



April 22, 2020

Christopher Moss  
Chemung County Executive  
John H. Hazlett Building  
203 Lake Street  
PO Box 588  
Elmira, NY 14902-0588

**Sent via email only to:** [REDACTED]

**Re: April 10, 2020 County Prohibition on Drive-in Church Services**

Dear County Executive Moss:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. We represent His Tabernacle Family Church ("His Tabernacle"), Pine City Christian Church, and Journey Church, all three within Chemung County, New York. Please direct all correspondence on this matter to my attention.

***Three Local Churches Attempt to Hold Drive-in Church Services***

*His Tabernacle*

Between March 18 and April 6, His Tabernacle held weekly drive-in church services and distributed thousands of pounds of food to the local community, each compliant with social distancing guidelines from the Centers for Disease Control ("CDC") and Chemung County Board of Health regulations.<sup>1</sup> The church also aired its services on local radio and the church's livestream platforms. Attendees remained in or beside their vehicles at an appropriate social distance, and the food service team wore gloves and masks. On April 6, Pastor Micheal Spencer called the Chemung County Board of Health, and a County Board of Health employee confirmed that His Tabernacle's drive-in services complied with the county's safety guidelines. His Tabernacle wishes to continue to provide these services in compliance with CDC guidelines, as articulated below.

*Pine City Christian Church*

Similarly, Pastor Jim Stearns of Pine City Christian Church lead a twelve-car drive-in service on Palm Sunday (April 5), which begins the holiest week on the Christian calendar.<sup>2</sup> The

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<sup>1</sup> 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>.

<sup>2</sup> See *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-CV-264 at 9 (W.D. Ky. Apr. 11, 2020) (order granting temporary restraining order).

cars parked at least one space apart. Pastor Stearns stood at least 25 feet away from the nearest vehicle and delivered the sermon by sound system. A pianist, guitarist, and two technological support volunteers supported the service while maintaining an appropriate social distance. Attendees remained in their cars. Following the County's prohibition on drive-in church services, Pine City Christian cancelled its plans for a similar drive-in Easter service. Pine City Christian Church wishes to resume conducting drive-in services consistent with CDC guidelines, as articulated below.

### *Journey Church*

Likewise, Pastor Scott Lowmaster of Journey Church planned to conduct drive-in church services to celebrate Easter Sunday. Journey Church parishioners would have parked in the church parking lot, remained in their vehicles, and listened to the service via livestream in their vehicles. In fact, the church even boosted its wireless internet capacity in preparation for the event. The only individuals outside their vehicles (maintaining an appropriate social distance) would be church staff necessary to conduct the worship services and security personnel necessary to ensure attendee compliance with CDC guidelines.

Journey Church made every effort to protect their congregants and accommodate county health officials' concerns. After discussions with county health officials, Journey Church crafted a questionnaire designed to ensure volunteers assisting with the service did not manifest any symptoms commonly associated with COVID-19. However, your prohibition on drive-in church services forced Journey Church to cancel its Easter service. Journey Church wishes to begin drive-in church services compliant with CDC guidelines, as articulated below.

### ***Chemung County Prohibits Drive-in Church Services***

On April 9, Governor Andrew Cuomo issued Executive Order 202.15,<sup>3</sup> which modified the State of New York's COVID-19 restrictions. While Governor Cuomo's executive order placed restrictions on large gatherings, it is silent as to drive-in churches, neither expressly forbidding nor directly approving their use.

The next day, you announced by video on your county's Facebook page that Chemung County would prohibit drive-in church services. You pointed only to Governor Cuomo's updated order to justify this decision. To interpret that order, you cited a portion of Empire State Development guidance, which in part explained that "individuals should not gather in houses of worship, homes, or other locations for religious services until the end of this public health emergency."<sup>4</sup>

In addition, you alleged anecdotal lack of social distancing based upon informant photographs submitted to the County Executive's office: "The fact of the matter is, when [local churches] did [held drive-in services] last week we got pictures from Facebook, Twitter and [sic] sent in to us where kids are running around, people are outside their cars, so unfortunately like

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<sup>3</sup> Executive Order No. 202.15 (April 9, 2020), <https://www.governor.ny.gov/news/no-20215-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>4</sup> Empire State Development, Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction under Recent Executive Orders, <https://esd.ny.gov/guidance-executive-order-2026>.

any good thing it only takes a few people to ruin it for everybody.”<sup>5</sup> The County provided no further guidance to churches since your verbal social media announcement.

