



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout Illinois
DT: March 30, 2020
RE: Governmental Authority to Restrict Church and Other Gatherings in Illinois

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 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 in Illinois.

BACKGROUND

On March 9, 2020, Governor J.B. Pritzker declared a state of emergency in Illinois in response to the global coronavirus pandemic. Soon after, Governor Pritzker issued a series of executive orders aimed at limiting the spread of the virus. Among these is Executive Order No. 2020-10 (the “Order”). Issued on March 20, the Order requires all persons living in Illinois to stay at home or at their place of residence through April 7, allowing them to leave only for essential activities, essential government functions, or to operate essential businesses and operations.¹ The Order defines “essential activities” to include all tasks essential for one’s health and safety.

The Order also prohibits gatherings of more than 10 people except in certain exempted circumstances. Fairly read, this applies to religious assemblies. Section 1.8 of the Order allows people to leave their homes to work for or obtain services from “Human Services Operations.” If broadly construed, that category of “Human Services Operations” may include churches, especially since churches often provide much needed food, supplies, and/or services for the economically disadvantaged, elderly, children, and other persons in need of financial, mental, or emotional support. If a church has such a ministry, that aspect of the church operations can remain open. Furthermore, Section 1.12.c of the Order defines “Essential Businesses and Operations” to include “[o]rganizations that provide charitable and social services,” including religious organizations.

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

¹ See <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf> for more details.

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 thus 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? Title 20, § 3305/7 of the Illinois Compiled Statutes declares that “[i]n the event of a disaster . . . the Governor may, by proclamation declare that a disaster exists.” The worldwide COVID-19 pandemic is precisely the sort of disaster the Governor may declare. *See* 20 ILCS 3305/4 [defining “Disaster” to mean “an occurrence or threat of widespread or severe damage, injury or loss of life . . . resulting from any natural or technological cause . . . requiring emergency action to avert danger or damage, *epidemic* . . . (and) *public health emergencies*” (emphasis added)]. Subsection (8) of 20 ILCS 3305/7 confers upon the Governor power to “[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area, and *the occupancy of premises therein*” (emphasis added).

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Temporarily, yes – the key word being “temporarily”. Under 20 ILCS 3305/7, the Governor may only exercise the emergency powers allotted to him for a period of 30 days. The Order itself does not even last that long, as it only extends through April 7 – a period of less than three weeks. This is not to say that the Governor cannot extend the state of emergency if need be; however, the 30-day limitation helps ensure that any infringement on civil liberties is minimal (i.e., narrowly tailored to serve Illinois’ compelling government interest in ensuring the health and safety of its citizens without infringing on individual rights more than is necessary).

Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, including Illinois, PJI believes it is highly likely a court would defer to government officials in this crisis — at least in the short term — and uphold bans on mass religious gatherings notwithstanding the First Amendment. This is because, as stated above, Illinois does have a compelling interest in ensuring the health and safety of its citizens, and its actions are not motivated by anti-religious animus. However, the longer the state of emergency lasts, the less likely courts are to view infringements on the right to gather for religious purposes as a temporary emergency measure.

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.

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.

Many churches in Illinois have already suspended services and other weekly gatherings – Bible studies, youth-group meetings, etc. – due to the Order’s restriction on gatherings of more than 10 people. 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 worship services or exclude people from small-group gatherings in order to achieve prescribed numeric limitations. They may believe that the biblical 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.

Depending on the specific facts and circumstances, PJI may be willing to defend church leaders who are fined and jailed for following their consciences. Please know, however, that should the violation of the Governor’s stay-at-home order become prosecutable, as is the case in some other states, the legal outcome of such prosecution would be highly uncertain, and it must not be assumed that the First Amendment would provide a complete defense to such prosecutions. Discretion is thus very much in order (Romans 13:1-2). As with all cases, PJI’s defense does not necessarily constitute philosophical, theological, or public policy agreement with a defendant’s position.

Churches should also take into account potential civil liability for meeting in defiance of a ban on mass gatherings. 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. Bear in mind, too, that elderly persons are especially vulnerable to the coronavirus, as the death toll is highest among people aged 70 or older. PJI thus strongly advises churches to consult their liability insurance carriers to ascertain the scope and limits of their coverage prior to taking such actions. PJI also strongly advises churches providing religious services to observe the social distancing requirements set forth in Section 1.15 of the Order, including designating six-foot distances to separate attendees, providing hand sanitizer and other sanitizing products, providing special services for the elderly

and other vulnerable populations, and live-streaming or posting videos of services so congregants can remain at home while still having their spiritual needs met.

Aside from government restrictions, 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 congregants to wear masks or make masks available to congregants. 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. PJI remains 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.

To learn more about what PJI is accomplishing on behalf of churches and individuals in Illinois, please visit pacificjustice.org.

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