



April 1, 2020

Mayor Jeff Cheney
6101 Frisco Square Blvd.
Frisco, TX 75034

Sent via email only to: [REDACTED]

Re: March 27, 2020, Mandatory Stay at Home Order

Dear Mayor Cheney:

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 stay-at-home order of March 27, 2020, and explanatory flyer,² go far beyond the CDC guidelines and, disturbingly, appear to target religious exercise. We represent Pastor Brandon Burden of Kingdom Life Church in Frisco, Texas, with regard to this matter.

On March 27, the Mayor of the City of Frisco signed Ordinance No. 2020-03-13 Amending Ordinance No. 2020-03-12, continuing the Mayor's Amended Declaration of Local Disaster for Public Health Emergency ("Amended Declaration") and ordering all Frisco residents to stay at home except to perform essential activities.³ The Amended Declaration specifically prohibits religious services except by video or teleconference and limits in-person staff providing such services to no more than ten people.⁴ We write to inform you that these restrictions go beyond the CDC guidelines and violate federal and state law. 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 available at <https://www.friscotexas.gov/DocumentCenter/View/21931/Stay-at-Home-Notice-Graphic-32520>.

³ Available at <https://www.friscotexas.gov/DocumentCenter/View/21946/--3-27-2020---AMENDED-DECLARATION-OF-LOCAL-DISASTER-FOR-PUBLIC-HEALTH-EMERGENCY-->

⁴ Amended Declaration § (3)(1)(e) ("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 as set forth by the CDC, including the six-foot social distancing.").

By singling out religious services for special restrictions, this Amended 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 as a misdemeanor offense, *see* Amended Declaration § 11, 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 indicates that even if two people gather for religious worship they are in violation.⁶ Frisco cannot meet its burden to demonstrate that it imposes this burden to advance a compelling interest by the least restrictive means.

Frisco's Amended 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* Amended Declaration § 3; *see, e.g., id.* § 3(1)(g)(2)(B) (requiring Essential Government Functions to comply with the social distancing and other guidelines only to the "extent possible"); *see also, id.* § 3(1)(g)(2)(G) (Professional services and pet grooming services are also exempt without reference to compliance with guidance). As a result, the Amended 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

Our client, Pastor Brandon, and his church community are one group that is disparately impacted by these constraints. Pastor Brandon plans to have a drive-in religious service with sound reaching the cars through FM radio, in compliance with the CDC guidelines. This will provide strong protection for the health of the church community and others, erring on the side of caution in preventing harmful contact. It will also allow members of the church to worship

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 4.

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>.

together in a manner that is consistent with current federal⁸, state⁹, and county¹⁰ orders. Church members will be in their cars and listening over the radio, ensuring that the transmission of illness is not facilitated by the service.

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. Frisco could accomplish its interest in reducing the spread of COVID-19 by requiring religious services to comply (like other activities are required to comply) with applicable social distancing guidelines but without dictating the method churches must use to comply. As a result, the Amended Declaration's special restriction to video and teleconferencing is not the least restrictive means to accomplish Frisco's interest. *See* Tex. Civ. Prac. & Rem. Code § 110.003(b); *Lukumi*, 508 U.S. at 538–39, 546. To the extent that the Amended Declaration restricts services such as that planned by Pastor Brandon, it is in violation of state and federal law.

Likewise, the Amended 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. *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 Amended 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. Amended Declaration § 3(1)(g)(2)(E). Childcare services and news media are exempt entirely and suffer no staff limitations. *Id.* § 3(1)(g)(2)(I) & (J). 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), Frisco 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.

⁸ *See supra* note 1.

⁹ Available at <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-08.pdf>

¹⁰ Available at

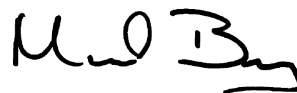
https://www.collincountytx.gov/public_information/news/Documents/20200324%20Chris%20Hill%20Executive%20Order%20FINAL.pdf.

Defining these similarly situated services as “essential” is not a defense. Religious exercise is an essential and constitutionally protected activity.¹¹ No government may suspend the Constitution because that government insufficiently values its citizens’ religious needs.

Furthermore, the Governor of Texas has declared that religious worship services are “essential services,” and the federal Cybersecurity & Infrastructure Security Agency of the U.S. Department of Homeland Security includes clergy within its list of essential infrastructure personnel. Texas Division of Emergency Management, “GA-14 Essential Services Designation,” *available at* <http://tdem.texas.gov/essentialservices> (includes “Religious services conducted in churches, congregations, and houses of worship.”); 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). Note that the Governor’s executive order preempts all local orders that attempt to restrict services designated by the Governor as essential. Executive Order GA-14 (“This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services allowed by this executive order or allows gatherings prohibited by this executive order”).

For the above reasons, the Amended Declaration’s religious restrictions violate the First Amendment’s Free Exercise Clause, the Texas Religious Freedom Restoration Act, and Executive Order GA-14. Frisco’s restrictions go well beyond the CDC and other applicable guidance, and it behooves the City to ensure its additional restrictions are legal. If you have any questions regarding this please contact me.

Sincerely,



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¹¹ 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).