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May 14, 2020

The Honorable Joe Hogsett
200 East Washington Street, Suite 2501
Indianapolis, IN 46204

Dr. Virginia Caine
3838 North Rural Street
Indianapolis, IN 46205

RE: Health Department Order No. 9-2020

Dear Mayor Hogsett and Dr. Caine:

It has come to my attention that the Public Health Order 9-2020 ("Order 9") issued by the Consolidated City of Indianapolis and Marion County and the Marion County Health Department (together the "Consolidated City") about May 13, 2020, targets religious services for special prohibitions. The limitations on religious entities and religious services are not also placed on other essential businesses and unduly infringe on Marion County residents' right to exercise their faith.

As we discussed with Corporation Counsel Morgan last week, during this difficult time, it is reasonable to expect all Hoosiers to make sacrifices to prevent the spread of the easily transferred COVID-19 virus, including by tolerating restrictions on gatherings and assemblies. Yet government officials must continue to respect the core civil right to be free from unlawful discrimination, including with respect to the free exercise of religion. It is inappropriate and unlawful to impose special burdens on churches and other religious gatherings. Unfortunately, Order 9 does just that by limiting places of worship to twenty-five (25) people. This is problematic for two reasons. One, essential businesses are open pursuant to paragraph 4 of Order 9 except for places of worship which are explicitly prohibited, unlike other essential businesses, from having more than 25 people. Second, Order 9 allows *non-essential* businesses to operate at 50 percent capacity, while limiting religious services, an essential business, to 25 people.[1]

[1] See Public Health Order No. 5 paragraphs 3, 4 and 8. The Orders lists religious entities as essential businesses by reference to Governor Holcomb's executive order 20-08 paragraph 14. Religious services are referred to in paragraph 8 and included as a public gathering limited to twenty-five (25) people. Reading the paragraphs together, religious entities are an essential business and their services may include no more than 25 people. As an essential business, religious entities may not be treated differently than other essential businesses or have imposed upon them special burdens unless that difference is narrowly tailored to a compelling governmental interest. See *Lukumi* 508 U.S. at 559.

The Supreme Court of the United States has made clear that the First Amendment prohibits the government from singling out people for disfavored treatment because they are religious. See, e.g. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citing *Church of of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1992)). Enshrined in Indiana's Constitution are strong protections for the free exercise of religion. See Ind. Const. art 1, §§ 2 and 3. Additionally, Indiana law prohibits the government from limiting the free exercise of religion by anything other than the least-restrictive means necessary to achieve the government's compelling interest. Ind. Code § 34-13-9-8.

While state and local government have broad police powers, those powers are limited. In 1905, the United States Supreme Court held that certain restrictions may become necessary and reasonable to protect all Americans during times of public health crisis, but those restrictions must be reasonable and must not be a "plain and palpable" invasion of rights. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29, (1905). More recently, United States Attorney General William Barr issued a memorandum[2] on behalf of the Department of Justice titled "Balancing Public Safety with the Preservation of Civil Rights." While the memorandum acknowledges restrictions on movement are necessary and essential public health measures legitimately carried out by states, including Indiana, these measures must be narrowly tailored to further compelling state interests in fighting the spread of COVID-19. The Department of Justice noted recently, "there is no pandemic exception to the Constitution and its Bill of Rights." See The United States' Statement of Interest in Support of Plaintiff's Motion for an Injunction Pending Appeal, p. 10, *Lighthouse Fellowship Church v. Northam* No. 2:20-cv-00204-AWA-RJK (Dist. Ct. E.D. Va Norfolk Div. Va).

A neutral law of general applicability that incidentally burdens the free exercise of religion will generally be upheld. *Listecki v. Official Comm. Of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015). However, a law will not be upheld if it discriminates against religious worship "unless the law is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi* 508 U.S. 520, 553 (1992). Recently the 6th Circuit held that Kentucky's governor's executive order unduly infringed on Kentuckians' ability to exercise their faith. As the 6th Circuit noted, "[d]iscriminatory laws come in many forms. Outright bans on religious activity alone obviously count. So do general bans that cover religious activity when there are exceptions for comparable secular activities. As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Maryville Baptist Church v. Beshear*, No. 3:20-cv-00278, 2020 WL 2393359 (6th Cir. May 2, 2020) (internal cites omitted). Public Health Order 9 has plenty of exceptions to the prohibition on public gatherings and therefore is not a generally applicable law.

Certainly, the interest of containing or limiting the spread of COVID-19 is a compelling interest. However, it is difficult to imagine that social distancing in a shopping mall at 50 percent capacity that might have hundreds of people is more effective against spreading the virus than a church with fewer people but also practicing social distancing. Moreover, restaurants may open for outdoor dining without limitation on the number of people while a religious service, even if

[2] See Memorandum for the Assistant Attorney General for Civil Rights and all United States Attorneys https://www.justice.gov/opa/page/file/1271456/download.

outside where it appears the threat of spread is severely diminished, remains limited to 25 people. Businesses that have remained open or are reopening could also exceed 25 people, even with a limited staff. Non-essential retail such as liquor stores likewise may open at 50 percent capacity. None of these examples impose on those businesses the same limitation imposed upon religious entities and religious services. Absent scientific evidence that COVID-19 spreads more quickly in religious entities and at religious gatherings than other public interactions, Order 9 amounts to unconstitutional and unlawful religious discrimination.

To be sure, "individual rights secured by the Constitution do not disappear during a public health crisis." *In re Abbott* 934 F.3d 772, 784 (5th Cir. 2020). As state and local regulations have increased during this pandemic, so has the Office of the Attorney General's oversight and review of actions impacting constitutional protections and their impact on hard-working Hoosiers. These freedoms and fundamental guarantees have become even more essential to Indiana families in the midst of a global pandemic. We are firmly committed to the protection of Hoosiers' constitutional rights by ensuring regulations are sufficiently tailored to achieve the government's public health interest.

If my office can be of assistance in this matter, please contact my Chief Deputy Aaron Negangard at (317) 234-7015.

Very truly yours,

Curtis T. Hill, Jr.
Attorney General

cc: Donald Morgan, Corporation Counsel
Kelly Thompson, General Counsel Department of Health
Marion County City-County Council