



STATE OF NORTH CAROLINA  
OFFICE OF THE GOVERNOR

ROY COOPER  
GOVERNOR

William C. McKinney  
General Counsel

May 1, 2020

**VIA EMAIL**

ajbiller@michaelbest.com

Mr. Anthony J. Biller  
Michael Best & Friedrich LLP  
2501 Blue Ridge Road, Suite 390  
Raleigh, NC 27607

Dear Mr. Biller:

Thank you for your letter dated April 29, 2020. In that letter, you write on behalf of your clients to seek clarification as to whether outdoor worship services are prohibited under the Governor's executive orders issued in response to the COVID-19 pandemic. Similarly, you seek clarification as to whether your clients may engage in indoor worship services under the same public health social distancing protocols applicable to "essential businesses" as set forth in Executive Order No. 121 ("Stay-at-Home Order") from March 27, 2020 which addresses certain occupancy limitations and social distancing guideline requirements. This letter serves as a response.

Governor Roy Cooper's Stay-at-Home Order specifically protects free exercise of religion.<sup>1</sup> Among other things, it allows for travel to and from places of worship and recognizes religious "facilities" and "gatherings" and "services . . . provided by religious organizations to the members of their faith community" as Essential Operations that may continue.<sup>2</sup> The only limitation applicable to these activities in the executive orders is the generally applicable limitation on mass gatherings, which is tailored to limit close physical interactions to halt the spread of COVID-19. The executive orders also encourage religious institutions and parishioners to adhere to social distancing guidelines to the maximum extent practicable.

Your clients – like other North Carolinians – have been able to exercise their constitutional right to the free exercise of their religious beliefs for the past six weeks since the Governor declared a State of Emergency on March 10, 2020.<sup>3</sup> Indeed, I understand that Hope Baptist Church has been able to livestream worship services and hold an afternoon sharing time, as have many other churches and houses of worship. The fundamental right to the free exercise of religion has not been unduly limited.

As you are aware, Governor Cooper announced last Thursday that the Executive Orders currently in place and relevant to your inquiry would expire on May 8, 2020, just one week from today. Notwithstanding that announcement, you have suggested that a challenge to that soon-to-expire Executive Order may be imminent. Courts are clear that laws of general applicability do not infringe on the free

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<sup>1</sup> Exec. Order No. 121 § 1(3)(vi), 34 N.C. Reg. 1903-1912 (May 1, 2020), which was issued on March 27, 2020.

<sup>2</sup> *Id.* § 2(C)(10).

<sup>3</sup> Exec. Order No. 116, 34 N.C. Reg. 1744-1749 (April 01, 2020), which was issued on March 10, 2020.

exercise of an individual's religion.<sup>4</sup> The Governor anticipates issuing a new executive order, assuming public health circumstances so allow, to take effect as Executive Order No. 135, issued on April 23, 2020, expires. That Order, like those in place now, will account for and continue to accommodate the fundamental rights and liberties of North Carolinians.

In the interest of providing clarity, and with respect to the specific questions set forth in your letter, we provide the following responsive information:

1. In accordance with this office's April 20, 2020, response to your letter regarding outdoor protests involving ReOpenNC, outdoor church services are consistent with the relevant executive orders so long as the space where the service is held is not enclosed (i.e., with walls) and so long as attendees maintain the Social Distancing Requirement that individuals remain at least six feet apart unless they are members of the same household.

In this example, the church service would be an Essential Activity as referenced in Executive Order No. 121, participants would follow Social Distancing Requirements, and the event would be in a non-confined outdoor space. Under these conditions, such an outdoor service would be allowed under Executive Order No. 121, even with more than ten people in attendance.

2. With regard to indoor worship services, public health considerations require that those activities remain limited by the Mass Gathering provisions in the Executive Orders. Indoor worship services would be consistent with the Orders as long as they do not "bring together more than ten (10) persons in a single room at a single time," and the persons who are in attendance otherwise abide by Social Distancing Requirements. These limitations are necessary to protect public health during the COVID-19 crisis—a public health emergency the likes of which has not been faced before in our lifetime. Studies indicate that COVID-19 has particularly pernicious effect among people with underlying health conditions, the elderly, people gathered indoors, and among people who are otherwise in close proximity and relatively stationary for extended time periods.

Public health officials have been clear that certain measures to limit the spread of COVID-19, including maintaining social distancing of six feet, reducing population density, avoiding contaminated surfaces, and not using shared facilities (like a restroom), are more likely to be achieved in an outdoor setting than an indoor one. One study found that the odds of a COVID-19 transmission in a closed environment is 18.7 times higher than an open-air environment.<sup>5</sup>

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<sup>4</sup> See e.g. *Legacy Church, Inc. v. Kunkel*, 2020 U.S. Dist. LEXIS 68415, No. CIV 20-0327 JHB/SCY (D.N.M. 17 April 2020) (finding that New Mexico's mass gathering limitation did not unconstitutionally infringe on parishioners' free exercise of religion).

<sup>5</sup> H. Nishura et al., Closed environments facilitate secondary transmission of coronavirus disease 2019 (COVID-19), medRxiv (April 16, 2020)(available at <https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2>). See also H. Qian, Indoor Transmission of SARS-CoV-2 (April 7, 2020)(available at <https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1>), T. Frieden and C. Lee, "Identifying and Interrupting Superspreading Events – Implications for Control of Severe Acute Respiratory Syndrome Coronavirus 2," 6 *Emerging Infectious Diseases* 26 (June 2020)(available at [https://wwwnc.cdc.gov/eid/article/26/6/20-0495\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0495_article)).

Your letter references and seeks to apply the Additional Social Distancing Requirements for Retail Businesses.<sup>6</sup> However, from a public health perspective, indoor religious services, like cinemas and theatres, are different in significant ways from retail shopping, where customers generally do not remain stationary for extended periods. Executive Order No. 120 therefore treats these more stationary indoor activities, where attendees frequently stay in a single place for an extended period of time, in close proximity, and use shared facilities, differently from retail services. Finally, I note that a significant portion of the population that is likely to attend services in person, as you indicate in your letter, is older and more vulnerable to COVID-19.

Thus, Executive Order No. 120 appropriately allows religious activities and protected speech events involving more than ten people to take place only if participants follow the six-foot Social Distancing Requirement, and meet outside in a space that is not confined, where the risk of COVID-19 transmission is greatly reduced. Nothing in the Executive Order prevents religious organizations like your client from holding multiple services instead of one in compliance with the Mass Gathering requirements. I note that, at least as of now, the weather forecast for this area for this coming Sunday, May 3, 2020, appears favorable. However, if your client's parishioners do not want to worship outside, the Executive Orders would still allow several indoor services in groups of ten people or less.

As a final point, the decision to bring an enforcement action based on violation of the Governor's Executive Orders is a decision for local law enforcement, including the District Attorney. Those individuals are not included in your correspondence dated April 29. This office is unaware of any information that would indicate that your clients are under any threat of arrest or prosecution, much less an imminent threat. You may wish to direct any concerns your clients have regarding their activities to the local authorities. Should you wish to discuss this matter further, please do not hesitate to contact me at your convenience.

With kind regards, I am

Very truly yours,



William C. McKinney

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<sup>6</sup> Exec. Order No. 131, 34 N.C. Reg. 1960-1968 (May 1, 2020), which was issued on April 9, 2020.