

# EXHIBIT L



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May 6, 2020

***Via Email Only***

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Re: *Herndon et al. v. Little et al.* 2:20-cv-00205

Dear Steven L. Olsen:

1. Thank you for forwarding the April 30, 2020 Stay-Healthy Order. We have reviewed the Order and discussed the same with our clients.
3. **The Stay-Healthy Order fails to resolve the issues raised in the *Herndon v. Little* complaint.**
4. The bottom line is that fundamental constitutional rights, such as religious freedom, are, as a matter of law, “essential.” So, if anything is to be considered “essential” under the Order, the State of Idaho is required to include religious gatherings and practices in that list.
5. Indeed, both the governor and attorney general of Arizona<sup>1</sup> recognize church attendance as an essential activity. See the enclosed Arizona Attorney General

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<sup>1</sup> Arizona has four times the population of the State of Idaho.

Opinion No. 120-008 (April 30, 2020), which is attached hereto for your ease of reference.

6. We demand an amendment to the Stay-Healthy Order to bring it up to constitutional muster and that the Governor and Director officially direct state actors to treat fundamental constitutional rights, including religious activities, as “essential.”
7. Places of worship are still “non-essential” under both the Stay-Healthy Order and the Guidelines for Opening Up Idaho.
8. Note that the April 23 Guidelines for Opening Up Idaho specifically targets “places of worship” with disparate treatment as opposed to its more favorable treatment of “essential” and “non-essential” businesses.
9. The May 1 Stay-Healthy Order neither mentions nor expressly incorporates the April 23 Guidelines for Opening Up Idaho.
10. The May 1 Order, being later in time and signed by the governor, appears to supersede the April 23 “Guidelines.” Therefore, paragraph 4 of the Order purports to control churches.
11. That paragraph reads: “Gatherings, both public and private, should be avoided.”
12. The Stay-Healthy Order demonstrates unconstitutional facial hostility toward people and gatherings that are “faith based” and “spiritual.”
13. Under the Stay-Healthy Order’s paragraphs 6 and 7, businesses that are permitted to open and businesses that are not permitted to open are only required to adhere to social distancing and sanitation requirements “to the extent possible” or “whenever possible,” whereas places of worship can open only “if they adhere to strict physical distancing, sanitation protocol, and any CDC guidance.”
14. Assuming the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? Why can someone safely interact with a Grub Hub or pizza runner but not a pastor?
15. The State of Idaho’s disparate treatment is patently discriminatory and unconstitutionally vague: what is “strict physical distancing”? what “protocol” are the plaintiffs to employ? and what “guidance” are they required to strictly follow on pain of imprisonment?
16. Assuming *arguendo* that the later-in-time May 1 Order does not foreclose the earlier-in-time April 23 Guidelines—can restaurants continue with unfettered take-out and delivery of bread so long as they comply with Social Distancing and Sanitation

Requirements “to the extent possible” or “whenever possible,” but churches may not deliver sacramental bread unless “they adhere to strict physical distancing, sanitation protocol, and any CDC guidance?” This is disparate treatment.

17. The State of Idaho’s disparate treatment toward places of worship is unconstitutional. Religious liberty is “deeply woven into this Nation’s historical fabric,”<sup>2</sup> is not merely a matter of toleration, and was historically considered the exercise of an inherent natural right and duty towards the Creator.
18. “In general, a government action that bans an aspect of an adherent’s religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, will qualify as a substantial burden on the exercise of religion.” *See* Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668, 49669 (Oct. 26, 2017).
19. Further, daycares and organized youth activities and camps, which are not mentioned in either the state or the federal Constitution, may reopen with no restrictions, but places of worship that are specifically protected by both Constitutions, holding the same types of activities, are required to adhere to strict physical distancing, sanitation protocol, and any CDC guidance.
20. This, again, is unconstitutional disparate treatment.
21. Further, pastors and congregants who either live in Idaho and attend church in another state or live in another state and attend church in Idaho (we know such people) are not permitted to travel to engage in religious activity and must quarantine for 14 days because, under the Stay-Healthy Order, neither engaging in religious expression nor traveling therefor is considered an “essential purpose” or “essential travel.”
22. In contrast, their neighbors a few miles away on the other side of the border who attend the same church are not required to quarantine.
23. This on its face is unequal treatment.
24. The Stay-Healthy Order and the Guidelines for Opening Up Idaho also operate as a baseline of discrimination against places of worship and worshipers alike because “cities, counties, and public health districts” remain free to “enact more stringent public health orders....”

