



## LEGAL MEMORANDUM

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

### 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 Virginia can make wise, legally informed decisions for their congregations.

### BACKGROUND

On March 13, 2020, Virginia Governor Ralph S. Northam ordered all K-12 schools in the Commonwealth closed for a minimum of two weeks due to the coronavirus pandemic.<sup>1</sup> On March 20, Governor Northam and the Virginia State Health Commissioner issued a joint order statewide to limit the number of patrons in restaurants, fitness centers, and theaters to no more than 10 individuals per establishment.<sup>2</sup>

Although not initially required to do so, many churches across Virginia 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.

Despite these efforts, by March 23, information from the Virginia Department of Health and the Centers for Disease Control (CDC) revealed occurrences of coronavirus in every region of the Commonwealth; this data also showed community spread.<sup>3</sup> To address this, Governor Northam issued an executive order that mandated a statewide shutdown of non-essential businesses, extended the prior school closures to the end of the school year, and banned all gatherings, public or private, of 10 or more individuals.<sup>4</sup>

<sup>1</sup> [Governor Northam Orders All Virginia K-12 Schools Closed for Minimum of Two Weeks](#) (Mar. 13, 2020).

<sup>2</sup> [Order of the Governor and State Health Commissioner - Declaration of Public Health Emergency](#) (Mar. 17, 2020) (later amended).

<sup>3</sup> [Executive Order No. 53 \(2020\)](#) (Mar. 23, 2020).

<sup>4</sup> [Executive Order No. 53 \(2020\)](#) (Mar. 23, 2020). The ban went into effect at 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020.

The language of the March 23 executive order did not specifically mention places of worship, either with regard to the non-essential businesses closure or the ban on gatherings of more than 10 individuals.<sup>5</sup> However, the official website for the Governor’s Office published guidance that stated, “Virginians are strongly encouraged to seek alternative means of attending religious services, such as virtually or via ‘drive-through’ worship. Places of worship that do conduct in-person services must limit gatherings to 10 people, to comply with the statewide 10-person ban.” Therefore, places of worship are not required to shut their doors. They must, however, abide by the 10-person limit on gatherings, which applies to both public and private gatherings.<sup>6</sup> All in-person gatherings are to following social distancing guidelines to allow six-foot spacing between individuals, as described by the Virginia Department of Health and the CDC.<sup>7</sup>

Violations of Governor Northam’s executive order can be charged as a Class 1 misdemeanor pursuant to section 44-146.17 of the Code of Virginia.<sup>8</sup> Penalties for a Class 1 misdemeanor may include confinement in jail for up to twelve months, a fine not to exceed \$2,500, or both.<sup>9</sup>

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.<sup>10</sup> As a practical matter, the bans affecting churches are most likely to be enforced locally, pursuant to state law. State law of the commonwealth 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? The Virginia Constitution declares the Governor to be the Commonwealth’s chief executive.<sup>11</sup> As such, the Governor is specially authorized by the Code of Virginia, Section 44-146.17, to issue “executive orders declaring a state of emergency [that] address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health

<sup>5</sup> This Memo focuses on worship-services and other church-related gatherings. Although outside the scope of this Memo, Governor Northam did carve out specific exemptions for entities that provide childcare and essential services for low-income residents. These exemptions are not directed toward churches as such, but may be relevant to some services they provide. See [Executive Order No. 53 \(2020\)](#) (2), (9), (Mar. 23, 2020).

<sup>6</sup> Office of the Governor, Virginia, “[Frequently Asked Questions Regarding Executive Order Fifty-Three](#)” (Mar. 24, 2020).

<sup>7</sup> Virginia Dept. of Health, “[What is social distancing and how can I do my part to slow the spread of COVID-19?](#)” (Mar. 21, 2020).

<sup>8</sup> [Code of Virginia § 44-146.17](#) (“Executive orders, to include those declaring a state of emergency and directing evacuation, shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect.”)

<sup>9</sup> [Code of Virginia § 18.2-11\(a\)](#).

<sup>10</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.

