

April 17, 2020

The Honorable Ned Lamont
Governor of the State of Connecticut
State Capitol
210 Capitol Ave.
Hartford, CT 06106

Dear Governor Lamont:

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 Connecticut. This includes your efforts to limit mass gatherings in line with the Centers for Disease Control and Prevention (CDC) guidance.¹ On April 10, you issued an executive order that extended the prohibition on mass gatherings of more than 5 people.² Unfortunately, that order continues to grant a special exemption to religious gatherings by subjecting them only to a prohibition of 50 or more people.³ If secular gatherings of more than 5 people are a danger to the public health, so too are religious gatherings.

This religious 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 a risk 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.”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 In Attorney General William Barr’s statement explaining that states can restrict

¹ 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.

² Conn. Exec. Order No. 7X § 3g., extending Conn. Exec. Order No. 7N, § 1.

³ *Id.*

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->

thirds of other states have temporarily suspended mass gatherings, including those at houses of worship.¹⁴ Even Kansas¹⁵ and New Mexico,¹⁶ which originally included religious exemptions in their mass-gathering bans, now prohibit religious gatherings. When announcing the updated executive order that removed the religious exemption, Kansas Governor Laura Kelly explained that 25% of coronavirus outbreaks in the state are tied to religious gatherings.¹⁷

Connecticut 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.¹⁸

There is no federal¹⁹ or state²⁰ 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.”²¹ Indeed, courts in New Hampshire,²² New York,²³

¹⁴ See e.g. [Ga. Exec. Order 04.02.20.01](#) (Mar. 23, 2020); [Ill. Exec. Order 2020-10](#) (Mar. 20, 2020); [Iowa Proclamation of Disaster Emergency](#) (Apr. 6, 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); [Tenn. Exec. Order 17](#) (Mar. 22, 2020).

¹⁵ [Kan. Exec. Order 20-18](#) (Apr. 7, 2020).

¹⁶ [N.M. Public Health Order](#) (Apr. 11, 2020).

¹⁷ Anna Christianson & Tiffany Littler, *Gov. Kelly Issues Executive Order to Limit Church Gatherings, Funerals*, *KSNT*, Apr. 7, 2020, available at <https://www.ksnt.com/health/coronavirus/watch-live-kansas-governor-gives-states-tuesday-coronavirus-update/>.

¹⁸ *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 & Social Distancing, <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0> (“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.”)

¹⁹ 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.

²⁰ The Connecticut Constitution protects the right to religious worship, provided that it is not construed “to justify practices inconsistent with the peace and safety of the state.” Conn. Const. art. first, § 3. Under this provision, the government may place restrictions on religious worship to protect public health. See *St. John’s Roman Catholic Church Corp. v. Town of Darien*, 184 A.2d 42, 46 (Conn. 1962) (“[T]he right to impart or receive [religious] instruction may constitutionally be subjected to reasonable regulations.”); *First Church of Christ, Scientist v. Historic Dist. Commission of Town of Ridgefield*, 738 A.2d 224, 231 (Conn. Super. Ct. 1998), *aff’d*, 737 A.2d 989 (Conn. App. Ct. 1999), *cert. denied* 742 A.2d 358 (Conn. 1999) (“Churches and religious organizations can be regulated under a state’s police power if that regulation is religiously neutral and for secular purposes.”).

²¹ 321 U.S. 158, 166-67 (1944).

²² *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>.

²³ *Nigen v. Cuomo*, Order, No. 20-CV-1576 (E.D.N.Y. Mar. 29, 2020), <https://www.courtlistener.com/recap/gov.uscourts.nyed.446761/gov.uscourts.nyed.446761.7.0.pdf>.

and Virginia²⁴ have recently rejected arguments that mass-gathering orders 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."²⁵

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.²⁶ To avoid a constitutional violation, a religious exemption "must be measured so that it does not override other significant interests"²⁷ and may not "impose unjustified burdens on other[s]."²⁸ 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.²⁹ In *Tolle v. Northam*, 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."³⁰ The separation of church and state does not require a religious exemption to the Connecticut mass gathering ban, but rather prohibits it.³¹

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

²⁴ *Tolle v. Northam*, Order, No. 20-CV-363 (E.D. Va. Apr. 8, 2020).

²⁵ *Binford*, Order on Plaintiff's Petition for Preliminary Injunction & Defendant's Motion to Dismiss; 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.).

²⁶ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-5 (1987) (*internal quotation marks omitted*).

²⁷ *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).

²⁸ *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.").

²⁹ 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.

³⁰ *Tolle*, Order, No. 20-CV-363.

³¹ 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.

elderly and other vulnerable populations in houses of worship and throughout their communities, in harm's way.

Nor can the exemption be justified under Connecticut law. The Connecticut Religious Freedom Restoration Act requires religious exemptions when the burden on free exercise is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."³² 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 Connecticut. Indeed, a Virginia court just recently upheld the state's mass-gathering restriction, rejecting claims that it did not meet strict scrutiny because it did not exempt religious gatherings.³³

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."³⁴ They explained, "canceling in-person worship services is not the same as canceling worship."³⁵ 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."³⁶ 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

³² Conn. Stat. § 52-571b.

³³ *Hughes v. Northam*, Order, Civ. Action No. CL20-415 (Russell County Cir. Ct, Apr. 9, 2020). See Matthew Barakat, *Judge Rejects Lawsuit Over Order; No Religious Exemption*, *Washington Post*, Apr. 9, 2020, available at https://www.washingtonpost.com/local/judge-rejects-lawsuit-over-order-no-religious-exemption/2020/04/09/7528bc44-7aaa-11ea-a311-adb1344719a9_story.html.

³⁴ 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>.

³⁵ *Id.*

³⁶ 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).

virtual gatherings.³⁷ On March 16, the Archdiocese of Hartford suspended all public Masses.³⁸ Houses of worship from a variety of denominations and traditions, ranging from Congregation Beth Israel in West Hartford,³⁹ to the Islamic Association of Central Connecticut in Berlin,⁴⁰ the Calvary Free Evangelical Church in Trumbull,⁴¹ and the Community Baptist Church in New Haven⁴² 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

³⁷ 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).

³⁸ An Announcement Regarding the Celebration of Mass in the Archdiocese of Hartford (Mar. 16, 2020), <https://archdioceseofhartford.org/an-announcement-regarding-the-celebration-of-mass-in-the-archdiocese-of-hartford/>;

³⁹ Kaitlin McCallum, *Conn. Faith Communities Suspend Services, Seek to Connect Virtually Amid Coronavirus Outbreak* (Mar. 14, 2020), <https://www.courant.com/news/connecticut/hc-news-connecticut-churches-response-coronavirus-20200314-3hchmvqzmjdlznyebyjp7lsym-story.html>.

⁴⁰ *Id.*

⁴¹ Pastor Peter A. Smith, Coronavirus Update (Mar. 12, 2020), https://s3.amazonaws.com/media.cloversites.com/33/33b38a12-65ef-4e1b-8579-bdac232a8fc8/documents/Coronavirus_update_3.12.20.pdf.

⁴² Covid-19 Updates, Community Baptist Church of New Haven, <https://www.cbcnewhaven.org/new-page> (last visited Apr. 15, 2020).