



LEGAL MEMORANDUM

FR: Pacific Justice Institute
TO: Pastors and Church Leaders Throughout Utah
DT: April 7, 2020
RE: Governmental Authority to Restrict Church and Other Gatherings in Utah

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 have advised many church leaders navigating this crisis. In this resource, we will provide the legal background for the directives so church leaders in Utah can make wise, legally informed decisions for their congregations.

BACKGROUND

While Gov. Gary Herbert has not issued a statewide mandate yet, the Governor did issue a “Stay Home, Stay Safe” Directive on March 27 as part of the planned step laid out in the Utah Leads Together Plan.¹

This directive seeks to make clear what individuals and businesses should do to slow the spread of COVID-19 in our state and communities. “I’m tremendously grateful to all Utahans who are already taking steps to stay at home whenever possible,” the Governor said. “While we are seeing positive indications that this is slowing the spread of coronavirus in our communities, we need to do more. The clear directives issued today will help Utahans understand what activities are safe — and if we unite behind these instructions as if our lives depended upon them, we will, in fact, save many lives.”

Goals of the directive are to flatten the curve, reduce the strain on hospitals and the healthcare system, and minimize the impact on medical resources for those with the highest need. According to the directive, Utahans are expected to stay home whenever possible. The directive includes specific instructions for all individuals, high-risk individuals (60 years and older and those with serious underlying medical conditions), and children.

The directives on hygiene, gatherings, travel, and outdoor recreation are effective immediately. Businesses that remain open are reminded to comply with all public health orders, offer telework options wherever possible, continue following strict hygiene policies, and implement enhanced social distancing measures in the workplace where telework is not an option.

¹ Economic Response Task Force, Utah’s plan for a health and economic recovery.

Separately, on March 29, Salt Lake County ordered a number of businesses closed and told residents to only venture outside the home for “essential activities.”² The Salt Lake County Health Department and Mayor Jenny Wilson issued a public health order with “further protections” to prevent the spread of COVID-19.

The order includes closing certain businesses where people tend to gather or that involve close contact, requiring businesses to actively enforce social distancing (six feet). Further, the order specifies what types of businesses are to be closed and which types are considered “essential” and will be “open with conditions.”³

Businesses that will be ordered to close include:

- Hair, nail, and eyelash salons
- Barber shops
- Waxing/electrolysis providers
- Day spas and estheticians
- Permanent makeup
- Eyebrow threading
- Body art facilities (tattoo/piercing)
- Massage and tanning
- Swimming pools and splash pads
- Aquariums, zoos, aviaries, and museums
- Playgrounds and recreation centers
- Arcades, bowling alleys, and movie theatres
- Gyms and fitness centers
- Theatres and performance venues
- Indoor play centers
- Social clubs

According to the order, religious and charitable institutions can remain open.⁴ Previously, Governor Herbert had asked churches, as well as other businesses and social organizations, to limit gatherings to fewer than 100 people.⁵

Although not required to do so, the Church of Jesus Christ of Latter-day Saints had previously decided to temporarily suspend services of 111 temples out of 168 worldwide.⁶ As the COVID-19 continued to spread significantly,⁷ the Church of Jesus Christ of Latter-day Saints decided to close all temples on March 25.⁸

As of April 1, there is no mandate or public order which compels churches in Utah to limit or restrict service or gathering.

² Public Health Order No. 2020-03 (Mar. 29, 2020).

³ *Id.*

⁴ *Id.*

⁵ Emergency Operations Center press conference, March 12, 2020.

⁶ Updates on How COVID-19 Is Impacting Saints Worldwide.

⁷ Utah Department of Health, COVID-19 Surveillance in Utah, <https://coronavirus.utah.gov/case-counts/>.

⁸ The First Presidency of The Church of Jesus Christ of Latter-day Saints, letter dated March 25, 2020.

Although President Trump has also issued Executive Orders in coordination with the Centers for Disease Control (CDC), these have so far been a less direct factor in the bans of mass gatherings than have state and local orders.⁹ 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

Where does the Governor derive the authority to take drastic actions like banning core First Amendment activities including church gatherings? Under Utah Public Safety Code § 53-2a-206 (1), the Governor can declare a state of emergency by executive order if the governor “finds a disaster has occurred or the occurrence or threat of a disaster is imminent in any area of the state in which state government assistance is required to supplement the response and recovery efforts of the affected political subdivision or political subdivisions.”¹⁰

Once a state of emergency is declared, the Governor holds extremely broad discretion concerning the state of emergency. The Governor has sole power in his discretion to decide whether the “threat or danger has passed or the disaster reduced to the extent that emergency conditions no longer exist.”¹¹

Furthermore, the Governor can utilize all available resources of state government,¹² control ingress and egress to and from disaster area,¹³ and temporarily override “any public health, safety, zoning, transportation, or other requirement of a statute or administrative rule” in Utah.¹⁴

Locally, the chief executive officer of a municipality or county has authority to declare a local emergency.¹⁵ However, any declaration of local emergency does not affect or prohibit the Governor’s authority to declare a statewide state of emergency.¹⁶

Does this sweeping authority give state and local officials discretion to override civil liberties? Temporarily, yes. However, the key word here is “temporarily.” The Utah Public Safety Code mandates that no state of emergency may continue for longer than 30 days, “unless extended by joint resolution of the Legislature.”¹⁷ Likewise, a state of emergency declared locally is limited to 30 days and may be renewed only with the consent of the governing body of the municipality or county.¹⁸

⁹ 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.

