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FOR IMMEDIATE RELEASE

From: Eric M. Hoffman, Prosecuting Attorney
Date: July 23, 2020 5:50 p.m.

Enforcement of Governor's Mask Mandate

Muncie Indiana - Yesterday the Governor announced that he is issuing an Executive Order amending his emergency declaration that mandates the wearing of facial coverings or masks in public. This requirement apparently goes into effect this coming Monday. Although I have looked for the executive order, it has yet to be posted so I have not had a chance to read it and conduct the necessary research to formulate a formal opinion. However, for now, these are my preliminary thoughts on whether a person can be criminally prosecuted for failure to wear a facial covering as required by the Governor's Order.

1. First, I want to be clear that I am not anti-mask or a "COVID denier." I believe the threat of COVID is real and further believe in what the experts are telling us about this terrible virus and how to effectively mitigate its spread. Moreover, I believe that given the current medical research, I believe that it is wise to wear facial coverings or masks to mitigate the spread of the virus. I wear a mask in public and encourage others to wear facial coverings or masks in public. That said, I believe there are some legal issues related to the Governor's Order.

2. Generally speaking, current Indiana law gives the Governor authority to make executive orders during times of emergency. That very same law enumerates the specific things that the Governor can order; a violation of which would be a Class B Misdemeanor. For example, the Governor can prescribe routes, modes of transportation, and destinations in connection with evacuation, control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises in the area, suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles, and make provision for the availability and use of temporary emergency housing. However, mandating the wearing a face covering or a mask is not contained within that list. Indiana Supreme Court precedent is crystal clear that criminal laws are to be strictly construed against the State.

3. The Indiana Attorney General has issued an advisory opinion that states the Executive Order is unconstitutional and unenforceable with a criminal penalty. The Opinion is attached. After reading the Attorney General's

Opinion advisory opinion I tend to agree with his legal analysis. I have very serious concerns about the constitutionality of enforcing the Governor's Order through the criminal justice system. We live in a society where the government has a constitutionally mandated separation of powers. The General Assembly passes laws, including those that create criminal offenses. Article 1 § 4 of the Indiana Constitution clearly states that passing laws in the state "shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." It is the General Assembly alone who has the authority to criminalize behavior and pass criminal statutes, not the Governor. Rather, the Governor, as the executive branch of government, is responsible for ensuring that the laws passed by the General Assembly are collectively enforced.

4. Absent a valid statute properly passed by the Indiana General Assembly, this is a public health issue not a law enforcement or criminal justice issue.

5. Given these serious constitutional concerns and the legal analysis of the Indiana Attorney General, the Delaware County Prosecutor's Office will not criminally prosecute a person for failing to wear a face covering or a mask until such time as the Indiana General Assembly passes a statute criminalizing such behavior and that statute is signed into law by the Governor. Prosecutors have an ethical duty to only file charges that are supported by probable cause that a *crime* has been committed. In this instance there is no statute criminalizing the failure to wear face coverings or masks.

6. I join the Sheriff in his recognition of the rights of property and business owners. They have the absolute right to create polices for their properties and businesses. If a business, school, government building, etc. requires you to wear a mask while on their property then you can either wear the mask or leave. The same thing applies to private property. If the property owner asks you to wear a mask, you can either wear a mask or leave. If you are asked to leave a business or property and you refuse to do so, then you may be committing the criminal offense of trespassing. Trespassing is a criminal statute on the books which will be properly investigated and prosecuted.

7. Moreover, I think there are practical issues with enforcing such an order using the criminal justice system. Calling dispatch to report people allegedly not wearing a mask will overwhelm and overload the dispatch system. This will have serious consequences. People who need immediate help with serious life threatening medical issues or crimes of violence will not be able to get prompt assistance. It would seem to me that violations of the Governor's Executive Order should be reported to the Indiana State Department of Health.

