



## LEGAL MEMORANDUM

**FR:** Pacific Justice Institute  
**TO:** Pastors and Church Leaders Throughout Nevada  
**DT:** March 25, 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 has been advising many church leaders navigating this crisis. In this resource, we will provide the legal background for the directives so church leaders in Nevada can make wise, legally informed decisions for their congregations.

### BACKGROUND

On March 20, 2020, Nevada Governor Steve Sisolak issued an emergency directive ordering all non-essential businesses to cease operations, due to the coronavirus pandemic (the Mandatory Order).<sup>1</sup> The emergency directive also ordered essential businesses continuing operations to follow the guidelines issued by the Centers for Disease Control (CDC).<sup>2</sup> Earlier in the week, Governor Sisolak had announced the creation of the Nevada Risk Mitigation Initiative,<sup>3</sup> a website collaboration with the Nevada Department of Health and Human Services (DHHS), to issue non-binding guidance.

On March 20, to accompany the Mandatory Order, the Governor also signed and endorsed a set of Emergency Regulations from the Nevada DHHS (the Emergency Regulations). The Emergency Regulations identify a list of businesses deemed non-essential and thus required to cease operations.<sup>4</sup> The Emergency Regulations do not list houses of worship or faith-based communities as entities required to close. As such, faith-based communities could “continue operations, not to include retail sales, if they are able to implement social distancing safeguards for the protection of their employees,” and:

- Perform operations without contact with the Nevada general public; or
- Provide services consistent with social-distancing goals of a minimum of six feet of separation between individuals; or

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<sup>1</sup> Declaration of Emergency for COVID-19 Directive 003 (Mar. 20, 2020).

<sup>2</sup> CDC, “Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission” (Mar. 12, 2020).

<sup>3</sup> See “Nevada Health Response COVID-19 Risk Mitigation Initiative” (Mar. 18, 2020).

<sup>4</sup> Nevada Dept. of Public Safety, Division of Emergency Management (DEM), Homeland Security, “DEM Emergency Regulations” (Mar. 20, 2020).

- Provide services without causing more than ten members of the Nevada general public to congregate.<sup>5</sup>

The language of the Mandatory Order is consistent with the guidance from the Nevada Risk Mitigation Initiative that although “the Governor cannot and will not say that places of worship should be closed, he strongly urges our faith leaders to find ways to tend to your congregation without bringing them together in person.”<sup>6</sup>

Although not initially required to do so, many churches across Nevada 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.

Nonetheless, on March 24, Governor Sisolak issued a new emergency directive “to address those circumstances where people are engaged in reckless action that endangers the public health of our state.”<sup>7</sup> The newest emergency directive broadly prohibiting all gatherings of the general public of ten or more individuals to further curb the spread of coronavirus.<sup>8</sup> This ban applies very broadly to any gathering of ten or more individuals, regardless of whether they are held indoors or outdoors, or on public property or private property.<sup>9</sup> Places of worship are not specifically exempted from this latest ban on gatherings of ten or more individuals. There is an exemption for individuals working at or patronizing entities defined as “Essential Licensed Businesses.”<sup>10</sup> However, the previously published Emergency Regulations do not include places of worship as such exempted entities.<sup>11</sup>

Therefore, while the March 24 ban on gatherings stops short of ordering churches to close their doors, the ban does appear to bar them from allowing any gathering of ten or more individuals.<sup>12</sup>

Individuals found to be in violation of these orders can incur civil or criminal penalties. This includes prosecution for “crimes against public justice” for resisting an officer, NRS § 199.280,<sup>13</sup> and “crimes against public health and safety,” as a public nuisance. NRS § 202.450.<sup>14</sup> The penalty for resisting a public officer is a misdemeanor;<sup>15</sup> the penalty for a public nuisance is a fine not to exceed \$5,000. § NRS 202.480.<sup>16</sup> Prior to any penalty, Governor Sisolak stated that an

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<sup>5</sup> Declaration of Emergency for COVID-19 Directive 003, § 8 (Mar. 20, 2020).

<sup>6</sup> See “Nevada Health Response COVID-19 Risk Mitigation Initiative” (Mar. 18, 2020).

<sup>7</sup> Nevada Health Response, “Governor Sisolak signs directive related to public gatherings to mitigate spread of COVID-19” (Mar. 24, 2020).

<sup>8</sup> Declaration of Emergency for COVID-19 Directive 007 (Mar. 24, 2020). [NB: As at the date of this Memo’s publication, the Nevada State Governor’s official website had not yet published this most recent emergency directive.]

<sup>9</sup> The ban includes gatherings in privately owned places “where the public has access by right or invitation, express or implied, whether by payment of money or not.”

<sup>10</sup> Nevada Dept. of Public Safety, Division of Emergency Management (DEM), Homeland Security, “DEM Emergency Regulations” (Mar. 20, 2020).

<sup>11</sup> The alternative exemption from the gathering ban for individuals living in the same household also does not appear to provide an exemption for places of worship.

<sup>12</sup> Declaration of Emergency for COVID-19 Directive 007 (Mar. 24, 2020).

<sup>13</sup> NRS § 199.280.

<sup>14</sup> NRS § 202.450. Public Nuisance includes a “crime against the order and economy of the State,” NRS § 202.450(1) includes acts and omissions that “engages the safety [and] health . . .” NRS § 202.450(3)(a).

