Nussbaum Speir Gleason PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
www.nussbaumspeir.com

NSG
Nussbaum Speir Gleason

L. Martin Nussbaum
Main: (719) 428-4937
Direct: (719) 428-1919
martin@nussbaumspeir.com

May 15, 2020

Rev. Mark Cowart
Senior Pastor
Church for All Nations
6540 Templeton Gap Road
Colorado Springs, Colorado 80922

Re: Re-opening the Church for Worship

Dear Pastor Cowart,

Notwithstanding Colorado's Safer at Home order, constitutional protections make it lawful for churches in Colorado to reopen especially if they comply with Colorado's Social Distancing Requirements. Let me explain.

On May 8, 2020, the Colorado Department of Public Health & Environment ("CDPHE") issued its Second Amended Public Health Order 20-28 entitled "Safer at Home" ("PHO"). This PHO prohibits public and private gatherings of more than ten individuals. (PHO, ¶ I(C)). It also exempts over 100 types of entities from its requirements for numerous secular reasons. There are so many exemptions it takes eighteen pages to list them. Among those exempted are scores of "critical businesses" including oil and gas drillers, liquor stores, firearms stores, and marijuana dispensaries. The only condition for their exemption is that they comply with the PHO's Social Distancing Requirements. (*Id.*, Appendix F).

There are five Social Distancing Requirements defined in the PHO:

1. "[I]ndividuals shall maintain at least a six-foot distance from other individuals";[1]

2. Individuals should "wash hands with soap and water for at least twenty seconds as frequently as possible or us[e] hand sanitizer";

3. Individuals should cover coughs or sneezes (into the sleeve or elbow, not hands)";

---

[1] I presume that this would not apply to individuals who come to church from a common household.

4. The organization should "regularly clean high-touch surfaces"; and

5. Individuals should "not shake hands."

(PHO at 12, ¶ N).

The PHO also permits counties to request a variance when "transmission [of the coronavirus] is at a low level" so that those counties may "tailor social distancing policies to local conditions, in order to promote community wellness and economic stability." (*Id.*, Appendix G).

Churches, synagogues, and mosques are not eligible for any of these many exemptions or for this variance. Thus, the PHO with its "no-gathering-beyond-ten-persons" rule effectively bans religious worship for all but the tiniest of congregations while exempting scores of organizations with comparable or greater risks of infection.

As you and other Colorado pastors note in your letter to Colorado Governor Jared Polis and CDPHE Executive Director Jill Ryan, the gathering of faith communities for worship is a core ecclesiastical function. It is required by the commandment to keep holy the Sabbath and commended by the New Testament. (*See* Ex. 20:8-11; Dt. 5:12-15; Heb. 10:22-24). One Christian writer has well-described the centrality of worship for human beings:

> [M]an alone…is to respond to God's blessing with his blessing. . . . All rational, spiritual and other qualities of man, distinguishing him from other creatures, have their focus and ultimate fulfillment in this capacity to bless God, to know, so to speak, the meaning of the thirst and hunger that constitutes his life. '*Homo sapiens'*, '*homo faber'. . . ye*s, but first of all, '*homo adorans'*. The first and basic definition of man is that he . . . stands at the center of the world and unifies it in his act of blessing God, of both receiving the world from God and offering it to God.

Alexander Schmemann, FOR THE LIFE OF THE WORLD, 14-15 (2002). Thus, the burden on the exercise of religion and the encroachment on the autonomy of the Church occasioned by the Safer at Home Order is incalculable.

Before the Safer at Home Order, Colorado had a long tradition of protecting the right to worship. Its Bill of Rights states that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed." Colo. Const. art. II, §4. Colorado has adopted special statutes further protecting the right to worship--whether it be in one's home, Colo. Rev. Stat. § 29-1-1202 (Freedom to Gather and Worship Act); in a service

setting for the developmentally disabled, *id*. § 25.5-10-222; or in prison, *id.* §§ 17-42-101, 17-42-102. *See also Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339, 346-47) (Colo. App. 2006) (parking ordinance designed to frustrate start-up parish's worship and other gatherings must past strict scrutiny under Free Exercise and other federal constitutional protections).

While the PHO is also problematic, unlawful, or unconstitutional under the First Amendment Doctrine of Church Autonomy, the First Amendment Free Speech and Assembly Clauses, and the First Amendment Right of Association, my discussion below focuses on its clear unconstitutionality under the First Amendment Free Exercise Clause.

It is beyond cavil that the PHO burdens the exercise of religion. When religious exercise is burdened, the Free Exercise "cases establish . . . that a law that is neutral and of general applicability need not be justified by a compelling governmental interest." *Church of Lukumi Babalu Aye v. City Hialeah*, 508 U.S. 520, 531 (1993). On the other hand, when the law provides categorical exemptions for secular reasons while refusing to do so for a religious reason, it "must undergo the most rigorous of scrutiny[, *i.e.,*] it must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (internal quotation omitted).

Thus, for example, when the Newark Police Department forbade its officers from having beards except for medical reasons and, thereafter, refused an exemption for Muslim officesr required by their faith to grow beards, the Second Circuit held that the "no beard" rule was not generally applicable and subjected it to strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). Strict scrutiny applies when "when the government . . . creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Id.*

Just a few days ago, the Sixth Circuit applied these principles against the Kentucky Governor's COVID-19 orders. Those orders effectively outlawed in person religious services, but they—like Colorado's PHO—permitted gatherings for over 100 types of secular organizations. *Roberts v. Neace*, __ F.3d __, 2020 WL 2316679 *1 (6th Cir. 2020). The Sixth Circuit held that, with so many categorical exceptions, the orders were not generally applicable. *Id*. at *3. It reasoned:

> [T]he Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the [State's] general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . . The Governor has offered no good reason for refusing to trust the congregants
>
> who promise to use care in worship in just the same way it trusts accountants,

> lawyers, and laundromat workers to do the same.
>
> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.

Id. at *3.[2]

The Sixth Circuit also found that Kentucky could not satisfy the second prong of the strict scrutiny test, to wit: that the State, when imposing its regulation on religious organizations, must employ the least restrictive means to serve its laudable goals. It explained: "There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities?" *Id.* at *4.

You and the other pastors signing the letter to Governor Polis and Ms. Ryan have committed your best efforts to comply with the State's Social Distancing Requirements. Thus, I agree with the conclusion you and the other Colorado pastors made in that letter: if your "religious freedom means anything, it means that the State must treat churches at least as well as it does stores for guns, liquor, and marijuana."

Sincerely yours,

L. Martin Nussbaum

[2] It is also worth noting that the United States Department of Justice recently filed a Statement of Interest in a Virginia case where a church is challenging an order similar to Colorado's Safer at Home Order. It argued, similar to the analysis here, that "[in] prohibiting church services or other religious gatherings that exceed ten people, despite permitting various other gatherings that may result from secular activities, the [State's] orders appear, at least, not to be generally applicable." *Lighthouse Fellowship Church v. Northam* (No. 2:20-cv-00204) United States Statement of Interest (May 3, 2020).