

May 6, 2020

VIA EMAIL

William C. McKinney, General Counsel
North Carolina Office of the Governor
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Dear Mr. McKinney:

On behalf of Hope Baptist Church and their congregants, Ashok and Sona Noah, thank you for your May 1 letter and explanation. Our clients appreciate the Governor's guidance on outdoor church services and your written acknowledgement that such services do not violate Executive Order No. 121, provided participants observe social distancing protocols. In view of the Governor issuing Executive Order No. 138, which will go into effect at 5 PM ET on May 8, 2020, we seek your clarification regarding the circumstances under which it is "impossible" to hold outside any of the activities (to include worship services, retail services, and government operations) excluded from the Governor's ban on Mass Gatherings, as relevant to sections 6.A and 6.C. As the Order now stands, our client does not know whether or under what conditions the Governor believes outdoor church services would be "impossible" such that the church could hold indoor services without threat of criminal prosecution.

Your May 1 letter begins with an attempt to portray Executive Order No. 121 as a law of general applicability. You write that "[t]he only limitation applicable to [religious] 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." Examination of the text of Executive Order No. 121 demonstrates that the order is not neutral; to the contrary, it specifically burdens religious practice in North Carolina.

Section 2 of Executive Order No. 121 contains thirty numbered paragraphs which identify and describe "Essential Businesses and Operations" that are allowed to operate in the midst of the State's response to COVID-19. The Governor's order specifically exempts from the mass gathering restrictions "any COVID-19 Essential Business or Operation as defined in this Executive Order." Exec. Order No. 121, § 3.A.2. The *only* Essential Businesses and Operations subject to the Governor's mass gathering restrictions are religious entities and funeral services. *Id.* § 2.C.10; § 2.C.29. Even there, the Governor imposed a lesser burden on funeral services than on religious entities, allowing up to fifty people to attend funeral services. *Id.* § 3.A.3. At the same time, the Governor allows for gatherings at large retail stores, liquor stores, within banks, and law firm offices.

Executive Order No. 138 continues the Governor's restrictions on religious practice throughout North Carolina. The order allows "[p]eople . . . [to] leave their homes to travel to and from a place of worship or exercise any other rights protected under the First Amendment to the U.S. Constitution and its North Carolina counterparts." Exec. Order No. 138, § 2.C.7. The Governor further excluded from the definition of his Mass Gathering ban "gatherings for health and safety, to look for and obtain goods and services, for work, for worship, or for receiving governmental services" as well as "normal operations at airports, bus and train station stops, medical facilities, shopping malls, and shopping centers." *Id.* § 6.A. However, the Governor provided that gatherings allowed under the aforementioned exclusions "shall take

place outdoors unless impossible.” *Id.* § 6.C.

The dictates in Executive Order No. 138 are vague and unclear. It is theoretically possible for many of the activities allowed under the Mass Gatherings provision of the Governor’s order to occur outdoors. Retail stores could move their inventory into parking lots. Medical examinations could happen outside. Passengers could board airplanes on the tarmac at Raleigh-Durham International Airport. The General Assembly could theoretically meet outdoors. The North Carolina Supreme Court could also hold oral arguments outside. The Governor, his staff and his executive agencies could theoretically discharge their duties outside on the grounds of the State Capitol. You could pen a response to this letter under the shade of one of Raleigh’s imposing oaks while enjoying a refreshing North Carolina springtime breeze. Every one of the activities listed in § 6.A could *possibly* be conducted outdoors, however impractical. One must ask: is it truly the Governor’s design to force such activities outdoors to comply with his order? Has the Governor directed his agencies to move their operations outdoors? Are our state’s ABC Stores moving to curbside pickup only?

The question is not academic for our clients. Executive Order No. 138 is a criminal law. *Id.* § 13.B. As the Supreme Court has explained, “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). A law is unconstitutionally vague if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Id.* (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)). The impossibility provision in section 6.C of Executive Order No. 138 is virtually impossible to apply. The provision is unconstitutionally void for vagueness on its face.

Any attempt to impose a saving construction on the impossibility provision raises more constitutional problems. Perhaps the term “unless impossible” in subsection 6.C really means “unless impractical.” Assume for argument that it does. What then? Practically, it appears the only activity in subsection 6.A forced indoors would be worship services. What this means is that while Executive Order No. 138 gives some lip service to our clients’ constitutional rights, it ends in the same place as Executive Order No. 121—burdening houses of worship more than similarly-situated secular places of businesses. Our clients, like other believers throughout North Carolina, are left asking themselves whether the Governor’s orders reflect “animus toward the class it affects,” *Romer v. Evans*, 517 U.S. 620, 632 (1996), namely religious North Carolinians.