<sup>15</sup> NRS § 199.280. If any type of weapon is used in this resistance, however, the charge will be a felony.

<sup>16</sup> NRS § 202.480.

offending individual would first receive a warning from the police.<sup>17</sup> Governor Sisolak authorized all enforcement agencies and all local, city, and county governments in Nevada to enforce this ban.<sup>18</sup>

Although President Trump has also issued Executive Orders in coordination with the CDC, these have so far been a less direct factor in the bans of mass gatherings than have state and local orders.<sup>19</sup> 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 Nevada Revised Statutes (NRS) Section 414 provides that the Governor may determine the threat or existence of an emergency is such that state agencies require assistance in order “to save lives, protect property and protect the health and safety of persons in this state.” NRS §§ 414.035, 414.045.<sup>20</sup> The worldwide coronavirus pandemic is such an emergency. When the Governor makes this determination, the “existence of such an emergency or disaster may be proclaimed by the Governor.” NRS 414.070.<sup>21</sup> On March 12, Nevada Governor Sisolak issued a Declaration of Emergency in Nevada in response to the recent outbreak of COVID-19.<sup>22</sup>

Upon the declaration of a state of emergency, the Governor has extremely broad powers. These powers include the power to “make, amend, and rescind necessary orders and regulations” because the “Governor is responsible for carrying out the provisions of this [Section 414].” NRS § 414.060.<sup>23</sup> Local officials have similar, derivative powers under the NRS.<sup>24</sup>

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Temporarily, yes. However, the key word here is “temporarily.” The Governor’s additional powers “are operative only during the existence of a state of emergency . . . [and] terminate upon the proclamation of the termination thereof by the Governor, or the passage by the Legislature of a resolution terminating the emergency . . .” NRS § 414.070.<sup>25</sup>

Governor Sisolak’s most recent emergency directive terminates on April 16, after Easter, unless extended by a subsequent emergency directive.<sup>26</sup> As the April 16 expiration has been used throughout each of the Governor’s seven emergency directives, Nevada is highly unlikely to terminate these executive orders or its state of emergency before the end of April. Based on PJI’s

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<sup>17</sup> Nevada Health Response, “Governor Sisolak signs directive related to public gatherings to mitigate spread of COVID-19” (Mar. 24, 2020). Gov. Sisolak stated that “[t]he intent of this directive is to help, not to punish. While this directive does come with consequences for those who fail to comply, law enforcement has to give warnings before moving to more drastic measures such as civil or criminal penalties.” See also, NRS § 202.470.

<sup>18</sup> Declaration of Emergency for COVID-19 Directive 007, §§ 5, 6 (Mar. 24, 2020).

<sup>19</sup> 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.

<sup>20</sup> NRS § 414.0335; NRS § 414.0345.

<sup>21</sup> NRS § 414.070.

<sup>22</sup> Declaration of Emergency for COVID-19 (Mar. 12, 2020).

<sup>23</sup> NRS § 414.060.

<sup>24</sup> NRS § 414.090; NRS § 414.060(3)(f).

<sup>25</sup> NRS § 414.070.

<sup>26</sup> Declaration of Emergency for COVID-19 Directive 007, § 7 (Mar. 24, 2020).

more than 20 years' experience litigating in federal and state courts in multiple states, including Nevada, 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.<sup>27</sup> This is because Nevada 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 Sisolak's emergency directives, 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 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. NRS Section 414 grants the Governor and state authorities very broad, albeit temporary, power during a declared state of emergency. As stated above, defying Governor Sisolak's emergency directives

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<sup>27</sup> In New Hampshire, a Merrimack County Superior Court judge upheld Gov. Chris Sununu's order to restrict the size of public gatherings to fewer than 50 individuals, because of the COVID-19 pandemic. In so doing, Judge John Kissinger dismissed a lawsuit filed by three religious leaders and activists claiming that the New Hampshire ban violates the state Constitution's protection of the right to assembly and the right of free speech under the First Amendment of the U.S. Constitution. Judge Kissinger has not yet issued his written opinion. "[Judge upholds governor's power to ban large gatherings](#)," *New Hampshire Union Leader* (Mar. 20, 2020).

during this declared state of emergency carries inherent legal risks and consequences, including the possibility of civil and criminal fines. Discretion is thus very much in order (Romans 13:2). Moreover, like all cases involving criminal or civil defense, the actions of the ministry may not necessarily reflect the views of the Pacific Justice Institute.

Churches should also take into account potential civil liability for meeting in defiance of a ban on mass gatherings. According to official state figures provided in Governor Sisolak's evening press conference on March 24, Nevada has over 300 confirmed cases and six deaths due to coronavirus.<sup>28</sup> 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. The ultimate civil and criminal consequences may well extend beyond those listed for resisting an officer and public nuisance. NRS §§ 202.450, 202.48.<sup>29</sup> 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 the Governor during the present crisis as it relates to churches, at least in the short term.

PJI staff – including Emily C. Mimnaugh, PJI's attorney for the state of Nevada and based in Reno – 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 Nevada and across the country, please visit [www.PJI.org](http://www.PJI.org).

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<sup>28</sup> Nevada DHHS, Office of Analytics, "[Nevada Health Response - COVID-19](#)" (Mar. 24, 2020).

<sup>29</sup> [NRS § 202.450](#); [NRS § 202.480](#).

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