U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 25, 2020

The Honorable London Breed
Mayor
City Hall, Room 200
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102

Dear Mayor Breed:

San Francisco's treatment of places of worship raises serious concerns about religious freedom. In particular, the limitation of indoor worship to one congregant without regard to the size of the place of worship is draconian, out of step with the treatment afforded other similar indoor activities in San Francisco, wholly at odds with this Nation's traditional understanding of religious liberty, and may violate the First Amendment to the Constitution.

Of course, as mayor, you have a duty to protect the health and safety of the people of San Francisco in the face of the global COVID-19 pandemic. In exigent circumstances, the Constitution allows some temporary restriction on our liberties that would not be tolerated in normal circumstances.

But, there is no pandemic exception to the Constitution. Individual rights, including the protections in the Bill of Rights, are always operative and restrain government action. Thus, even in times of emergency, when reasonable, narrowly-tailored, and temporary restrictions may lawfully limit our liberty, the First Amendment and federal statutory law continue to prohibit discrimination against religious institutions and religious believers. These principles are legally binding, and the Constitution's unyielding protections for religious worshipers distinguish the United States of America from places dominated by tyranny and despotism.

The First Amendment protects religious observers against unequal treatment. Government may not discriminate against religious gatherings compared to other nonreligious gatherings that have the same effect on the government's public health interest, absent compelling reasons. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). Indeed, the Chief Justice of the United States recently explained that "restrictions on places of worship" may be consistent with the First Amendment, but only when such restrictions "apply to comparable secular gatherings." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

And, while state and local governments have "broad latitude," such latitude may be respected only when it is "not exceeded." *Id.*

As you know, Order of the Health Officer No. C19-07i (the "Health Order"), as revised and effective as of September 14, 2020, states that "[o]nly one individual member of the public may enter the house of worship at a time."[1] The Health Order provides no reasoned explanation why its one-size-fits-all limit on indoor religious gatherings, regardless of size, is necessary or appropriate. This policy is not equal treatment that "appl[ies] to comparable secular gatherings." And indeed, in context, this restriction suggests hostility to religious people and the free exercise of religion.

The Health Order provides more favorable treatment to a range of secular activities including activities that typically feature similar or greater degrees of personal contact as religious gatherings. Personal service providers including barber shops, nail salons, massage locations, and tattoo parlors—where there is significant contact between the service provider and the customer over an extended period of time—are permitted to serve as many customers indoors as they can space at six feet apart.[2] Gyms and fitness centers are permitted to serve "10% of the facility's normal maximum occupancy or . . . the number of people who can maintain at least six feet of physical distance from each other in the facility at all times" (12 feet of physical distance is required where individuals "are engaged in an activity that may increase breathing rate and/or intensity").[3] Childcare facilities are allowed to operate with 10 to 12 children in a class, even though children in a childcare center are together in an enclosed space for much longer than those attending a typical religious service.[4] Retail establishments, where patrons may linger for extended periods of time, are allowed to operate at 50% of capacity (25% for indoor shopping centers) with six-foot separation.[5]

In contrast to the above settings where the number people able to be present is generally expressed as a percentage of a facility's capacity, places of worship are limited to *one person* regardless of the size of the facility and even though there is typically *less* contact between the clergy and the congregant than at the other more-favored establishments and plenty of room for six feet or greater separation. Thus, some of the City's most spacious buildings for religious services including Temple Sherith Israel, with the capacity for **1,400 people**, and the Cathedral of Saint Mary of the Assumption, with the capacity for **2,400 people**, are limited to a vanishing fraction of their capacity.

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[1] Order of the Health Officer No. C19-07i, Appendix C-1 § 9(b)(1)(i), *available at* https://www.sfdph.org/dph/alerts/files/C19-07i-Shelter-in-Place-Health-Order.pdf.

[2] *See* Health Order at Appendix C-1 § 15(b)(2)(iii) (limiting the number of persons in a personal services facility to "the number of people who can safely fit inside the facility while maintaining social distance").

[3] *See id*. at § 16(b)(2)(i)-(iii).

[4] *See id.* at § 3(b)(1)(ii).

[5] *See id.* at § 1(b)(2)(i) & (iv).

These rules plainly discriminate against people of faith and their ability to gather and practice their faith at churches, synagogues, mosques, and other houses of worship. Put simply, there is no scientific or legal justification for permitting a 20,000 square foot synagogue to admit only one worshipper while allowing a tattoo parlor to accommodate as many patrons as it can fit so long as they are six feet apart. This is not the kind of reasonable, temporary, and narrowly tailored regulation to protect public health and safety that can justify infringements on fundamental rights such as religious freedom.

We understand and appreciate that it is the City's "goal" to increase permitted indoors attendance at houses of worship to 25% of capacity up to a maximum of 25 people by the "end of September."[6] This would be an improvement over the current situation, but would continue to burden religious exercise severely and unnecessarily, including for houses of worship with large capacity and room for proper social distancing protocols. The proposed "goal" would also continue to disadvantage religious exercise compared to the permitted secular indoor activities described above. And until the City actually implements its aspirational "goal," the current discriminatory scheme remains; that is, the City continues to mandate the gross disparity of permitting only a single congregant at a place of worship while allowing more patrons—often by many orders of magnitude—in the other similar venues identified above.

For these reasons, we respectfully request that the City promptly change its current standards to bring them in line with the Constitution and our nation's best traditions of free religious exercise. Doing so will enable all religious San Franciscans to gather together and practice their faith consistent with appropriate public health limitations.

The Department of Justice is reviewing its options and may take further action, as and if appropriate, to protect the religious liberty rights of the people of San Francisco. Thank you for your prompt attention to this matter.

Sincerely,

Eric S. Dreiband

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[6] *See* https://sf.gov/step-by-step/reopening-san-francisco.