



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 South 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. Though there has not been a formal “stay-at-home order” issued by Gov. Henry McMaster, mass gatherings have been restricted, and it is imperative that churches become informed of their legal rights.

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 possible under the circumstances, this resource will focus primarily on South Carolina law.

BACKGROUND

On March 15, 2020, Governor McMaster ordered all K-12 schools in the Palmetto State closed for a minimum of two weeks due to the coronavirus pandemic.¹ On March 17, Governor McMaster issued a statewide order to close restaurants and bars for dine-in service.² On March 23, the Governor issued an order directing law enforcement officers to prohibit or disperse any gathering of three or more people, unless authorized or in their homes, if in their discretion they determine the people pose, or could pose, a threat to public health.³

Most recently on March 28, Governor McMaster reissued his declaration of a State of Emergency and issued additional limitations on mass gatherings and extended the school closure date.⁴

¹ <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-15%20FILED%20Executive%20Order%20No.%202020-09%20-%20Closing%20Schools%20Cancelling%20Elections%20Other%20Provisions%20Due%20to%20COVID-19.pdf>.

² <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-17%20eFILED%20Executive%20Order%20No.%202020-10%20-%20Directing%20Additional%20Emergency%20Measures%20Due%20to%20COVID-19.pdf>.

³ <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-23%20eFILED%20Executive%20Order%20No.%202020-13%20-%20Authorizing%20Law%20Enforcement%20to%20Preserve%20Public%20Health.pdf>.

⁴ <https://files.nc.gov/governor/documents/files/EO120.pdf>.

Although not initially required to do so, many churches across South Carolina have 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.

As of the writing of this memo, a formal stay-at-home order has not been entered in South Carolina. There are many South Carolina officials who are urging Governor McMaster to do so and even are circulating a change.org petition.⁵ The trends across country show that it is very likely a stay-at-home order will be entered in the near future.

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 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. State law will therefore be the primary focus of this memo.

LEGAL DISCUSSION

Where does the Governor derive the authority to take drastic actions like banning core First Amendment activities including church gatherings? South Carolina authorizes the declaration of state of emergency under SC Code of Laws § 1-3-420. Governor McMaster took this step in March 13 and renewed it on March 28. This law allows the Governor to exercise his power and duties to “in his opinion prevent or minimize danger to life, limb or property, or prevent breach of peace . . .” SC Code of Law § 1-3-430. The Governor holds extremely broad, state-of-emergency 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 temporarily to override civil liberties? Yes – with an emphasis on *temporarily*. Unless a time limit is specified in the order, it will remain in effect until terminated by the Governor. SC Code of Laws § 1-3-430. 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.

Based on PJI’s more than 20 years of experience litigating in the federal and state courts, PJI believes 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.

Many churches have already complied with Governor McMaster’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. Home-based groups

⁵ <https://www.thestate.com/news/coronavirus/article241626686.html>.

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.

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 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. Churches should be aware that failure to comply with the emergency order currently in place is a misdemeanor. SC Code of Laws §16-7-10(a). The penalties under that section are a \$100 fine, 30 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 South Carolina Department of Health on March 31, South Carolina has over 925 confirmed cases and 18 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 misdemeanor. Bear in mind, too, that elderly individuals are especially vulnerable to the coronavirus, and risk of illness is highest among people aged 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.

⁷ <https://www.scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/monitoring-testing-covid-19>.

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

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 Governor McMaster 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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