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COVID19 Restrictions and Freedom of Religion

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A bloody path was trod to bring religious freedom to modern America. Christian martyrs and patriots secured our God-given right to Freedom of Religion with their suffering and even with their lives. Religious freedom in America is not simply a fundamental right but a foundational one. The settlements of the first American colonies were established in the flight from oppressive religious persecution and the struggle continued even on these shores. From the beating of Obadiah Holmes, the lynching of Quakers and the imprisonment of 50 Baptist preachers who were defended by a fiery attorney named Patrick Henry, religious liberty in America has been something Christians have always been willing to stand for or even to die for. This history and more gave us our First Amendment to the Constitution and its underlying principle of religious conscience which has been part of the bedrock of our Republic for more than two centuries.

The “Father of the Constitution” and fourth President James Madison wrote in 1792, “Conscience is the most sacred of all property...the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle...”

Indeed prohibitions upon the government’s authority to infringe, limit, or dictate the operation of the church have been codified in western law long before the settlement of American colonies. Many American Christians have heard of Thomas Jefferson’s famous letter to the Danbury Baptists ensuring them that America would never return to a time where the government sought to dictate the operations of the church. But long before 1802, Jefferson’s “wall of separation of church and state” that kept government outside the sacred walls of the church was one alluded to by King Henry I in the 1100 Charter of Liberties. Henry declared the body of the church to be free from government intrusions. Two-hundred years later, one of the tipping points in the fight that brought us Magna Carta was the crown’s attempt to interfere in the free operation of the church. This charter history of our founding documents continued its development through the Grand Remonstrance of 1641 and the English Bill of Rights of 1689 under which our founders arrived in this New World. Each of these installments, which would later culminate in our founding documents; all happened amid the fight for religious liberty.

However even with the clear language of our First Amendment and the history that should inform our actions, the struggle to maintain this essential right from the control of government continues to this day. Modern lawmakers like to carve out excuses and causes for government intrusions into our inherent rights when some imagined need arises. William Pitt, The Younger warned in 1783, “*Necessity is the plea for every infringement of human freedom. It is the argument of tyrants. It is the creed of slaves.*” Necessity seems to always be the most powerful tool to persuade the masses into accepting these infringements. Today because of the coronavirus scare, religious

liberty is facing a huge “necessity plea” in the form of limits upon assembly. At least one church has been descended upon by police and threatened with the National Guard for having more than 250 people attend.

According to the courts, a law that infringes upon a fundamental right, like Freedom of Religion, must overcome certain challenges: The law must not be arbitrary, oppressive, or unreasonable. The law must be equally applied to secular businesses and it must satisfy a qualification of being the least restrictive means necessary to accomplish a compelling governmental interest. The restrictions imposed by Governors and municipalities upon the number of people who can assemble in a private church gathering appears to fail these tests.

First, these numerical restrictions are completely arbitrary in nature. There has been no tested nor proven scientific or medical data to show us what “number” of people that congregate together are a danger to society. The number has varied from place to place and moment by moment. Somewhere it’s 50, other places its 10 and there are still other variations. When politicians assign an “acceptable” number of people allowed in a private church, they are reducing our right to Freedom of Religion to a first come, first served privilege. Our first foundational document reads: “We hold these truths to be self-evident, that all men are *created equal*, that they are *endowed by their Creator with certain unalienable Rights...*”

The government deciding who can attend a service by way of a numerical limit does not demonstrate an equality of rights and ought to be seen as a per se violation of the principle of separation of church and state.

Secondly, in the current scare, these orders are not being applied equally upon secular businesses and other institutions. When arbitrary number limits are applied to a church and not to a library, post office, grocery store, or hotel gym, there is not equal application. These orders try to justify unequal application based upon the definition of “essential” services. By what authority does the government declare the church non-essential? The Church is a place where people turn for help and for comfort in a climate of fear and uncertainty. In a time of crisis, people are fearful and in need of comfort and community, more than ever before. Even people who do not attend church regularly, or perhaps never go to church, need to know that there is somewhere for them to go when they need help. Since Roman persecution of the church ended, the church has been viewed by Western civilization as an essential part of society, a refuge in time of trouble or need, a place of peace and a sanctuary for the weary, even a place of healing and provision. More salient for believers is that the Bible pointedly addresses the issue of assembling during troubled times: “Not forsaking the assembling of ourselves together, as the manner of some is; but exhorting one another: and so much the more, as ye see the day approaching.” Hebrews 10:25

Many in the church take this as a solemn command. To deny a Christian his obligation to gather with his local called out body is to put him at odds with a fundamental tenet of the faith. For a believer in Christ there are few things as essential as the gathering of the body of Christ in the study of God’s Word and worship of His Glory. As a matter of fact,

the Bible teaches that since we are eternal beings in this temporary world, God's word is more essential than food. "But Jesus replied, "It is written and forever remains written, 'Man shall not live by bread alone, but by every word that comes out of the mouth of God.'" Matthew 4:4

When those in government can assign a label of non-essential to the practice of religion, then government is taking a very serious and dangerous role of defining religion, which is expressly forbidden in our Bill of Rights and in a majority of our State Constitutions.

