





April 10, 2020

Governor Doug Ducey

1700 W Washington Ave

Phoenix, AZ 85007

RE: Endangering the Community by exempting churches from Stay Home, Stay Healthy Executive Order 2020-18

Dear Governor Ducey,

I am writing on behalf of Secular Communities for Arizona, a 501 (c)3 non-profit organization. Our purpose as a statewide organization is to ensure secular government by endorsing the constitutional principle of separation of church and state in both the Arizona and U.S. Constitutions.

The COVID-19 pandemic has been a serious wake up call for us all. We are encouraged that you have taken actions for the people of Arizona, but we are concerned that your Stay Home, Stay Healthy, Stay Connected Executive Order 2020-18 in section (4) (f) says: Engaging in constitutionally protected activities such as speech and religion, ... provided that such is conducted in a manner that provides appropriate physical distancing to the extent feasible.”

This is a very dangerous approach to the health of Arizonans. Church attendance has been one of the chief vectors for transmitting the virus. One-third of all COVID-19 cases in Sacramento County, CA have been tied to church gathering. (Hilda Flores, “One-third of COVID-19 cases in Sac County tied to church gatherings, officials say,” NBC News KCRA (April 1, 2020)) As of March 18, 2020, roughly 60% of *all* known virus cases in South Korea could be traced to several large church gatherings. One person attending two services spread the virus to 1,200 others. In Lee County, Alabama, health officials blamed church gatherings with as few as 10 people for a “swell in new cases.” A single church service in France “kicked off the biggest cluster of COVID-19 in France . . . Around 2,500 confirmed cases have been linked to it.” Worshippers carried the virus home to Burkina Faso, Corsica, Latin America, Switzerland, and elsewhere.

Even small gatherings can be deadly. According to “officials at East Alabama Medical Center . . . church gatherings have been tied to a swell in new cases across the area, explaining that even groups smaller than 10 people can spread the coronavirus.” As those doctors explained, “There were only 10 people at a time in the building, but the infection still spread.” (Jack Helean, “East Alabama Medical Center says surge in COVID-19 cases likely due to church gatherings,” ABC 33 (April 5, 2020)). While Pope Francis is delivering the Easter service from a vacant church, the pastor of Life Point Church in San Tan Valley insists on holding in-person services for 300 people. Allowing churches to meet in person, guarantees that the virus will spread in AZ. The spread won’t be just among the church members but among those they come into contact with through an essential job, or a medical appointment, or a grocery shopping trip.

From your actions, we know that you have recognized the impact of the spread. Your executive order of 2020-10 was aimed at conserving health care resources that we know we’ll need; executive order



2020-15 focused on the expansion of telemedicine; the order of 2020-16 focused on increasing hospital capacity for COVID-19 preparedness; the order of 2020-28 recognizes the strain on health care workers; and on April 9, 2020, you re-opened St. Luke's Hospital for the surge. Allowing large in-person meetings will dramatically impact our struggling health care system and harm medical workers, completely negating your executive orders.

You have received a letter from Freedom from Religion Foundation stating:

### **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.

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. The “Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles” when the regulated conduct “posed some substantial threat to public safety.” *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). *See also, Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Put another way, the right to express deeply-held belief does not include the right to risk others' health and safety. *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (religious freedom does not include physical force or threats of such force.)

In fact, one federal court recently explained, “society has a compelling interest in fighting the spread of contagious diseases,” to the point of overriding other rights. *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016). The court went on, “[a]ll courts, state and federal, have so held either explicitly or implicitly for over a century,” and then listed the cases dating back to 1903. *Id. at* 1090.

### **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.**

This order is unpatriotic, unconstitutional, and, above all, immoral—because it will kill people. According to health officials, one third of all COVID cases in one large California county can be traced to church services. The numbers are even bigger elsewhere. 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.” That article documents the harrowing story of one infected person attending two church services and spreading COVID to another 1,200 people and that that “Church cluster accounts for at least 60% of all cases in South Korea.”

Reuters, “The Korean clusters: How coronavirus cases exploded in South Korean churches and hospitals,” (March 20, 2020).

Sanford Levinson who is Centennial Chair Professor of Government at the University of Texas Law School and Eric Segall who is a Professor of Law at Georgia State University College of Law said, “Exempting churches, synagogues, and mosques from the generally applicable quarantine laws is a terrible mistake, a misreading of the Constitution as well as awful public policy.” While religious accommodations are allowed under the state and federal Religious Freedom Restoration Act (RFRA), most such accommodations are minimal in their consequences for the rest of us – e.g. leaving the Amish alone and allowing conscious objectors to work in other capacities.

But when there are “negative externalities” impacting the majority of citizens from the “accommodation,” that is not permissible. We know of the exponential infection rate of COVID-19 so one can infect two and two can infect four and in a matter of days it can be over a thousand cases. Yuma has already seen a tripling of cases in three days from March 27 – March 30.

Levinson and Segall pointed out that, “Justice Antonin Scalia, both a devout Catholic and a fierce defender of religious liberty, said that Americans do not have a constitutional right to disobey generally applicable laws that were enacted without an intent to discriminate against religion.” Steps to control COVID-19 are a compelling governmental interest that overrides the reckless desires of a few



individuals who are uncaring about the health or welfare of others. Closing places of worship is the least restrictive way to control the spread and does not impinge on anyone's religion. Churches can worship on line, on facebook live, or at home.

In fact the Bible encourages people not to make public spectacles and supports worshipping at home. "But when you pray, go into your room and shut the door and pray to your Father who is in secret. And your Father who sees in secret will reward you." Matthew 6:6 "Beware of practicing your righteousness before other people in order to be seen by them, for then you will have no reward from your Father who is in heaven. "Thus, when you give to the needy, sound no trumpet before you, as the hypocrites do in the synagogues and in the streets, that they may be praised by others. Truly, I say to you, they have received their reward. But when you give to the needy, do not let your left hand know what your right hand is doing, so that your giving may be in secret. And your Father who sees in secret will reward you. "And when you pray, you must not be like the hypocrites. For they love to stand and pray in the synagogues and at the street corners, that they may be seen by others. Truly, I say to you, they have received their reward. ... (Matthew 6:1-34) What would Jesus do? He would do what Matthew said – tell people to stay home and love thy neighbor as thyself by not exposing them to infection.

Overall, 23% of Americans identify as non-religious. That 8-point increase since 2007 and 15-point jump since 1990 makes the "nones" the fastest growing identification in America. Nationally about 35% of millennials are non-religious. The most recent Pew Research poll found that 27% of Arizonans say they have no religion, compared to 23% nationally. In fact privileging churches to continue to hold large gatherings while prohibiting everyone else discriminates against non-believers – more than 25% of Arizonans - and violates their First Amendment rights by violating the neutrality rules and their equal protection by favoring one particular belief. As Levinson and Segall said, to exempt churches and allow them to continue spreading the virus allows the... "...small and atypical religious minorities to tyrannize the rest of us through the thoughtless indifference to what the Constitution in its Preamble calls the "General Welfare."

Therefore, we ask that you 1) issue an executive order removing the exemption of churches from the Stay Home, Stay Healthy order; 2) make an immediate public statement to prohibit any large Easter Sunday gathering; 3) contact the pastor at Life Point Church in San Tan Valley directly and let him know he may not have such a gathering. We look forward to your response.

Sincerely,

Dianne Post, Legal Director

Secular Communities for Arizona

