



LEGAL MEMORANDUM

FROM: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout **Oregon**
DATE: March 23, 2020
RE: 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 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 12, Gov. Kate Brown issued a statement prohibiting public gatherings of 250 or more people for a period of four weeks due to the coronavirus (COVID-19) pandemic. In response to Gov. Brown's statement, churches throughout **Oregon** temporarily suspended Sunday services and other weekly happenings – Bible studies, youth group meetings, etc. – in order to keep the coronavirus from spreading. Because too few Oregonians heeded her statement, however, Gov. Brown followed up today by issuing a stay-at-home order that constrains social and recreational gatherings.¹ Failure to comply with the stay-at-home order will be treated as “an immediate danger to public health,” and violators will be face punishment of up to 30 days in jail and/or a fine of up to \$1,250.

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.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.

LEGAL DISCUSSION

Where does the Governor derive the authority to take drastic actions like banning core First Amendment activities, including church gatherings? Section 401.165(1) of the Oregon Revised Statutes declares, “The Governor may declare a state of emergency by proclamation ... after determining that an emergency has occurred or is imminent.” The worldwide coronavirus pandemic is just such an emergency.

¹ There are numerous exemptions in these directives for “essential” functions but they do not relate to church services and are beyond the scope of this memo.

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.

Once the Governor has declared a state of emergency, ORS 401.188 goes into effect. ORS 401.188 gives the Governor extremely broad power to issue orders, suspend laws and regulations, and even commandeer private property. *See* ORS 401.188(3) [allowing the Governor to “take any other action that may be necessary for the management of resources following an emergency”] and 401.192(3) [requiring the state to provide reasonable compensation to owners of real or personal property whose property is taken pursuant to ORS 401.188]. Local officials have similar, derivative powers. ORS 401.309.

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties? Temporarily, yes: “All existing laws, ordinances, rules and orders inconsistent with ORS 401.165 to ORS 401.236 shall be inoperative during the period of time and to the extent such inconsistencies exist.” ORS 401.192(1). However, the key word here is “temporarily”: “The powers granted to the Governor by ORS 401.165 to 401.236 shall continue until termination of the state of emergency.” ORS 401.192(4).

As most, if not all, of you are probably aware, Gov. Brown has ordered all K-12 schools in Oregon to cease operations until roughly the end of April. Gov. Brown is thus unlikely to issue a proclamation declaring the current state of emergency in Oregon to be over before then. Based on PJI’s more than 20 years’ experience litigating in federal and state courts in multiple states, including Oregon, 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 Oregon 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 have already complied with Gov. Brown’s executive mandates and will continue to do so. 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. 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 complete defense to such prosecutions. ORS 401.175(1), for instance, allows the Governor to “do all things deemed advisable and necessary to alleviate the immediate conditions,” including declaring and enforcing penalties for those who do not comply with her orders. As stated above, defying Gov. Brown’s executive orders during this state of emergency thus carries inherent risks and consequences, including jail time and/or fines. Discretion is thus very much in order (Romans 13:2).

Churches should also take into account potential civil liability for meeting in defiance of a ban on mass gatherings. According to Gov. Brown, 161 cases of coronavirus have been reported in Oregon, including five deaths. 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 – including Ray D. Hacke, PJI’s attorney for the state of Oregon, who is based in Salem – 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 Oregon, please visit pacificjustice.org.

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