



May 20, 2020

VIA U.S. MAIL AND EMAIL

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Re: Reopening Catholic and Lutheran houses of worship

Dear Governor Walz and Attorney General Ellison,

We write on behalf of the Minnesota Catholic Conference, the Minnesota North District of the Lutheran Church–Missouri Synod, and the Minnesota South District of the Lutheran Church–Missouri Synod (the “Churches”) regarding the restrictions that Minnesota has placed on in-person worship services. From the first, and throughout this pandemic, the Churches have been good public citizens, suspending public worship, continuing to minister to the sick, the infirm, and the incarcerated as best they could, and generally supporting the stern restrictive measures necessary to contain the spread of the novel coronavirus.

Now, Minnesota begins the slow trudge towards reopening and, hopefully, an eventual return to normalcy. Resuming public worship is a necessary and valuable part of that process, and for weeks now, the Churches have engaged with you and your administration to chart that path forward. Those discussions have, sadly, not generated a concrete roadmap for resuming public worship within the short term that also contains reasonable allowances for congregational capacity.

On May 13, 2020, you issued Emergency Executive Order 20-56 (“Order 20-56”) allowing “non-critical” businesses—such as malls and pet groomers—to reopen at 50% capacity beginning on May 18, 2020, and contemplating the reopening of bars and restaurants around June 1, 2020. We are also aware that Minnesota casinos are beginning to open as early as May 26. However, while reopening malls and



restaurants, your Order continues the indefinite ban on worship services that involve more than 10 participants, without regard to the size of the venue, social distancing rules, or any other relevant consideration. This unequal and unfair treatment violates the Churches' cherished constitutional freedoms and, more importantly, hobbles unconscionably their pastoral mission. Accordingly, as the Churches have indicated in their separate letters to you today, they are compelled to resume public worship services, doing so in a manner that, at a minimum, complies with the capacity and social distancing requirements that apply to "non-critical" retail establishments.

On May 26, 2020, Catholic and Lutheran churches will resume in-person worship services at 33% capacity of their respective facilities, while instituting the rigorous social distancing and hygiene protocols that they identified to you in their letters of May 7 and May 16, and in repeated discussions with your administration. The following Sunday, May 31, 2020, will be Pentecost Sunday. As you may know, Pentecost celebrates the Holy Spirit descending upon the apostles of Jesus Christ. Having been so filled and having evangelized so many, the apostles "devoted themselves to meeting together in the temple area" and preaching the Gospel. Acts 2:46. It is now clear that communities of faith can follow their forebears without jeopardizing public health. The Churches feel more compelled than ever to do so.

As noted, the Churches have been—and remain—leaders in protecting public health. They suspended in-person worship services voluntarily, and well before any of your stay-at-home directives required them to do so. As a result, for the past nine weeks, their congregations have not known the spiritual, mental, and social benefits that come from personal worship. Even with that loss, the Churches and their members have continued to follow public health guidance. Their religious convictions have spurred them to provide front-line care to those most vulnerable to COVID-19—from comforting those in dying moments with the anointing of the sick, to urging assistance to at-risk prisoners, to advocating for increased federal assistance to schools. And, as you know, the rigorous social distancing and hygiene measures that the Churches will implement for all in-person worship services are based on current guidance issued by the World Health Organization, the U.S. Centers for Disease Control and Prevention, and other public health authorities.

Now that you have determined that current circumstances allow the partial reopening of almost every "critical" and "non-critical" Minnesota business with appropriate safeguards, there is no valid, non-discriminatory reason to continue the



blanket closure of churches. To the contrary, basic equality and honest science—not to mention the special solicitude afforded to religious freedom under both the federal and Minnesota constitutions—require the end of this discriminatory policy and restoration of desperately needed in-person worship.

Background on Minnesota COVID orders

On Wednesday, May 13, 2020, you announced that the state’s stay-at-home order would expire on Monday, May 18, 2020. As a result, “[a]ll retail stores, malls, and other businesses that sell, rent, maintain and repair goods can be open . . . as long as they: Have adopted and implemented a COVID-19 Preparedness Plan, including social distancing guidelines for workers and customers[;] [and] [a]llow no more than 50% of the establishment’s occupant capacity inside at any time.” <https://mn.gov/deed/newscenter/covid/safework/non-critical/>.

At the same time that the state moved to reopen most businesses, it went out of its way to specifically and purposefully single out religious organizations for disparate and disfavored treatment. Under Order 20-56, houses of worship remain subject to a blanket ban on gatherings in excess of 10 persons. Even apart from your announcement that the stay-at-home order would lapse on May 18, Order 20-56 encouraged any “Non-Critical Business” that “choose[s] to open or remain open” to “establish and implement a COVID-19 Preparedness Plan.” Order 20-56 ¶ 7.e. It also directed the “develop[ment] of a phased plan to achieve the limited and safe reopening of bars, restaurants, and other places of public accommodation beginning on June 1, 2020.” *Id.* ¶ 7.b. By contrast, Order 20-56 banned “faith-based” gatherings, “even if social distancing can be maintained,” indefinitely. *Id.* ¶ 6.c. On Saturday, May 16, the state issued guidance for houses of worship under Order 20-56. <https://www.health.state.mn.us/diseases/coronavirus/guidfaithserv.pdf> (the “Guidance”). The Guidance reinforces the ban on gatherings of 10 or more. Moreover, there is no indication when faith-based gatherings can resume normal operation. Rather, the Guidance contemplates, at best, “the incremental lifting of restrictions for group gatherings of up to 10 people.” Guidance at 1.

