



## LEGAL MEMORANDUM

**FR:** Pacific Justice Institute  
**TO:** Pastors and Church Leaders Throughout Michigan  
**DT:** March 27, 2020  
**RE:** Governmental Authority to Restrict Church and Other Gatherings in Michigan

### 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

On or about March 10, 2020, Gov. Gretchen Whitmer declared a state of emergency in Michigan in response to the global coronavirus pandemic. Soon after, Governor Whitmer issued a series of executive orders aimed at limiting the spread of the virus. Among these is Executive Order No. 2020-11 (“Order No. 1”), which prohibits “all assemblages of more than 50 people in a single shared space and all events of more than 50 people” in Michigan. Exempted from Order No. 1, pursuant to Section 1, are churches and other religious entities (collectively “churches”). “The prohibition set forth in this section *does not abridge* protections guaranteed by the state or federal constitution under these emergency circumstances” (emphasis added).

Also relevant for purposes of discussion here is Executive Order No. 2020-20 (“Order No. 2”). Order No. 2 requires that all places of public accommodation, with few exceptions, close down through 11:59 p.m. on April 13. Subsection 3.b of Order No. 2 defines “place of public accommodation” to “mean[ ] a business, or an educational, refreshment, entertainment, or recreational facility, *or an institution of any kind*, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public” (emphasis added). Though churches are not identified specifically, the words “institution of any kind” is broad enough to include churches. Violations of Order No. 2 shall be treated as misdemeanors.

In addition, on March 24, Governor Whitmer issued Executive Order No. 2020-21 (“Order No. 3,” and, collectively with Order Nos. 1 and 2, the “Orders”). Order No. 3 prohibits all “in-person work that is not necessary to sustain life.” Order No. 3 is essentially a stay-at-home order, as Section 2 declares that “all individuals currently living within the State of Michigan are ordered to stay home or at their place of residence.” Exempt from Order No. 3, pursuant to Section

7.a.11, are persons who leave their home or place of residence “[t]o work or volunteer for businesses or operations (including both . . . religious and secular non-profit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals . . .” Such persons are deemed “critical infrastructure workers” under Section 9.d. Section 10 of Order No. 3 also makes clear that “a place of religious worship, when used for religious worship, is not subject to penalty under section 14,” which makes violation of Order No. 3 a misdemeanor. Like Order No. 2, Order No. 3 shall be in effect through 11:59 p.m. on April 13.

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>1</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? To begin with, Article V, § 1 of the Michigan Constitution vests executive power in the Governor. Section 10.31(1) of the Michigan Compiled Laws (“MCL”) permits the Governor:

During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled . . . [to] promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include . . . designation of specific zones within the area in *which occupancy and use of buildings and ingress and egress of persons* and vehicles *may be prohibited or regulated* (emphasis added).

The worldwide coronavirus pandemic is just such a public emergency.

Meanwhile, MCL § 30.405(1)(e) permits the Governor to “[d]irect and compel the evacuation of all or part of the population from a stricken or threatened area within the state if necessary for the preservation of life or other mitigation, response, or recovery activities.” Section 30.405(1)(g), like § 10.31(1), allows the Governor to “[c]ontrol ingress and egress to and from a stricken or threatened area, removal of persons within the area, and *the occupancy of premises within the area*” (emphasis added). MCL §§ 30.405(3) and 10.33 both allow the Governor to make violations of her executive orders a misdemeanor.

<sup>1</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.

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Temporarily, yes – the key word being “temporarily”. Under MCL § 10.31(2), “[t]he orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations[.]” In this case, none of the Orders will remain effective beyond 11:59 p.m. on April 13 – less than a month after they were issued. Should the global coronavirus pandemic still be in full swing at that point, the Governor may amend or modify any of the Orders pursuant to § 10.31(2) to extend the time in which the Orders are effective. However, the emergency will cease to exist once the Governor declares it is no longer in effect.

As stated above, Governor Whitmer has made clear in her Orders that places of religious worship are free to continue operating, and congregants are still free to attend church, while the coronavirus pandemic is ongoing. This may change at some point, however. Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, including Michigan, 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 Michigan 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.

Many churches in Michigan have already suspended services and other weekly gatherings – Bible studies, youth-group meetings, etc. – due to Order No. 1’s restriction on gatherings of more than 50 people and the stay-at-home provision of Order No. 3. 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. That does not appear to be a problem in Michigan, as the Orders afford churches their 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. Please know, however, that because a violation of any of the Orders constitutes a misdemeanor, the legal outcome of a prosecution for violating the Orders 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 13:1-2). 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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