April 14, 2020

City Attorney Jason Morton
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82 West Washington Street, Ste. 100
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Sent via email: jmorton@salvatoremorton.com

Chief of Police Paul Kifer
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Hagerstown, MD 21740

Sent via email: pkifer@hagerstownpd.org

Mayor Robert E. Bruchey II
City of Hagerstown, City Hall
1 E. Franklin St.
Hagerstown, MD 21740

Sent via email: mayor@hagerstownmd.org

Dear Mr. Morton, Chief Kifer, and Mayor Bruchey:

The Thomas More Society is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. We represent Wanda King and other pro-life individuals who regularly engage in peaceful expressive activities outside Hagerstown Reproductive Health (“abortion clinic”) located at 160 W. Washington Street. This letter is intended to clarify the rights of Ms. King and others to continue engaging in First Amendment free speech and free exercise of religion under the Order of the Governor of the State of Maryland, Number 20-03-30-01, issued March 30, 2020 (“Stay Home Order” or “Order”).¹

Factual Background

Every Tuesday and Thursday, a small group of approximately six pro-life individuals, including Ms. King, engage in peaceful pro-life speech outside the abortion clinic. On Thursday, April 2, 2020, Ms. King and five other individuals were on the public sidewalk outside the abortion clinic praying and expressing a pro-life message while standing at least six feet apart from one another. Several Hagerstown Police Officers approached the pro-life individuals and ordered them to leave. The officers stated that the individuals’ presence on the sidewalk violated the Stay Home Order. Later that day, another local pro-life individual (David Neel) informed Maryland State Delegate Neil Parrott about the incident. Delegate Parrott then inquired about the matter to the Governor’s Task Force, which informed Delegate Parrott that the pro-life individuals in Hagerstown could be outside the abortion clinic as long as they continued to walk around the block while staying six feet away from each other and other people. On Friday, April 3, pro-life

¹ As of today’s date, there have been five Executive Orders by Maryland Governor Larry Hogan, dated March 12, 16, 19, 23 and 30, 2020. The Executive Order of March 30 amended and restated the prior orders. The citations in this analysis are to Executive Order of March 30, unless otherwise indicated.
individual Lisa Plaisance emailed this information to Hagerstown Police Chief Paul Kifer, who never responded.

On Tuesday, April 7, 2020, only two pro-life individuals returned to the sidewalk outside the abortion clinic, including Ms. King. The two individuals regularly stood more than 15 feet apart from each other. Nonetheless, at approximately 9:30 a.m., three Hagerstown Police Officers standing shoulder-to-shoulder approached Ms. King and informed her that her presence on the sidewalk violated the Stay Home Order. They told her she would be ticketed and fined $5,000 if she was still there when the officers returned. Ms. King was indeed still there when the officers returned approximately two hours later. The officers were about to cite Ms. King when a friend of Ms. King drove up and offered to take her home.

Since then, pro-life individuals have not returned to the sidewalk outside of the abortion clinic as a direct result the earlier police threats. Additionally, Ms. Plaisance has emailed Chief Kifer three more times about the situation and has not received any response.

**Legal Analysis**

As a threshold matter, on March 23, 2020, Maryland Secretary of Health Robert R. Neall issued a “Directive and Order Regarding Various Healthcare Matters” in light of the COVID-19 situation and declared the following:

Pursuant to the Executive Order of March 16, 2020 relating to various health care matters and in accordance with the guidance issued by MDH and posted on its website at http://coronavirus.maryland.gov, all licensed hospitals, ambulatory surgical centers, and all other licensed health care facilities shall cease all elective and non-urgent medical procedures effective at 5 p.m., Tuesday, March 24, 2020 and not provide any such procedures for the duration of the catastrophic health emergency.²

Almost all abortions are elective, yet the abortion clinic continues to operate without regard to such limitations. As I’m sure you know, selective enforcement of parts of Maryland’s orders to stop the spread of COVID-19 against pro-life advocates like Ms. King, while not enforcing other parts against the abortion clinic, is unlawful.

In addition, while Section III of the Stay Home Order expressly prohibits “[s]ocial, community, spiritual, religious, recreational, leisure, and sporting gatherings and events,” it does so only if these gatherings and events contain “more than 10 people . . . including but not limited to parades, festivals, conventions, and fundraisers.” (Order, P. 3, Sec. III.a.) This section implicitly allows such gatherings and events if they have fewer than 10 people, and indeed the U.S. Court of Appeals for the Fourth Circuit has expressly recognized “the interpretive maxim inclusio unius est exclusion alterius, to include one item . . . is to exclude other similar items.” Zhao Lin Chen v. Holder, 531 F. App’x 364, 373 (4th Cir. 2013) (quoting Holland v.

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Florida, 560 U.S. 631, 648 (2010) (internal quotes omitted) (alteration in original)). Given the specificity of the impliedly exempt gatherings, the Order clearly intends that these exemptions supplement the exemptions outlined in Section II for Essential Activities and certain business and organizational activities. This is especially true in light of the Governor’s Task Force informing Delegate Parrott that the pro-life individuals could remain outside the abortion clinic within due limitations.

Here, Ms. King and fellow pro-life individuals (always fewer than 10) are expressing a religiously-motivated pro-life message and engaging in communal and individual prayer, thus rendering their activities permissible “spiritual” and “religious” gatherings or events under the Order.