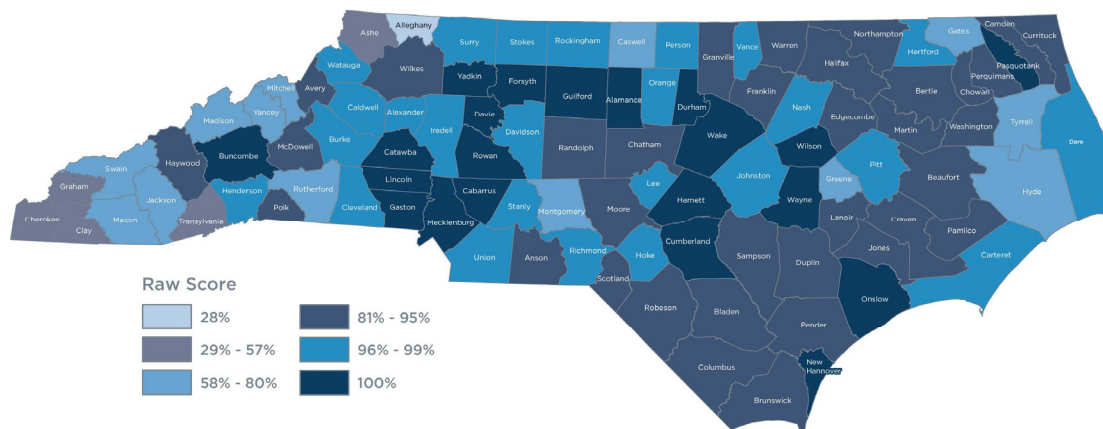
By their plain or otherwise vague terms, Executive Order Nos. 121 and 138 single out religious entities for different treatment. The Governor’s decision to engage in such discrimination against religious practice subjects his orders to strict First Amendment scrutiny. For the order to survive a constitutional challenge, the State must demonstrate the Governor’s order advances a “compelling governmental interest” and that it is “narrowly tailored to advance that interest.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532-33 (1993).

At the very least, our clients do not believe the Governor’s orders meet the narrowly tailored prong of the compelling government interest test. Your letter attempts to justify the State’s discriminatory treatment of indoor religious services with a reference to “studies” that show COVID-19 “has particularly pernicious effect[s] . . . among people who are otherwise in close proximity and relatively stationary for extended periods of time.” You suggest these proximity and mobility factors are the reason why indoor worship services and movie theatres are closed while certain retail services are

allowed to continue.

As a threshold matter, we take issue with your conflating the treatment of churches, cinemas and theatres. Neither the right to visit a movie theatre or the cinema are enumerated constitutional rights.¹ Your explanation also ignores what we have all seen and experienced—lines of stationary people waiting for long periods of time to access stores, parks or other “Essential Businesses and Operations.” You also assert that there has been no imposition on my clients’ free exercise rights because Hope Baptist Church has live streamed services. As stated in my last letter, the importance of in-person fellowship and worship is a sincerely held religious belief of my clients and of many other churches. Your statement also assumes that all congregants have live streaming capabilities at home. That assumption is simply unsupported by any evidence. The figures below depict the availability of broadband internet in North Carolina as compared to COVID-19 infections.

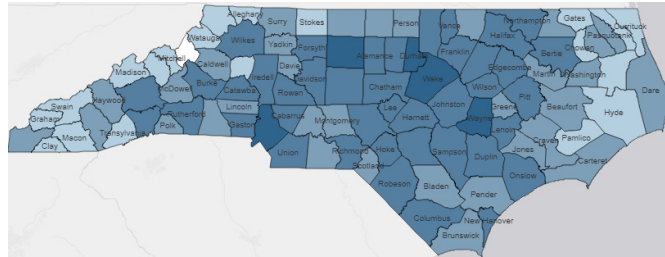
Figure 1. Map of Broadband Internet Availability in North Carolina²



¹ Nor is the right to drink alcohol, *see* U.S. Const. Amend. XXI, or practice other unenumerated constitutional rights subject to less scrutiny which otherwise enjoy the privilege of falling within the penumbras and emanations of the protective force of the Governor’s orders.

² North Carolina Dep’t of Information Technology, *Broadband Availability Recommendations*, <https://www.ncbroadband.gov/connectingnc/broadband-availability/> (last visited May 6, 2020).

