



June 21, 2023

The Hon. Brad Wenstrup
Chairman
Select Subcommittee on the
Coronavirus Pandemic
2157 Rayburn House Office Building
Washington, DC 20515

The Hon. Raul Ruiz
Ranking Member
Select Subcommittee on the
Coronavirus Pandemic
2105 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Wenstrup and Ranking Member Ruiz:

On behalf of Americans United for Separation of Church and State, thank you for the opportunity to submit this statement for the record of the hearing titled, “Churches vs. Casinos: The Constitution Is Not Suspended in Times of Crisis.”

Unfortunately, the title of the hearing wrongly suggests that the Constitution was suspended at the height of the COVID-19 pandemic to disfavor houses of worship. But the facts tell a different story. In 2020, the world struggled to grasp the implications of a global pandemic. We were in an unprecedented and scary moment. Our nation’s health officials were doing their best to determine how the highly contagious and deadly COVID-19 virus worked, spread, and could be treated and contained. Our government officials were doing their best to adopt policies to save lives.

When government officials temporarily limited in-person gatherings, their actions saved countless lives. They did *not* target houses of worship. They did *not* target religious gatherings. Instead, government officials adopted policies that generally treated similar religious and secular gatherings the same. To the extent that religious organizations and gatherings were treated differently, however, they were actually given *more favorable treatment* than their secular counterparts—further belying claims that officials discriminated against churches and synagogues.

Many people find solace in attending religious services in-person, and being prohibited from doing so during such a frightening time was incredibly difficult for many. But it was done to save lives. And at that moment, the Constitution not only permitted, but demanded that the safety and health of every single person must take precedence. Many religions, denominations, and faith groups, including the United Church of Christ,¹

¹ See Press Release, Carol Fouke-Mpoyo, Communications Director, Leadership of the Wider United Church of Christ, [UCC Leadership Statement on Safety First Before Reopening Churches](#) (May 19, 2020).

the National Council of Churches of Christ in the USA,² the Union for Reform Judaism,³ the Anglican Church of North America,⁴ and the Catholic Church⁵ encouraged their congregations and faithful to protect everyone's health and follow public health guidance. They paused in-person worship and many gathered for worship online. The public also supported curbing in-person worship.⁶

Americans United for Separation of Church and State

With a national network of more than 300,000 supporters, Americans United is a nonpartisan advocacy organization that brings together people of all religions and none to safeguard the foundational American principle of the separation of church and state, which is the cornerstone of religious freedom. We believe the freedom to worship in accordance with one's spiritual practices and traditions is a right of the highest order. At the same time, no one has the right to expose their community to an infectious disease during a deadly pandemic. That is why it was necessary for public health orders that temporarily suspended large gatherings to treat similar gatherings with similar risks—whether religious or secular—in the same manner.

Accordingly, we filed more than fifty briefs defending public-health orders and statutes from challenges claiming the Constitution requires states to treat religious institutions and gatherings more favorably and exempt them from temporary restrictions. We filed in the U.S. Supreme Court; the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits; federal district courts in California, Connecticut, Kansas, Kentucky, Louisiana, Maine, Maryland, New Jersey, New Mexico, New York, and Virginia; and state courts in Texas and Virginia. Four courts specifically cited our briefs, noting that our efforts were helpful to the courts in rendering their decisions.

State Officials Acted in Good Faith to Save Lives When They Temporarily Limited In-Person Gatherings

One thing that became clear early in the pandemic was that halting large gatherings was effective in stopping the spread of COVID-19.

Attendance at in-person gatherings—secular or religious—was dangerous not just for the individuals who attended, but for the community at large. Indoor gatherings that

² See Press Release, Nat'l Council of Churches of Christ in the USA, [NCC Statement on Urging Churches to Exercise Extreme Caution Before Re-Opening](#) (May 22, 2020).

³ See Press Release, Rabbi Rick Jacobs, President, Union for Reform Judaism, [URJ Statement Responding To President Trump's Call To Immediately Open Houses of Worship](#) (May 22, 2020).

⁴ See Press Release, Rev. Dr. Foley Beach, Archbishop & Primate, Anglican Church in North America, [College of Bishops Statement Responding to COVID-19](#) (Mar. 18, 2020).

⁵ Ryan Di Corpo, [U.S. Dioceses Suspend Masses and Close Churches as Coronavirus Pandemic Escalates](#), *America The Jesuit Rev.* (Mar. 13, 2020).