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STATE OF INDIANA

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CURTIS T. HILL, JR.
ATTORNEY GENERAL

July 22, 2020

OFFICIAL OPINION 2020-6

The Honorable James Buck
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

The Honorable Mark Messmer
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

The Honorable Blake Doriot
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

The Honorable Jim Tomes
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

The Honorable Aaron Freeman
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

RE: Mask Mandate

Dear Senators Buck, and Doriot, Freeman, Messmer and Tomes:

This letter responds to your request for an official opinion of the Attorney General regarding whether the governor may issue an executive order mandating masks and make it a criminal offense to not wear a mask.

QUESTION PRESENTED

Whether the governor may issue a statewide mask mandate pursuant to his authority under the Emergency Management and Disaster Law, Ind. Code ch. 10-14-3 (EMDL), and whether such a mandate could be enforced by criminal penalty?

BRIEF ANSWER

The governor has various powers under the EMDL, although the limitations of those powers are not clearly spelled out in the law. The EMDL does not provide that a governor may issue a mandate on wearing masks. Additionally, even if such broad authority was granted under the EMDL, it is outside the scope of the General Assembly's authority to delegate to the governor the limitless ability to create laws. Without properly delegated authority from the General Assembly, the proposed order would not have the force and effect of law. The General Assembly would need to specifically and clearly allow for a mask mandate by law.

By declaring that a violation of his proposed executive order requiring masks is a class B misdemeanor under the EMDL, the governor has taken conduct that has not been specifically criminalized by the General Assembly and unilaterally declared it as criminal. The General Assembly has not clearly delegated this law-making authority to the governor, and cannot delegate law-making power. If the governor believes it is necessary to enact a mask wearing mandate before the beginning of the next legislative session, he should call a special session of the General Assembly.

BACKGROUND

In the face of the COVID-19 pandemic and resulting public health emergency, Governor Holcomb has, 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, a few of which are relevant here. First, on March 6, 2020, he issued Executive Order 20-02, officially declaring a COVID-19 public health emergency in the State of Indiana. More recently, with Executive Order 20-34, the governor renewed the state of emergency for the fourth time until August 3, 2020. On July 22, 2020, the governor announced that he would issue an executive order mandating that masks be worn by all individuals eight (8) and over effective July 27, 2020.[1] This inquiry is a result of the governor's announcement. This Office has not been contacted by the governor or his staff for legal guidance.

ANALYSIS

Experts largely agree that wearing masks helps to stem the spread of COVID-19. Many businesses including Walmart and Meijer and myriad small businesses have opted to require masks to enter their stores. However, the governor's announcement of a mask mandate raises the question whether the governor has gone beyond the scope of his authority and whether the General Assembly ceded or delegated power to the governor under the EMDL beyond the scope of its authority.

A. The authority to issue a mask mandate was not granted to the governor by the General Assembly, and broad authority to create a law would be unconstitutional.

Whatever authority the governor has is predicated on his declaring a disaster emergency and is limited by the EMDL. The EMDL, however, does not provide specifically the authority to the governor to enact a mask mandate. By issuing such a mandate on all Hoosiers with criminal penalties attaching if violated, the governor's intended mandate would have the effect of a law which goes beyond the scope of his authority and violates separation of powers.

Even if the EMDL was read to grant to the governor the authority to create laws, such authority would violate the separation of powers, and be unconstitutional. Under the "nondelegation doctrine," the legislative branch is limited in its authority to transfer its lawmaking powers to administrative agencies in the executive branch. Throughout the years,

[1] See: https://www.indystar.com/story/news/health/2020/07/22/indiana-coronavirus-governor-announces-mandatory-face-masks/5488294002/

Indiana courts have relied upon nondelegation principles to limit executive branch power. "It is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute[.]" *Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993), *cert. denied* (1994); *see also Vehslage v. Rose Acre Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985) ("It is black-letter law that generally, administrative agencies are creatures of statute, and only the legislature has the broad power to provide for their creation. Administrative boards, agencies, and officers have no common law or inherent powers, but only such authority as is conferred upon them by statutory enactment."). "Any act of an agency in excess of its power is *ultra vires* and void." *Howell v. Ind.-Am. Water Co.*, 668 N.E.2d 1272, 1276 (Ind. Ct. App. 1996), *trans. denied* (1997). "To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions." *Wilmont v. City of S. Bend*, 48 N.E.2d 649, 650 (1943).

