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October 14, 2020

OFFICIAL OPINION 2020-8

The Honorable Curt Nisly
Indiana House of Representatives
200 W. Washington Street
Indianapolis, Indiana 46204

Dear Representative Nisly:

QUESTION PRESENTED

Whether the governor may, using emergency executive authority, place restrictions on religious activities and organizations that do not apply to other comparable activities and businesses.

BRIEF ANSWER

No. Under the First Amendment, absent a compelling government interest, the governor may not place restrictions on religious activities and organizations that do not equally apply to comparable activities and organizations, and that, in effect, discriminate against religion.

BACKGROUND

In the face of the COVID-19 pandemic and resulting public health emergency, Governor Holcomb, pursuant to statutory authority (*see* Indiana Code ch. 10-14-3), issued a series of temporary Executive Orders designed to limit the spread of the pandemic and to conserve resources useful for fighting the pandemic. First, on March 6, 2020, he issued Executive Order 20-02, officially declaring a COVID-19 public health emergency in the State of Indiana. Among other directives, Executive Order 20-02 ordered the Indiana State Department of Health (ISDH) to follow the COVID-19 guidelines issued by the federal Centers for Disease Control and Prevention (CDC). The Governor thereby established CDC guidance as the baseline set of controls applicable during the public health emergency.

Next, as the public health situation worsened, Governor Holcomb, on March 23, 2020, issued a “stay at home order” via Executive Order 20-08. This order prohibited gatherings of more than ten people, mandated the closure of all outside-the-home non-essential businesses and

operations, and required all Hoosiers to maintain social distancing of at least six feet from any other person when outside the home (including when engaged in essential businesses or operations). In defining essential businesses and operations, Executive Order 20-08 incorporated the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) list of essential infrastructure workers (last updated on March 28, 2020), which includes clergy. In addition, the order specifically included the following as essential businesses and operations: groceries, pharmacies, farms, animal shelters, media, gas stations, financial institutions, hardware stores, critical trades, post offices and logistics services, laundromats, restaurants for consumption off-premises, transportation providers, professional services, home-based caregivers, manufacturers and distributors of critical products, funeral homes, charities, and religious entities.

By its terms, Executive Order 20-08 was set to expire on April 6, 2020, so that day Governor Holcomb issued Executive Order 20-18, which extended and amended Executive Order 20-08. Executive Order 20-18 maintains the same general requirements as Executive Order 20-08: It banned all gatherings of more than ten people other than gatherings of households, required the closure of all outside-the-home non-essential businesses and operations, mandated six feet of separation at all times, and generally maintained the same definition of essential businesses and operations (which continued to include religious entities).

Next, on April 9, 2020, Governor Holcomb and ISDH issued a document of particular concern here, namely "Guidance for Places of Worship" (the Guidance). Rather than issue the Guidance via Executive Order, the Governor conveyed it during a press conference and through a press release. The Guidance "direct(ed)" "faith institutions" in significant ways. Specifically, contrary to Executive Order 20-18 and notwithstanding CDC's guidance that church services may continue as long as they include ten or fewer people, the Guidance "direct(ed)" that "Church buildings and other physical locations for worship should be closed." The Guidance further provided that "Drive-in services may be conducted only under [specified] conditions," including no physical interaction with clergy, nine-foot spacing between cars, and a "preference" for "no communion" at all, but in all events "only prepackaged communion." The Guidance also excluded the elderly and infirm from all religious drive-in services. The Governor did not issue similar guidance for other essential businesses.

During the month of April, however, similar orders from government officials around the country sparked litigation and other responses. On April 27, 2020, United States Attorney General William Barr issued a memorandum on behalf of the Department of Justice titled "Balancing Public Safety with the Preservation of Civil Rights." While the memorandum acknowledged the necessity and legitimacy of restrictions on movement as essential public health measures, it also confirmed that such measures must be narrowly tailored in furtherance of compelling state interests in fighting the spread of COVID-19. And in litigation against a local ordinance impinging religious exercise in the name of public health, the Department of Justice observed that "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.).

On May 1, 2020, Governor Holcomb, via Executive Order 20-26, announced a period of general reopening over five phases and pulled back his restrictions on religious services, providing that religious services “may continue and will no longer be subject to limits on social gatherings... [h]owever, social distancing and other sanitation measures ... will continue to apply....” Additionally, the Governor issued “Revised Guidance for Places of Worship” with the stated purpose “not to restrict religious liberty, but to provide recommendations to places of worship and encourage safe environments during these extraordinary times....” The Revised Guidance referenced CDC guidelines and recommended minimum health protocols. On May 21, 2020, Governor Holcomb issued Executive Order 20-28 that re-stated the language in Executive Order 20-26 regarding religious entities. On July 24, 2020, in Executive Order 20-37, the Governor required everyone to wear a mask when inside a business, public building or other indoor place open to the public. So, at this point, while participants at religious gatherings and exercises must practice social distancing, masking, and other sanitation measures, churches and religious activities themselves are not otherwise encumbered by restrictions related to COVID-19.