### ***NY’s Executive Orders Permit Drive-in Church Services***

Drive-in church services comply with the CDC’s guidelines for the COVID-19 crisis.<sup>6</sup> Additionally, none of the New York Executive Orders, including 202.10,<sup>7</sup> 202.15,<sup>8</sup> and the Interim Guidance for Passover Observance during COVID-19,<sup>9</sup> prohibit drive-in worship services. In fact, in its full context, the Empire State Development guidance you cited in part actually supports church services that comply with social distancing, such as drive-in services:

Congregate services within houses of worship are prohibited. Houses of worship may only be used by individuals and only where appropriate social distancing of, at least, six feet between people can be maintained. Further, individuals should not gather in houses of worship, homes, or other locations for religious services until the end of this public health emergency. If possible, religious leaders should consider alternative forms of worship, replacing in-person gatherings with virtual services, such as phone or conference calls, videoconference calls, or online streaming.<sup>10</sup>

Neither the Executive Order nor the guidance above prohibits drive-in services as a safe alternative to traditional worship services. Indeed, in searching for additional guidance, Pastor Spencer turned to the state’s COVID-19 hotline, which explained that Governor Cuomo’s executive order permits drive-in church services.

### ***Chemung’s Prohibition on Drive-in Services Violates the First Amendment***

When government targets religious exercise, the First Amendment’s Free Exercise Clause requires the government to prove that its restriction advances a compelling interest by the least restrictive means. *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 exceptionally demanding standard. *Id.* at 546; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).<sup>11</sup> Indeed, government action “that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive [this standard] only in rare cases.” *Lukumi*, 508 U.S. at 546.

Drive-in church service bans do not fare well under this standard. We recently filed suit challenging Louisville, Kentucky’s similar ban on drive-in church services, and the court granted

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<sup>5</sup> *See* Chemung County Executive Chris Moss Facebook, <https://www.facebook.com/moss4exec/>. The statement was made around the six-minute mark of the video.

<sup>6</sup> Centers for Disease Control, *supra* n. 1.

<sup>7</sup> Executive Order No. 202.10 (March 23, 2020), <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>8</sup> Executive Order No. 202.15, *supra* n. 3.

<sup>9</sup> Interim Guidance for Passover Observance during COVID-19 (April 5, 2020),

[https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh\\_religiousgatheringsguidance\\_040520.pdf](https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_religiousgatheringsguidance_040520.pdf)

<sup>10</sup> Empire State Development, *supra* n. 4.

<sup>11</sup> Although *Hobby Lobby* applied the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1, cases interpreting RFRA are instructive in applying strict scrutiny under the Free Exercise Clause. *See generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

a temporary restraining order to protect our client, On Fire Church. Judge Justin Walker explained that by banning drive-in church services, “Louisville is violating the Free Exercise clause ‘beyond all question,’” because the government treated “sincerely held religious beliefs in a manner that is not ‘neutral’ between religious and non-religious conduct, with orders and threats that are not ‘generally applicable’ to both religious and non-religious conduct.”<sup>12</sup>

Other municipalities have been hard-pressed to defend similar bans. In fact, the U.S. Department of Justice filed a Statement of Interest in a case challenging a drive-in church service ban in Greenville, Mississippi.<sup>13</sup> Chemung County’s directive mirrors Greenville’s directive and cited many of the same justifications.<sup>14</sup> As United States Attorney General William Barr explained, singling out religious organizations during a time of crisis is unlawful and unconstitutional:

But even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers. Thus, government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity. For example, if a government allows movie theaters, restaurants, concert halls, and other comparable places of assembly to remain open and unrestricted, it may not order houses of worship to close, limit their congregation size, or otherwise impede religious gatherings. Religious institutions must not be singled out for special burdens.<sup>15</sup>

After suffering two lawsuits in less than a week and worldwide media attention, Greenville’s unconstitutional policy no longer exists. Neither should yours.

