



## LEGAL MEMORANDUM

FR: Pacific Justice Institute  
TO: Pastors and Church Leaders  
DT: April 1, 2020  
RE: Updated Guidance on Church Responses to COVID-19 Restrictions in Arizona

### 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. These unprecedented restrictions 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 order to be as precise as is possible under the circumstances, this resource will focus primarily on Arizona law.

### BACKGROUND

On March 30, 2020, Gov. Douglas A. Ducey issued an executive order<sup>1</sup> “institut[ing] a ‘Stay home, Stay healthy, Stay connected’ policy that promotes physical distancing, while also encouraging social connectedness.” The order took effect at 5:00 p.m. on March 31, 2020. Under this policy, all individuals in the State of Arizona are ordered to limit their time away from their place of residence or property, except:

- a) To conduct or participate in Essential Activities.
- b) For employment, to volunteer or participate in Essential Functions.
- c) To utilize any services or products provided by Essential Businesses.
- d) Employment, if as a sole proprietor or family owned business, work is conducted in a separate office space from your home and the business is not open to serve the public.
- e) No person shall be required to provide documentation or proof of their activities to justify their activities under this order.

The order is to last until April 30, 2020. Importantly, for the purpose of this memorandum, the order defines “Essential Activities” to include “engaging in constitutionally protected activities such as speech and *religion*, and any legal or court process provided that such is conducted in a manner that provides appropriate physical distancing to the extent feasible” (emphasis added). Although the order mentions the “guidance” from the Centers for Disease Control (CDC) recommending meetings larger than 10 persons be cancelled, the order itself does not define the size of gatherings that are acceptable under its edicts. It defines physical distancing as at least six feet from any other person, consistent with guidance from the CDC.

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<sup>1</sup> Executive Order 104 (Mar. 16, 2020).

Prior to issuing the March 30, 2020 order, Governor Ducey issued a number of other relevant orders.

On March 11, the Governor issued a declaration of a Public Health State of Emergency due to the necessity to prepare for, prevent, respond to, and mitigate the spread of COVID-19.

On March 12, the Governor issued an order defining “Essential Business Activities” to include: “iv. **Organizations that Provide Charitable and Social Services:** Businesses and religious and secular nonprofit organizations, including food banks when providing food, shelter and social services, and other necessities of life for economically disadvantaged or otherwise vulnerable individuals who need assistance as a result of this emergency and people with disabilities.”

On March 15, a statewide school closure was issued in and later extended on March 30, 2020, through the end of the school year.

On March 17, following updated guidance from the CDC, the Arizona Department of Health Services (ADHS) issued updated guidance that included canceling or postponing gatherings of 10 or more people, recommending telework and other alternatives, restricting access to nursing homes, retirement homes, and long-term care facilities to provide critical assistance, and providing recommendations to restaurants and eating establishments.

On March 19, Governor Ducey issued an order requiring restaurants in Arizona counties with confirmed COVID-19 cases to provide dine-out options only and required all bars, gyms, and movie theaters in those counties to close.

Thus, taken as a whole the executive orders and related guidance:

- Do not specifically require churches to shut their doors;
- Provide that religious exercise is protected as an “Essential Activity”; and
- Do not give specific regulation as to the amount of people that can meet together, but do require social distancing measures.

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>2</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 that may temporarily restrict activities of religious institutions? The Constitution and statutes of the State of Arizona, particularly the provisions of Arizona Revised Statutes §§ 26-303 and 36-787, confer upon the Governor certain emergency powers:

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<sup>2</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.

During a state of emergency or state of war emergency declared by the governor in which there is an occurrence or imminent threat of an illness or health condition caused by bioterrorism, an epidemic or pandemic disease or a highly fatal infectious agent or biological toxin and that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability, the department shall coordinate all matters pertaining to the public health emergency response of the state.<sup>3</sup>

The worldwide coronavirus pandemic is such an emergency. On March 11, Governor Ducey issued an executive order declaring a public health emergency and state of emergency in Arizona.<sup>4</sup>

Does this sweeping authority give state and local officials unlimited discretion to temporarily override civil liberties? Yes – the operative word being “temporarily.” “The governor shall have complete authority over all agencies of the state government and the right to exercise, within the area designated, all police power vested in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter.”<sup>5</sup> Arizona law requires that “[t]he powers granted the governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end.” Executive orders at a municipal or state level remain, always, subject to the Arizona Constitution, the U.S. Constitution, and federal law.<sup>6</sup>

None of the orders issued by Governor Ducey have dates of expiration. Given that the state of Arizona was late in issuing its stay-at-home order and the likelihood of an increase of cases exists, it is unlikely that Arizona will terminate these executive orders or its state of emergency before May.

Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, 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. Arizona 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.

Given the fact that the stay-at-home order from Arizona (unlike most states) specifically protects First Amendment activities, such as religious practice by calling them *Essential Activities*, and does not give specific prohibition as to the size of gatherings, we still urge caution on the part of pastors. Many churches have already restricted services, even before the declaration of emergency and Governor Ducey’s stay-at-home order, and will continue to do so. Churches

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<sup>3</sup> AZ Rev. Stat. § 26:303 (2013).

<sup>4</sup> AZ Declaration of Emergency \*COVID-19\* (Mar. 11, 2020).

<sup>5</sup> AZ Rev. Stat. § 26:303(E) (2013).

<sup>6</sup> AZ Rev. Stat. § 26:303(F) (2013).

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 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 admonitions 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.

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. Title 26 of the Arizona Revised Statutes, for instance, allows that “[d]uring a state of war emergency [and other emergencies declared by the governor], the governor shall have complete authority over all agencies of the state government and shall exercise all police power vested in this state by the constitution and laws of this state in order to effectuate the purposes of this chapter.” As stated above, defying Governor Ducey's executive orders during this state of emergency carries inherent legal risks and consequences, including the possibility of fines and any criminal punishments that may later become applicable. Discretion is thus very much in order (Romans 13:2). 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 state figures, Arizona's total known cases of the coronavirus increased to at least 1,430, including at least 29 known deaths.<sup>7</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 financial consequences may well exceed those fines that can be levied for violation of the Governor's executive orders. 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.

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<sup>7</sup> <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/index.php#novel-coronavirus-home>.

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, statutes 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 Governor Ducey during the present crisis as it relates to churches, at least in the short term.

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

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