



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout Arkansas
DT: July 10, 2020
RE: Update on 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 (PJI) has continued to advise many church leaders navigating this crisis. This memorandum will provide the legal background for the directives so Arkansas church leaders can make wise, informed decisions for their congregations.

BACKGROUND

On June 18, 2020, Governor Asa Hutchinson issued an executive order¹ which terminated the “emergency declared pursuant to Executive Order 20-03, and its amendments.” With this executive order, Governor Hutchinson declared a new state of emergency which “expire[s] in sixty (60) days [from June 18], unless it is renewed in whole or in part by a subsequent executive order.” This order specified that “[a]ll businesses, manufactures, construction companies, long term care facilities, medical and dental providers, community and school sponsored team sports, and places of worship” (emphasis added) are required to “adhere to applicable directives or guidelines issued by the Secretary of Health.”

According to the Arkansas Department of Health’s “COVID-19 Guidance for Places of Worship” which was updated on July 2, places of worship are ordered “during Phase 2 of Reopening Arkansas” to adhere to the following restrictions:

- a) Houses of worship are **strongly encouraged to continue to offer online platforms** for participation in worship because it is not yet advisable/feasible for all congregants to come for in-person services
- b) Post signs at all building entrances advising congregants not to enter if
 - a. They have had a fever of 100.4° or higher in the past 2 days
 - b. They have cough, shortness of breath, sore throat, new loss of taste or smell or other symptoms typical of Covid-19
 - c. They have had known exposure to someone with Covid-19 in the past 14 days

¹ Executive Order 20-37 (June 18, 2020).

- c) Post signs at all building entrances advising congregants that they may wish to refrain from entering if they are 65 or more years old or have underlying health conditions including high blood pressure, chronic lung disease, diabetes, severe obesity, asthma or immunocompromising conditions, because they are at higher risk for severe illness if infected by Covid-19.
- d) Post signs at all building entrances to inform people that **no one** will be admitted into the building without a face covering and **that face coverings must be worn by congregants at all times while indoors**. The only exceptions to the wearing of face coverings will be:
 - a. Worship leaders, only while addressing the congregation
 - b. Performing singers, only while singing
 - i. The above individuals must stand at a 12' distance from others while speaking or singing without a face covering
 - c. All congregants who participate in Holy Communion, only while actually consuming the Elements
 - d. Face coverings for children under 10 years are optional
 - e. Face coverings for children under 2 years old are prohibited by CDC guidelines
 - f. Places of worship may make their own decision on whether to allow children under ten to return to corporate worship, as this may pose some risk of transmission of Covid-19
- e) Provide hand sanitizing stations at all public entrances.
- f) Lines or cues for entrance and exit must be marked or monitored for maintaining a distance of 6 feet between people.
- g) Instruct all congregants, staff and volunteers that the strict 6' physical distancing protocol applies to everyone aside from family groups, both indoors and outdoors. As above, speakers and singers will require additional distance while speaking or singing without face coverings.
- h) As much as possible, move "meet and greet" times before and after services outdoors. Because of the indoor face covering requirement, refreshments should be offered outdoors only.
- i) Instruct people to refrain from any physical contact with each other outside of family groups— no hand shaking, touching, embracing, or reverencing of hands/rings of clergy.
- j) Aside from congregant family groups, seating in the sanctuary must follow strict physical distancing protocols with 6' between individuals.
- k) Eliminate or alter the use of items that are traditionally touched or handled by many different people. Examples are offering plates, the Torah (touch only by the bearer), holy water stations, shared prayer and song books, and the common cup (chalice) for Holy Communion.
- l) If possible, refrain from having people come forward to a common altar rail for Holy Communion, blessing, altar call, etc.
- m) Religious education classes for children/youth or childcare may resume if this can be accomplished in compliance with physical distancing.
- n) Sanitize all high-touch surfaces in the sanctuary and common areas after and between services.²

² Arkansas Department of Health (2020, July 2). *COVID-19 Guidance for Places of Worship*. Retrieved from <https://www.healthy.arkansas.gov/programs-services/topics/covid-19-guidance-for-faith-based-organizations>.