Legal Analysis

In singling out religious assemblies for special and disfavored treatment, Minnesota has violated the protections afforded religion under the federal and state constitutions.



The federal constitution's Free Exercise Clause

The First Amendment's Free Exercise Clause protects the right of religious groups to gather for worship. Any law restricting that right that is not neutral and generally applicable is subject to the "exceptionally demanding" strict scrutiny test. *Holt v. Hobbs*, 574 U.S. 352, 353 (2015). Here, Order 20-56 will face strict scrutiny because, among other things, it (1) is not generally applicable; and (2) is not neutral toward religion.

General applicability. Strict scrutiny will apply because Order 20-56 is not generally applicable. Supreme Court precedent specifies that general applicability is its own free-exercise requirement—it does not depend on whether a law is neutral toward religion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (general applicability "a second requirement of the Free Exercise Clause," separate from neutrality analysis). A law is not generally applicable when it "fail[s] to prohibit nonreligious conduct that endangers" the government's regulatory interest "in a similar or greater degree" than the prohibited religious conduct. *Id.* at 543.

At least three federal courts have now held that applying public health restrictions differently to churches and retail establishments violates the Free Exercise Clause's general applicability requirement. "[T]he more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Roberts v. Neace*, No. 20-5465, 2020 WL 2316679, at *3 (6th Cir. May 9, 2020). In *Roberts*, the Sixth Circuit enjoined Kentucky's executive orders as applied to houses of worship in a *per curiam* order, asking:

why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.

Id. at *5; see also *First Baptist Church v. Kelly*, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020) (finding that a law is not generally applicable where the state did not "argue[] that mass gatherings at churches pose unique health risks that do not arise in mass gatherings at airports, offices, and production facilities."); *Berean Baptist Church v. Cooper*, 4:20-cv-81-D, Doc. 18, at 15 (E.D.N.C. May 16, 2020) (granting temporary restraining order) ("Eleven men and women can stand side by side working indoors Monday through Friday at a hospital, at a plant, or at a package distribution center and be trusted to follow social distancing and hygiene guidance,



but those same eleven men and women cannot be trusted to do the same when they worship inside together on Saturday or Sunday.”¹

Here, as in Kentucky, Minnesota’s Order 20-56 and the Guidance favor retail operations over gathering for worship—even though only the latter constitutes a fundamental First Amendment right. Order 20-56 lessens restrictions on every “non-critical” Minnesota business—and, now, “all” retailers in Minnesota may be open (Order at ¶ 5.e), so long as they do what the Churches are committed to doing: (1) enforce rigorous social distancing and hygiene protocols, and (2) cap the size of congregants to a certain percentage of that facility’s capacity. In fact, the Churches are willing to start in-person worship services at a population cap that is *lower* than the caps enjoyed by every Minnesota retailer. In other words, the Churches are willing to help you mitigate the general applicability problems that, left unchecked, will not survive litigation under the Free Exercise Clause.

Neutrality. Order 20-56 will also be subject to strict scrutiny because it is not neutral toward religion. “[A] law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones.” *Roberts*, 2020 WL 2316679, at *4 (“neutrality between religion and non-religion” required). By singling out churches for less protection than virtually every Minnesota retailer—and by prohibiting in-person worship “even if social distancing can be maintained,” Order 20-56 6.c., the Order is not neutral toward religion.

A law also lacks neutrality if it “targets religious conduct for distinctive treatment.” *Lukumi*, 508 U.S. at 534. The Guidelines target specific religious practices and specify that houses of worship are subject to more restrictions than non-critical businesses. Singling out religion in this manner is unequal treatment that violates Minnesota’s constitutional duty to ensure neutrality toward religion.

¹ Some courts have upheld restrictions on in-person worship, though in markedly different circumstances. One court, for example, upheld a restriction while accepting the state’s concession that a 30-person gathering to facilitate a livestreamed worship service (which well exceeded the ban on gatherings of five or more people) is permissible. See *Legacy Church, Inc. v. Kunkel*, No. 20-cv-0327, 2020 WL 1905586, at *36 n.12 (D. NM. Apr. 17, 2020) (“Legacy Church is thus free to staff its services to the extent needed to worship and broadcast its worship.”). Another set a timeframe for reopening religious worship. See *Calvary Chapel of Bangor v. Mills*, 1:20-cv-00156, Doc. 27 at PageID.312 (D. ME. May 9, 2020) (“gatherings to 50” “starting in June”).



Strict Scrutiny. Because Order 20-56 and the Guidance are neither generally applicable nor neutral toward houses of worship, they must satisfy strict scrutiny. And based on your decision to allow so many other entities to reopen—including many that involve *more* people, interacting *more* frequently, and for *longer* periods of time—Order 20-56 cannot possibly survive strict scrutiny. Unsurprisingly, the vast majority of states now allow for larger worship services than Order 20-56 and treat religious worship at least on par with non-essential retail.