Chemung’s prohibition of drive-in church suffers from the same deficiency as both Greenville’s and Louisville’s. It imposes a substantial burden—indeed, a wholesale prohibition—on core religious exercise. *See Lukumi*, 508 U.S. at 531–32. *Cf. Hobby Lobby*, 573 U.S. at 726. And this burden is neither neutral nor generally applicable, because your directive does not enforce the same restriction on similarly situated entities and activities. *See Lukumi*, 508 U.S. at 533–34. For example, the prohibition on parking lot use does not apply to entities deemed “essential,” such as restaurants or convenience stores that provide drive through or take out service.<sup>16</sup> When a government provides exemptions, it cannot demonstrate a compelling interest in restricting religious exercise. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006); *Lukumi*, 508 U.S. at 547. Designating churches as “nonessential” is no defense. *See e.g., On Fire Christian Center, Inc., supra* n. 2, at 13 (“[I]f beer is ‘essential,’ so is Easter.”)<sup>17</sup>

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<sup>12</sup> *See On Fire Christian Center, Inc., supra* n. 2, at 11.

<sup>13</sup> Statement of Interest in Support of Plaintiffs, *Temple Baptist Church, et al. v. City of Greenville, et al.*, No. 4:20-CV-64, Doc. 6 (N.D. Miss. Apr. 14, 2020).

<sup>14</sup> *See id.*

<sup>15</sup> *See* “Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case,” *available at* <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0> (last accessed April 20, 2020).

<sup>16</sup> Empire State Development, *supra* n. 4; *see On Fire Christian Center, Inc., supra* n. 2, at 16 (“[I]f sitting in cars did pose a significant danger of spreading the virus, Louisville would close all drive-throughs and parking lots that are not related to maintaining public health, which they haven’t done.”).

<sup>17</sup> *See also* U.S. Dep’t of Homeland Security Cybersecurity & Infrastructure Security Agency, “Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response,” *available at*

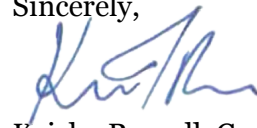
Moreover, banning drive-in church services is not narrowly tailored to accomplish the County's interest in preventing the spread of COVID-19, because drive-in services can be conducted consistent with CDC requirements. *See id.* at 16. Thus, the prohibition is overbroad to the County's interest. *See Lukumi*, 508 U.S. at 546.

Our clients recognize that you are dealing with a tremendously difficult situation and wish to work with you and the County to keep everyone safe and healthy. In order to ensure congregants' physical safety, our clients agree to adhere to the following recommendations for drive-in services:

- Cars will park at least six feet apart.
- All congregants will remain in their cars for the entirety of the service.
- Windows will remain no more than half open and doors will remain closed.
- Parishioners will not sit in the beds of pickup trucks.
- Church personnel, observing social distancing, will be present to ensure proper spacing between cars and the orderly compliance with all guidelines.
- Pastors will preach using permitted amplified sound systems, Part 15 radio transmitters heard by tuning to an FM station in each vehicle, or by other wireless transmission.
- A box or basket will be provided for parishioners to deposit their tithes and offerings without engaging in social contact or leaving their vehicles.
- At the conclusion of the services, parishioners will exit as they came.

His Tabernacle and Pine City Christian Church would like to resume, and Journey Church wishes to begin, drive-in church services immediately. Accordingly, we request that you immediately rescind, in writing, the County's ban on drive-in church services. As our clients aspire to hold drive-in services this Sunday, please respond by noon central time, Friday, April 24, 2020 or we will be forced to take legal action this week to prevent further irreparable harm to our clients.

Sincerely,



Keisha Russell, Counsel  
First Liberty Institute

CC:  
Mr. Eric Treene,  
Special Counsel for Religious Discrimination  
U.S. Department of Justice  
950 Pennsylvania Avenue  
Washington, D.C. 20530

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[https://www.cisa.gov/sites/default/files/publications/CISA\\_Guidance\\_on\\_the\\_Essential\\_Critical\\_Infrastructure\\_Workforce\\_Version\\_2.0\\_Updated.pdf](https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf) (designating clergy as essential infrastructure personnel).