ANALYSIS

The Free Exercise Clause of the First Amendment precludes laws and other government directives “prohibiting the free exercise” of religion. U.S. Const., Amdt. 1. Among other safeguards, 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 Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1992)). The Free Exercise Clause “protect[s] religious observers against unequal treatment” and “subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017). The Court “has repeatedly confirmed that denying a generally available benefit on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’” *Id.*

Here, the Governor’s Guidance, issued in April, directed places of worship to close and provided that drive-in services may only be conducted under specific circumstances. Executive Order 20-18 required churches and religious entities to abide by CDC Guidelines, but the Guidance went further, ostensibly to protect against the further spread of COVID-19. It purported to “direct” that faith institutions “should” close their doors and declared the conditions under which drive-in worship services “may” occur. Courts have sometimes disagreed whether churches belong in broad categories with, on one hand, movie theaters and concert halls (for which alternative forms of service not requiring physical interaction may be available) or, on the other hand, grocery stores and soup kitchens (where the service provided *requires* physical interaction). *See, e.g., Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (collecting cases and grouping churches with theaters). The Governor’s Executive Orders, however, had already deemed churches and religious exercise to be “essential,” and the Guidance did not even attempt neutral treatment of religion compared with other “essential businesses and activities.”

Accordingly, because the Guidance was not neutral or general applicable, it could impose a material burden on religious exercise only if narrowly tailored to advance a compelling government interest. *Church of Lukumi Babalu Aye*, 508 U.S. at 533. Slowing the spread of COVID-19 is, of course, a compelling government interest, but, absent some evidence or explanation as to how religious gatherings pose special problems with spreading COVID-19 that other essential businesses do not, such a broad (albeit compelling) interest could not justify the Guidance. This standard is “a difficult hill to climb, and it was never meant to be anything less.” *Maryville Baptist Church, Inc.* 957 F.3d 610, 613 (6th Cir. 2020) (citing *Holt v. Hobbs*, 574 U.S. 352, 364 (2015)).

The Governor, however, did not recite any evidence or plausible explanation for singling out “places of worship” for special burdens not applicable to other essential businesses and services. The Guidance, for example, required a mere six feet between individuals *indoors*; it is hard to see what rationale would justify this requirement while also justifying a *nine-foot* requirement between cars in *outdoor* drive-in church services. And if none-foot vehicle spacing restrictions were necessary to prevent the spread of COVID-19, then such restrictions should have been applied to all manner of parking lots, not just those located outside places of worship.

The requirement that those attending drive-thru service be from the same household raises similar concerns. Under the Guidance, persons from different households could carpool to pick up beer or food, but had to drive separately to attend worship. Additionally, public transportation continued to operate, mixing individuals from various households and moving them across town. Again, if householder-only restrictions were necessary to achieve the Governor’s goals, they should have applied across the board. The requirements for providing communion elements suffer a similar deficiency, as they did not apply to restaurants providing delivery or curbside service. Unless communion elements more easily transmit COVID-19 than other food, this amounts to unlawful discrimination.

Perhaps most perplexing of all was the requirement that Churches close their buildings completely. While other essential businesses continued to remain open and conduct limited in-person contact with the public, churches were ordered to close their doors. It would be especially troubling if the Governor ordered church buildings to close merely because he *suspected* that religious worshippers would be more likely than consumers of other essential services to violate CDC social distancing guidelines. The First Amendment precludes government officials from imposing discriminatory burdens on religious observers based on mere assumptions.

While Executive Order 20-18 and the Guidance aimed to effectuate the government’s compelling interest in managing the public health emergency as declared by Executive Order 20-02, the Governor did not articulate how targeting religious exercise advanced that cause. Absent evidence (or, again, at least a plausible explanation) that COVID-19 spreads more quickly during the exercise of religious activities than during the exercise of other activities the Governor designated essential during the COVID-19 public health emergency, the Guidance amounted to unconstitutional religious discrimination under the First Amendment.

CONCLUSION

Because it subjected religious activities and institutions to additional restrictions than other essential activities and businesses without any apparent justification, the Governor's Guidance was unlawful as religious discrimination under the First Amendment.

Sincerely,

A handwritten signature in black ink, appearing to read "Curtis T. Hill, Jr.", written in a cursive style.

Curtis T. Hill, Jr.
Attorney General

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