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April 1, 2021

Kevin A. Carr
Secretary
Wisconsin Department of Corrections
3099 East Washington Avenue
Madison, WI 53704

via first-class mail and
email: kevin.carr@wisconsin.gov

Dear Secretary Carr:

We are writing regarding reports we have received that the Department of Corrections (the "DOC") has, as a means of addressing COVID-19, banned all volunteer religious ministers from visiting inmates in the DOC's care. This policy apparently applies even when a desired religious activity cannot be conducted virtually and contains no exceptions for visits by ministers who are vaccinated and/or can comply with health and safety protocols designed to prevent the transmission of COVID-19.

While the illegality of such a draconian policy should be self-evident, we are sending this letter to confirm that the DOC is indeed violating state and federal statutory and constitutional law by indefinitely denying inmates the basic freedom to exercise their religion.

We are asking the DOC to immediately reassess its policy and inform us by April 8, 2021 what steps it intends to take to bring itself into compliance with well-established law.

DOC'S VISITOR POLICY

On March 13, 2020, the DOC announced that, "out of an abundance of caution," in order to "minimize the risk of bringing COVID-19 (Coronavirus) into [its] facilities," "[a]ll visits, including volunteer visits, are temporarily suspended at all Department of Corrections Institutions." By its terms, this blanket suspension applies to all volunteer religious ministers who visit DOC facilities to provide religious services. And, as noted, it does not contain exceptions for instances where a minister is able to comply with health and safety protocols designed to prevent the transmission of COVID-19.

Thus, inmates are apparently unable to, for example, attend an in-person religious service led by a volunteer minister who shares their faith, receive a sacrament administered by a volunteer minister such as communion, or even meet one-on-one with a volunteer minister for counseling.

The DOC website notes that "several religious accommodations" "may" still be available to inmates, such as the ability to receive "self-study materials," assistance from the on-duty chaplain (who will often not share an inmate's faith), and/or "secular/non-denominational information" such as "uplifting stories."

The policy does not apply to other classes of individuals who may enter DOC facilities from outside, such as employees (which would include psychologists, social workers, and teachers) and professional and legal visitors. These individuals are instead subject to health and safety protocols.

The DOC has promised to "review[]" its decision to suspend volunteer entry "on a daily basis." One year later, the policy remains in place. The DOC has further explained that it is "working with local health officials and the Wisconsin Department of Health Services to determine criteria that indicate[] it is safe to resume in-person visitation." To our knowledge, no such criteria have been announced.

DOC'S POLICY VIOLATES STATE LAW

Although DOC's policy violates multiple statutory and constitutional guarantees, perhaps its most blatant flaw is its contravention of the express terms of Wis. Stat. § 301.33 ("Freedom of worship; religious ministration."), which provides in part:

> (1) Subject to reasonable exercise of the privilege, members of the clergy of all religious faiths shall have an opportunity, at least once each week, to conduct religious services within the state correctional institutions. Attendance at the services is voluntary.
>
> (2) Every inmate shall receive, upon request, religious ministration and sacraments according to the inmate's faith.

Obviously, a policy barring members of the clergy from ministering to inmates is utterly incompatible with these guarantees. And it is our understanding that requests for in-person clergy visits have in fact been denied by DOC personnel—that is, statutory violations are occurring.

Even if these statutory protections did not exist, the DOC's policy violates the Wisconsin Constitution's religious liberty provision, Article I, § 18, which provides that

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . .

This section provides expansive protections for religious exercise—more expansive than those that obtain under the federal constitution. *See, e.g.*, *State v. Miller*, 202 Wis. 2d 56, 65, 68-69, 549 N.W.2d 235 (1996) (declaring that "the drafters of our constitution created a document that embodies the ideal that the diverse citizenry of Wisconsin shall be free to exercise the dictates of their religious beliefs" and declining to follow more lenient federal approach). Specifically, where a challenger can show that the state is burdening a religious belief he or she holds sincerely, the

state must show that the measure furthers a compelling state interest and cannot be served by a less restrictive alternative. *Id.* at 66.