"The legislature may only delegate rule-making powers to an administrative agency if that delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority." *Gunderson v. State, Indiana Department of Natural Resources*, 90 N.E.3d. 1171, 1186 (Ind. 2018). More recently, the Indiana Court of Appeals held in *Tyus v. Indianapolis Power & Light Co.* (IPL) that the Indiana Utility Regulatory Commission (IURC) exceeded its delegated authority when it approved an electric rate tariff for IPL that contained a release from liability for IPL for any injuries to third persons resulting from an interruption of service or supply of electricity, "unless due to willful default or neglect on the part of [IPL]." 134 N.E.3d 389, 408 (Ind. Ct. App. 2019). The legislature had given IURC the power "'to formulate rules necessary or appropriate to carry out the provisions of [this] chapter.' Ind. Code § 8-1-1-3(g)." But, this language was not specific enough to delegate authority to IURC to shield IPL from liability caused by its negligence to noncustomers. *Id*. at 406. Likewise, here, the General Assembly has not sufficiently articulated standards to guide the governor in the exercise of emergency powers under EMDL, including what acts may be subject to a criminal penalty, and when the emergency ends.

The legislature cannot delegate the power to make a law. *Gunderson*, 90 N.E.3d at 1186 (quoting *City of Carmel v. Martin Marietta Materials, Inc.,* N.E.2d. 781, 788 (Ind. 2008)). However, the Indiana General Assembly may assign adjudicatory power to an agency to determine that a certain set of facts or circumstances exist to properly operate a certain law. *Id.* For the legislature to delegate more general and prospective rule-making powers to an agency, they must also prescribe sufficient standards to guide an agency in the exercise of statutory authority. *Healthscript Inc. v. State*, 770 N.E.2d. 810, 814 (Ind. 2002). The governor's planned order requires compliance by all Hoosiers and threatens criminal liability. If the emergency continues, it is possible that the mandate could be in place for several more months without input by the General Assembly.

The governor has done all of this – extending the emergency and proposing a mask mandate, effectively making laws – without participation from the General Assembly and without notice and comment as through rule making. To promote transparency and out of respect for the rule of law and separation of powers, especially now that we have passed the early stages of the epidemic, the governor should have the support of the General Assembly. As the

representatives of the people, the General Assembly should have a say in the regulation of behavior and whether there is a criminal element to violating an order issued by the governor.

As we continue to deal with COVID-19, there is less of a sense of immediate emergency, and we are learning to deal with the virus. We continue to learn more about the disease, and can therefore take a more thoughtful approach to policy matters as a result of the virus. If the State or localities want to enforce restrictions on people, they should go through the legislative process instead of governing by fiat. We are in the midst of what will be looked back on as perhaps the most significant event of the century, and our General Assembly is left on the sidelines while major policy prescriptions are left to one individual and branch of government. Moreover, at the local level, executives continue to operate via order as opposed to seeking input from their legislative bodies. We are at a time where governmental entities can look ahead, plan, and seek approval from the people's representatives. Prudence requires and our system of government demands that the General Assembly and local legislative bodies not be carved out of the process when making laws.

B. The proposed mask mandate order is not enforceable as a class B misdemeanor.

While encouraging wearing masks and understanding the health benefits of doing so is important in the fight against COVID-19, such a mandate and threat of criminal penalty goes beyond the power delegated to the governor by the EMDL. By declaring violations of his executive orders a class B misdemeanor, the governor has effectively exercised legislative authority. That is, he has taken conduct that has not been specifically criminalized by the General Assembly and declared it as criminal. This declaration raises the question whether such authority was properly delegated by the General Assembly.