Minnesota could satisfy strict scrutiny only by moving beyond “broadly formulated” arguments about public health, and proving the “asserted harm of granting specific exemptions to particular religious claimants.” *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). “[W]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.” *See Lukumi*, 508 U.S. at 546-47. This means that, in order to justify Order 20-56, Minnesota must prove that religious services, conducted pursuant to social distancing requirements, pose a unique public health risk not present in *any* of the other soon-to-be-permitted uses. Put differently, Minnesota must prove that time spent congregating in malls, restaurants, factories, offices, and other retailers do *not* present a public-health risk—but adding one other hour a week of socially-distant, hygienic in-person worship to the mix *does*. Minnesota cannot meet this burden.

Underscoring this fact, many other states have allowed churches *more* freedom than retail establishments in reopening to the public. Michigan, for example, has not restricted houses of worship from meeting. *See, e.g.*, Executive Order 2020-92, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-529476--,00.html (“neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place”). Maryland now allows both retailers and in-person worship at 50% capacity. *See, e.g.*, <https://www.wbaltv.com/article/coronavirus-governor-larry-hogan-maryland-reopening-plan/32451874#>. New Mexico, too, now subjects retailers and in-person worship to the same capacity requirement. *See* <https://cv.nmhealth.org/wp-content/uploads/2020/05/5-15-2020-PHO.pdf> (New Mexico ordering, as of May 15, 2020, that “non-essential” retailers and houses of worship may each operate at the same capacity). In Minnesota, casinos that were exempted under your executive orders have announced that they will reopen on May 26. Indeed, most states are now allowing churches to meet *without* numerical restrictions.



In order to withstand strict scrutiny, Minnesota “must, at a minimum, offer persuasive reasons why it believes that it must take a different course.” *Holt*, 574 U.S. at 369 (considering the policies of other states and the federal government in determining whether Arkansas had a compelling interest in enforcing its different policy). Worshipping in Minnesota—which is not one of the nation’s most densely-populated states—poses no greater health risk than worshipping in Michigan or Maryland. No court would believe otherwise.

Even if Minnesota could demonstrate some heightened risk inherent uniquely in public worship services, it would still have to prove that its public health goals cannot be met by any means other than banning in-person religious worship by more than ten people. *See id.* at 352 (“[i]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.”) (internal citation and quotation marks omitted). Here, the Churches have set forth protocols, which they have shared with state officials, that would allow church buildings to be open to 33% capacity, less than the capacity allowed for even non-essential retail. They have also suggested numerous ways that they can meet the state’s standards of social distancing. To refuse to engage in dialogue with the Churches about how they can gather for worship in a way that protects public health is to ignore means by which the state can meet its interests and also respect religious liberty.

Minnesota offers no public explanation for allowing the Mall of America to operate at 50% capacity with store employees, custodial staff, security, and guests for upwards of 8 hours a day, while demanding that houses of worship be banned from holding services at 30% capacity for a short time on Saturday or Sunday. If this uneven restriction on houses of worship were litigated, the state would be required to provide science-backed evidence that supports any reasoning that it relies on. That evidence would be tested in oral testimony, expert testimony, and document discovery going to Minnesota’s decision to exclude houses of worship from the privileged class of entities created by Order 20-56.

Minnesota Constitution

The Minnesota Constitution “affords greater protection against governmental action affecting religious liberties than the First Amendment of the federal constitution.” *Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 203 (Minn. Ct. App. (2008) (citations omitted). Indeed, the Minnesota Constitution authorizes restrictions on religious freedom “[o]nly” when “the government’s interest in peace or safety or against acts of licentiousness” are (1) “at stake” and (2) “the government can



establish that the affected religious practices are specifically *inconsistent* with public safety.” *Id.* (internal quotation marks and citations omitted) (emphasis in original). This will take more than abstract concerns. It will take evidence. Order 20-56 cites none.

The way forward

For months, churches throughout Minnesota—and indeed, the entire United States—have embraced extraordinary restrictions on their religious freedom. They have done so because, for Christians, loving their neighbors as themselves is part of the great commandment. *See* Mark 12:30-31. Now, actions from Minnesota and states throughout the nation confirm that loving their neighbors need “not forsak[e] the assembling of ourselves together.” Hebrews 10:25. Minnesota is now planning to open bars and restaurants, while partially reopening virtually every retailer in the state. Some states are not restricting religious worship at all, and other states reopening in-person worship are doing so on equal footing with retailers. These approaches appreciate the special solicitude that the First Amendment affords religious exercise—and the eternal hope that encountering spiritual realities provides to everyone facing this pandemic’s temporal fears.

To continue the Churches’ efforts at a constructive solution, we respectfully urge you, between now and May 26, to confirm that in-person worship capable of rigorous social distancing and hygiene practices can occur with at least 33% occupancy. As has been the case over the past few months, the Churches remain happy to work with you and your administration to ensure religion’s non-discriminatory treatment. We hope you do so.

Very truly yours,

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