

FREEDOM FROM RELIGION *foundation*

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April 13, 2020

SENT VIA EMAIL AND FAX ONLY: DirectorAmyActon@odh.ohio.gov,
(614) 466-9354

The Honorable Mike DeWine
Office of Governor
30th Floor
77 South High Street
Columbus, OH 43215

Director Amy Acton
Director of Health
Ohio Department of Health
246 N High St
Columbus, Ohio 43215

Re: Protective measures for gatherings must apply to churches

Dear Gov. DeWine and Dr. Acton:

We are writing on behalf of the Freedom From Religion Foundation's 31,000 members, including more than 800 in Ohio, to ask that you modify Ohio's stay-at-home order to include church and other religious gatherings. FFRF protects the constitutional separation between state and church, and educates about nontheism.

Ohio's stay-at-home order, amended April 2, exempts religious gatherings by defining them as essential services in §12e. This exemption will kill Ohioans.

One-third of all COVID cases in one large California county can be traced to church services. The numbers are even bigger elsewhere.¹ Reuters reported: "South Korea announced thousands of coronavirus cases in the space of only a few days in late February. The surge in cases centered mostly around one main cluster from a church in Daegu city."² That article documents the harrowing story of *one infected person attending two church services and spreading COVID to another 1,200 people* and that a single "church cluster accounts for at least 60 percent of all cases in South Korea."

Even small gatherings can be deadly. For instance, "Lee County [Alabama] had 105 confirmed cases and three deaths related to the virus. The surrounding counties had a combined total of 119 cases." Health officials believed that "church gatherings have been tied to a swell in new cases across the area, explaining that even groups

¹ Hilda Flores, "One-third of COVID-19 cases in Sac County tied to church gatherings, officials say," [NBC News KCRA](#) (April 1, 2020).

² [Reuters](#), "The Korean clusters: How coronavirus cases exploded in South Korean churches and hospitals," (March 20, 2020).

smaller than 10 people can spread the coronavirus.”³ Your stay-at-home order is not safe enough.

We know that you have vocally encouraged churches to abide by this order, but that falls short for three reasons. **First**, religious freedom does not require exempting churches from these orders. **Second**, such exemptions themselves unconstitutionally favor churches. **Third**, these exemptions are immoral and deadly.

1. There is no legal reason to exempt churches from these orders.

Americans have rights to worship and to assemble, but neither of those rights is unlimited and neither includes the right to risk other peoples’ lives. Our First Amendment rights are limited. Freedom of speech does not include defamation or true threats. 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.

States *already* regularly limit worship gatherings that 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 building 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.

There is no doubt that states have the authority to take necessary measures to protect public health. It is hard to imagine a clearer need for prohibiting church services and gatherings than a highly infectious global pandemic. More importantly, the Supreme Court and many lower federal courts have repeatedly held that burdening the First Amendment rights to worship and assemble is perfectly permissible to prevent the spread of diseases.

More than 100 years ago, in a 7-2 opinion, the Supreme Court explained that society and other citizens’ interest in stopping the spread of smallpox was greater than one individual’s religious rights. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905). The Supreme Court reiterated this again and again. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). *See also, Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

³ Jack Helean, “East Alabama Medical Center says surge in COVID-19 cases likely due to church gatherings,” [ABC 33](#) (April 5, 2020).

The right to worship does not include the right to risk others' health and safety. Or, as the Supreme Court put it, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Mass.*, 321 U.S. 158, 166–67 (1944).

Kelly Shackelford runs First Liberty Institute and disagrees with FFRF on nearly everything related to religion and the law. But not this. He wrote an op-ed for the *Washington Post*, co-authored with R. Albert Mohler, a theologian and president of Southern Baptist Theological Seminary. The headline says it all: "Mandatory social distancing is not a threat to religious liberty. It's essential for humanity." They write, "asking houses of worship to briefly suspend large gatherings is neither hostile toward religion nor unreasonable in light of the threat. Rather, this is a time for all of us to exercise prudence over defiance."⁴

Prohibiting large gatherings is not a ban on worship any more than speed limits are a ban on driving. And this is only temporary. The short-term ban is guided by science: The more people that gather, the more viruses spread. Viruses do not respect boundaries or holy ground, they simply travel from person to person.

2. These exemptions unconstitutionally favor churches.

The Supreme Court has said time and again that the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson v. Ark.*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947). Courts have long ruled that the Establishment Clause of the First Amendment bars the government from preferring one religion over another, or religion over non-religion. *Everson*, 330 U.S. at 8 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27–28 (1997) ("government may not favor religious belief over disbelief") (Blackmun, J., concurring).

The exemption for church services does not uphold First Amendment values, it unnecessarily favors churches and, therefore, violates the First Amendment.

3. Exempting churches from these orders is immoral.

Preachers 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. They are risking the lives of responsible Ohioans, immuno-compromised Ohioans, and other people who

⁴ April 3, 2020 op-ed. Available at <https://wapo.st/3dWT6Xv>.

are, for instance, only risking exposure to get necessary groceries or medicine. These churches are also overburdening the health care system. Doctors are already working overtime and are already rationing beds and ventilators. Churches that hold services are contemptuously disregarding the efforts of these heroes.

In summary, the church exemption in the stay-at-home order is unconstitutional, immoral, and deadly. You now know that exempting churches from these orders will spread the pandemic. Data backs this up. Science tells us so. If you do not rescind these orders, you are as responsible for the deaths as the preachers who insist on holding packed services despite knowing the catastrophic risk to the community.

Revise the stay-at-home order and remove the exemption for religious gatherings.

Very truly,

Handwritten signature in blue ink, reading "Annie Laurie Gaylor Dan Barker". The signature is written in a cursive style.

Annie Laurie Gaylor & Dan Barker

Co-presidents

ALG/DB:als