



LEGAL MEMORANDUM

FROM: Pacific Justice Institute
TO: Pastors and Church Leaders
DATE: March 24, 2020
RE: Updated Guidance on Church Responses to COVID-19 Restrictions in Washington

INTRODUCTION

The unprecedented crisis and response to COVID-19 (novel coronavirus) is prompting near-daily changes in the legal landscape and new parameters within which churches must operate. Pacific Justice Institute held a teleconference for pastors and released guidance for churches on March 19, in California. It is our intention to hold one in Washington State as we assess interest. This becomes even more imperative now that Governor Inslee announced a “Stay Home, Stay Healthy” Order on March 23.

These unprecedented restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. PJI has been advising many church leaders navigating this crisis. In order to be as precise as is possible under the circumstances, this resource will focus primarily on Washington law.

BACKGROUND

Before Governor Inslee’s March 23rd order, local jurisdictions in Washington were developing a confusing patchwork of their own restrictions. Among others, a few cities in Snohomish County implemented highly restrictive shelter-in-place regime. Cities across the State were mostly waiting for the Governor to act, which he has now done.

Until this latest order, many churches outside the King County Area were still able to meet in groups under 250 if observing “social distancing.” The March 23 order eliminates the confusions between counties, but adds the burden of subjecting many more to severe restrictions. It is now illegal for any church in the Evergreen State to hold regular services or gatherings, until further notice.

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.¹ As a practical matter, the bans affecting churches are most likely to

¹ 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.

be enforced locally, pursuant to state law. State law will therefore be the primary focus of this memo.

The various federal, state, and local social distancing and stay-at-home orders have some differences amongst themselves but also share commonalities. All tend to either strongly discourage or outright ban gatherings outside one's home, with several categories of exceptions for "essential" workers and services. One of the leading federal lists, originally developed as a counter-terrorism measure by the Cybersecurity and Infrastructure Security Agency (CISA), includes no mention of religious entities or services.

LEGAL DISCUSSION

Where does the Governor derive the authority to take drastic actions like banning core First Amendment activities including church gatherings? Washington authorizes Emergency Proclamation (EP) power through the Revised Code of Washington (RCW) 43.06.010. Combating a disaster that affects life, health, and public peace is one of the specified reasons for issuing such a declaration. RCW 43.06.010 (12).

The EP power of the Governor is a sprawling statutory scheme. It gives the Governor extremely broad power to issue orders, suspend laws and regulations, and even commandeer private property. Local officials have similar, derivative powers.

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Not quite. In one of the leading cases interpreting the Governor's EP powers, the Supreme Court of Washington opined that the process of determining the existence of a protected governmental discretionary decision requires that the State make a showing that a "policy decision, consciously balancing risks and advantages, took place." *Cougar Business Owners Ass. V. State*, 97 Wn.2d 466, 472 (1982) [quoting *King v. Seattle*, 84 Wn.2d 239, 246 (1974)].

Unfortunately, there are no reported decisions in which the courts have had occasion to apply the Governor's EP powers in a context like the present. Thus, it is impossible to say whether a court would uphold the bans on mass gatherings. Based on our more than 20 years' experience litigating in the federal and state courts, we believe it is highly likely a court would defer to government officials in this crisis—at least in the short term—and uphold these bans notwithstanding the First Amendment.

Churches will have a variety of responses to such restrictions. Beyond the legal issues presented, the directives 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 will comply. In many ways, churches today are better positioned than many other entities to deal with this crisis. Most churches now have online giving options and broadcast their sermons and/or services online. The latest Washington list of essential services unfortunately does not explicitly recognize this, as mentioned above.

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 a worship service, or exclude people from a small group gathering in order to achieve prescribed numeric limitations. They may believe that the 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. If so, such churches should be aware that failure to comply with the “Stay Home, Stay Healthy” order under the Governor’s EP power is a misdemeanor. RCW 43.06.250. The penalties under that section are a \$1,000 fine, 90 days imprisonment, or both. Similar penalties are prescribed for violation of local health directives, under RCW 70.28.033.

Depending on the specific facts and circumstances, PJI may be willing to defend church leaders who are fined and jailed for following their consciences. 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. Moreover, like all cases involving criminal or civil defense, the actions of the ministry may not necessarily reflect the views the Pacific Justice Institute.

Civil liability for meeting in defiance of a ban on mass gathering should also be taken into account. A church in the Sacramento California area is now under scrutiny for having several of its attendees afflicted with coronavirus. Two members have died. (It is unclear at this point whether the church had any fault or could have prevented this with reasonable precautions.) 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. It is therefore strongly recommended that churches consult their liability insurance carrier to ascertain the scope and limits of their coverage prior to taking such actions.

Aside from government restrictions, and for those not yet subject to a mass gathering ban, 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 masking or make them available. While the benefits of mask-wearing have been debated by experts, many doctors continue to advocate mask-wearing. Lastly, churches not yet subject to bans may be well served to limit the size of gatherings and become more reliant on home-based fellowships and gatherings. In many ways, this would be a return to the church's New Testament roots.

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. We remain 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 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, 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.

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