



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout Indiana
DT: April 3, 2020
RE: Governmental Authority to Restrict Church and Other Gatherings in Indiana

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 advised many church leaders navigating this crisis. In this resource, we will provide the legal background for the directives in Indiana so church leaders can make wise, informed decisions for their congregations.

BACKGROUND

On March 6, 2020, Gov. Eric J. Holcomb declared a 30-day state of emergency in Indiana in response to the global coronavirus pandemic. Soon after, Governor Holcomb began issuing a series of executive orders aimed at limiting the spread of the virus. Chief among these is Executive Order No. 20-08 (“the Order”).¹ Issued on March 23, the Order requires persons in Indiana to stay at home or their places of residence unless they are engaging in what the Governor has deemed “essential activities.” Further, the Order prohibits all gatherings of more than 10 people except as exempted by the Order.

Section 14(e) of the Order declares that “religious facilities, entities and groups” are “essential businesses and operations.” “Religious gatherings” are accordingly “essential activities,” so long as the religious facilities, entities, and groups involved adhere to the Centers for Disease Control (CDC) guidelines on social gatherings. Such guidelines include “social distancing” (keeping people at least six feet apart from one another), avoiding physical contact (such as handshakes), keeping surfaces clean and disinfected, and having hand sanitizer and/or soap and water available so congregants can keep their hands clean. The Order does not extend the original 30-day state of emergency which is set to expire at 11:59 p.m. on April 6. However, Governor Holcomb may extend the state of emergency if necessary.

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.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.

¹ See https://www.in.gov/files/Executive_Order_20-08_Stay_at_Home.pdf.

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.

LEGAL DISCUSSION

Although Governor Holcomb has not yet banned religious gatherings at churches, many other states have. The Governor still could if he deems such a ban necessary to keep the coronavirus from spreading. Indiana’s Emergency Management and Disaster Law (the “Emergency Disaster Law”), Ind. Code § 10-14-3 *et seq.*, declares that “[t]he governor shall declare a disaster emergency by executive order or proclamation if the governor determines that a disaster has occurred or that the occurrence or the threat of a disaster is imminent.” Ind. Code § 10-14-3-12(a). The coronavirus pandemic is just the sort of disaster emergency that the Governor can declare. Ind. Code § 10-14-3-1(a) defines “disaster” to mean “an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural phenomenon or human act.” Subsection (b)(21)-(23) further defines “disaster” to include “[b]iological incident,” “[e]pidemic,” and “[p]ublic health emergency.”

While the state of emergency exists, Governor Holcomb has the power to “[c]ontrol ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises within the area.” Ind. Code § 10-14-3-12(d)(7). Section 10-14-3-11(b) allows the Governor to “make, amend, and rescind the necessary orders, rules, and regulations” to preserve public health and safety after declaring a disaster emergency. This power enables the Governor to order Indiana residents to stay at home and limit their travel while the coronavirus pandemic rages on.

Does this sweeping authority give state and local officials unlimited temporary discretion to override civil liberties? Yes – the key word being “temporary.” Under Ind. Code § 10-14-3-12(a)(2), “[a] state of disaster emergency may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor.” Given that the current state of disaster emergency is set to expire on April 6, it is very possible, if not likely, that Governor Holcomb may extend the state of disaster emergency another 30 days. However, the 30-day limitation at least ensures that any infringement on civil liberties is minimal, and the Governor may even cut the 30-day state of emergency short if he decides that the threat of spreading the coronavirus has subsided. Ind. Code § 10-14-3-12(a)(1)-(2).

Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, PJI believes that, if Governor Holcomb amended the Order to prohibit religious gatherings, a court would be highly likely to defer to government officials in this crisis — at least in the short term — and uphold such a ban notwithstanding the First Amendment. Indiana 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 in Indiana may 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 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. Such an adjustment 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. That does not appear to be a problem in Indiana, as the Order affords churches considerable discretion to continue operating and individuals considerable discretion to leave their homes to attend religious services if they feel doing so would serve their mental, emotional, and spiritual needs. However, should the violation of the Governor's Order become prosecutable, as is the case in some other states, the legal outcome of such prosecution would be highly uncertain. 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. Churches would thus be wise to follow the Order's suggestions concerning social distancing and limiting person-to-person contact. Bear in mind, too, that elderly persons are especially vulnerable to the coronavirus, as the death toll is highest among people aged 60 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.

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 across the country, please visit pacificjustice.org.

This general information does not constitute legal advice; instead, all information, content, and materials available in this resource are offered for general informational purposes only. The content may not constitute the most up-to-date legal or other information. Readers of this resource should contact PJI to obtain advice with respect to any particular legal matter. No reader should act or refrain from acting on the basis of information herein without first seeking legal advice from counsel in the relevant jurisdiction. Only an attorney can provide assurances that the information contained herein—and your interpretation of it—is applicable or appropriate to your particular situation. Use of, and access to, this resource does not create an attorney-client relationship between the reader and authors. The views expressed through this resource are those of Pacific Justice Institute as a whole. All liability with respect to actions taken or not taken based on the contents of this educational resource are hereby expressly disclaimed. The content in this resource is provided "as is"; no representations are made that the content is error-free. Contact Pacific Justice Institute via our website, www.PJI.org, if you believe your rights have been violated and you need representation.