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<sup>2</sup> *State v. Burnett*, 93 Ohio St. 3d 419, 427 (2001) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); and *Reno v. Flores*, 507 U.S. 292, 302 (1993)). *See also Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014) (legislative prayer has become part of our heritage and tradition).

25. Finally, violations or failure to comply with the Stay-Healthy Order remain punishable by fine, imprisonment, or both, but the Stay-Healthy Order is too vague to put a reasonable citizen on notice of what conduct is potentially criminal. The Order deems a violation of a mandatory provision of the Order an imminent threat to public health. The reader and law enforcement officer are left to interpret which provisions of the Order are “non-mandatory,” and if any provisions of the Order are “non-mandatory,” whether they, like “mandatory provisions,” are punishable by fine, imprisonment, or both.
26. For example, is a free religious musical performance held at a “place of worship” considered a “concert venue” under the Order even if the event participants adhere to “strict physical distancing, sanitation protocol, and any CDC guidance”? Is an act of non-adherence to CDC guidelines considered a criminal act in Idaho? If so, which one? Are the plaintiffs and law enforcement required by the Order to parse CDC guidelines for “mandatory” and “non-mandatory” provisions?
27. Because a “place of worship” is a “specific type of employer” under Stage 1 of the Guidelines for Opening Up Idaho (assuming, now, that the later-in-time Stay-Healthy Order does not trump the Guidelines), a place of worship is required to “minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel,” and strictly adhere to “any CDC guidance.” Non-essential businesses are only required to “adhere to CDC guidelines regarding isolation following travel.” A link is provided to CDC travel guidelines, but a link is not provided to instruct places of worship regarding what constitutes “any CDC guidance.” Under the Stay-Healthy Order, places of worship must strictly adhere to any and all CDC guidance, while all other businesses are free to adhere only to CDC guidance regarding isolation following travel. Again, on its face the Order discriminates against the free exercise of religion.
28. The Bill of Rights and the Idaho Constitution cannot be ignored, even in times of “pandemic.” As the Department of Justice stated on Sunday, “There is no pandemic exception to the Constitution and its Bill of Rights.” *See* The United States’ Statement of Interest in Support of Plaintiff’s Motion for an Injunction Pending Appeal, *Lighthouse Fellowship Church v. Ralph Northam*, 2:20-cv-00204-AWA-RJK (E.D. Va., Norfolk Division) Doc. 19, p. 10.
29. “[I]ndividual rights secured by the Constitution do not disappear during a public health crisis.” *In re Abbott*, 954 F.3d 784 (5th Cir. 2020).
30. On Saturday, the Sixth Circuit held that, “Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave delivery woman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one.” *Maryville Baptist Church et al v. Beshear*, 20-5427 (6th Cir.

2020) (*Per Curiam* order granting in part church’s motion for an injunction pending appeal).

31. The state may not prohibit the exercise of religion, especially as it has been practiced since colonial days, nor may the state favor one format of religious practice over another.
32. Our clients have directed us to continue to seek a temporary restraining order or preliminary injunction to force a stop to the violation of their constitutionally protected religious freedoms unless Governor Little and Director Jeppesen amend the Order to entirely eliminate the vague and unconstitutional requirements currently placed upon places of worship to put them on an equal playing field with “essential businesses.”
33. Rather than attempt to defend an indefensible and frivolous position, we hope that you will instead, in accordance with the U.S. and Idaho constitutions, federal law, state law, Supreme Court decisions interpreting the same, and the U.S. Attorney General guidelines (Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668 (Oct. 26, 2017)), amend the Orders to treat religion as “essential.”

Sincerely,

BOYLES LAW, PLLC



D. Colton Boyles, Esq.

Cc: Scott Herndon  
Josh Jones  
Michael Gulotta  
Nathan MacPherson  
Scott MacPherson

Encl.: Arizona Attorney General Opinion No. 120-008 (April 30, 2020).



