



LEGAL MEMORANDUM

FROM: Pacific Justice Institute
TO: Pastors and Church Leaders
DATE: March 18, 2020
RE: Governmental Authority to restrict church and other gatherings

INTRODUCTION

The unprecedented restrictions on everyday life resulting from COVID-19 (novel coronavirus) have prompted many questions from church leaders as to their legal obligations and responsibilities. Pacific Justice Institute (PJI) has been advising many church leaders navigating this crisis. In this resource, we will provide the legal background for the directives so church leaders can make wise, informed decisions for their congregations. Note that this advice is focused on California, though the underlying principles will be applicable nationwide.

BACKGROUND

On March 11th Governor Newsom updated California's policy and guidance stating that gatherings of 250 or more persons should be canceled or postponed, gatherings of under 250 should proceed only with "social distancing" of 6 feet between persons, and gatherings of high-risk individuals should be limited to no more than 10. The next day on March 12th Governor Newsom issued an Executive Order directing, among other things, that all residents of the State are to heed such guidance.

The following week, the entire Bay Area was put under "shelter in place" orders that essentially banned church and most other gatherings. Orange County banned gatherings of any size on March 17, and Sacramento County has taken a similar stance.¹ Although President Trump has also issued Executive Orders in coordination with the Centers for Disease Control, these have so far been a less direct factor in the bans of mass gatherings than have state and local orders.² As a practical matter, the bans affecting churches are most likely to be enforced locally, pursuant to state law. State law will therefore be the primary focus of this memo.

LEGAL DISCUSSION

Where does the Governor derive the authority to take drastic actions like banning core First Amendment activities including church gatherings? California authorizes emergency declarations through the Emergency Services Act (ESA), Gov't. Code §§ 8550-8669.7.

¹ There are numerous exemptions in these directives for "essential" functions, but they do not relate to church services and are beyond the scope of this memo.

² On a federal level, emergency declarations are governed by the Stafford Act, 42 U.S.C. § 5121 et seq. There appear to be no cases involving the Stafford Act and the First Amendment.

Combating an epidemic is one of the specified reasons for issuing such a declaration. Gov't. Code § 8558.

The ESA is a sprawling statutory scheme, including dozens of individual sections. It gives the Governor extremely broad power to issue orders, suspend laws and regulations, and even commandeer private property. Local officials have similar, derivative powers.

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Not quite. In one of the leading cases interpreting the ESA, the California Supreme Court opined, “Thus, the Emergency Services Act makes clear that in situations of ‘extreme peril’ to the public welfare the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties.” *Macias v. State* (1995) 10 Cal. 4th 844, 854.

There are at least two limitations on emergency orders as they relate to the First and Second Amendments. Gov't. Code § 8572; Gov't. Code § 8571.5. One provision expressly bars the Governor from taking over the press, and the other prevents seizure of firearms. Unfortunately, there are no reported decisions in which the courts have had occasion to apply the ESA in a context like the present. Thus, it is impossible to say whether a court would uphold the bans on mass gatherings. Based on our more than 20 years' experience litigating in the federal and state courts in California, as well as in many other states, we believe it is highly likely a court would defer to government officials in this crisis—at least in the short term—and uphold these bans notwithstanding the First Amendment.

Churches will have a variety of responses to such directives. Beyond the legal issues presented, the guidance and overarching health crisis are spiritual challenges to be wrestled with by pastors and, where applicable, the eldership or other ecclesiastical authority of a church.

Many churches will comply. In many ways, churches today are better positioned than many other entities to deal with this crisis. Most churches now broadcast their sermons and/or services online, and tithing can also usually be done online. Churches may possibly spread out their services throughout the week and have more services on the weekend, in order to reduce the total number of congregants at one time. Home-based small groups within churches may be well positioned to take on a greater role in the absence of larger gatherings. In many ways, this would be a return to the church's New Testament roots. This crisis could also present tremendous service opportunities such as delivering groceries to the elderly, becoming better acquainted with neighbors and their needs, sharing resources and offering prayer for the sick and those in our immediate surroundings.

Some church leaders may feel they cannot in good conscience cancel a worship service, or exclude people from a small group gathering in order to achieve prescribed numeric limitations. They may believe that the admonition not to forsake the assembling of ourselves together,

laying hands on the sick, and similar commands, do not yield to bans on mass gatherings or health crises. Throughout history, the church has met secretly and when necessary illegally, from the catacombs of Rome to the barns of Puritan England and Chinese house churches today. These are sobering decisions that church leaders should not undertake lightly. If a church is hierarchical or has a local body of elders, the decision should be made in consultation with those authorities and not by the pastor alone. If so, such churches should be aware that failure to comply with an Executive Order under the ESA is a misdemeanor. Gov't. Code § 8665. The penalties under that section are a \$1,000 fine, six months imprisonment, or both. Slightly lesser penalties are prescribed for violation of local health directives, under Cal. Health & Safety Code § 120295.

Depending on the specific facts and circumstances, PJI may be willing to defend church leaders who are fined and jailed for following their consciences. The legal outcome of such a prosecution would be highly uncertain, and it must not be assumed that the First Amendment would provide a complete defense to such prosecutions. As with all criminal cases, PJI's defense does not necessarily constitute philosophical, theological, or public policy agreement with a defendant's position.

Civil liability for meeting in defiance of a ban on mass gathering should also be taken into account. A church in the Sacramento area is now under scrutiny for having several of its attendees afflicted with coronavirus. (It is unclear at this point whether the church had any fault or could have prevented this with reasonable precautions.) It is far from clear what kind of liability a church might have if it met in violation of the law and members subsequently became sick. It is therefore strongly recommended that churches consult their liability insurance carrier to ascertain the scope and limits of their coverage prior to taking such actions.

Aside from government restrictions, and for those not yet subject to a mass gathering ban, church leaders do have the authority to take steps such as directing elderly or high-risk congregants to avoid church gatherings. Many churches are also making hand sanitizer available, discouraging handshakes, and cleaning more often than usual. Churches may also wish to require masking or make them available. While the benefits of mask-wearing have been debated by experts, many doctors continue to advocate mask-wearing.

CONCLUSION

There is reason to be concerned about governmental overreach during a state of emergency. As noted above, statute and precedent provide a basis for raising First Amendment arguments during this crisis. At the same time, it seems most likely that a court would uphold almost any shutdown order by the Governor during the present crisis as it relates to churches, at least in the short term. PJI staff are taking appropriate precautions, but we are not giving in to fear. We remain here to serve the Body of Christ through every crisis. Due to all of the disruptions this crisis is creating in many different areas of our lives, our response times to non-urgent requests may be somewhat delayed as we prioritize the most urgent needs of churches, ministries, and clients.

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