<sup>11</sup> [Virginia Constitution, Art. 1, § 5](#).

threat . . .”<sup>12</sup> The worldwide coronavirus pandemic is such an emergency. On March 12, Governor Northam issued an executive order declaring a state of emergency in the Commonwealth of Virginia in response to the recent outbreak of coronavirus.<sup>13</sup>

Upon the declaration of a state of emergency, the Governor is the Commonwealth’s Director of Emergency Management and has extremely broad powers. These powers include the power “to proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary . . .”<sup>14</sup>

Does this sweeping authority give commonwealth and local officials unlimited discretion to override civil liberties? Temporarily, yes. However, the key word here is “temporarily.” The Code of Virginia Section 44-146.17 also limits the duration of the Governor’s emergency orders, and generally “no rule, regulation, or order issued under this section shall have any effect beyond June 30 next following the next adjournment of the regular session of the General Assembly but the same or a similar rule, regulation, or order may thereafter be issued again if not contrary to law . . .”<sup>15</sup> Governor Northam’s most recent ban on gatherings of more than ten individuals expires on April 23.<sup>16</sup> The Commonwealth’s K-12 schools have been physically closed through the end of the 2019-2020 schoolyear, and the Governor’s declaration of a state of emergency extends until June 10, unless extended or rescinded by subsequent executive order.<sup>17</sup>

Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, including Virginia, 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.<sup>18</sup> This is because Virginia 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 Northam’s emergency directives, even before they were mandates, and will continue to do so. In many ways, churches today are better

<sup>12</sup> [Code of Virginia § 44-146.17](#) (1), (7). This section also requires that “communicable disease of public health threat that is issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ [32.1-48.05](#) et seq.) of Chapter 2 of Title 32.1.” The Virginia State Health Commissioner, Dr. M. Norman Oliver, declared the [COVID-19 a Communicable Disease of Public Health Threat for Virginia](#) on February 7, 2020.

<sup>13</sup> [Declaration of Emergency for COVID-19](#) (Mar. 12, 2020).

<sup>14</sup> [Code of Virginia § 44-146.17](#) (1).

<sup>15</sup> [Code of Virginia § 44-146.17](#) (1).

<sup>16</sup> [Executive Order No. 53 \(2020\)](#) (Mar. 23, 2020).

<sup>17</sup> [Declaration of Emergency for COVID-19](#) (Mar. 12, 2020).

<sup>18</sup> In New Hampshire, a Merrimack County Superior Court judge upheld Gov. Chris Sununu’s order to restrict the size of public gatherings to fewer than 50 individuals, because of the COVID-19 pandemic. In so doing, Judge John Kissinger dismissed a lawsuit filed by three religious leaders and activists claiming that the New Hampshire ban violates the state Constitution’s protection of the right to assembly and the right of free speech under the First Amendment of the U.S. Constitution. Judge Kissinger has not yet issued his written opinion. “[Judge upholds governor’s power to ban large gatherings](#),” *New Hampshire Union Leader* (Mar. 20, 2020).

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. As previously stated, each violation of the Governor's executive order is a Class 1 misdemeanor<sup>19</sup> punishable by up to 12 months in jail and/or a fine not to exceed \$2,500.<sup>20</sup>

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. 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. According to official figures provided by the Virginia Department of Health on March 26, Virginia has over 450 confirmed cases and 13 deaths due to coronavirus.<sup>21</sup>

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 and criminal consequences may well extend beyond those listed for a Class 1 misdemeanor. Bear in mind, too, that elderly persons are especially vulnerable to the coronavirus, and sever-risk of illness is highest among people aged 65 or older.<sup>22</sup> 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.

<sup>19</sup> [Code of Virginia § 44-146.17](#) (“Executive orders, to include those declaring a state of emergency and directing evacuation, shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect.”)

<sup>20</sup> [Code of Virginia § 18.2-11\(a\)](#).

<sup>21</sup> Virginia Department of Health, “[COVID-19 in Virginia](#),” (Mar. 26, 2020).

<sup>22</sup> CDC, “[People who are at higher risk for severe illness](#)” (Mar. 22, 2020).

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 in Virginia and across the country, please visit [www.PJI.org](http://www.PJI.org).

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