



# KANSAS JUSTICE INSTITUTE

April 1, 2020

The Honorable Laura Kelly  
Governor of the State of Kansas  
Capitol, 300 SW 10<sup>th</sup> Avenue, Suite 241S  
Topeka, Kansas 66612

Dear Governor Kelly,

Executive Order 20-16 exempts faith-based services or activities from public gathering bans. The exemption is reasonable, appropriate, and in our view,<sup>1</sup> constitutional.

In its March 25, 2020, letter to you, Americans United for Separation of Church and State (“AU”) argued otherwise, indicating Kansas “must include houses of worship in [a] mass-gathering ban[.]”<sup>2</sup> AU also argued the First Amendment prohibits religious exemptions.<sup>3</sup> This is not our reading of the law.

The Kansas Constitution does not require mass-gathering bans in houses of worship. Instead, the Kansas Constitution Bill of Rights provides even greater free-exercise protection than the First Amendment. *Stinemetz v. Kansas Health Policy Auth.*, 45 Kan.App.2d 818 (2011). Any executive order<sup>4</sup> that substantially burdens the free exercise of religion must pass strict scrutiny, the most stringent review possible. It requires the government to prove, by clear and convincing evidence, a compelling justification for the burden imposed; and, that the government has used the “least restrictive means” possible to accomplish that purpose.<sup>5</sup>

Even during the COVID-19 pandemic, an executive order imposing a complete and total ban of in-person religious services, regardless of social distancing, the number of participants, or other precautionary measures taken,<sup>6</sup> would not survive the “least restrictive means” component of the test.

---

<sup>1</sup> Kansas Justice Institute is a non-profit, public-interest litigation firm committed to protecting individual liberty and the constitutional rights of all Kansans.

<sup>2</sup> Letter at 2 (cleaned up).

<sup>3</sup> Letter at 3.

<sup>4</sup> Executive orders have the “force and effect” of law during a disaster. KSA § 48-925.

<sup>5</sup> See “Kansas Preservation of Religious Freedom Act” at KSA 60-5301 et seq.; *See also Stinemetz*.

<sup>6</sup> Precautionary measures could include requiring members to wear masks and gloves, sit more than 10-feet away from one another, prohibit handshakes, etc.

AU next argues “the Establishment Clause of the First Amendment ... prohibits the government from exempting houses of worship from this general public-safety ban.”<sup>7</sup> This is inconsistent with Supreme Court precedent. “In an unbroken line of seven cases, the Supreme Court has rejected the argument that a religious exemption in a larger regulatory or tax framework is an active involvement with religion that violates the Establishment Clause.” Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Ky. L.J. 603, 609 (2017-18).

AU appears to rely in part on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) for its position that an exemption is an Establishment violation. But *Caldor* was not an exemption case, it was a preference case. Esbeck at 613 (“The important case of *Estate of Thornton v. Caldor, Inc.* did indeed strike down a Connecticut statute because it was in violation of the Establishment Clause. The statute, however, was not a religious exemption from a regulatory or tax burden but was a religious preference.”).

The point is, the Supreme Court treats religious exemptions differently than religious preferences. A preference is generally when the government compels a private citizen to help another private citizen better conform to their religious beliefs. Esbeck at 614. Executive Order 20-16 provides for a faith-based exemption, not a preference. The exemption is reasonable, appropriate, and in our view, constitutional.

In these trying times, vigilance is paramount. Flattening the curve is laudable and necessary. Reasonable action should be taken to ensure the public’s safety. Imposing a complete and total ban of in-person religious ceremonies, regardless of social distancing or other precautionary measures taken, would not be reasonable. Executive Order 20-16 appropriately exempted religious or faith-based services or activities from the public gathering ban.

Respectfully,



---

Samuel G. MacRoberts  
Kansas Justice Institute  
12980 Metcalf Avenue, Suite 130  
Overland Park, Kansas 66213  
(913) 213-5018  
Sam.MacRoberts@KansasJusticeInstitute.org

---

<sup>7</sup>Letter at 3.