



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout Mississippi
DT: April 2, 2020
RE: Governmental Authority to Restrict Church and Other Gatherings in Mississippi

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. In this resource, we will provide the legal background for the directives so Mississippi church leaders can make wise, informed decisions for their congregations.

BACKGROUND

On March 14, 2020, Gov. Tate Reeves declared a state of emergency in Mississippi in response to the global coronavirus pandemic. Soon after, Governor Reeves began issuing a series of executive orders aimed at limiting the spread of the virus. Among these is Executive Order No. 1463 (the “Order”).¹ Issued on March 24, the Order prohibits “social and other non-essential gatherings in groups of more than 10 people where the gatherings [are] in a single space at the same time where individuals are in close proximity to each other.” The Order does not apply to what Governor Reeves has deemed “essential businesses or operations.” According to the Order, the term “essential businesses or operations” includes “[r]eligious entities including religious and faith-based facilities, entities and groups, religious gatherings provided that they adhere to the [Centers for Disease Control] and Mississippi Department of Health recommendations and guidance to prevent the spread of COVID-19.” Such recommendations include observing the social-distancing guideline of six feet between persons, limiting physical contact, cleaning and disinfecting surfaces, and providing soap and water and/or hand sanitizer to ensure that congregants can keep their hands clean. The Order is effective through April 17.

Furthermore, unlike many other states, Mississippi does not have a “stay-at-home” order in place for all counties, meaning most Mississippi residents are free to patronize churches and other houses of worship to ensure that their mental, emotional, and spiritual needs are met. The only exception is in Lauderdale County, for which Governor Reeves issued a “shelter-in-place” order on March 31. Residents of Lauderdale County must stay at home unless they are caring for someone in a vulnerable population, obtaining food or supplies, or working for an essential business.

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

¹ See <https://www.sos.ms.gov/Education-Publications/ExecutiveOrders/1463.pdf>.

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

Although Governor Reeves has not yet banned religious gatherings at churches, many other states have. And the Governor still could ban religious gatherings if he deems it necessary to keep the coronavirus from spreading. The Mississippi Emergency Management Law (MEML), Miss. Code Ann. § 33-15-1 *et seq.*, declares that “in the event of a man-made, technological or natural disaster or emergency beyond local control,” the Governor “may assume direct operational control over all or any part of the emergency management functions within this state.” Miss. Code Ann. § 33-15-11(a). The MEML also authorizes and empowers the Governor “[t]o make, amend and rescind the necessary orders, rules and regulations to carry out” his emergency powers and “[t]o perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency.” Miss. Code Ann. §§ 33-15-11(b)(1) and (c)(4).

Does this sweeping authority give state and local officials unlimited discretion to temporarily override civil liberties? Yes – the key word being “temporarily.” Under Miss. Code Ann. § 33-15-11(b)(17), the Governor “shall review the need for continuing the state of emergency at least every 30 days until the emergency is terminated and shall proclaim . . . the termination of the state of emergency *at the earliest possible date that conditions warrant*” (emphasis added). As it stands, the Order is not even scheduled to last a full 30 days, as it is set to expire on April 17.

Based on PJI’s more than 20 years of experience litigating in federal and state courts in multiple states, PJI believes that, if the Governor amended the Order to prohibit religious gatherings at churches, a court would be highly likely to defer to government officials in this crisis — at least in the short term — and uphold such a ban notwithstanding the First Amendment. This is because Mississippi has a compelling interest in ensuring the health and safety of its citizens,³ 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 Mississippi may 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. 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

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.

³ Miss. Code Ann. § 33-15-11(c)(4).

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 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. That does not appear to be a problem in Mississippi, as the Order affords churches considerable discretion to continue operating and individuals considerable discretion to leave their homes to attend religious services if they feel doing so would serve their mental and emotional needs. However, if the violation of the Governor's Order become prosecutable, as is the case in several other states, the legal outcome of such prosecution would be highly uncertain. It must not be assumed that the First Amendment would provide a complete defense to such prosecutions. Discretion is thus 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. Churches would be wise to follow the Order's suggestions concerning social distancing and limiting person-to-person contact. 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.

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 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 across the country, please visit pacificjustice.org.

This general information does not constitute legal advice; instead, all information, content, and materials available in this resource are offered for general informational purposes only. The content may not constitute the most up-to-date legal or other information. Readers of this resource should contact PJI to obtain advice with respect to any particular legal matter. No reader should act or refrain from acting on the basis of information herein without first seeking legal advice from counsel in the relevant jurisdiction. Only an attorney can provide assurances that the information contained herein—and your interpretation of it—is applicable or appropriate to your particular situation. Use of, and access to, this resource does not create an attorney-client relationship between the reader and authors. The views expressed through this resource are those of Pacific Justice Institute as a whole. All liability with respect to actions taken or not taken based on the contents of this educational resource are hereby expressly disclaimed. The content in this resource is provided "as is"; no representations are made that the content is error-free. Contact Pacific Justice Institute via our website, www.PJI.org, if you believe your rights have been violated and you need representation.