



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders
DT: March 30, 2020
RE: Updated Guidance on Church Responses to COVID-19 Restrictions in New Jersey

INTRODUCTION

The unprecedented crisis and response to COVID-19 (novel coronavirus) is prompting near-daily changes in the legal landscape and new parameters within which churches must operate. Pacific Justice Institute held a teleconference for pastors and released guidance for churches.

These unprecedented restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. PJI has been advising many church leaders navigating this crisis. In order to be as precise as is possible under the circumstances, this resource will focus primarily on New Jersey law.

BACKGROUND

On March 16, 2020, Governor Philip Murphy issued an executive order¹ directing that “all gatherings shall be limited to 50 persons or fewer, excluding normal operations at airports, bus and train stations, medical facilities, office environments, factories, assemblages for the purpose of industrial or manufacturing work, construction sites, mass transits, or the purchase of groceries or consumer goods.” Interestingly, there was no “end date” for the order. This order to cancel gatherings in excess of 50 persons did not specify whether or not it applied to houses of worship. Nonetheless, in response to Governor Murphy’s order, many churches across New Jersey temporarily suspended their regularly scheduled services and activities – including Bible studies, youth group meetings, and choir rehearsals – in order to help stop the spread of coronavirus.

As numbers of confirmed coronavirus cases continued to rise, Governor Murphy issued a series of follow-on executive orders.

On March 21, the Governor ordered that all New Jersey residents shall remain home or at their place of residence unless they are (1) obtaining goods or services from essential retail businesses; (2) obtaining takeout food or beverages from restaurants, other dining establishments, or food courts; (3) seeking medical attention, essential social services, or assistance from law enforcement or emergency services; (4) visiting family or other individuals with whom the resident has a close personal relationship, such as those for whom the individual is a caretaker or romantic partner; and (5) reporting to, or performing, their job. Moreover, gatherings of individuals, such as parties, celebrations, or other social events are deemed cancelled, unless

¹ Executive Order 104 (Mar. 16, 2020).

otherwise authorized by any part of the Order. The brick-and-mortar premises of all non-essential retail businesses must close to the public as long as the Order remains in effect.

The list of essential businesses has the standard government, medical, and retail businesses. The use of these businesses must include the practice of mandated social distancing. All recreational and entertainment businesses must close to the public as long as the Order remains in effect. The list of non-essential businesses does *not* include churches.

Note for the purpose of potential ministry: the Order sets forth at Paragraph 18: “Nothing in this Order shall be construed to limit, prohibit, or restrict in any way access to essential services for low-income residents, including but not limited to food banks.”²

On March 25, Governor Murphy signed an executive order requiring child care centers to close by April 1st *unless* they are solely serving children of essential workers.³

Thus, taken as a whole the executive orders and related guidance:

- Do not specifically require churches to shut their doors;
- Do not allow any gatherings, worship related or otherwise, of more than 50 people; and
- *May forbid any gathering of any size for any reason*, including worship-related gatherings.

Penalties for violation of these executive orders could result in a term of imprisonment of up to six months and a fine of up to \$1,000.00.

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.⁴ 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? The Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, N.J.S.A. 38A:2-4, and all amendments and supplements thereto, confer upon the Governor certain emergency powers. “The Governor, in consultation with the commissioner and the Director of the State Office of Emergency Management, may declare a public health emergency.”⁵ The worldwide COVID-19 pandemic is such an emergency. On March 9, Governor Murphy issued an executive order declaring a Public Health Emergency and State of Emergency exist in the State of New Jersey.⁶ The law provides that any public health

² Executive Order 107 (March 21, 2020).

³ Executive Order 110 (March 25, 2020).

⁴ 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.

⁵ NJ Rev. Stat. § 26:13-3 (2013).

⁶ Executive Order 103 (Mar. 9, 2020).

emergency declared pursuant to this act shall be terminated automatically after 30 days unless renewed by the Governor.

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Temporarily, yes. The Governor “may temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency.”⁷ However, the key word here is “temporarily.” New Jersey law requires that “no suspension or directive shall be made for a period in excess of thirty days;” any extension by the Governor requires a “reconsideration of all of the relevant facts and circumstances” for each 30-day extension. Executive orders at a municipal or state level remain, always, subject to the New Jersey Constitution, the U.S. Constitution, and federal law.

None of the orders issued by Governor Murphy have dates of expiration. Thus, pursuant to law, they have a 30-day limit, subject to extension by the Governor. Given that the neighboring state of New York is undergoing a severe (as compared with other states) ongoing increase of cases, it is unlikely that New Jersey will terminate these executive orders or its state of emergency before May.

Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, 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 New Jersey has 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.

Many churches have already complied with Governor Murphy’s executive orders, even before they were mandates, and will continue to do so. 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 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 may 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 together, laying hands on the sick, and similar commands do not yield to bans on mass gatherings or health crises. PJI has not and does not advise any violation of law at a federal, state or local level. PJI

⁷ NJ Rev. Stat. § 26:13-3, Section (3)(a)(4) (2013).

also has not and cannot advise an individual to violate his personal conscience. 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 the legal outcome of such a prosecution would be highly uncertain, and it must not be assumed that the First Amendment would provide a partial or complete defense to such prosecutions. Title 26 of NJ Revised Statutes, for instance, allows that the “governor, by executive order, may issue any directive during a state disaster emergency . . . necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.” As stated above, defying Governor Murphy’s executive orders during this state of emergency carries inherent legal risks and consequences, including the possibility of fines and any criminal punishments that may later become applicable. Discretion is thus very much in order (Romans 13:2). 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. According to State officials, New Jersey’s total known cases of the coronavirus increased to at least 6,876, including at least 81 known deaths. Officials announced another 2,492 new positive test results on March 26, 2020 — by far the State’s largest single-day increase since the outbreak.⁸ It is far from clear what kind of liability a church might have if it met in knowing and willful violation of the law and members subsequently became sick. The ultimate civil financial consequences may well exceed those fines that can be levied for violation of the Governor’s Executive Orders. 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.

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 Governor Murphy during the present crisis as it relates to churches, at least in the short term.

⁸ <https://www.nj.com/coronavirus/2020/03/nj-coronavirus-outbreak-hits-6876-cases-with-81-deaths-another-2492-positive-tests-in-huge-single-day-increase.html>.

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 New Jersey and across the country, please visit www.PJI.org.

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