It is pertinent to note that these current health and safety guidelines are subject to change at the discretion of Governor Hutchinson and the Secretary of Health Nathaniel Smith depending on the severity of the COVID-19 situation in Arkansas.

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.³ 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

Although Governor Hutchinson has not banned religious gatherings at churches and other houses of worship (collectively churches), many other states have, and the Governor still could if he deems it necessary to keep the coronavirus from spreading. The Arkansas Emergency Services Act of 1973, Ark. Code Ann. § 12-75-101 *et seq.*, declares as follows:

Because of the existing and increasing possibility of a major emergency or a disaster of unprecedented size and destructiveness resulting from . . . natural or human-caused catastrophes . . . and in order to ensure that this state will be prepared to deal with such contingencies in a timely, coordinated, and efficient manner and generally to . . . protect the public peace, health, safety and preserve the lives and property of the state, it is found and declared to be necessary to . . . [c]onfer upon the Governor and upon the executive heads of the political subdivisions of the state the emergency powers provided herein . . .

Ark. Code Ann. § 12-75-102(a)(2).

“The Governor is responsible for meeting and mitigating, to the maximum extent possible, dangers to the people and property of the state presented or threatened by disasters.” Ark. Code Ann. § 12-75-114(a). The worldwide coronavirus pandemic is precisely the sort of disaster the Governor may declare. *See* Ark. Code Ann. §§ 12-75-103(2)(A) [defining “Disaster” to include “any air or surface-borne toxic or other hazardous material contamination, or other catastrophe, whether caused by natural forces . . . or any other means which . . . (i)n the determination of the Governor . . . is or threatens to be of sufficient severity and magnitude to warrant state action”] and 12-75-107(a)(1) [“A disaster emergency shall be declared by executive order or proclamation of the Governor if he or she finds a disaster has occurred or that the occurrence or the threat of a disaster is imminent”].

³ 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.

Ark. Code Ann. § 20-7-110(b) states, “Whenever the health of the citizens of this state is threatened by the prevalence of any epidemic or contagious disease in this or any adjoining state and, in the judgment of the Governor, the public safety demands action on the part of” the State Board of Health, “then the Governor shall call the attention of the board to the facts and order it to take such action as the public safety of the citizens demands to prevent the spread of the epidemic or the contagious disease.” Section 12-75-114(b) confers upon the Governor power to issue, amend, and rescind executive orders, proclamations, and rules as necessary to address an actual or potential disaster, and such orders, proclamations, and rules “have the force and effect of law.” § 12-75-114(b)(2).

The Governor’s powers to address an actual or potential disaster are broad. Ark. Code Ann. § 12-75-115(a) says, “In addition to disaster prevention measures as included in the state, local, and interjurisdictional emergency operations plans, the Governor shall consider on a continuing basis steps that could be taken to prevent or reduce the harmful consequences of disasters.”

Does this sweeping authority give state and local officials unlimited discretion to temporarily override civil liberties? Yes – the key word being “temporarily.” Under Ark. Code Ann. § 12-75-107(b)(1), the state of disaster emergency shall only continue until “(A) The Governor finds that the threat of danger has passed and terminates the state of disaster emergency by executive order or proclamation; or (B) The disaster has been dealt with to the extent that emergency conditions no longer exist.” Furthermore, “[n]o state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor.” § 12-75-107(b)(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 Hutchinson amends the Order to prohibit religious gatherings at churches and other houses of worship, it is highly likely a court would defer to government officials in this crisis — at least in the short term — and uphold such a ban notwithstanding the First Amendment. As stated above, Arkansas 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.

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.

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. 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. That does not appear to be a problem in Arkansas, 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 and emotional needs. 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 account for 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. 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.

To learn more about what PJI is accomplishing on behalf of churches and individuals in Arkansas, please visit pacificjustice.org.

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