⁶ Elana Schor & Emily Swanson, [Poll: Most in US Back Curbing In-Person Worship Amid Virus](#), *Associated Press* (May 8, 2020).

brought together large groups of people for extended periods were responsible for a substantial proportion of the spread of COVID-19.⁷ As the Centers for Disease Control and Prevention explained, “[t]he more people an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19.”⁸ And people who become infected at a gathering were likely to go on to infect others in their community.

For example, a single person who is infected and attends a large worship service can cause a ripple effect throughout an entire community: They could pass the virus to neighbors in the pews, who would then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members went to the doctor’s office or the grocery store, they could expose others, who would then do the same to their families—and so on. And the more people who get sick, the more the healthcare system is strained and the greater the chance that people could die because of inadequate healthcare resources.

To contain the spread of COVID-19 and save lives, therefore, governors across the country issued public health orders that placed temporary restrictions on in-person gatherings. Religious gatherings were rightly included in the restrictions. Whether an institution hosting an event—or those attending it—are religious or secular has no impact on whether or how the virus COVID-19 spreads. Instead what matters is risk factors present at the event.

And, unfortunately, because of the nature of religious services, they are often more likely than other gatherings to lead to the transmission of COVID-19. The American Medical Association explained that “there are five risk factors that determine whether an activity is one where an infectious person is more or less likely to spread COVID-19 and religious services include every one” of those factors.⁹ Religious services take place in enclosed spaces, include large groups, people are usually in close proximity to each other, the services go on for long durations and people stay in one place, and there is . . . loud talking and singing.¹⁰

Sadly, these risks are borne out by the facts. Many thousands of cases of COVID-19 were linked to gatherings at houses of worship across the country. Here are just some examples:

⁷ See, e.g., Christie Aschwanden, [How ‘Superspreading’ Events Drive Most COVID-19 Spread](#), *Sci. Am.* (June 23, 2020).

⁸ Ctrs. for Disease Control & Prevention, [COVID-19 Consideration for Events and Gathering](#) (2020).

⁹ Tanya Albert Henry, [5 Reasons Why Religious Services Pose High Risk of COVID-19 Spread](#), *Am. Med. Assoc.* (Dec. 7, 2020).

¹⁰ *Id.*

- At a March 2020 church event in rural Arkansas, 35 of 92 attendees were infected with COVID-19, and three died.¹¹
- In April 2020, seventy-one members, including the pastor, of a Sacramento, California, church tested positive, and one person died.¹²
- A March 2020 Sunday service at a church in Cartersville, Georgia, led to an outbreak that infected at least 75 and killed four people.¹³
- Kansas officials reported in April 2020 that church events led to three separate outbreaks that caused 165 COVID-19 infections and twelve deaths.
- A March 2020 church revival in Kentucky led to approximately 50 confirmed COVID-19 cases and six deaths.
- In November 2020, more than 200 cases of COVID-19 were also linked to services at a church in Fitchburg, Massachusetts.¹⁴
- In Grand Ledge, Michigan, a November 2020 church service led to at least 74 cases of COVID-19 and one death.¹⁵
- More than 100 cases of COVID in New Rochelle, New York, were linked to a man who had COVID and attended events at a local synagogue in March 2020.¹⁶
- An October 2020 event at a church in Charlotte, North Carolina, led to at least 213 cases of COVID-19 and the deaths of twelve people.¹⁷
- An outbreak in June 2020 at a church in Union County, Oregon, led to at least 236 cases of COVID-19.¹⁸
- In June 2020, an outbreak at a West Virginia church led to 79 COVID-19 cases, including 26 people who did not attend the church service.¹⁹

Limiting gatherings at houses of worship was not done to restrict religious liberty, but to save lives.

¹¹ James A, Eagle L, Phillips C, et al., [High COVID-19 Attack Rate Among Attendees at Events at a Church — Arkansas, March 2020](#), 69(20) *Morbidity and Mortality Weekly Report* 632 (Mar. 22, 2020).

¹² Tony Bizjak, et al., [71 Infected with Coronavirus at Sacramento Church. Congregation Tells County 'Leave Us Alone'](#), *Sacramento Bee* (Apr. 4, 2020).

¹³ See Curtis Compton, [Church at Liberty Square Resumes Services After Coronavirus Outbreak](#), *Atlanta Journal-Constitution* (June 7, 2020).

