



LEGAL MEMORANDUM

FROM: Pacific Justice Institute
TO: Pastors and Church Leaders
DATE: April 30, 2020
RE: Updated Guidance on Church Responses to COVID-19 Restrictions in California

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. Within hours after Pacific Justice Institute released initial guidance for churches on March 19, Governor Newsom announced a statewide stay-at-home order for Californians. As of late April, the virus appears to have peaked and stabilized in California. To date, the Golden State has averted the horrific death tolls and overloaded health systems seen in other states such as New York. Some states, particularly in the Deep South and Midwest, are beginning to slowly relax restrictions. California is taking a longer approach in hopes of continuing its relative success against spread of the virus, but at a cost to civil liberties such as free exercise of religion.

These unprecedented restrictions have prompted many questions from church leaders as to their legal obligations and responsibilities. PJI 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 California law. PJI has prepared dozens of similar resources for other states as the crisis has unfolded, all of which are available at www.PJI.org.

BACKGROUND

Before Governor Newsom's March 19 order, local jurisdictions in California were developing a dizzying array of their own restrictions. At first, it appeared that the statewide order would standardize approaches. However, while the Governor does have authority to override county orders for the sake of uniformity, he has largely chosen not to do so. This first became evident when he deferred to county sheriffs as to whether gun stores should be deemed essential. By mid-April he was more heavily emphasizing localized decision-making on the rollback of shelter-in-place orders. As a result, while the statewide order restricts all churches from hosting activities such as traditional worship services on their campuses, counties in the Bay Area and elsewhere continue to promulgate even greater restrictions. The Governor has stated (for instance, at his April 21 press conference, in answer to a question about counties and cities reopening) that local jurisdictions can pursue their own actions as long as they do not "contravene" or "conflict with" the Governor's orders. In some cases there will be differences of

opinion on whether local directives are at odds with the State, and clarity can only come from the Governor or his office. This memo will not attempt to parse the differences in local orders across California's 58 counties but will highlight a few in the legal discussion below.

Under the March 19 Executive Order, it is currently unlawful for any church in the Golden State to hold regular, in-person services or gatherings, until further notice. While it is anticipated that some parts of California could be allowed to relax restrictions by the end of May, the 6-county Bay Area have collectively extended their stay-at-home orders until May 31. Meanwhile, several rural northern counties have requested clearance from the Governor to begin reopening sooner.

On a federal level, although President Trump has also issued Executive Orders and important guidance in coordination with the Centers for Disease Control (CDC), these have so far avoided the types of mandates that would supersede state orders, particularly as they relate to mass gatherings and religious activities.¹ As a practical matter, the bans affecting churches are most likely to be enforced locally, pursuant to state law, and thus necessitating a state-focused inquiry.

The various federal, state, and local social distancing and stay-at-home orders have some differences amongst themselves but also share commonalities. All tend to either strongly discourage or outright ban gatherings outside one's home, with several categories of exceptions for "essential" workers and services. One of the leading federal lists, originally developed as a counter-terrorism measure after 9/11 by the Cybersecurity and Infrastructure Security Agency (CISA), has now been updated to include clergy as essential workers. Meanwhile, in its latest guidance of March 20, California expanded on the federal 20-sector list of essential workers² and included a specific exception for religious broadcasting as follows: "Faith based services that are provided through streaming or other technology." PJI has also written to Governor Newsom on behalf of bishops in California to request that, consistent with the revised CISA list, California deem clergy essential for purposes of ministering to the sick and dying. The Governor has not yet responded to this request.

California and the Trump Administration have released competing plans for reopening business and other activities that are currently restricted. The federal roadmap, released on April 16, describes three phases. It is proposed that churches could resume meeting under strict social distancing protocols in Phase 1. However, on April 28, Governor Newsom announced California's roadmap for reopening. This approach sets forth four phases or stages. The first stage is considered to be the present, focusing on planning and preparation. Stage 2 would involve relaxing restrictions on non-essential manufacturing, more retail, some workplaces, and modified daycare and schools. Not until Stage 3 does California propose to ease restrictions on in-person church services and events such as weddings. In Stage 4, remaining restrictions would

¹ On a federal level, emergency declarations are governed by the Stafford Act, 42 U.S.C. § 5121 et seq.

