



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders
DT: April 7, 2020
RE: Guidance on Church Responses to COVID-19 Restrictions in Georgia

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 restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. Pacific Justice Institute has advised hundreds of church leaders across the nation as they navigate this crisis. This resource will focus primarily on Georgia law. PJI has released separate memos for dozens of other states now under varying levels of restrictions. Check in regularly with us at www.PJI.org to access all of our resources on this and many other topics.

BACKGROUND

On the federal level, President Trump has issued a number of Executive Orders and guidance in coordination with the Centers for Disease Control (CDC). Among the more notable aspects of this guidance are social distancing measures that have quickly come into common parlance, and a baseline list of sectors deemed “essential” for purposes of continuing operation during the pandemic.

These federal guidelines have served as a starting point for most state and local restrictions, including those in Georgia. Many Americans undoubtedly wonder how it was determined that some industries and sectors of the economy are deemed more “essential” than others.

This terminology can be traced to a federal list originally developed as a counterterrorism effort to protect especially vulnerable targets in the aftermath of 9-11. The agency that maintains this list is the Cybersecurity and Infrastructure Security Agency (CISA) within the Department of Homeland Security. The list has recently been updated and adapted for COVID-19, first on March 19 and again on March 28.

On March 14, Gov. Brian Kemp declared a statewide emergency due to COVID-19. In the next two weeks, local jurisdictions, particularly counties in the metro Atlanta area, began issuing their own stay-at-home or shelter-in-place directives. In the first week of April, Governor Kemp issued a statewide order to be in effect from 6 p.m. on April 3 until April 13.

Like many of its counterparts, Governor Kemp's order generally directs all state residents and visitors to remain at home except for "essential" business, work, and travel.

In regards to churches, the order itself is not a model of clarity as compared with other states. However, a handout with questions and answers released in conjunction with the order provides more guidance. This handout states:

What does this Order mean for church services and funeral services?

No business, establishment, for-profit or non-profit corporation, organization, or county or municipal government is allowed to have more than ten (to) people gathering in a single location unless there is at least six (6) feet between each person at all times. This rule applies to church services and funeral services.

Unfortunately, several community outbreaks can be directly attributed to recent, in-person church services and funeral services. Public health officials strongly discourage gatherings of people for these services due to the high risk of transmission of novel coronavirus. For elderly Georgians and the chronically ill, exposure to novel coronavirus can be deadly. Please comply with the Governor's order to stop the spread of COVID-19.

In addition to this guidance on church services, the latest version of the federal CISA list, on which Georgia relies, now includes "clergy for essential support." It is unclear what exactly this phrase is intended to encompass, but it does give pastors and ministers some freedom that was not specified in the first CISA list.

LEGAL DISCUSSION

Where does the Governor derive the authority to take such drastic action as limiting all work, business, and travel that he deems non-essential, even to the point of limiting church gatherings and meetings?

Governor Kemp's Order cites O.C.G.A. (Official Code of Georgia Annotated) Sections 38-3-51 (c)(4) and (d)(1). Subsection (c)(4) authorizes the Governor to exercise broad emergency powers, beyond his typical authority, as he deems necessary to protect citizens during times of emergency or disaster: "To perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population."

Subsection (d)(1) further allows the Governor to "[s]uspend any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster."

The order further cites the authority of the Department of Public Health, under O.C.G.A. Sections 31-2A-4 and 31-12-4 to require isolation and quarantine for not only those afflicted with a communicable or infectious disease, but also those who may be carriers or have been exposed to the disease.

Section 31-12-4 states in relevant part:

The department and all county boards of health may, from time to time, require the isolation or segregation of persons with communicable diseases or conditions likely to endanger the health of others. The department may, in addition, require quarantine or surveillance of carriers of disease and persons exposed to, or suspected of being infected with, infectious disease until they are found to be free of the infectious agent or disease in question. The department shall promulgate appropriate rules and regulations for the implementation of the provisions of this Code section in the case of a declaration of a public health emergency. . . .

Violation of the Governor's executive order is punishable as a misdemeanor under O.C.G.A. Section 39-3-7.

Many believers wonder how executive orders limiting or strongly discouraging church services can possibly be constitutional.

Under normal circumstances, states are deemed to have "police powers" which allow them broad authority to legislate in ways they believe will advance the health, safety, and welfare of their citizens. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905) (upholding city's mandatory vaccinations for smallpox). These powers are heightened in emergencies such as epidemics. *Id.* at 27 ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.")

While Georgia has a Freedom of Conscience provision in the State Constitution, Article I, Section 1, paragraph 3, it has been lightly interpreted, and the courts have shown no eagerness to override the Governor's emergency powers or public health directives. Indeed, state precedent indicates quite the opposite. "Liberty of conscience is one thing. License to endanger the lives of others by practice is contrary to statutes passed for the public safety and in reliance upon modern medical knowledge is another." *Anderson v. State*, 84 Ga. App. 259, 264 (Ga. Ct. App. 1951) (affirming conviction of parents for failure to vaccinate their children as required for compulsory school attendance).

