



March 27, 2020

Mayor George Fuller
222 N. Tennessee St.
McKinney, TX 75069

Sent via email only to: Mayor@mckinneytexas.org

Re: March 25, 2020 Mandatory Stay at Home Order

Dear Mayor Fuller:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. First Liberty Institute is encouraging religious institutions to follow the CDC 15 day guidelines.¹ Your order, and especially your unlawful flyer,² go far beyond the CDC guidelines and, disturbingly, appear to directly target religious exercise.

On March 25, you signed the Third Revised Mayoral Declaration of Local State of Disaster Due to Public Health Emergency ("Disaster Declaration") ordering all McKinney residents to stay at home except to perform essential activities.³ The Disaster Declaration specifically prohibits religious services except by video or teleconference and limited in-person staff providing such services to no more than ten people.⁴ We write to inform you that these restrictions go well beyond the CDC guidelines, and violate federal and state law, and we encourage you to amend the Disaster Declaration to remedy these violations. While we appreciate the delicate balance between public health and constitutional rights, the City must address the ongoing public health crisis in a way that does not discriminate against religious exercise.

¹ See Centers for Disease Control, *Interim Guidance for Administrators and Leaders of Community- and Faith-Based Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html>.

² Original flyer attached as Exhibit 1.

³ Available at <https://www.mckinneytexas.org/DocumentCenter/View/22925/Third-Revised-Declaration-of-Local-Disaster-for-Public-Health-Emergency-3-25-2020>.

⁴ Disaster Declaration § 7(5) ("Religious and worship services may only be provided by video and teleconference. Religious institutions must limit in-person staff to ten (10) people or less when preparing for or conducting video or teleconference services, and all individuals must follow the Social Distancing Guidelines including the six-foot social distancing. Funerals are allowed with appropriate social distancing.").

By singling out religious services for special restrictions, McKinney’s Disaster Declaration violates both the First Amendment’s Free Exercise Clause and Texas’s Religious Freedom Restoration Act (“TRFRA”). TRFRA prohibits governments from substantially burdening religious exercise without demonstrating that the restriction advances a compelling interest by the least restrictive means. Tex. Civ. Prac. & Rem. Code § 110.003. The Free Exercise Clause imposes a similar standard when a law targets religious exercise. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The government bears the burden of meeting this high standard. *See id.* at 546; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014)⁵; Tex. Civ. Prac. & Rem. Code § 110.003(b).

Prohibiting in-person church services and enforcing the limitations through criminal prosecution and potentially crippling fines, *see* Disaster Declaration § 12, indisputably imposes a substantial burden on religious exercise. *Cf. Hobby Lobby*, 573 U.S. at 726. Indeed, the flyer you put out summarizing your restrictions indicate that even if two people gather for religious worship they are in violation.⁶ McKinney cannot meet its burden to demonstrate that it imposes this burden to advance a compelling interest by the least restrictive means.

McKinney’s Disaster Declaration specifically targets religious services for special restrictions. First, it limits religious services to video or teleconferencing only but does not enforce such a restriction against any other entity. *See generally* Disaster Declaration § 7; *see, e.g., id.* § 6 (allowing McKinney City Council meetings to proceed in person and requiring teleconferencing only when “possible”). As a result, the Disaster Declaration uniquely handicaps churches from developing innovative ways to provide religious services consistent with social distancing guidelines. For example, some churches across the country organized drive-in services that comply with all applicable social distancing guidelines.⁷

Restricting services only to video and teleconferencing precludes such innovative solutions and weighs most heavily on places of worship lacking the expertise or technological infrastructure necessary to provide religious services by video or teleconference. McKinney could accomplish its interest in reducing the spread of COVID-19 by requiring religious services to comply with applicable social distancing guidelines—just as it does for other activities—but without dictating the method churches must use to comply. As a result, the Disaster Declaration’s special restriction to video and teleconferencing is not the least restrictive means to accomplish McKinney’s interest. *See* Tex. Civ. Prac. & Rem. Code § 110.003(b); *Lukumi*, 508 U.S. at 538–39, 546.

⁵ TRFRA is substantially similar to the federal Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1. Thus, cases interpreting RFRA are instructive in interpreting TRFRA. *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009).

⁶ *See supra* note 1.

⁷ *See, e.g.,* Salena Zito, “While some churches go virtual, others go old school: Drive-ins,” Washington Examiner (March 23, 2020), <https://www.washingtonexaminer.com/opinion/while-some-churches-go-virtual-others-go-old-school-drive-ins>.

Likewise, the Disaster Declaration’s specific limitation of in-person church personnel to ten does not advance a compelling interest by the least restrictive means, because it treats similarly situated entities more leniently. A government cannot meet its burden to demonstrate that it advances a compelling interest in restricting religious exercise if it creates exemptions. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

Although it subjects churches to a strict ten-person staff limit, the Disaster Declaration notably does not impose such a limit on other entities engaging in similar activity. Restaurants providing drive through or take out service, for example, are not limited to ten in-person staff. Disaster Declaration § 7(4). Childcare services and news media are exempt entirely and suffer no staff limitations. *Id.* § 7(A)(2)(g), (h). To illustrate, for the purposes of preventing the spread of COVID-19, a church staff broadcasting a church service is no different than a news station’s staff broadcasting a news program. By failing to restrict the number of news station staff (or, for that matter, restaurant staff or childcare staff), McKinney demonstrates that it does not have a compelling interest in restricting churches’ staff. “[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 547; *see Gonzales*, 546 U.S. at 436–37.

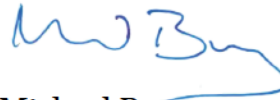
Defining these similarly situated services as “essential” is not a defense. Religious exercise is an essential and constitutionally protected activity.⁸ No government may suspend the Constitution because that government insufficiently values its citizens’ religious needs.

For the above reasons, the Disaster Declaration’s religious restrictions violate both the First Amendment’s Free Exercise Clause and the Texas Religious Freedom Restoration Act. McKinney’s restrictions go well beyond the CDC’s guidance, and it behooves the City to ensure its additional restrictions are legal. As a nonprofit law firm devoted to defending religious liberty, First Liberty will take all necessary action, including litigation, to ensure that McKinney complies with the law. Yet, as stated above, our intent in writing is to encourage McKinney to continue to be a place that welcomes people of faith and the institutions that serve them. Our sincere hope is that you will amend the Disaster Declaration such that it no longer violates the Constitution, federal, and state law.

⁸ *See U.S. Const. amend. I. Cf. McCreary Cty. v. ACLU*, 545 U.S. 844, 875 (2005) (noting the constitutional necessity that the military provide chaplains for servicemembers).

Thank you for your attention to this important matter. I am available and happy to discuss this at your convenience.

Sincerely,



Michael Berry
General Counsel
First Liberty Institute

2001 West Plano Parkway
Suite 1600
Plano, Texas 75075

[Enclosure]