¹⁴ Deanna Pan, [Church in Fitchburg Now Tied to More Than 200 COVID-19 Cases, Public Health Director Confirms](#), *Boston Globe* (Nov. 6, 2020).

¹⁵ Krystle Holleman, [One Death Reported after COVID-19 Outbreak at Grand Ledge Church](#), *WILX 10* (Nov. 11, 2020).

¹⁶ Joseph Spector, [How a New Rochelle Synagogue is Coping as an Epicenter of the U.S. Coronavirus Spread](#), *Lohud* (Mar. 11, 2020).

¹⁷ Julie Mazziotta, [COVID Outbreak at North Carolina Church Linked to 12 Deaths and More Than 200 Cases](#), *People* (Nov. 20, 2020).

¹⁸ Emily Czachor, [89 Percent of Oregon County's Coronavirus Cases Linked to Church Outbreak](#), *Newsweek* (June 23, 2020).

¹⁹ Alexander Nazaryan, [West Virginia Sees Coronavirus Outbreaks in Churches](#), *Yahoo News* (June 15, 2020).

State Officials Actually Treated Religious Gatherings More Favorably Than Secular Gatherings

While some have claimed that houses of worship were targeted for discrimination, in many cases, the opposite was true: they were allowed to have more people attend services than could attend similar non-religious events.²⁰ This was true even with the serious risks connected with in-person worship services and even though it violated core principles of the First Amendment to the Constitution. And it was true in states run by both Republican and by Democratic governors. For example:

- In Connecticut, religious, spiritual and worship gatherings were subject to different, more favorable standards in the state emergency orders. At one point, secular gatherings were limited to five people, but religious, spiritual, and worship gatherings of up to 49 people were allowed.²¹ And a subsequent order banned indoor gatherings of ten people or more, but religious gatherings were allowed to have up to 25% of a building's capacity or 100 people.²²
- Iowa fully exempted religious gatherings (except weddings and funerals) from its ban on gatherings of more than ten people.²³
- Indiana completely exempted religious services, including weddings and funerals from its gathering limit, when secular gatherings were limited, depending on the severity of the COVID infection rates at the time, to ten people or 25 people.²⁴
- In New Mexico, people attending churches, synagogues, mosques, or other places of worship could meet without limit even though other gatherings of five or more people were banned and non-essential businesses were closed.²⁵

And, contrary to the claims of some, houses of worship were not treated less favorably than grocery stores, pharmacies, and liquor stores. When states categorized certain businesses differently than in-person, mass gatherings, it was because they presented significantly different health risks.

Attending religious services is very different from shopping at a store, and the risk of contagion is different. Religious services are a communal experience, where large groups of people come together, at the same time and place for an extended period to talk, sing (which increases the spread of germs), and interact with each other. Such prolonged contact puts people at greater risk of exposing others or being exposed to COVID-19.²⁶ Shopping, on the other hand, is a markedly different activity, where people

²⁰ Virginia Villa, [Most States Have Religious Exemptions to COVID-19 Social Distancing Rules](#), Pew Research Center (Apr. 27, 2020).

²¹ [Conn. Exec. Order No. 7N](#) (Mar. 26, 2020).

²² [Conn. Exec. Order No. 7TT](#) (Mar. 29, 2020).

²³ [Iowa Proclamation of Disaster Emergency](#) (Apr. 27, 2020).

²⁴ [Ind. Exec. Order 20-26](#) (May 1, 2020).

²⁵ [N.M. Pub. Health Order](#) (Mar. 23, 2020).

²⁶ See, e.g., Aschwanden.

enter the store at different times, move around individually, interact with others only when making a purchase, and leave when finished. There is a much smaller chance of infection under these circumstances.

Furthermore, essential businesses such as grocery stores and pharmacies had to remain open because people cannot physically survive without access to food and medicine. And often people overlook the public-health risks of closing all liquor stores: keeping liquor stores open can help people with alcohol-use disorder avoid withdrawal symptoms and prevent yet another health crisis from emerging.²⁷

Although the Supreme Court eventually struck down certain stringent public health orders that treated businesses and worship services differently, that doesn't support the claim that public officials acted in bad faith when they put those orders in place. In fact, these public officials were acting in line with the May 2020 Court decision in *South Bay United Pentecostal Church v. Newsom*²⁸ that upheld such restrictions.

