

FREEDOM FROM RELIGION *foundation*

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March 26, 2020

SENT VIA EMAIL ONLY:

Kay.Ivey@governor.alabama.gov

The Honorable Kay Ivey
Office of the Governor
State Capitol
600 Dexter Avenue
Montgomery, AL 36130-2751

Re: Appropriate protective measures must apply to churches

Dear Governor Ivey:

We are writing on behalf of the Freedom From Religion Foundation (FFRF) to explain that churches must be included in the extensive list of entities that must avoid large gatherings to combat the coronavirus pandemic. FFRF is a national nonprofit organization with more than 31,000 members across the country, including in Alabama. FFRF protects the constitutional separation between state and church, and educates about nontheism.

To combat the spread of COVID-19, states are heeding the advice of public health professionals and prohibiting large gatherings of people, other than where essential, such as hospitals and grocery stores. However, some states have exempted church gatherings from this requirement, and some churches have even asserted that it would be unconstitutional for the state to prohibit large in-person worship services. This claim is incorrect and imperils the effort to contain the virus's spread.

You must include worship services and other large church gatherings among the gatherings you limit to protect the public health.

Americans have rights to worship and to assemble, but neither of those rights is unlimited. Nor should they be. The rights the First Amendment guarantees are limited. For example, freedom of speech does not allow a citizen to incite violence or defame another. Political speech—a quintessential example of constitutionally protected

speech—is even limited near polling places. Free assembly, and the free exercise of religion, are similarly limited.

In fact, the government **already** regularly limits worship gatherings if they jeopardize public health. For instance, the government prohibits churches from cramming too many people into a building in violation of fire codes and also requires that church buildings comply with necessary codes. *See, e.g., Christ College, Inc. v. Bd. of Sup'rs, Fairfax Cty.*, 944 F.2d 901 (4th Cir., 1991) (rejecting the argument that “zoning and fire safety policies of the [local government] impinged on [a church’s] first amendment rights to the free exercise of religion.”). The congregants’ right to gather and worship is limited by the government’s need to protect those congregants from being trampled to death and the community from a fire. Preventing large gatherings due to a pandemic is even more crucial.

To determine when it is appropriate to limit these foundational rights, the government must balance its interest against the protected right. As the Supreme Court has explained, the government may limit those activities if doing so is the least restrictive means of achieving a compelling government interest. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a statute prohibiting campaign materials near polling places survived strict scrutiny).

Protecting the public against a pandemic is unquestionably a compelling government interest, among the most compelling that it has. States have the authority to take necessary measures to protect public health. It is hard to imagine a clearer need for prohibiting large church services than a highly infectious global pandemic. Creating exceptions to prohibitions against large gatherings undermines the purpose of those measures because it connects huge numbers of people who are otherwise safely isolated.

There is no less restrictive way to achieve this interest than prohibiting large gatherings. Viruses do not respect houses of worship, they simply travel from person to person. The more people who gather, the more viruses spread. There is no way to effectively prevent this other than preventing person-to-person contact, so large gatherings must be stopped. Thus, the state has every right to prohibit these services under the current extreme circumstances.

The worshippers seeking exemption from social distancing orders are not simply asking for a right to gather and worship, they are also asking for a right to risk the health and lives of every other member of the community and country. More than 100 years ago, in a 7-2 opinion, the Supreme Court explained that sometimes stopping the spread of a deadly disease, smallpox, was an interest more important to society and third parties than one individual’s religious rights. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11

(1905). Prohibiting large gatherings is not a ban on worship, as some churches have asserted. Churches and believers all over the country are worshipping alone, in small groups or even in large groups online. The ban is simply on the unsafe activity, regardless of purpose. *Framing this restriction as a ban on worship would be like arguing that a speed limit is a ban on driving.*

Finally, we note that many Americans—though the number is shrinking—assume a religious person is a moral person or that a person must be religious to be moral. Churches that insist on ignoring these orders and medical science are proving this assumption to be erroneous. These churches are not just recklessly risking the lives of worshippers, though that is certainly true. The real danger is overwhelming the health care system. Doctors are working overtime and are already rationing beds and ventilators. Churches that hold services are demonstrating a complete lack of respect for those efforts and the lives of community members, not just worshippers. They are knowingly increasing pressure on the health care system, rather than alleviating it. Holding services at this time would be immoral.

Put another way, this is not simply an issue of what is constitutionally permissible, but a more basic issue of right and wrong. Today, more than one-quarter of Americans, 26 percent, are religiously unaffiliated.¹ These secular Americans demand evidence- and science-based government action, especially in times of crisis. Now is no time for favoritism of churches. Treating churches the same as all other organizations is constitutional, smart, necessary, and an example of equality, not an assault on religious freedom.

We hope that you take this threat as seriously as the evidence demands and take decisive action to contain the spread of this highly infectious virus. Thank you for your time and consideration.

Very truly,



Annie Laurie Gaylor & Dan Barker
Co-presidents

¹ Robert P. Jones & Daniel Cox, *America's Changing Religious Identity*, Public Religion Research Institute (Sept. 6, 2017), available at www.prrri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.