

Guidance on Drive-In Church Services

In the wake of the hundreds of stay-at-home orders that have been instituted in response to the CoViD-19 pandemic, many faith leaders are understandably concerned about the appropriate balance between public health and religious freedom. First Liberty has received countless inquiries about how places of worship can safely hold religious services while fully complying with the law and Centers for Disease Control and Prevention (CDC) guidelines.¹

One of the most frequent questions we receive is whether “drive-in” style church services are safe and permissible? The short answer is, yes, when conducted in accordance with CDC guidelines, drive-in church services are lawful and permissible.

First Liberty recently secured a Temporary Restraining Order (TRO) for On Fire Christian Church, in Louisville, Kentucky, to allow it to conduct drive-in services despite the City of Louisville’s attempt to ban those services. In granting the TRO, U.S. District Court Judge Justin Walker wrote, “When faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis.”² The TRO ensured On Fire Christian Church was able to hold a CDC-compliant drive-in service on Easter Sunday.

What is a safe, compliant drive-in church service?

Churches hosting drive-in church services in their parking lots must do so consistently with guidelines issued by the CDC for community and faith-based organizations to ensure the safety and well-being of members and congregants. The government may be justified in preventing drive-in services where the guidelines are *not* followed. In order to ensure the physical safety of congregants, drive-in churches should be conducted consistent with the following recommendations:

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 *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-CV-264-JRW, at *11 (W.D. Ky. April 11, 2020) (order granting temporary restraining order) (citing *In re Abbott*, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))).

- Cars should park at least six feet apart.
- All congregants should remain in their cars for the entirety of the service.
- Windows and doors should remain closed throughout the experience.
- Parishioners should not sit in the beds of open-air pick-up trucks.
- Church personnel, observing social distancing, should be present to ensure proper spacing between cars and the orderly compliance with all guidelines, but not interact with the passengers beyond requesting they remain in their vehicles.
- The pastor can preach using permitted amplified sound systems or Part 15 radio transmitters heard by tuning to an FM station in each vehicle.
- At the conclusion of the services, parishioners may exit as they came.

This will provide strong protection for the health of the church community and others and err on the side of caution to prevent potential contact and ensure the transmission of illness is not facilitated by the service. The faith community must recognize that the government is dealing with a tremendously difficult situation. First Liberty is committed to supporting the government in its lawful measures to protect the country and its residents during this pandemic and in working with the faith community to help them safely exercise their religious rights.

How do I know if an order preventing drive-in church services should be challenged?

If state or local orders restricting large gatherings are inequitably applied or unfairly single out or target churches, synagogues, or other houses of worship, they are unlikely to be upheld.

The U.S. Constitution applies to all levels of government—federal, state, and local—even during a pandemic. The First Amendment’s Free Exercise Clause prohibits, except in extremely rare and unusual circumstances, any government official from imposing a law that substantially burdens religious exercise if the law targets religion in particular or treats religious activities worse than it treats similar secular activities.³

An emergency order that prohibits drive-in church services imposes a substantial burden—indeed, a wholesale prohibition—on this particular religious exercise. Such a prohibition is unlawful if it treats houses of worship less favorably than similarly situated secular entities unless the government can show that it has an extremely rare and important reason for doing so.

³ See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

For example, if a prohibition does not apply to restaurants that provide drive-in or take out service, or if it does not apply to establishments such as Walmart, where far more people park with more contact and less oversight, then it cannot apply to churches. Stated another way, such a directive prohibits the gathering of believers, effectively limiting religious services by houses of worship to video or teleconferencing only, but does not force the same restriction on other, secular entities or activities. As a result, it uniquely handicaps churches from implementing the social distancing guidelines provided by the CDC.⁴

Are drive in church services “essential” religious activities?

Some states recognize religious activities as essential, yet give more leeway in their emergency orders to other “essential” activities than are provided to religious exercise. No government may suspend the Constitution because that government insufficiently values its citizens’ religious needs. There is no pandemic exception to the First Amendment. Furthermore, the federal Cybersecurity & Infrastructure Security Agency of the U.S. Department of Homeland Security includes clergy within its list of essential infrastructure personnel.⁵

When the government does substantially burden religious exercise in a way that is limited by RFRA (for the federal government) or the U.S. Constitution (for any level of government), that burden is illegal unless the government can show *both* that it has a “compelling interest”—that is, an interest of the highest order—and that the burden on religion is the “least restrictive means” of accomplishing that interest. This means that if there is any method that the government can use to further its compelling interest that is less burdensome to religion, then the government *must* use that less burdensome method.

While the government likely has a compelling interest in ensuring public safety during a pandemic, a prohibition on drive-in religious worship is not the least restrictive means of achieving that public safety goal. The CDC’s social distancing guidelines are appropriate to limit the spread of COVID-19. Imposing more restrictive requirements that target only churches and their drive-in services does not meet the requirements of the least restrictive means test. Isolating congregants in a car is less restrictive than isolating

⁴ It also effectively prohibits any services for houses of worship that lack the expertise or technological infrastructure necessary to provide religious services by video or teleconference.

⁵ See 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 https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf (includes “Clergy for essential support” as essential workers).

them in a house. Consequently, prohibitions of drive-in services are not the least restrictive means of preventing the spread of COVID-19.⁶

If, however, the government could show that cars were parked within six feet of one another with the windows down or that members were gathering outside of their vehicles as part of the service giving rise to potential transmission of COVID-10, the government's compelling interest could possibly be met. This would justify prohibitions on religious gatherings that are likely to facilitate the spread of the virus. However, the government must not prohibit religious conduct unless that prohibition aids in preventing the spread of disease.

⁶ See *Lukumi*, 508 U.S. at 538–39