Chief Justice Roberts explained that California's limits on gatherings "appear[ed] consistent with the Free Exercise Clause" because "[s]imilar or more severe restrictions appl[ied] to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." And "only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods" got exemptions or more lenient treatment.²⁹

Moreover, state officials' decisions about "when restrictions on particular social activities should be lifted during the pandemic . . . should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."³⁰

It wasn't until much later—when the makeup of the Court changed and Amy Coney Barrett replaced Ruth Bader Ginsburg—that such restrictions were struck down in *South Bay United Pentecostal Church v. Newsom II*³¹ and *Tandon v. Newsom*.³² And in those cases, the Court was acting on the emergency docket, which means it second-guessed

²⁷ See, e.g., Max Jordan Nguemini Tiako & Kelsey C. Priest, [Yes, Liquor Stores Are Essential Businesses](#), *Sci. Am.* (April 7, 2020).

²⁸ 140 S.Ct. 1613 (2020).

²⁹ *Id.* (Roberts, C.J., concurring). See also [Att'y Gen. William P. Barr Issues Statement on Religious Practice and Social Distancing](#), U.S. Dep't of Justice (Apr. 14, 2020) (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls).

³⁰ *Id.* at 1613-14 (Roberts, C.J., concurring) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

³¹ 141 S.Ct. 716 (2021).

³² 141 S.Ct. 1294 (2021).

elected officials and public health experts without thorough discovery and briefing on the science and medical reasoning.

The Government Can and Sometimes Must Implement Restrictions on Houses of Worship and Religious Gatherings During a Pandemic

More than a century of legal precedent from the Supreme Court makes clear that the government has the authority to protect the public health through appropriate measures, even when some people have religious objections to complying.³³ There is no federal constitutional requirement to exempt houses of worship from public health orders.³⁴ As explained by the Supreme Court in *Prince v. Massachusetts*: “the right to practice religion freely does not include liberty to expose the community . . . to communicable disease.”³⁵

On the contrary, the First Amendment to the Constitution prohibits the government from exempting houses of worship from requirements that were put in place to protect people’s health. 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.³⁶ To avoid a constitutional violation, a religious exemption “must be measured so that it does not override other significant interests”³⁷ and may not “impose unjustified burdens on other[s].”³⁸ In other words, the government must not grant a religious exemption that puts people’s health at risk—otherwise the government is favoring religion over public health and people’s lives.³⁹

³³ *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 Att’y Gen. Barr (“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.”).

³⁴ 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.

³⁵ 321 U.S. 158, 166-67 (1944).

³⁶ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987) (internal quotation marks omitted).

³⁷ *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).

³⁸ *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.”).

³⁹ Doing so would violate the historic, foundational principle at the heart of the Establishment Clause: The government must remain neutral between religions, and between religion and nonreligion. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982). Indeed, exemptions from limits on gatherings for houses of worship would clearly run afoul of this principle. Such an exemption would not be neutral: religious

There is no question that exemptions for mass gatherings at houses of worship caused a significant and unjustified danger to all—and therefore were unconstitutional. The exemptions undermined the effectiveness of efforts to contain the spread of the virus through social distancing and put everyone, particularly the elderly and other vulnerable populations in houses of worship and throughout their communities, in harm’s way. As one federal court explained, “it is no exaggeration to recognize that the stakes for [the state’s] residents . . . are life-or-death.”⁴⁰

At the same time, the government may not target houses of worship and religious gatherings for worse treatment than their secular counterparts—public health orders must be religion-neutral.⁴¹

Conclusion


Taking the time to learn from what worked and what didn’t during the pandemic is a worthwhile endeavor. Casting aspersions on state officials as being anti-religion is not. State and federal officials generally acted in good faith during the pandemic to save people’s lives. They did not target religion for worse treatment. To the contrary, they routinely granted houses of worship and religious gatherings exemptions from otherwise neutral laws in violation of the First Amendment.

Religious freedom is a fundamental American value; it shouldn’t become a license to ignore public health and cause people harm. We applaud the public health officials who acted in accordance with this principle.

Sincerely,



Rachel K. Laser
President and CEO



Maggie Garrett
Vice President for Public Policy



Dena Sher
Associate Vice President for Public Policy

gatherings would be given preferential treatment—events at houses of worship would be exempted from the mass gatherings ban, but events at their secular counterparts would not be.

⁴⁰ *Tolle v. Northam*, Order, No. 20-CV-363 (E.D. Va. Apr. 8, 2020).

⁴¹ See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 US 520, 543 (1993).