Government Must Be Able to Protect Public Health

Dear Representative:

On behalf of the Pennsylvania chapter, members, and supporters of Americans United for Separation of Church and State, I write to express our opposition to HB 2530. This bill would prohibit the Governor and state and local officials from issuing emergency orders that limit in-person religious services, even if doing so is necessary to protect public health and safety. It would single out religious gatherings for preferential treatment, putting public health at risk and violating both the U.S. and Pennsylvania Constitutions.

This Bill Would Prevent Government Officials from Protecting the Public Health

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.”1 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.”2 Like any virus, COVID-19 is just as likely to spread at houses of worship as at other gathering places.

Indeed, numerous outbreaks of COVID-19 have been connected to houses of worship. In Pittsburgh, for example, more than a dozen people connected to Eastminster Presbyterian Church, including the pastor, came down with the coronavirus.3 The Church closed their building and moved services online to protect the rest of the congregation.4 At least three people died and 37 congregants tested positive after attending a children’s ministry event in Arkansas.5 One church revival in Hopkins County, Kentucky, “can be traced directly to about 50 confirmed COVID-19 cases and six deaths.”6 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.7

Of course, there are many more examples that demonstrate that large in-person religious services, like other gatherings, can spread COVID-19. That is why, over the last few months, nearly two-thirds of the states temporarily suspended mass gatherings, including those at

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4 Id.
houses of worship.8 Experts believe it is only a matter of time until there is a second wave of COVID-199 or that a different pandemic will hit.10 State and local officials must be able to issue emergency orders to protect public health under these circumstances. Tying the hands of government officials and forbidding them from limiting in-person religious gatherings regardless of the public health dangers will put lives at risk.

Targeting Religious Services for Preferential Treatment Violates the U.S. and Pennsylvania Constitutions

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 even when some people have religious objections to complying.11 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.”12 That is why, in the last few months, the Supreme Court13 and courts in California,14 Connecticut,15 Delaware,16 Illinois,17 Louisiana,18 Maine,19 Maryland,20 New Hampshire,21 New Mexico,22 New York,23 Tennessee,24 Virginia,25 and Washington26 have 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

11 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.”).
New Hampshire court explained that the impact of these orders 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.”\footnote{Binford, No. 217-2020-CV-00152.} Even U.S. Attorney General William Barr released a statement explaining that the government can restrict religious gatherings in the same manner as secular gatherings.\footnote{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.}

On the contrary, the U.S. and Pennsylvania Constitutions prohibit the government from exempting houses of worship from all emergency orders. Under the Establishment Clause of the First Amendment of the U.S. Constitution, the government’s ability to issue religious exemptions is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.”\footnote{Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 334-5 (1987) (internal quotation marks omitted).} To avoid a constitutional violation, a religious exemption “must be measured so that it does not override other significant interests”\footnote{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 interests” violates Constitution).} and may not “impose unjustified burdens on other[s].”\footnote{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.”).} In other words, when deciding whether to grant religious exemptions, the government is forbidden from granting a religious exemptions that will harm others.

There is no question that limiting the power of government officials in future emergencies and pandemics could cause a significant and unjustified danger to all. In Tolle v. Northam, for example, a Virginia Court recognized the harm that could result from exempting houses of worship from the 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.”\footnote{Tolle v. Northam, Order, No. 20-CV-363 (E.D. Va. Apr. 8, 2020).}

Furthermore, the bill violates both the U.S. and the Pennsylvania Constitutions by preferring religious gatherings over nonreligious gatherings. The cardinal rule of the Establishment Clause is that governmental entities cannot take any action that “has the purpose or effect of ‘endorsing’ religion.” Instead, “governmental neutrality between religion and religion, and between religion and nonreligion” must be maintained.\footnote{McCreary Cty. v. ACLU of Kentucky, 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).} The Pennsylvania Constitution similarly requires that “no preference shall ever be given by law to any religious establishments . . .”\footnote{Penn. Const. art. I § 3. See also Springfield Sch. Dist. v. Dep’t of Educ., 397 A.2d 1154, 1170-71 (Pa. 1978) (Art. 1 § 3 is not stricter than the Establishment Clause and should be interpreted in a similar manner).} The exemption in HB 2530 is not neutral: houses of worship are given preferential treatment—it prohibits restrictions on in-person religious gatherings while allowing restrictions on similar secular gatherings.

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\textbf{Footnotes:}
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\item \footnote{Binford, No. 217-2020-CV-00152.}
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\item \footnote{Tolle v. Northam, Order, No. 20-CV-363 (E.D. Va. Apr. 8, 2020).}
\item \footnote{Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000); County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989).}
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Conclusion
Representative Clint Owlett said he introduced the bill because churches were confused by conflicting public-health orders. Quelling confusion over emergency orders is a worthy goal. But exempting religious gatherings from all future orders does not achieve that goal. It only serves to place public health at risk.

Many faiths teach that in emergency circumstances, 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. That is why so many have supported the temporary restrictions on in-person religious gatherings.⁴⁶ To protect people who attend religious worship services, as well as those who don’t, we should encourage these efforts, not exempt houses of worship from the restrictions that apply to all other institutions. Thank you for your consideration on this important matter.

Sincerely,

Nikolas Nartowicz
State Policy Counsel