



FOR FAITH. FOR JUSTICE.

April 24, 2020

VIA EMAIL

The Honorable Greg Ford, Chairman  
Wake County Board of Commissioners  
P.O. Box 550  
Raleigh, NC 27601  
Greg.Ford@wakegov.com

Re: *Unconstitutional Treatment of Religious Organizations By Wake County Under the First Amendment to Proclamation of Emergency Restrictions*

Dear Chairman Ford,

Wake County's April 15, 2020, *First Amendment to Proclamation of Emergency Restrictions*, violates the First Amendment to the United States Constitution and Article 1, Section 13 of the North Carolina Constitution by treating churches and other houses of worship worse than similarly situated secular organizations. Specifically, the ban on distribution of communion elements targets Christian churches and the ban on in-person collection of tithes is unreasonable in light of the exceptions for businesses to receive payment for goods and services.

We have been contacted by multiple churches in Wake County affected by this proclamation and, along with Shanahan Law Group of Raleigh, North Carolina, have been retained in order to seek reversal of this unconstitutional policy. To avoid litigation and facilitate the County's compliance with fundamental constitutional rights, the County must immediately eliminate the ban on churches' distribution of communion and in-person collection of tithes. We are happy to discuss this matter with you to ensure the continuance of safe practices while adhering to the guarantees of the Constitution.

By way of introduction, Alliance Defending Freedom ("ADF") is an alliance-building, nonprofit legal organization that advocates for the right of people to live out their faith freely. ADF seeks to ensure that the government treats religious institutions and people of faith equally, without discrimination. We often litigate on

behalf of religious organizations and individuals whose religious freedom has been violated.<sup>1</sup>

### **Factual Background**

Wake County has issued several orders purporting to regulate its citizens' behavior due to the COVID-19 crisis. On April 15, 2020, Wake County issued the *First Amendment to Proclamation of Emergency Restrictions* (“the Order” or “Amended Order”). While the Order addressed some problematic provisions contained in prior orders, such as those interpreted to ban “drive-in” church services, it includes several additional constitutional infirmities.

Chief among the Order’s constitutional violations are its “strict[ ] prohibit[ions on] . . . distributing communion elements, and personal collection of tithes/offerings” at drive-in services. Amended Order, § 3. These “strict” prohibitions stand in stark contrast to the Order’s permissiveness with respect to numerous other activities, such as allowing drive-through restaurants to distribute food items and collect in-person payments.

Our clients intend to observe communion and allow congregants the opportunity to present tithes and offerings during drive-in services on May 3, 2020. In doing so, they plan to take numerous safety precautions such as commercially-prepacked communion elements, drive-by offering repositories, and minimal, if any, personal interaction. Any necessary personal interaction will be conducted by church leadership who are following safety protocols similar to those described in Section 1 of the Order.

### **Analysis**

The Order expressly and unconstitutionally targets “Faith Institutions and Organizations.” It specifically regulates and prohibits core Christian religious

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<sup>1</sup> Alliance Defending Freedom has consistently achieved successful results for its clients in courts throughout the country, including nine victories before the United States Supreme Court in the last nine years. *See, e.g., NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (upholding ADF’s client’s free speech rights against the State of California); *Masterpiece Cakeshop, LTD. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (upholding ADF’s client’s First Amendment rights); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (upholding ADF’s client’s First Amendment rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (representing Geneva College and Southern Nazarene University in consolidated cases) (upholding ADF’s clients’ First Amendment rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF’s client’s free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (representing Conestoga Wood Specialties Corp. in consolidated case) (striking down federal burden’s on ADF’s client’s free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state’s tuition tax credit program defended by a faith-based tuition organization represented by ADF).

practices such as “communion” and “tithing.” Laws that facially target religious groups for disfavored treatment are *always unconstitutional*. Indeed, the Supreme Court has stated that government action “targeting religious beliefs as such is *never permissible*.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (emphasis added). And just three years ago, the Supreme Court reiterated that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*, 508 U.S. at 533). The Order cannot withstand strict scrutiny.<sup>2</sup>

Although we and our clients acknowledge and respect the importance of public health and safety, the Order clearly fails the second prong of the strict scrutiny test because the method used by the County to advance its interest in maintaining the public health and safety is not narrowly tailored, using the least restrictive means, with regard to religious organizations. In fact, the Order specifically targets religious organizations with more restrictive regulations than those of secular organizations.

