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## Hamilton, Toxic Religious Liberty in the COVID-19 Era

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[Click here \(https://verdict.justia.com/2020/04/07/toxic-religious-liberty-in-the-covid-19-era?utm\\_source=verdict-newsletter&utm\\_medium=email&utm\\_campaign=2020-04-07&utm\\_content=text-title-1\)](https://verdict.justia.com/2020/04/07/toxic-religious-liberty-in-the-covid-19-era?utm_source=verdict-newsletter&utm_medium=email&utm_campaign=2020-04-07&utm_content=text-title-1)

by Marci A. Hamilton

Just as predicted [here \(https://verdict.justia.com/2020/03/19/the-lessons-the-coronavirus-crisis-can-teach-us-about-the-religious-liberty-that-serves-the-public-good-aka-the-framers-religious-liberty\)](https://verdict.justia.com/2020/03/19/the-lessons-the-coronavirus-crisis-can-teach-us-about-the-religious-liberty-that-serves-the-public-good-aka-the-framers-religious-liberty), religious believers are demanding exemptions from the state COVID-19 stay-at-home mandates.

That is their right, but, governors and lawmakers: faith alone is not a good enough reason to let someone break the law. You are responsible for the public good. Before you grant any religious exemption to any law—though especially when the law is aimed at saving lives from a deadly pandemic—you should be asking whether the exemption serves the common good. Right now, doctors and experts are saying that everyone should stay home, period.

Let's look at these issues analytically. As I set forth in *God vs. the Gavel: The Perils of Extreme Religious Liberty*. ([https://www.amazon.com/God-vs-Gavel-Extreme-Religious/dp/110745655X/ref=sr\\_1\\_2?dchild=1&keywords=God+vs+the+Gavel%3A+The+Perils&qid=1586175097&sr=8-2](https://www.amazon.com/God-vs-Gavel-Extreme-Religious/dp/110745655X/ref=sr_1_2?dchild=1&keywords=God+vs+the+Gavel%3A+The+Perils&qid=1586175097&sr=8-2)) there are two prerequisites to

make religious exemptions legitimate. The exemptions to the stay-at-home orders, which exist in 12 of the 39 states that have implemented such orders (<https://www.cnn.com/2020/04/02/us/stay-at-home-order-religious-exemptions-states-coronavirus/index.html>), fail both.

## 1. Every Religious Exemption Should Be Publicly Debated to Determine Who Will Be Harmed by It: That Did Not Happen with the COVID-19 Religious Exemptions

First, a religious exemption should be debated in the glare of public scrutiny, not granted in some backroom deal. The bottom line needs to be this: if the exemption does not harm others, then it is well worth pursuing. A good example is the exemption for communion wine during Prohibition. If it harms others, time to put on the brakes and ask the hard questions: who will be hurt and how much?

The religious exemptions to the stay-at-home orders were not only kept from public debate, but it often seemed like the governors didn't fully understand what the exemption accomplished in their state. In other words, they were fly-by-night backroom deals without deliberation or adequate consideration. It sounds like the typical religious exemption request: "Hi Governor, this is [fill in the clergy name]. Our believers shouldn't have to bear the burden of this new law. Slip in an exemption, please. Remember all the great things we do for the community." The governor (or other lawmaker) agrees they do great things, and that's it. Exemption granted.

This is typical, but the overweening power of religious entities to obtain exemptions from neutral, generally applicable laws without being second-guessed abandons the public good, and in particular, whatever public interest was supposed to be served by the neutral, generally applicable law. This is irresponsible behavior by lawmakers. If the voters don't hold them accountable, history will.

## 2. Presidents, Governors, and Lawmakers Should Actually Weigh How the Religious Exemption Harms Others: That Did Not Happen with the COVID-19 Religious Exemptions

Let's do the calculations that need to be done regarding religious exemptions from stay-at-home orders. First, the purpose of the stay-at-home order is to establish physical distancing between individuals, because the virus can kill, there is no cure, there is no vaccine, and no way to know who has it. Add to this literally toxic mix that some people have the virus and can infect others without themselves exhibiting symptoms. The government interest in keeping humans apart does not get stronger than this.

Now let's ask: who will be harmed if there are religious gatherings? Now, some governors have qualified their exemption (<https://thehill.com/homenews/state-watch/490908-florida-other-states-allowing-church-services-during-coronavirus>) with a nod to the federal guidelines that currently limit gatherings to ten people. That ten is foolhardy at this point, and if someone were to hold a birthday party for ten people today, they would be rightly pilloried. But let's give the federal government the benefit of the doubt and say that number is for how many people are in the same home and together every day. That's the idea of social distancing: you radically reduce the number of people you interact with.

The ten worshippers are going to someone else's home or a house of worship and then returning home. To state the obvious: they did not stay home but dramatically expanded the numbers and surfaces they interact with. Even if they stay six feet apart, there is no guarantee against infection, because some reports (<https://www.usatoday.com/in-depth/news/2020/04/03/coronavirus-protection-how-masks-might-stop-spread-through-coughs/5086553002/>) have suggested that the virus can travel over 20 feet. Plus every door handle they touch, bathroom they use, and person they greet has the capacity to transmit this invisible virus.

I can understand why we permit healthcare providers to be close to people, and I do believe that most hospitals are sanitizing like crazy, and every healthcare provider is wearing every bit of protective gear they can lay hands on. But the religious believers asking for these exemptions aren't.

The harm to the public occurs when the person leaves their ten-person gathering and goes to the grocery store or pharmacy. That has nothing to do with the faith group. That's the larger society being affected.

So, here is the question: religious entities deserve religious exemptions and their tax exemptions because they serve the common good. An exemption to the COVID-19 stay-at-home mandate makes absolutely no sense for believers. They, like every other American who is not essential to fighting this scourge, need to stay home and thereby actually and really serve the public good.

Each COVID-19 death that flows from a religious gathering will be another argument against religious exemptions in the future. That harm will be in the public record.

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