There can be little doubt that the DOC is burdening the sincerely held religious beliefs of countless Wisconsin inmates. To take just one of many possible examples: a number of religious denominations are currently observing the penitential season of Lent, and Catholic inmates may wish to avail themselves of the Sacrament of Confession, which under the teaching of the Catholic Church can only be obtained in-person from an ordained priest. By barring priests from visiting its facilities—even for, for example, a one-on-one, outdoor visit—the DOC is infringing on the Article I, § 18 rights of those Catholic religious adherents in its custody.

Nor could the DOC meet the heavy burden necessary to justify such a restriction, because regardless of whether combatting COVID-19 qualifies as a compelling interest, less restrictive alternatives are available. The agency could apply to religious ministers the same or similar health and safety protocols it requires of employees (including psychologists, social workers, and teachers) and professional and legal visitors. It could require temperature checks, COVID tests, masking, hygiene procedures, social distancing, outside visits, or even proof of vaccination. But the DOC has attempted none of these measures and has not proven that any of these options (widely used in sensitive settings like nursing homes and hospitals) are inadequate. Instead it has simply adopted a blanket ban. The Wisconsin Constitution forbids this approach.[1]

DOC'S POLICY VIOLATES FEDERAL LAW

Even if a court were to conclude that this state constitutional right ought to be afforded less of a sweep in the penological context, the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, mandates the same analysis.

This law, which was "enacted . . . 'in order to provide very broad protection for religious liberty," *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)), provides in part that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution [as defined] . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). This law applies to DOC facilities, *see, e.g.*, 42 U.S.C. §§ 1997, 2000cc-1(b), and the Supreme Court's recent decision in *Holt v. Hobbs* demonstrates just how "expansive" RLUIPA's "protection for religious liberty" is:

[1] This is not the only violation of Article I, § 18 at issue. The DOC is also constitutionally barred from giving "any preference . . . to any religious establishments or modes of worship." Yet the DOC's policy accomplishes exactly that result by privileging the adherents of those faiths whose services or activities do not require the in-person assistance of religious ministers.

> Congress defined "religious exercise" capaciously to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). Congress mandated that this concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g). And Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." § 2000cc–3(c).

Holt, 574 U.S. at 358. Further, it does not matter "whether the RLUIPA claimant is able to engage in other forms of religious exercise," *id.* at 362, as the DOC's list of alternate "accommodations" appears to assume.

For reasons already discussed, the DOC's decision to deny to all of its inmates all visits by religious ministers cannot survive these robust religious liberty guarantees.

Finally, and setting all of the foregoing violations aside, it is unlikely the DOC's policy meets even the basic and much less stringent requirements of the First Amendment's Free Exercise Clause, pursuant to which a prison regulation "is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Factors relevant to this inquiry include whether there is a "valid, rational connection" between the regulation and the governmental interest, "whether there are alternative means of exercising the right that remain open to prison inmates," what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and whether there are "ready alternatives" to the regulation. *Id.* at 89-91.

These considerations militate in favor of a finding of unconstitutionality. There is no rational connection between the DOC's policy and its interest in combatting COVID-19, given that the DOC allows social workers and lawyers entrance from outside of facilities, for example, but not clergy. The COVID-19 virus does not discriminate in this manner. Further, the DOC's existing health and safety protocols show that a tailored policy of permitting visits by ministers is a "ready alternative[]" that would have a *de minimis* impact on the functioning of a facility.

DOC SHOULD IMMEDIATELY REASSESS ITS POLICY TO AVOID LEGAL ACTION

In sum, the DOC's policy is illegal and the DOC must act now to restore the rights of Wisconsin's inmates to freely exercise their religion. One year of violations is long enough.

Governor Evers has suggested that "reform" of the "criminal justice system" is one of the goals of his administration, and has sought, in his words, to "ensure fair treatment for all within" that system. It is surprising, then, that one of the agencies in his control is utterly failing to meet not only basic state and federal constitutional and statutory requirements but fundamental, universally-recognized precepts premised upon the dignity of every human being.

We are asking the DOC to immediately reassess its policy and inform us by April 8, 2021 what steps it intends to take to bring itself into compliance with well-established law.

Sincerely,

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cc: Governor Tony Evers (ryan.nilsestuen1@wisconsin.gov)