Rather than acknowledging the ability to churches to distribute communion in ways that meet the safety precautions undertaken by others, the County has outright banned a fundamental practice of the Christian faith. Under the current Order, congregants of Christian churches could attend a drive-in service where they are prohibited from receiving sanitary and safely-prepared elements for observing communion, but thereafter purchase hand-prepared food at a drive-through restaurant on the way home. To the extent that any regulation of liturgical practices of churches or core Scriptural commands is constitutionally permissible, there are undoubtedly less restrictive ways to protect health and safety than outright bans.

Similarly, there is less risk in permitting congregants to drop tithes in a bucket than there is in permitting them to hand credit cards and cash back and forth to pay for goods at the hardware store or food at a drive-through. This provision, again, targets religious organizations for disfavored treatment and is likewise unconstitutional.

As you may be aware, several courts have issued temporary restraining orders prohibiting state and local regulations related to the COVID-19 crisis that target religious organizations for disfavored treatment. *See On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264-JRW (W.D. Ky. Apr. 11, 2020) (issuing TRO against City Order that targeted churches for disfavored treatment); *First Baptist Church v.*

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<sup>2</sup> The Order also violates North Carolina’s Constitution. *See, e.g.*, N.C. Const. Art I, § 13 (“All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.”).

*Governor Laura Kelly*, No. 6:20-cv-1102-JWB (D. Kan. April 18, 2020) (issuing TRO against state order that targeted in-person church services for disfavored treatment).

The United States Department of Justice has also weighed in and filed a statement of interest in a similar case recognizing that, even in times of emergency, the “government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity.” U.S. Dept. of Justice, *Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, April 14, 2020, <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0>. The County should adhere to the law and revoke the portions of the Order targeting religious organizations for disfavored treatment.

### **Conclusion**

In sum, the Order targeting churches is plainly unconstitutional and must be immediately revised. We are happy to work with you to draft a solution that promotes the County’s health and safety interests while ensuring the freedom of churches to operate according to their faith as guaranteed by both the federal and state constitutions. Your reply is requested by COB, Monday, April 27, 2020. If the portion of the order targeting churches is not repealed, our clients will be forced to seek emergency injunctive relief.

You can reach us via the contact info listed below.



**Shanahan Law Group, PLLC**

Kieran J. Shanahan  
John E. Branch III  
Andrew D. Brown  
128 E. Hargett St., Ste. 300  
Raleigh, NC 27601  
(919) 856-9494  
kieran@shanahanlawgroup.com  
jbranch@shanahanlawgroup.com  
abrown@shanahanlawgroup.com

Sincerely,



Ryan J. Tucker  
**ALLIANCE DEFENDING FREEDOM**  
15100 N. 90th Street  
Scottsdale, AZ 85260  
Telephone: (480) 444-0020  
rtucker@adflegal.org

J. Caleb Dalton  
**ALLIANCE DEFENDING FREEDOM**  
440 First Street NW, Suite 600  
Washington, D.C. 20001  
Telephone: (202) 393-8690  
cdalton@ADFlegal.org

CC: Scott Warren, Wake County Attorney  
swarren@wakegov.com

Enclosures:

1. *On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264-JRW (W.D. Ky. Apr. 11, 2020)

2. *First Baptist Church v. Governor Laura Kelly*, No. 6:20-cv-1102-JWB (D. Kan. April 18, 2020)