To be sure, the Governor's executive order greatly limiting churches exceeds any other restrictions attempted in generations. And many would undoubtedly dispute the necessity of the Governor's actions, particularly as applied in parts of the State with few or no reported cases of coronavirus.

But in the short term, PJI believes it is most likely that a court would still defer to the government and to the consensus of the medical community, especially since not all church services or activities have been outright banned. When the threat from COVID-19 diminishes, the balance will shift and may well make the continuation of church restrictions unconstitutional. At this point in the throes of the crisis, it is impossible to say when that balance might tip, but PJI will closely monitor both the progression of the pandemic and corresponding state actions and update our advice accordingly.

Churches will have a variety of responses to the crisis and restrictions. Many churches began complying with CDC guidance and voluntarily moved their services online prior to the Governor's order or the county directives. In many ways, churches today are better positioned than other entities to deal with this crisis. Most churches now have online giving options and broadcast their sermons and/or services online. Even under the 16-sector CISA guidelines, broadcasting of church services would arguably fit within the exception for television, radio, and similar broadcast communication. The recent additions to the CISA list for core non-profit services and clergy would also support this interpretation. Moreover, the inclusion of "clergy for essential services" likely means pastoral care such as visitation of the sick and dying for prayer, spiritual counsel, confession, and last rites.

This crisis presents 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. Many churches are doing all of this and more. Some are finding that the viewership of online sermons exceeds their usual attendance. Others are enlisting teens in the youth ministry to make phone calls to all of the senior citizens in the congregation, to ask how they are doing and what they might need. This crisis—by keeping us physically apart—could actually be an opportunity to break down other barriers between neighbors and across generational lines.

Some church leaders believe 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 admonitions not to forsake the assembling of ourselves together, laying hands on the sick, or distribution of sacraments do not yield to bans on mass gatherings or health crises. Others have expressed to PJI that not all of their congregants can access online services or content.

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. Churches should be aware that failure to comply with a public health directive may be enforced by law and treated as a criminal violation. On the last Sunday in

March, a pastor in the Tampa, Florida, area was criminally charged for violating mass gatherings orders. Pastors in Louisiana and elsewhere have had similar clashes with authorities.

PJI may be willing to defend church leaders under certain circumstances who are fined and jailed for following their consciences. This would be a very fact-specific determination, taking into account the relative precautions or recklessness of the particular church. As one example, a church gathering of 15 people observing social distancing would be much more defensible than would a gathering of 500. The legal outcome of any prosecution would be highly uncertain. While PJI has had significant success defending evangelists against criminal charges, it must not be assumed that the First Amendment would provide an effective defense in light of the current crisis. As with other believers we have defended on First Amendment grounds against criminal charges, representation does not necessarily imply our philosophical, theological, or public policy endorsement of such actions.

In addition to potential criminal liability, tort liability for meeting in defiance of a ban on mass gathering must also be taken into account. More than one church in the Sacramento area is now under scrutiny for having several of their parishioners afflicted with coronavirus. (It is unclear at this point whether the churches had any fault or could have prevented this with reasonable precautions.) Tragically, a community chorus in Skagit County, Washington, has now had 45 of its members fall ill from the virus, and at least a couple have died, after practice was held at a local church. At the time, no one attending the practice showed any symptoms, and there had been no reported cases in the county. Further, the choir practiced social distancing, provided hand sanitizer, and followed other health protocols. Tragic stories are also emerging from Illinois and Arkansas where churches have persisted in meeting despite warnings or prohibitions, and faithful members in those situations such as church greeters and ushers have now died from the virus.

It is highly uncertain what level of liability a church might have if it met in violation of the law, and attendees subsequently became sick or died. 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.

At the very least, churches that persist in meeting to some extent in the face of stay-home orders should exercise multiple precautions, such as directing elderly or high-risk congregants to avoid church gatherings, making hand sanitizer available, discouraging handshakes, and cleaning much more often than usual. Churches may also wish to require masking or make masks available, in accordance with the latest CDC guidelines.

To the extent they are not already doing so, churches should become more reliant on home-based fellowships and gatherings. In many ways, this would be a return to the church's New Testament roots.

For pastors who may be unsure how to stream sermons and services online, PJI has developed a training tool available at www.PJI.org. PJI is also developing legal guidance for churches interested in pursuing funds available from the \$2 trillion stimulus (CARES Act).

CONCLUSION

The present crisis is unnerving on several levels, threatening both life and liberty. Considerable authority underlies the Governor's executive order which would not likely be susceptible to legal challenge in the short term. At the same time, the order does not ban all religious gatherings, and opportunities abound for outreach in this time of uncertainty. Throughout this crisis, PJI attorneys and staff are taking appropriate precautions, but we are not giving in to fear and remain committed to serve the Body of Christ.

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