While there is legal support for the proposition that the legislature can delegate limited authority to the executive to define criminal conduct via rule making or executive order, the General Assembly has not explicitly delegated such authority with respect to the governor's executive orders issued under the EMDL. See e.g. *Meier v. American Maize-Products Co., Inc.*, 645 N.E.2d 662, 671 (Ind. Ct. App. 1995)(("The law is well-settled that 'the legislature may constitutionally delegate rule-making powers to an administrative agency if that delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority'"); *U.S. v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993) (upholding a conviction for violating an executive order issued under the International Emergency Economic Powers Act (IEEPA)). Additionally, the "creation of criminal statutes is an inherently legislative function," thereby raising the question whether the governor's attempt to define criminal conduct constitutes an improper exercise of legislative authority. *Tiplick v. State*, 43 N.E.3d 1259, 1266 (Ind. 2015). While the court in *Tiplick* upheld criminal conduct that was provided by an administrative body, the General Assembly had provided clear guardrails and a delegation of authority to define what constituted the offense. That is, the General Assembly laid out the criminal behavior, and the board filled in the gaps. The General Assembly has not done that here.

The question remains, then, what are the limitations on a governor exercising his authority under the EMDL? As previously noted, the authority of the governor under the EMDL is not without limits. For example, the governor's authority includes taking "any action and giv[ing] any direction to state and local law enforcement officers and agencies as may be reasonable and necessary for securing compliance with [EMDL] and with any orders, rules, and regulations made under [EMDL]." Ind. Code § 10-14-3-11(b)(3). The authority also allows suspending the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with any of these provisions would in any way prevent, hinder, or delay necessary action in coping with an emergency. Ind. Code § 10-14-3-12(d)(1). Additionally, the ISDH (Ind. Code § 16-19-3-10, -12; Ind. Code § 16-19-4-10) and IOSHA (Ind. Code §22-8.1-1.1-2) have authority to address epidemics or harm to employees.

In addition to the authority under the EMDL, the government has broad police power. But that power too is limited. In 1905, the United States Supreme Court held that certain restrictions may become necessary and reasonable to protect all Americans during times of public health crisis, but those restrictions must be reasonable and must not be a "plain and palpable" invasion of rights. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29, (1905). While a mask mandate may be allowed under *Jacobson*, it is still required to be a law that is duly enacted. At issue in *Jacobson* was a statute that allowed a locality to require vaccines, not an order or decree. This is a far cry from the issue here which is a mandate on all Hoosiers by order. Under our system of government, the legislature passes laws, and it is the executive's job to enforce laws. Here, the governor has created a law in violation of separation of powers.

CONCLUSION

Individual rights secured by the Constitution do not disappear during a public health crisis. Although the governor has powers under the EMDL, the General Assembly is limited by nondelegation principles in its ability to delegate its lawmaking powers to the governor and his agencies. And while the General Assembly maintains the authority to terminate the public health emergency, this authority can only be exercised when the General Assembly is in session. To ensure a check on the governor's proposed executive order, and the establishment and maintenance of appropriate guidelines, it would be necessary for the governor to call the General Assembly into special session.

The governor has taken conduct that has not been specifically criminalized by the General Assembly and declared that a violation of his executive order under EMDL is a Class B misdemeanor. The General Assembly did not clearly delegate this authority to the governor. Even if the authority was clearly delegated, it is questionable whether the General Assembly could grant such broad authority without clear guidelines provided to the governor.

I encourage the use of masks, but we are bound by the Indiana Constitution and the laws of our state. Indeed, we have a duty to uphold and defend our laws pursuant to our oaths. This Opinion is not an argument for or against masks, but it is about process. These decisions on matters that have the effect of law and bind all of us continue to be made in private and handed

down by decree. For Hoosiers, whose lives and livelihoods are on the line, to have a voice in how we continue to deal with the virus, it is critical that the General Assembly assume its constitutional role. Pursuant to the Indiana Constitution, and the laws of our great state, if a mask mandate is to be a law, it is up to the General Assembly to make that determination.

Sincerely,

Curtis T. Hill, Jr.
Attorney General

David P. Johnson, Chief Counsel