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>April 30, 2020</p>	<p>No. I20-008 (R20-008)</p> <p>Re: Application of Executive Order 2020-18 to Religious Worship</p>
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To: The Honorable Kelly Townsend  
Representative  
Arizona House of Representatives

**Questions Presented**

1. In reference to the right to “peaceably assemble” protected under the US Constitution, would attendance at a church service constitute an “essential activity” and be considered a permissible activity under Executive Order 2020-18?
2. Would parishioners be required to maintain social distancing by being 6 feet apart?
3. If they are required to maintain 6 feet apart and do not, under what law would they be in violation of and what punishment would they be subject to?

**Summary Answer**

Attendance at a church service is an “essential activity” under Executive Order 2020-18. The Executive Order does not impose an absolute six-foot social distancing requirement on essential activities that are constitutionally protected. Instead, it provides flexibility to individuals

engaged in constitutionally protected activities by encouraging such activities to be “conducted in a manner that provides appropriate physical distancing to the extent feasible.” That being said, nothing in this opinion should be construed to require or recommend places of worship to reopen; that decision is beyond the scope of a legal opinion.

### **Background**

On March 11, 2020, Arizona Governor Doug Ducey issued a Declaration of Emergency declaring a State of Emergency throughout Arizona due to the COVID-19 outbreak. Pursuant to that State of Emergency, on March 30, 2020, Governor Ducey issued Executive Order 2020-18, which lists certain “Essential Activities” exempted from the order’s general proscription that “all individuals ... shall limit their time away from their place of residence or property.” Ariz. Exec. Order No. 2020-18 § 2 (March 30, 2020) (“Executive Order”).<sup>1</sup> These essential activities include “Engaging in constitutionally protected activities such as speech and religion ... provided that such is conducted in a manner that provides appropriate physical distancing to the extent feasible.” *Id.* § 4(f).

### **Analysis**

#### **I. Attending Places of Worship Is an “Essential Activity”**

Attendance at a place of worship is clearly an “essential activity” under Executive Order 2020-18. The Executive Order expressly provides that essential activities include “[e]ngaging in constitutionally protected activities such as speech and religion.” Executive Order § 4(f).

#### **II. Social Distancing for Constitutionally Protected Activities**

The Executive Order exempts essential activities from the requirement that individuals limit their time away from their place of residence or property. Executive Order §§ 2, 6. Gener-

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<sup>1</sup> On April 29, 2020, the Governor issued Executive Order 2020-33, to which this opinion is also applicable.

ally, when individuals engage in essential activities outside their residence or property, “they shall *to the extent possible* maintain physical distancing of *at least six feet* from any other person, consistent with guidance from the CDC.” Executive Order § 5 (emphasis added). The Executive Order, however, provides even wider latitude when constitutionally protected activities “such as speech and religion” are involved. For constitutionally protected activities, the Executive Order does not mandate a set distancing requirement. Instead, it provides that such protected activities be “conducted in a manner that provides *appropriate* physical distancing *to the extent feasible*.” Executive Order § 4(f) (emphasis added). This flexible language recognizes that what may be appropriate or feasible in one context may not be appropriate or feasible in another context. As such, the Executive Order encourages individuals to act responsibly based on individual circumstances. The flexible language also helps ensure that appropriate leeway is provided to individuals engaged in activities afforded heightened protections under both federal and state constitutions. No doubt recognizing the importance of these protections—even when faced with an emergency declaration—the “intent of th[e] Executive Order” expressly includes “protecting people’s rights ... to the greatest extent possible.” Executive Order § 14.

### **III. Applicable Penalties for Constitutionally Protected Activities**

As set forth above, the Executive Order does not impose an absolute six-foot social distancing requirement for essential activities that are constitutionally protected, but rather requires “appropriate physical distancing to the extent feasible.” *Id.* § 4(f).

### **Conclusion**

Executive Order 2020-18 proclaims that a state of emergency exists due to COVID-19 and implores all Arizonans to use their best judgment in suspending public activities that can be delayed, for the purposes of protecting the individual and the public as well as preserving vital

healthcare resources. Nevertheless, during times of pandemic and other crises, “[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” Ariz. Const. art. 2, § 1. Therefore, the Executive Order is properly interpreted to exempt constitutionally protected activities as “essential” and provides flexibility in social distancing.

Mark Brnovich  
Attorney General