² https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf.

be lifted and citizens could once again congregate in large venues for concerts, conventions, and sporting events. The California roadmap leaves many questions unanswered, and it is hoped that more clarity will be provided in the coming days. As of this writing, no specific dates have been identified for reopening.

LEGAL DISCUSSION

Many pastors and parishioners have expressed outrage that the Governor or local health officials would presume to order the closure of churches. Shortly after Easter, many states including California began experiencing public protests of shelter-in-place orders. It is therefore worth briefly examining the basis for this purported authority.

Federal precedent

In 1905, the U.S. Supreme Court considered similar questions in a case called *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This case weighed the authority of local officials to mandate smallpox vaccinations for the entire adult population of Cambridge, Massachusetts (where Harvard University is located). This case did not involve religious objections, but the Court considered constitutional rights generally and held that they were subordinated to the common defense against an epidemic. The Court analogized this fight to self-defense in time of war, during which the government could draft citizens into the military and otherwise override civil liberties. Also worth noting, the Court upheld the forced vaccinations even though the primary threat from smallpox seemed to have passed, and few other jurisdictions were taking similar measures. This decision, although more than a century old, has been the starting point for many courts now considering challenges to COVID-19 restrictions. While one may or may not agree with its logic, it undergirds the authority of state and local officers to take drastic measures in times of emergency.

Shortly before *Jacobson* was decided, California had a pair of its own cases that create a helpful contrast. At the turn of the century, San Francisco sought to impose quarantine and vaccination mandates on 12 blocks of Chinatown, ostensibly to combat the bubonic plague. However, the federal court³ struck down the measures as unconstitutional.⁴ Key to the court's decisions were the discriminatory stereotypes and questionable evidence behind the measures. Doctors who worked among the population of Chinatown disputed that there had been any actual instances of bubonic plague in the area. And the court was skeptical of the imposition of such restrictions on only Chinatown and not the rest of the city. These decisions, while predating *Jacobson*, offer hope that the courts will not blindly uphold any and all restrictions if they appear to be rooted in discrimination or lack medical evidence.

³ This court, known as the Circuit Court for the Northern District of California, no longer exists in the same form but was the predecessor of the Ninth Circuit Court of Appeals.

⁴ *Wong Wai v. Williamson*, 103 F. 1 (C.C.N.D. Cal. 1900); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900).

California statutes and precedent

California authorizes emergency declarations through the Emergency Services Act (ESA), Gov't. Code §§ 8550-8669.7. Combating an epidemic is one of the specified reasons for issuing such a declaration. Gov't. Code § 8558. The ESA is a sprawling statutory scheme, including dozens of individual sections. 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 state and local officials unlimited discretion to override civil liberties? Not quite. In one of the leading cases interpreting the ESA, the California Supreme Court opined, "Thus, the Emergency Services Act makes clear that in situations of 'extreme peril' to the public welfare the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties." *Macias v. State* (1995) 10 Cal. 4th 844, 854.

There are at least two statutory limitations on emergency orders as they relate to the First and Second Amendments. Gov't. Code § 8572; Gov't. Code § 8571.5. One provision expressly bars the Governor from taking over the press, and the other prevents seizure of firearms. There are no reported decisions in which the courts have had occasion to apply the ESA in a context like the present. Thus, it is impossible to say with any certainty whether a court would uphold the current levels of restrictions. One cautionary note for overreaching officials can be found in an older state decision that predates the ESA, *In re Areta*, 52 Cal. App. 380 (Cal. Ct. App. 1921). There, the appellate court freed a suspected prostitute after local authorities insisted she be held until she would consent to testing for communicable (venereal) disease. The court determined that the quarantine powers did not extend to such a detention based on conjecture.

Further, Gov't. Code § 8627.5 sets a time limitation on the Governor's orders, at least as to suspension of laws. The provision states that orders expire upon the Governor's rescission of them, his declaration of the end of the emergency, or 60 days, whichever comes first. There is no mention as to whether he can issue a new emergency declaration.

Recent litigation and decisions involving coronavirus orders

Since stay-at-home orders began taking effect, a number of lawsuits have been initiated in various jurisdictions that have largely confirmed PJI's early assessment of the viability of such lawsuits. In general, and with at least one notable exception, courts have tended to permit churches to adopt non-traditional approaches such as conducting drive-in services while rejecting broader challenges seeking the right to resume in-person services.

