



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders
DT: March 31, 2020
RE: Updated Guidance on Church Responses to COVID-19 Restrictions in North Carolina

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. Unprecedented restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. Pacific Justice Institute has advised many church leaders navigating this crisis. In order to be as precise as possible under the circumstances, this resource will focus primarily on North Carolina law.

BACKGROUND

On March 14, 2020, Governor Roy Cooper ordered all K-12 schools in the Tar Heel State closed for a minimum of two weeks due to the coronavirus pandemic.¹ On March 17, Governor Cooper issued a statewide order to close restaurants and bars for dine-in service.² On March 23, Governor Cooper issued an order with additional limitations on mass gatherings and extending the school closure date.³

Although not initially required to do so, many churches across North Carolina temporarily suspended their regularly scheduled services and activities – including Bible studies, youth group meetings, and choir rehearsals – in order to help stop the spread of coronavirus.

Despite these efforts, by March 27, information from the North Carolina Department of Health and the Centers for Disease Control (CDC) revealed occurrences of coronavirus in every county of the State; this data also showed community spread.⁴ To address this, Governor Cooper issued an executive order that mandated a statewide shutdown of non-essential businesses and banned

¹ <https://files.nc.gov/governor/documents/files/EO117-COVID-19-Prohibiting-Mass-Gathering-and-K12-School-Closure.pdf>.

² <https://files.nc.gov/governor/documents/files/EO118.pdf>.

³ <https://files.nc.gov/governor/documents/files/EO120.pdf>.

⁴ <https://www.ncdhhs.gov/covid-19-case-count-nc#nc-counties-with-cases>.

all gatherings, public or private, of ten or more individuals.⁵ The language did specifically mention “religious entities” and subjected them to limitations on events or convenings in Section 3 of the executive order.

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.⁶ As a practical matter, the bans affecting churches are most likely to be enforced locally, pursuant to state law. Thus, North Carolina law will be the primary focus of this memo.

LEGAL DISCUSSION

Where does Governor Cooper derive the authority to take drastic actions like banning core First Amendment activities including church gatherings? North Carolina authorizes the declaration of state of emergency under N.C. Gen. Stat. §§ 166A-19.10 and 166A-19.20. Governor Cooper took this step on March 10, 2020. This allowed the Governor to exercise his power and duties set forth therein to direct and aid in response to, recover from, and mitigation against emergencies. This worldwide pandemic is such an emergency.

The state of emergency power of the Governor is a sprawling statutory scheme. It gives the Governor extremely broad power to issue orders, suspend laws and regulations, and even commandeer private property. Local officials have similar, derivative powers.

Does this sweeping authority give the Governor and local officials unlimited discretion to temporarily override civil liberties? Yes – but the key word is temporarily. Unless a time limit is specified in the order, it will remain in effect until terminated by the official or governing body that declared it. N.C. Gen. Stat. § 166A-19.22(c). There are no reported legal decisions in which the courts have had occasion to apply the Governor’s Emergency Act powers in a context like the present. Thus, it is impossible to say whether a court would uphold the bans on mass gatherings. Based on PJI’s more than 20 years of experience litigating in the federal and state courts, PJI believe it is highly likely a court would defer to government officials in this crisis—at least in the short term—and uphold these bans notwithstanding the First Amendment.

Churches will have a variety of responses to such restrictions. Beyond the legal issues presented, the directives 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.

⁵ <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf> (Mar. 27, 2020). The ban went into effect at 5:30 p.m., Monday, March 30, 2020 until April 2, 2020.

⁶ 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.

Many churches have already complied with Governor Cooper’s emergency directives, even before they were 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 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 a worship service, or exclude people from a small group gathering in order to achieve prescribed numeric limitations. They may believe that the 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. If so, such churches should be aware that failure to comply with the “stay-at-home” order is a class 2 misdemeanor. N.C. Gen. Stat. § 14-288.20A. The penalties under that section are a \$1,000 fine, 60 days imprisonment, or both.

Depending on the specific facts and circumstances, PJI may be willing to defend church leaders who are fined and jailed for following their consciences. 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. 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 figures provided by the North Carolina Department of Health on March 31, North Carolina has over 1,498 confirmed cases and 8 deaths due to coronavirus.⁷

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 and criminal consequences may well extend beyond those listed for a Class 2 misdemeanor. Bear in mind, too, that elderly persons are especially vulnerable to the coronavirus, and severe risk of illness is highest among people aged

⁷ <https://www.ncdhhs.gov/covid-19-case-count-nc>.

65 or older.⁸ 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 masking or make masks available.

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 may be somewhat delayed as we prioritize the most urgent needs of churches, ministries, and clients.

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⁸ CDC, "[People who are at higher risk for severe illness](#)" (Mar. 22, 2020).