



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout Maryland
DT: March 31, 2020
RE: Governmental Authority to Restrict Church and Other Gatherings in Maryland

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.

BACKGROUND

On March 5, 2020, Gov. Lawrence J. Hogan declared a state of emergency due to the COVID-19 pandemic. The basis of this was that the World Health Organization and the Centers for Disease Control (CDC) declared the COVID-19 outbreak a public health emergency of international concern. On March 12, Governor Hogan issued an order calling the “Maryland National Guard into State active duty to enforce the laws and carry out emergency functions, including providing support to civil authorities.”

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.¹ 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. This memo will provide the legal background for the directives so Maryland church leaders can make wise, informed decisions for their congregations.

LEGAL DISCUSSION

Governor Hogan issued Executive Order 20-03-19-01 related to “large gathering events.” One provision specifically relates to churches and provides that “Social, community, spiritual, religious, recreational, leisure, sporting gatherings and events . . . of more than 10 people are hereby prohibited at all locations and venues . . .” Moreover, “[p]lanned large gatherings and events must be canceled or postponed until after termination of the state of emergency and the proclamation of the catastrophic health emergency has been rescinded.” The knowing and willful violation carries criminal sanctions as a misdemeanor with a penalty of up to \$5,000 and incarceration of no more than 1 year. Maryland Public Safety Code § 14-3A-08.

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.

In a subsequent order, certain exclusions have been set forth that may apply to churches, such as exclusions for non-profit organizations or facilities providing essential services to low income persons, including, without limitation, homeless shelters, food banks, and soup kitchens. Executive Order 20-03-23-01. Churches with such activities can continue to perform such ministries. On March 30, the Governor issued Executive Order 20-03-30-01 which requires all persons to stay in their homes.

Where does the Governor derive the authority to take drastic actions like a temporary ban of core First Amendment activities, including church gatherings? Title 14 of the Maryland Public Safety Code gives the Governor the authority to declare an emergency. MD Pub. Safety Code § 14-3A-02 (2018). When such an emergency has been declared, the Governor has sweeping powers. Such include immediate seizure of “anything needed to respond to the medical consequences of the catastrophic health emergency.” MD Pub. Safety Code § 14-3A-03(b)(1)(i). The Governor can order rationing, the creating of stockpiles, and setting prices. MD Pub. Safety Code § 14-3A-03(b)(2)(i)-(v). Likewise, there exists authority to establish places of quarantine, isolation, and treatment. MD Pub. Safety Code § 14-3A-03(b)(3)(i)-(iv). Importantly, “If necessary and reasonable to save lives or prevent exposure to a deadly agent, the Governor may order individuals to remain indoors or refrain from congregating.” MD Pub. Safety Code § 14-3A-03(d)(2).

Does this sweeping authority give state and local officials unlimited discretion to override civil liberties on a temporary basis? Yes – the key word being “temporary.” Maryland law provides that unless the declaration of an emergency is renewed, the duration stands at 30 days.

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 religious gatherings of more than ten persons, notwithstanding the First Amendment. This is because Maryland 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 in Maryland have already suspended services and other weekly gatherings – Bible studies, youth-group meetings, etc. – due to the Order’s restriction on gatherings of more than 10 people. 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.

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 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 should the violation of the Governor's stay-at-home order result in prosecution, the legal outcome would be highly uncertain, and it must not be assumed that the First Amendment would provide a complete defense to such prosecutions. Discretion is very much in order (Romans 13:1-2). 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. 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.

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, please visit pacificjustice.org.

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