Additionally, Ms. King uses her ministry time on the sidewalk as way to engage in outdoor exercise as a break from self-quarantining in her nearby apartment. But the Order expressly exempts the “Essential Activity” of “[e]ngaging in outdoor exercise activities, such as walking, hiking, running, or biking, as long as these are done with fewer than 10 people while maintaining social distancing. (Order, P. 3, Sec. II.b.v.) (emphasis added). The Order also exempts the “Essential Activity” of “[e]ngaging in activities essential for the health . . . of one’s self,” (Order, P. 3, Sec. II.b.i.), and Ms. King’s ability to engage in outdoor ministry time on the public sidewalk near the abortion clinic has been critical to her mental health during this time of social isolation and lockdown.

Finally, apart from these exceptions, the First Amendment to the U.S. Constitution protects anyone picketing, speaking, demonstrating, or otherwise peacefully advocating for their beliefs on the public right of way. Dating back to at least Hague v. CIO, it is well established that public rights of way “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” 307 U.S. 496, 515 (1939).

Here, the abortion clinic workers and supporters are free to come and go from the abortion clinic via the adjacent sidewalk, and they would be free to walk on the sidewalk to escort women inside while promoting abortion as a form of healthcare service. Thus, enforcing the Order against Ms. King and other pro-life individuals while they walk on the same sidewalk and promote a pro-life message (particularly where they are fewer than 10 in number and maintain social distancing), is a classic content-based restriction on speech. See Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 2227 (2015) (“Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”). But enforcement of the Order against Ms. King and other similar pro-life individuals would clearly fail strict scrutiny given the Order’s many non-healthcare-related exceptions for often non-fundamental-right activity. (See Order, P. 4, Sec. IV.a., incorporating by reference exemptions for critical infrastructure sectors identified by the U.S. Department of Homeland Security.) See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (“It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when
it leaves appreciable damage to that supposedly vital interest prohibited.”) (alteration in original) (internal quotations omitted).

In addition, the U.S. Constitution requires that even content-neutral time, place, and manner restrictions be narrowly tailored to advance significant government interests, while leaving open ample alternative channels for communication. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Even if the Order’s application to Ms. King and other similar individuals advances significant government interests, such enforcement is not narrowly tailored. The Order expressly allows individuals to leave their homes for outdoor exercise activities and numerous other essential activities and businesses, even sometimes without maintaining social distancing. (*Compare* Order, P. 3, Sec. II.b.v. (specifically requiring that outdoor exercise activities comply with federal and state social distancing guidelines) *with* Order, Sec. IV.a. (effectively exempting federally identified critical infrastructures including health clinics like Hagerstown Reproductive Health without specifically requiring compliance with social distancing guidelines)). The Order thus recognizes on its face the ability for people to be out in public within proper limits while still advancing the goal of reducing the spread of COVID-19. Yet Ms. King and other pro-life individuals have fully complied (and are committed to maintaining compliance) with social distancing requirements and gathering size limitations. Thus, failure to extend the allowance afforded to other “essential activities” to the sparse, social-distancing-compliant pro-life activities outside the abortion clinic is not narrowly tailored. For that reason alone, our clients should be protected under the Order.

Finally, the Free Exercise Clause of the First Amendment requires strict scrutiny where a government policy substantially burdens the free exercise of religion while failing to prohibit nonreligious conduct that endangers the policy’s interests in a similar or greater degree than the prohibited religious conduct. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 543. Here, the religiously-motivated activities of Ms. King and other (fewer than 10) pro-life individuals while standing more than six feet apart do no more harm to the government’s interest in stopping COVID-19 than, for example, exemptions for staff and owners of fast-food and other restaurants to engage in Minimal Operations in order to provide carry-out, drive-through, or delivery services (Order, P. 2, Sec. II.a.iii; PP. 3-4, Sec. V.b.ii.); for the homeless population to stand or walk on the public sidewalks (Order, P. 7, Sec. VI.b.ii.); for staff or volunteers to roam the sidewalks “in connection with their duties at any ... newspaper, television, radio, or other media service” (Order, PP. 6-7, Sec. VI.a.ii.); and for retail establishments attached to enclosed malls that are directly accessible from the outside (Order, P. 5, Sec. V.e.iii.). See, e.g., *On Fire Christian Center, Inc. v. Greg Fischer, et al.*, No. 3:20-cv-264 at *11-12 (W.D. Ky. April 11, 2020) (granting TRO against Louisville, KY, policy forbidding drive-in Easter services as a violation of the Free Exercise Clause because Louisville failed to prohibit “a multitude of other non-religious drive-ins and drive-throughs”). Here, Hagerstown fails to prohibit a multitude of other non-religious reasons to be on the public ways and sidewalks without granting the same exemption to the religiously motivated activities of Ms. King and similar individuals. This policy is in direct contravention of the Free Exercise Clause.

**Conclusion**

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We stand fully prepared to defend the constitutional rights of Ms. King and other pro-life individuals to be outside Hagerstown Reproductive Health to exercise their constitutional rights, and to take immediate legal action if necessary.

In light of the actions of Hagerstown Police Officers and the “chill” cast upon the First Amendment rights of Ms. King and others, we ask that you respond to this letter confirming that Ms. King and others engaged in similar activities may return to the abortion clinic without fear of arrest or citation no later than close of business tomorrow, Wednesday, April 15, 2020.

Sincerely,

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