The first such lawsuit was initiated in New Hampshire.⁵ It was a broad assertion of free speech and free exercise of religion rights against the state's shelter-in-place orders. That lawsuit was rejected. Then, in Louisville, Kentucky, a church succeeded in court on a challenge to a local prohibition on even drive-in services.⁶ A similar outcome was achieved by churches initiating two separate lawsuits in Greenville, Mississippi.⁷ Notably, the mayor in Greenville was out of step with the Governor, and the U.S. Department of Justice weighed in against the drive-in ban.

In Washington State, PJI has been advising a church seeking to hold a drive-in service. PJI sought clarification from the governor's office since such events were not clearly addressed in his order. The governor's office communicated that such a service would not be permitted. However, after the State was informed that the church intended to proceed, services were successfully held with no interference from law enforcement.

Meanwhile, churches in Kansas were able to successfully challenge their governor's order and were permitted to hold in-person worship services. However, the churches agreed to a number of restrictions, such as social distancing between family groups, allowing only 50 attendees in a sanctuary seating 300, wearing of masks and gloves by all attendees, keeping doors propped open, not passing out bulletins and not passing an offering plate, among other things. About the same time, a large church with multiple campuses and about 20,000 regular attendees in New Mexico was rebuffed by a court in its attempt to challenge their state's restrictions on worship services.⁸

In California, lawsuits have had mixed results. A suit filed by a church in rural San Diego County has thus far been unsuccessful, even though the church had proposed to the county that it conduct drive-in services.⁹ Meanwhile, lawsuits filed in Riverside and San Bernardino counties prompted local officials to permit drive-in services going forward.¹⁰ Notably, the Governor's Office undermined the counties when they first took a more adverse position. At the same time, it is unclear whether the churches will be able to obtain any relief beyond the drive-in services; their request for a broader Temporary Restraining Order was denied by the court. Another lawsuit filed on behalf of a church in the Northern California city of Lodi is pending with no court decisions having been issued as of yet.¹¹

⁵ <https://www.usnews.com/news/best-states/new-hampshire/articles/2020-03-19/new-hampshire-ban-on-large-gatherings-challenged-in-court>.

⁶ *On Fire Christian Center, Inc. v. Greg Fischer*, Case No. 3:20-cv-264-JRW (W.D. Ky. April 10, 2020).

⁷ *Temple Baptist Church, et al. v. City of Greenville, et al.*, Case No. 4:2020-cv-00064 (N.D. Miss. April 10, 2020).

⁸ *Legacy Church, Inc. v. Kunkel, et al.*, Case No. 1:2020-cv-00327 (D.N.M. April 11, 2020).

⁹ *Abiding Place Ministries v. Wooten, et al.*, Case No. 3:2020-cv-00683 (S.D. Cal. April 9, 2020).

¹⁰ *Gish, et al. v. Newsom, et al.*, Case No. 5:2020-cv-00754 (C.D. Cal. April 13, 2020).

¹¹ *Cross Culture Christian Center, et al. v. Newsom, et al.*, Case No. 2:20-cv-00832-JAM (E.D. Cal. April 22, 2020).

County overreach

As noted above, it is far from clear when local directives that differ from the State will be deemed by the Governor to conflict with the latter and thus be unenforceable. In one extreme example, Mendocino County promulgated orders purporting to prohibit the use of wind instruments or singing during broadcasts of church services. These restrictions seem plainly unenforceable and are the type of overreach that PJI would be willing to challenge in court if a church in that county desires to do so. PJI has also heard from both pastors and individuals who are having problems obtaining marriage licenses. We believe these restrictions are indefensible as well and have worked with pastors to resolve at least one such conflict. To the extent that some counties still seek to prohibit drive-in services despite the Governor's approval of them, we also believe this would present a conflict in which the Governor's position should prevail.

Church responses

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.

The vast majority of churches in California and elsewhere have chosen to comply with shelter-in-place and social distancing orders to this point. 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. The latest California list of essential services explicitly recognizes this, as quoted above. Even under the 20-sector CISA guidelines, clergy are deemed essential, and broadcasting of church services would arguably fit within the exception for television, radio, and similar broadcast communication.

