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ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL April 30, 2020	No. I20-008 (R20-008) Re: Application of Executive Order 2020-18 to Religious Worship
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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”).¹ 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-

¹ 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.

A handwritten signature in blue ink, appearing to read "Mark Brnovich", with a long horizontal flourish extending to the right.

Mark Brnovich
Attorney General