



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders
DT: April 2, 2020
RE: Guidance on Church Responses to COVID-19 Restrictions in Texas

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 been advising many church leaders navigating this crisis. In order to be as precise as is possible under the circumstances, this resource will focus primarily on Texas law. PJI has created and continues to update separate memos for dozens of other states now under varying levels of restrictions.

BACKGROUND

Throughout the month of March, as the COVID-19 crisis intensified internationally and then in other U.S. states, Governor Abbott resisted a statewide shelter-in-place order for Texas. Many large cities and counties in Texas began implementing their own restrictions. By the end of March, 51 of the most populous counties had issued restrictions (including most of the metro areas of Dallas, Ft. Worth, Houston, Austin, San Antonio, and El Paso). On March 31, Governor Abbott issued a statewide order that explicitly superseded these local orders.

Like many other states that have enacted COVID-19 restrictions, Governor Abbot's March 31 Executive Order (No. GA-14) delineates essential and non-essential businesses, services, and travel. The former are permitted with the observance of social distancing guidelines, while the latter are prohibited. Unlike many other states, however, Governor Abbott's order acknowledges religious activities, including worship services, to be essential. Thus, while services are encouraged to be broadcast and otherwise conducted remotely, they are not banned.

On page 2, the executive order states, “‘Essential services’ shall consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0,¹ plus religious services conducted in churches, congregations, and houses of worship.”

On pages 2-3, the executive order further explains, “In providing or obtaining essential services, people and businesses should follow the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, implementing social

https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf.

distancing, and working from home if possible. In particular, all services should be provided through remote telework from home unless they are essential services that cannot be provided through remote telework. If religious services cannot be conducted from home or through remote services, they should be conducted consistent with the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, and by implementing social distancing to prevent the spread of COVID-19.”

LEGAL DISCUSSION

Governor Abbott’s approach to church services, as set forth above, is remarkable in comparison to similar orders by other states, in its consideration of religious services. It should come as no surprise that Texas has a strong tradition of religious freedom. Since 1999, this tradition has been codified in the Texas Religious Freedom Restoration Act (RFRA).² To briefly summarize, the RFRA provides that neither state nor local government may substantially burden the exercise of religion unless that government can demonstrate a compelling interest achieved by the least restrictive means.³ Undoubtedly mindful of these principles, Governor Abbott is taking precautions to ensure government does not unduly interfere with the free exercise of religion, even in this emergency.

While Texas appears to have struck a balance in its current executive order between governmental authority and church autonomy, some key questions remain. First, what would be the legal implications if Governor Abbott subsequently decides that church services may no longer be allowed? And second, what other considerations besides free exercise of religion must churches take into account when deciding whether to continue meeting together?

First, what authority would the Governor possess to order that church services must go online-only, if he determines the crisis has worsened and the initial restrictions have been insufficient? Such authority would derive primarily from Chapter 418 of the Texas Government Code. This chapter lays out broad powers for the Governor to act in times of disaster, even to the point of commandeering private property. It also includes control over travel to and from disaster areas. While more typically invoked in response to natural disasters like hurricanes, the sweeping language of Chapter 418 would undoubtedly be read to encompass the current pandemic.

The Religious Freedom Restoration Act, discussed above, is a strong counterbalance to governmental action. But the RFRA is by no means absolute. The key question would be whether the government could articulate a compelling interest, achieved by the least restrictive means.⁴ Based on our more than 20 years litigating religious freedom cases throughout the country, PJI believes most courts would find that prevention of the COVID-19 outbreak is a compelling interest.⁵ But whether a statewide shutdown order that included church services would be deemed the least restrictive means of achieving this interest would be a much closer question. The answer could come down to where and how large a church was challenging the

² Texas Civil Practice and Remedies Code §§ 110.001 et seq.

³ Tex. Prac. and Rem. Code § 110.003.

⁴ Tex. Prac. and Rem. Code § 110.003.

⁵ Some courts in other parts of the country have already so determined in response to the COVID-19 crisis. “Judge upholds governor’s power to ban large gatherings,” New Hampshire Union Leader (Mar. 20, 2020), https://www.unionleader.com/news/health/coronavirus/judge-upholds-governors-power-to-ban-large-gatherings/article_f0e8bac3-fd0c-572c-b9de-87e909dbb1ac.html.

order. For instance, a large church in an urban or suburban area that has been hard-hit by the coronavirus would be very unlikely to overcome a shutdown order, while a small church in a rural part of the state with no reported cases would be in a much better position to challenge it. The viability of such a challenge would also depend on the timing—for instance, if such an order were in place long after the epidemic had peaked and was on the decline.⁶

Many churches are already complying with the strong recommendation that they discontinue worship services and other meetings until the worst of the pandemic seems to have passed. In many ways, churches today are better positioned than many other entities to deal with this crisis. Most churches now have online giving options and broadcast their sermons and/or services online.

This crisis also 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.

Some church leaders believe they cannot in good conscience cancel a worship service or exclude people in order to achieve prescribed social distancing. 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 health crises. 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.

There is another factor church leaders must consider when deciding whether to continue holding worship services during the pandemic: tort liability. A church in Sacramento, California, is now under scrutiny for having several of its attendees afflicted with coronavirus. (It is unclear at this point whether the church had any fault or could have prevented this cluster with reasonable precautions.) Another church in Sacramento County that met in defiance of shutdown orders is reported to have 71 cases of coronavirus. Overall, nearly 1/3 of the more than 300 cases diagnosed in the county to date have been linked to church attendance. 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. It is far from clear what kind of liability a church might have if it met in defiance of strong recommendations by health officials not to do so, and attendees subsequently became sick or died. It is therefore highly advisable that churches consult their liability insurance carrier to ascertain the scope and limits of their coverage prior to taking such actions.

For those churches that choose to meet notwithstanding the risks, church leaders certainly 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 require masking or make masks

⁶ Despite the strong authority vested in the Governor to deal with emergencies under Chapter 418, at least one federal court has issued a temporary restraining order to delay enforcement of COVID-19 restrictions on abortion providers. *Planned Parenthood Ctr. For Choice v. Abbott*, 2020 U.S. Dist. Lexis 57365 (W.D. Tex. March 25, 2020).

available. Lastly, churches not yet subject to bans may be well served to limit the size of gatherings and become more reliant on home-based fellowships. In many ways, this would be a return to the church's New Testament roots.

CONCLUSION

There is good reason to be concerned about governmental overreach during a state of emergency. Thus far, the statewide order from Governor Abbott limiting non-essential business, activities, and travel has acknowledged that religious services are indeed essential. Because the Governor's order was preceded by a patchwork of greater restrictions in heavily populated areas of the state, there is likely to be lingering confusion by local authorities. Throughout this crisis, PJI continues in its mission to serve the Body of Christ. We encourage pastors and church leaders who are being given conflicting information about their rights to meet, or who are erroneously being told they cannot meet, to contact us for assistance.

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