This crisis also presents tremendous opportunities. 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 are just a handful of the many service opportunities. As just a few more examples, we are aware of churches that have enlisted teens to make phone calls to all of the senior citizens in the church to find out how they were doing and whether they had any needs the church might be able to meet. At Easter, some churches delivered Easter eggs to the doorsteps of all the children of the congregation. Some churches have established special funds to assist those hardest hit by job loss and other economic fallout. Another church in Palmdale, California, reports that after it served the community with actions like food distribution, the city actually invited the church to hold drive-in services. Other pastors have observed that online viewing of their sermons and services has exceeded their usual attendance at church.

Potential criminal liability

Some church leaders may feel they cannot in good conscience cancel a worship service or stay away from those in need of counseling or prayer. Once small gatherings are permitted to resume,

leaders may feel it is wrong to 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. Other pastors may believe that more lenient State directives should control over more restrictive county orders, or vice versa.

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. Such churches should be aware that failure to comply with an Executive Order under the ESA is a misdemeanor. Gov't. Code § 8665. The penalties under that section are a \$1,000 fine, six months imprisonment, or both. Slightly lesser penalties are prescribed for violation of local health directives, under Cal. Health & Safety Code § 120295.

Depending on the specific facts and circumstances, PJI may be willing to defend church leaders who are fined and jailed for following their consciences. Indeed, PJI has undertaken the defense of a small church in the Bay Area facing criminal prosecution for meeting together in person. Further, as with all cases, PJI's defense does not necessarily constitute philosophical, theological, or public policy agreement with a defendant's position. And while PJI has been highly successful in obtaining dismissal of criminal charges against evangelists around the country prior to COVID-19, 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.

Potential civil liability

Civil liability for meeting in defiance of a ban on mass gathering should also be taken into account. Churches in the Sacramento area have come under scrutiny after dozens of their members became ill with coronavirus. It is unclear at this point whether the churches could have prevented the outbreaks with reasonable precautions.

A number of other tragic, cautionary tales have emerged from around the country. A community chorus in Washington State witnessed about ¾ of its members fall ill with the virus, and some died, after holding practice at a local church. Churches in Arkansas and Illinois have buried longtime members such as ushers and greeters after those churches held events beyond the point where most had closed. A pastor near Richmond, Virginia, became ill and died from coronavirus after initially insisting he would defy stay-at-home orders.

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. It is therefore strongly recommended that churches consult their liability insurance carrier to ascertain the scope and limits of their coverage prior to taking such actions.

Re-opening and mitigation strategies

Both federal and state approaches to reopening focus on increased testing, healthcare capacity, availability of protective equipment, and decline of new infections, hospitalizations, and deaths over a two-week period. California has not yet met these thresholds on a statewide level, or in its most populated regions.

When churches are permitted to meet again, it is clear that services will not look the same as they did before the pandemic, for quite some time. Under the federal guidelines, resumption of church services would be contingent on observance of strict social distancing. This might look something like the churches in Kansas currently being permitted to meet as discussed above, albeit in even smaller numbers. For instance, Phase 1 identifies groups of 10, while Phase 2 points to groups of 50 or fewer. In both Phase 1 and Phase 2, the guidelines recommend that vulnerable populations (which comprise a majority of attendees in many churches) continue to shelter in place. California has not yet indicated to what extent it will follow these aspects of the federal guidelines, but it is highly unlikely the State would take a less-restrictive approach.

Regardless of the phase or stage, when services resume churches should anticipate the need for heightened sanitation, and the reality that congregants will have heightened sensitivities about the possibility of getting sick in a large group setting for the foreseeable future. PJI has developed checklists for resumption of indoor, outdoor, and drive-in services, available alongside all our other free resources at www.PJI.org.

CONCLUSION

These are challenging times for people of faith. There is certainly reason to be concerned about governmental overreach during a state of emergency. As noted above, statute and precedent provide both strong bases for the authority of the Governor and other officials, while at the same time indicating that prolonged, plainly discriminatory or arbitrary restrictions will be vulnerable to First Amendment challenge. As of this writing, we believe it most likely—and the litigation to date has borne this out—that courts in California would reject broad-based legal challenges to shutdown orders while being more open to narrow challenges focused on extreme overreaches. As the threat diminishes, orders extend, and more venues are reopened while churches remain closed, legal challenges will become increasingly viable. PJI staff are taking appropriate precautions, but we are not giving in to fear. We remain committed to serve the Body of Christ through every crisis.

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.