¹⁰ Title 53 Public Safety Code, Section 53-2a-206(1).

¹¹ Title 53 Public Safety Code, Section 53-2a-206(2).

¹² Title 53 Public Safety Code, Section 53-2a-204(1)(a).

¹³ Title 53 Public Safety Code, Section 53-2a-204(1)(f).

¹⁴ Title 53 Public Safety Code, Section 53-2a-204(1)(j).

¹⁵ Title 53 Public Safety Code, Section 53-2a-208(1)(a).

¹⁶ Title 53 Public Safety Code, Section 53-2a-208(5)(a).

¹⁷ Title 53 Public Safety Code, Section 53-2a-206(3).

¹⁸ Title 53 Public Safety Code, Section 53-2a-208(1)(b).

Salt Lake Country’s county-wide stay-at-home order is scheduled to terminate on April 30.¹⁹ Local orders are subject to 30-day limits.²⁰ As they expire, local orders may not be renewed without the consent of the governing body of the Salt Lake County. It is highly unlikely that Salt Lake County will terminate the current stay-at-home order, or that Governor Herbert will withdraw the “Stay Home, Stay Safe” Directive prior to April 30.

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 public religious gatherings notwithstanding the First Amendment.²¹ Utah 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 have already complied with Governor Herbert’s request and Salt Lake County’s orders, even before they were mandates, and will continue to do so. In many ways, churches today are better positioned than 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 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 together, laying hands on the sick, and similar commands do not yield to bans on mass gatherings or health crises.

PJI has not and does not advise any violation of law at a federal, state, or local level. PJI also has not and cannot advise an individual to violate his personal conscience. 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 of today. These are sobering decisions that church leaders should not undertake lightly. If a church is hierarchical or has a local body of

¹⁹ Public Health Order No. 2020-03, Section 2 (Mar. 29, 2020).

²⁰ *Id.* at 18.

²¹ In New Hampshire, a Merrimack County Superior Court judge upheld Gov. Chris Sununu’s order to restrict the size of public gatherings to fewer than 50 individuals, because of the COVID-19 pandemic. In so doing, Judge John Kissinger dismissed a lawsuit filed by three religious leaders and activists claiming that the New Hampshire ban violated the state constitution’s protection of the right to assembly and the right of free speech under the First Amendment of the U.S. Constitution. Judge Kissinger has not yet issued his written opinion. “Judge upholds governor’s power to ban large gatherings,” *New Hampshire Union Leader* (Mar. 20, 2020).

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 face criminal consequences for following their consciences. However, the legal outcome of such a prosecution would be highly uncertain, and it must not be assumed that the First Amendment would provide a partial or complete defense to such prosecutions. State statutes give very broad, albeit temporary, power during a declared state of emergency to the Governor. Defying state and local emergency directives during this declared state of emergency carries inherent legal risks and consequences, including criminal penalties. 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 state figures provided daily by the Utah Department of Health, Utah had over 990 confirmed resident cases and 22 visitor confirmed cases of COVID-19 as of April 1.²² 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 under Utah Criminal Code 76-8-317.²³ Bear in mind, too, that elderly persons are especially vulnerable to coronavirus, and risk of illness is highest among people aged 65 or older.²⁴ 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. While experts cannot agree, some scientists say there is preliminary evidence that COVID-19 is airborne and airborne transmission is occurring.²⁵ This is the official view of the Chinese Center for Disease Control and Prevention and its director-general George Gao.²⁶ As such, 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 Governor Hebert during the present crisis as it relates to churches, at least in the short term.

²² Utah Department of Health, COVID-19 Surveillance in Utah, <https://coronavirus.utah.gov/case-counts/>.

²³ Title 53 Public Safety Code, Section 76-8-317.

²⁴ CDC, "People who are at higher risk for severe illness" (Mar. 22, 2020).

²⁵ Liu, Y. et al. Preprint at bioRxiv <http://doi.org/dqts> (2020).

²⁶ Science, "Not wearing masks to protect against coronavirus is a 'big mistake,' top Chinese scientist says" (March 27, 2020).

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 www.PJI.org.

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