Figure 2. Map of COVID-19 Cases in North Carolina by County³



A comparison of the two figures above and related data show that lack of access to the internet is a significant issue in certain counties in North Carolina with very few COVID-19 cases and zero COVID-19-related deaths. (As of this writing, Alexander, Alleghany, Anson, and Ashe counties have 49 COVID-19 cases and 0 confirmed deaths, but are treated the same as Mecklenberg and Wake counties.) Further, I would expect that there are multiple churches within Wake County alone that are not able to live stream their services and that there are very many individuals within our State without the means to receive live stream services. Live streaming is not a narrowly tailored accommodation to the Governor shutting down houses of worship throughout the entire State of North Carolina. As the Governor said in another context, “[l]ocal governments are closest to the people they represent, and I believe they should be able to make these decisions on their own.” Roy Cooper, *I’m doing my part on HB2; GOP must too*, Feb. 15, 2017, <https://www.charlotteobserver.com/opinion/op-ed/article132925474.html>. The same is true here, particularly in view of the burdens placed on fundamental constitutional rights.

Regarding the cited research papers, the studies do not support the Governor’s orders. As an initial matter, the publication dates you provide for the studies cited in your letter are all post-March 2020. At the very least, this means the studies are ex post justifications for Executive Order No. 121 which went into effect on March 27, 2020. The studies are also cited nowhere in Executive Order No. 138. Further, we have conducted an initial review of the cited studies and found they do not support many of the propositions you advance. Interestingly, the Qian study you cite found that “[h]ome outbreaks were the dominant category . . . followed by transportation.” Hua Qian et al., *Indoor Transmission of SARS-CoV-2*, at 1 (Apr. 7, 2020), available at <https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1.full.pdf>.⁴ Despite this, Executive Order No. 121 commands North Carolinians to “stay at home.” The Governor’s order also expressly

³ North Carolina Dep’t of Health and Human Services, *NC Cases COVID-19 By Counties/Map*, <https://www.ncdhhs.gov/divisions/public-health/covid19/covid-19-nc-case-count#by-counties-map> (last visited May 6, 2020).

⁴ Additional data from New York confirms home outbreaks are happening elsewhere. Today Governor Andrew Cuomo announced the finding that 66% of new COVID-19-related hospital admissions were for patients who were sheltering in place. Noah Higgins-Dunn & Kevin Breuinger, *Cuomo says it’s ‘shocking’ most new coronavirus hospitalizations are people who had been staying home*, CNBC (May 6, 2020), <https://www.cnbc.com/2020/05/06/ny-gov-cuomo-says-its-shocking-most-new-coronavirus-hospitalizations-are-people-staying-home.html?fbclid=IwAR2jLCDOZbMiw-JjvWTINVFEq8aBxVmR3kMsuzFznqGisAsWN8Ei6AvTRvk>. The Governor says this State’s response to COVID-19 is “data driven.” Our clients hope that the Governor will consider this data. In any event, it should go without saying that the people of this State are entitled to a full, transparent accounting of all of the evidentiary support the Governor has for the unprecedented sacrifices he is demanding of the citizens he was elected to serve.

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allows for the continued operation of airlines and commercial transportation operations such as buses with no limits on mass gatherings. Exec. Order No. 121 § 2.C.21. North Carolinians can also congregate at laundromats. *Id.* § 2.C.18. Nothing in Executive Order No. 138 changes this state of affairs. People are allowed to congregate in government office buildings, law firm and accounting offices, airports, and retail stores under the Governor's order, but not in houses of worship.

Your assertion that a significant portion of congregants are "older and more vulnerable to COVID-19" is unsupported by any evidence. The Governor's orders do not restrict only at risk or older congregants; it restricts all congregants. Regarding our clients, the significant majority of congregants are not high-risk individuals. Your letter appears to view widows, orphans, and other economically vulnerable people of concern to our clients as being "high-risk" by definition. That belief is unsupported by any evidence at all, much less the required showing to meet the challenge of the compelling government interest test.

This unequal treatment of religion cannot be squared with the Constitution's guarantee of religious freedom. Our clients seek the right to gather together while observing the same protocols applicable to other Essential Businesses and Operations. Your letter, as the Sixth Circuit recently observed in striking down some of the Commonwealth of Kentucky's restrictions on religious gatherings, does not provide a "good reason . . . for refusing to trust the congregants [of churches] who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same." *Maryville Baptist Church, Inc. v. Beshear*, Case No. 20-5427 (6th Cir. 2020) (slip op. at 8). Like the religious practitioners in *Maryville Baptist Church*, our clients seek the right to practice their faith on similar terms as secular entities. They do not seek special treatment, only to be treated fairly and evenhandedly. Our clients reiterate their request that the Governor remove all doubt and confirm that churches are allowed to conduct indoor services under the same social distancing protocols applicable to all other "essential businesses," as set forth in his orders regarding occupancy limits and social distancing.

We trust the Governor will promptly recognize and confirm our client's First Amendment rights to gather in worship. Please do not hesitate to contact me should you have any questions or desire to discuss these issues.

Sincerely,



Anthony J. Biller

cc: Hon. Governor Roy Cooper (Roy.Cooper@nc.gov)
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