Finally, these restrictions are not reasonable and not the least restrictive means necessary. The case law used to define reasonableness in these laws are easily distinguishable. In *Moore v. Draper*, the Florida Supreme Court held that Moore could be quarantined and prevented from attending church because *he* had Tuberculosis. The court also said that once he was *healthy* he could no longer be reasonably or legally quarantined and prevented from attending church. The current laws restricting the number of attendees of a church are not restrictions on one unhealthy individual. They are restrictions upon a group of *healthy* people from attending church. The court said that such a restriction would be unreasonable. Additionally, the court did not order the *entire church* to be shut down to keep Moore healthy, which is exactly what these orders are trying to suggest is a reasonable and Constitutional solution.

Limiting an entire congregation of people for the safety of those who may be at risk of infection does not meet the standard of *Moore*, nor can it be seen as the least restrictive means necessary. The Florida case of *Varholy v. Sweat* is distinguishable for the same reasons as *Moore*. Finally, in *Employment Division vs. Smith*, the U.S. Supreme Court held that a "neutral, generally applicable law" restricting use of a hallucinogenic plant was not an unreasonable interference upon freedom of religion. Because the current restrictions upon church assemblies are not generally applicable to every other place where people will congregate, *Smith* is not controlling and proponents of church meeting bans find it no support.

Although it is argued the "protection of the public health is one of the prime duties resting upon the State" we cannot escape the reality that the FIRST prime duty of every state is codified in the Declaration of Independence:
"...that among these are Life, Liberty and the pursuit of Happiness.--That **to secure these rights**, Governments are instituted among Men, deriving their just powers from the consent of the governed..."

There is nothing in the law or precedent to establish a blanket and arbitrary assertion of "state of emergency" as an unquestionable authority. There is nothing in law or precedent to support a restriction on the number of people who can assemble in a church, for health reasons or otherwise, as a criterion for denying the essential Right of Freedom of Religion. There is everything in history and experience that says such actions by government are unreasonable and oppressive restrictions upon the essential and inherent Right of Freedom of Religion. Rev. Jonathan Witherspoon, founder of Princeton University gave this warning:

"There is not a single instance in history in which civil liberty was lost, and religious

liberty preserved entire.”

When Peter and the apostles were told by law not to gather, preach, lay hands on the sick for God to grant them healing or else be thrown into prison, they chose to continue to practice their faith. After they escaped from prison and were told by God to go back and assemble with the people and preach and heal, they did exactly that. And when they were questioned by the government as to why they continued to break this law, the apostles did not hesitate or make excuse, they simply said, “We ought to obey God rather than men.”(Acts 5:29) True to the history that makes America great, our pastors and church members should not so easily surrender a fundamental rights so faithfully contended for by those who have gone before. Who will stand and not let the landmarks be moved?

The Unconstitutionality of a Regulatory Limit Upon Church Assembly Legal Summary

Florida Constitution:

SECTION 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

SECTION 5. Right to assemble.—The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

SECTION 9. Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

SECTION 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States

Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

SECTION 21. Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

According to the courts, a law that infringes upon a fundamental right, like Freedom of Religion, must overcome certain challenges: The law must not be arbitrary, oppressive, or unreasonable. The law must be equally applied to secular businesses and it must satisfy the qualification of being the least restrictive means necessary to accomplish a governmental compelling interest.

1. The number of healthy people determined to be “appropriate” for a “safe” meeting has been arbitrarily established and has no basis in fact, science, or medical data. It is Arbitrary.
2. Unlike the court cases of *Moore v. Draper* and *Varholy v. Sweat* where a persons infected with specifically diagnosed diseases and were quarantined and either prevented from attending church or remained involuntarily incarcerated, the limits attempting to be imposed make it unlawful for healthy law abiding citizens to meet. Imposing arbitrary restrictions upon a large group of presumably healthy people is not the least restrictive means necessary.
3. In the case of *Employment Division vs. Smith*, the court held it was not a violation of the Right to Freedom of Religion to restrict Native Americans in their use of peyote because the law outlawing peyote was a “neutral, generally applicable law.” However, the arbitrary restrictions upon church attendance are *not* “neutral, generally applicable law” as they are not applied to all secular business equally and some businesses are completely exempted with no real distinction.
4. The Restrictions are oppressive and tantamount to a regulatory taking. The government limiting of the size of the congregation to 10 people will deprive the church of the economic value of its property and the principle private use of that property.

5. Florida Statute 252.36(5)(h) Emergency management powers authorizes the Governor to act in a positive authority to keep essential businesses open. This statute only authorizes the power to “Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles.” It does not authorize the Governor to negatively effect any other private business or churches.