



## LEGAL MEMORANDUM

**FR:** Pacific Justice Institute  
**TO:** Pastors and Church Leaders Throughout Pennsylvania  
**DT:** March 26, 2020  
**RE:** Governmental Authority to Restrict Church and Other Gatherings in Pennsylvania

### 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.

### BACKGROUND

Starting on March 6, 2020, Gov. Tom Wolf announced a series of executive measures aimed at mitigating the global coronavirus pandemic's impact in Pennsylvania. These measures included encouraging the suspension of large gatherings, including religious services, and calling on religious leaders to "exercise discretion in order to mitigate the spread of illness."<sup>1</sup> On March 19, Governor Wolf issued an executive order requiring all "non-life-sustaining businesses" to temporarily cease operations until further notice. While churches and other religious entities are not technically "businesses," Governor Wolf has given them permission to continue operating.<sup>2</sup> That said, however, both Governor Wolf and Secretary of Health Rachel Levine, M.D., have issued a series of stay-at-home orders requiring individuals in the counties of Allegheny, Bucks, Chester, Delaware, Erie, Monroe, Montgomery, and Philadelphia "to stay at home or at their place of residence except as needed to access, support or provide life sustaining business, emergency or government services."<sup>3</sup> Surprisingly, the orders – the first of which went into effect on Monday, March 23, and has received minor amendments by subsequent orders since – carry with them no penalties of fines or imprisonment, as many other states' stay-at-home orders have. Still, churches in the affected counties face having a lot of empty seats at their services, or having to suspend such weekly activities as youth group meetings and Bible studies due to lack of attendance, as local residents stay home in compliance with the orders.

<sup>1</sup> See <https://www.governor.pa.gov/newsroom/gov-wolf-puts-statewide-covid-19-mitigation-efforts-in-effect-stresses-need-for-every-pennsylvanian-to-take-action-to-stop-the-spread/>.

<sup>2</sup> See <https://www.inquirer.com/health/coronavirus/spl/pennsylvania-coronavirus-list-life-sustaining-businesses-shutdown-order-20200319.html>.

<sup>3</sup> See <https://www.governor.pa.gov/wp-content/uploads/2020/03/SOH-Stay-at-Home-Order-Amdt-3-24-20.pdf>.

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.<sup>4</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? Title 35, § 7301(a) of the Pennsylvania Consolidated Statutes declares that “[t]he Governor is responsible for meeting the dangers to the Commonwealth and people presented by disasters.” The worldwide coronavirus pandemic is precisely the sort of danger the Governor is tasked with meeting. The Governor may declare a disaster emergency via executive order or proclamation pursuant to 35 Pa. C.S. § 3501(c) and § 7301(f)(5). These statutes confer upon the Governor power to “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery.” Similarly, 35 Pa. C.S. § 7301(f)(7) allows the Governor 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. Under 35 Pa. C.S. § 7301(b), the Governor’s “executive orders, proclamations and regulations” concerning disasters “shall have the force and effect of law.” However, the key word here is “temporarily.” Under § 7301(c), “the state of disaster emergency shall [only] continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation[.]” Section 7301(c) also requires a state of disaster emergency to automatically expire after 90 days unless the Governor renews the order declaring the state of disaster emergency.

Based on PJI’s more than 20 years’ 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 Pennsylvania 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.

<sup>4</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.

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 Wolf's call to "exercise discretion in order to mitigate the spread of illness" 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 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 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. 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. 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.

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.

In order to help empower churches, PJI will soon make videos available on our website, [www.PJI.org](http://www.PJI.org), that will (1) train churches how to have church services via Facebook, and (2) show how churches may take advantage of the opportunity to initiate Church Homeschool Co-ops in their churches.

To learn more about what PJI is accomplishing on behalf of churches and individuals, please visit [pji.org](http://pji.org).

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