



LEGAL MEMORANDUM

FROM: Pacific Justice Institute

TO: Pastors and Church Leaders Throughout New York

DATE: March 25, 2020

RE: Governmental Authority to Restrict Church and Other Gatherings in New York

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 New York can make wise, legally informed decisions for their congregations.

BACKGROUND

On March 12, 2020, New York Governor Andrew Cuomo issued an executive order¹ directing that all large gatherings anticipating attendance in excess of 500 people be cancelled or postponed until April 11 due to the coronavirus pandemic. This order to cancel large gatherings did not initially specify whether or not it applied to houses of worship. Nonetheless, in response to Governor Cuomo's order, many churches across New York 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 dramatically, Governor Cuomo issued a series of follow-on executive orders, including:

- On March 16, a clarification that the ban on large gatherings includes places of worship;²
- On March 16, a reduction in the size of an allowed large gathering from 500 people to 50 people;³

¹ [Executive Order No.202.1](#) (Mar. 12, 2020).

² [Executive Order No.202.3](#) (Mar. 16, 2020).

³ [Executive Order No.202.3](#) (Mar. 16, 2020).

- On March 20, a stay-at-home order for all state residents referred to as “New York on PAUSE”⁴ (except workers at essential businesses⁵), which took effect March 22, at 8 p.m. EST; and
- On March 23, a ban on all non-essential gatherings of individuals of any size for any purpose.⁶

On March 19, official state guidance on workers exempt from the stay-at-home order as essential businesses employees (the Exemption Guidance) clarified that houses of worship were not ordered closed. In the Exemption Guidance, however, it was “strongly recommended that no congregate services be held and social distance maintained.”⁷ The Exemption Guidance thus put houses of worship into their own category, not categorizing them as either essential or non-essential. Because of this, the March 23 ban on all “non-essential” gatherings *may* not apply to gatherings of individuals within churches. Even under that interpretation, however, the ban on any gathering at a worship service anticipating more than 50 participants remains in effect.

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

- Do not require churches to shut their doors;⁸
- Do not allow any gatherings, worship related or otherwise, of more than 50 people;⁹ and
- *May forbid any gathering of any size for any reason*, including worship-related gatherings.¹⁰

Businesses and non-profit entities found to be in violation of these orders will be treated as violations of section 12 of the Public Health Law.¹¹ Penalties include civil fines of up to \$2,000 for each violation, with an increase of up to \$5,000 for subsequent violations; such entities are also subject to immediate and mandatory closure.¹² Criminal penalties for individuals have not yet been established but may follow.

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

⁴ [Executive Order No.202.8](#), (Mar. 20, 2020) (“New York on PAUSE”). New York on PAUSE also includes “Matilda’s Law,” which contains restrictions specific to individuals aged 70 and over. *See* NY Dept. of Health, [NYS on PAUSE](#) (updated Mar. 23, 2020).

⁵ 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.

⁶ “Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time.” [Executive Order No.202.10](#) (Mar. 23, 2020).

⁷ New York State Department of Economic Development d/b/a Empire State Development, “[Guidance on Executive Order 202.6: Guidance for Determining whether a Business Enterprise is Subject to a Workforce Reduction under Recent Executive Orders](#)” (Mar. 19, 2020).

⁸ For Guidance on cleaning and disinfection of facilities, refer to the [NY Dept. of Health Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#).

⁹ All individuals must maintain at least six-feet from others when in public, and entities that remain open must implement rules to facilitate social distancing. NY Dept. of Health, [NYS on Pause](#) (updated Mar. 23, 2020).

¹⁰ [Executive Order No.202.10](#) (Mar. 23, 2020).

¹¹ [Executive Order No.202.10](#) (Mar. 23, 2020).

¹² [NY PBH, § 12](#).

have state and local orders.¹³ 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? Section 28 of Article 2-B of the Consolidated Laws of the State of New York, Executive Law (NY Executive Law) allows that, “Whenever the governor . . . finds that a disaster has occurred or may be imminent . . . he shall declare a disaster emergency by executive order.”¹⁴ The worldwide coronavirus pandemic is such an emergency. On March 7, Governor Cuomo issued an executive order declaring a disaster emergency in the State of New York.¹⁵

In a duly declared state of emergency, Section 29 of Article 2-B of NY Executive Law¹⁶ gives the Governor extremely broad power to issue directives by executive order and to suspend state statutes and local laws and regulations.¹⁷ Local officials have similar, derivative powers under NY Executive Law.¹⁸ City and county charters may also confer emergency powers on local officials. For example, the Charter and Administrative Code of the City of New York, along with the NY Executive Law, authorized Mayor Bill DeBlasio to issue a declaration of local state of emergency for the City of New York on March 12.¹⁹

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.”²⁰ However, the key word here is “temporarily.” NY Executive 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.²¹ The New York State Legislature “may terminate by concurrent resolution executive orders issued under this section at any time.”²² Executive orders at a municipal or state level remain, always, subject to the New York Constitution, the U.S. Constitution, and federal law, as explicitly recognized in NY Executive Law.²³

Each of Governor Cuomo’s executive orders have been issued to extend through the full 30-day period, with April 22 being the latest review date for executive orders issued on March 23. Governor Cuomo has issued multiple executive orders on an almost daily basis since the

¹³ 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.

¹⁴ [EXC Art. 2-B § 28\(1\)](#).

¹⁵ [Executive Order 202](#) (Mar. 7, 2020).

¹⁶ [EXC Art. 2-B § 29](#).

¹⁷ [EXC Art. 2-B, § 29-B](#).

¹⁸ [EXC Art. 2-B, § 29-B](#).

¹⁹ [Emergency Executive Order No. 98](#) (Mar. 12, 2020).

²⁰ [EXC Art. 2-B, § 29-A](#).

²¹ [EXC Art. 2-B, § 29-A](#).

²² [EXC Art. 2-B, § 29-A\(4\)](#).

²³ [EXC Art. 2-B, § 29-A\(1\)](#).

declaration of the state of emergency. New York is therefore highly unlikely to terminate these executive orders or its state of emergency before May.²⁴ 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 York 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 Cuomo'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 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.

²⁴ Governor Cuomo's [Executive Order 202](#) declaring a disaster emergency expires, or is subject to review, no later than September 7, 2020, the maximum six-month period allowed for a state of emergency under [EXC Art. 2-B § 28\(1\)](#).

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. Section 29 of NY Executive Law, for instance, states 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 Cuomo’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). Moreover, like all cases involving criminal or civil defense, the actions of the ministry may not necessarily reflect the views 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 Cuomo’s morning briefing on March 24, New York had over 25,000 confirmed cases and over 200 deaths due to coronavirus; this accounts for approximately 7% of the global total of confirmed coronavirus cases.²⁵ 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 financial consequences may well exceed those fines specified under Section 12 of the NY Public Health Law. 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 Cuomo during the present crisis as it relates to churches, at least in the short term.

²⁵ [“De Blasio May Shut Parks and Playgrounds Saturday: Live Updates,”](#) *New York Times* (Mar. 24, 2020).

PJI staff – including Emily C. Mimnaugh, PJI’s attorney for the state of Nevada and licensed in the state of New York for almost a decade – 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 New York and across the country, please visit www.PJI.org.

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