



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 10, 2020

Montgomery County Executive Marc Elrich
Executive Office Building
101 Monroe Street, 2nd Floor
Rockville, MD 20850

Montgomery County Council
100 Maryland Avenue, 6th Floor
Rockville, MD 20850

Dear Montgomery County Executive Elrich and County Council:

We write to raise several civil rights concerns with respect to the treatment of First Amendment rights in Executive Order No. 070-20 and its enforcement.

Of course, we recognize the solemn duty that you have to protect the health and safety of Montgomery County residents in the face of a pandemic that is unprecedented in our lifetimes. You and other leaders around the country are called on to balance multiple competing interests, to evaluate the constantly changing information available to you about COVID-19, and to make your best judgment on courses of action.

We applaud the actions you have recently taken to support peaceful public protest in Montgomery County during the COVID-19 pandemic. Like the people of Montgomery County, we are deeply troubled by the death of George Floyd in Minneapolis, and we recognize and are duty-bound to enforce the principle that our Constitution requires equal treatment under the laws, without regard to race, religion, or other protected traits. We are thus gratified that, although Executive Order No. 070-20 banned all gatherings larger than 10 persons, your June 1, 2020, Statement Supporting Freedom of Assembly and Public Safety committed “to provide a protected environment for memorials, rallies, and nonviolent protests.”

Your support for peaceful assembly and speech follows the best of our nation’s traditions. The First Amendment is incorporated against the States through the Fourteenth Amendment and provides that “Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. Amend. I. This Amendment reflects the “profound national commitment

to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Indeed, the Supreme Court has recognized that speech on public issues “is the essence of self-government.” *Id.*

Of no less importance, of course, is the First Amendment’s protection for religious exercise. Alongside the rights discussed above, the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. Amend. I. This Amendment protects religious observers against unequal treatment. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). Government may not discriminate against religious gatherings compared to other nonreligious gatherings that have the same effect on the government’s public health interest, absent compelling reasons.

Executive Order No. 070-20 became effective the same day as your statement in support of the First Amendment’s right of free assembly, and it prohibits all “[s]ocial, community, recreational, leisure, and sporting gatherings and events of more than 10 people . . . at all locations and venues.” The Order accordingly prohibits the reported gatherings of hundreds of people for political protest in the Bethesda library and streets. For the same reason, it starkly limits religious gatherings, except those conducted through “drive-in” services in which participants “remain in their vehicle at all times” and refrain from “interact[ing] physically with clergy, staff, or participants in other vehicles.”

In light of your recent statement of support for protests like those that took place throughout Montgomery County, we anticipate that you will amend Executive Order No. 070-20 to set forth the conditions under which Montgomery County residents may gather peaceably to exercise the full range of rights protected by the First Amendment. We urge you to ensure that your Executive Orders and enforcement of them respect both the right of your residents to assemble to express their views and the right to practice their faith. We understand that protests are typically held outdoors—where the risk of COVID-19 transmission is lower—and that religious services are typically held indoors. But the protest held in Bethesda on June 2 reportedly involved hundreds of persons packed into a library; to amend (or selectively enforce) the Order to permit gatherings of more than 10 people for political protest yet deny similar gatherings for religious exercise would raise grave concerns under the Constitution. Compliance with the First Amendment is not optional, and the First Amendment protects both free exercise and assembly rights.

The Department of Justice does not seek to dictate how Montgomery County determines what degree of activity and personal interaction should be allowed to protect the safety of their citizens. But in identifying the conditions under which gatherings for protest may proceed in Montgomery County, the Council should ensure that it imposes no more onerous conditions on gatherings for religious exercise than it does on gatherings for other purposes. In this time, as in any other, government “officials must pause to remember their own high duty to the Constitution and to the rights it secures.” *Lukumi*, 508 U.S. at 547. We are gratified that you have done so with respect to the freedom of assembly, and we urge you to do the same with the freedom of religious exercise.

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Should you wish to discuss further, please reach out to United States Attorney Robert Hur regarding any efforts to modify the order discussed above and ensure appropriate protection for the exercise of First Amendment rights, including the timeline for these revisions and the specific steps you plan to undertake.

Thank you for your kind attention to this matter.

Sincerely,
Eric S. Dreiband

06/10/2020
Eric S. Dreiband
Assistant Attorney General
Civil Rights Division

cc: Robert K. Hur, United States Attorney, District of Maryland