



Can the Government Compel a Church to Turn Over a List of Attendees During the Coronavirus Pandemic?

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With [news reports circulating](#) and questions being raised about the possibility of churches being forced to turn over lists of attendees to the government – ostensibly to track the spread of the coronavirus through contact tracing or other tactics – we thought it worthwhile to address the legality and constitutionality of any such government efforts to gather lists.

A church likely cannot be forced to keep a list of attendees or be forced to turn over any such list to the government. The Free Speech and Freedom of Association Clauses of the First Amendment will usually prevent the government from requiring forced disclosure from private groups and nonprofit organizations (which would include churches). The Supreme Court has reasoned that such compelled disclosure could inhibit people from joining these organizations and thus violate their First Amendment rights. While the Supreme Court has held that the government can compel an organization to turn over membership lists when done in the interest of national security, it is unlikely that such exceptions would apply to state efforts to force churches to keep and turn over lists. In addition, the public sensitivities that arise whenever government authorities appear to be targeting churches make it even less likely that they will try to compel such lists.

PRIOR CASES

The Supreme Court has addressed the question of compelled lists at [various points in its history](#). These instances include lists from communist groups, the NAACP, and political organizations.

In 1956, Alabama tried to require the NAACP, a nonprofit, to turn over a list of its members. In [NAACP v. Alabama](#), a unanimous Supreme Court held that requiring the NAACP to turn over a list of its members violated the First Amendment, reasoning that this requirement could deter membership and cause harm.

In 1961, just a few years later, the Supreme Court came to a contrary conclusion in [Communist Party of the United States v. Subversive Activities Control Board](#). In that case, the Court upheld a provision of the Subversive Control Act that required communist organizations to register with the government and provide a list of members. The Court did not find this to violate the First Amendment but rather held that its interests had to be balanced against Congress' judgment on how to handle national security threats. This ruling has been subsequently narrowed, however – the Supreme Court ruled in [Albertson v. Subversive Activities Control Board](#) that requiring registration of an individual constituted self-incrimination and was, therefore, a violation of the Fifth Amendment.

The Court has made some exceptions in the context of political organizations. In [Buckley v. Valeo](#), the Supreme Court upheld the provisions of the Federal Election Campaign Act, which required the disclosure of contributors to political campaigns. As part of its reasoning, the Court held that limiting corruption outweighed other interests and that the law was narrowly tailored.

CHURCH LISTS DURING THE CORONAVIRUS PANDEMIC

The cases and legal standards outlined above make it unlikely that governments can compel churches to keep or turn over lists during the current coronavirus pandemic. Many of these cases involved non-religious groups. Given the public relations sensitivities about infringement on churches, governments are even less likely to attempt to compel disclosure of church attendee lists, and courts will be even less likely to uphold the practice.

Yet the risk of compelled disclosure is not eliminated. The Supreme Court has held that some governmental rationales are compelling and narrowly tailored enough to justify it. For instance, there is some chance that a court could find a list of church attendees compelling because it would enable tracking of the virus – if a person with coronavirus attended church, the list would serve to notify the other attendees that they had been in a social setting with a person who had tested positive for the virus.

However, while it is feasible to see the coronavirus pandemic as causing a national public health concern, courts are starting to find the pandemic less compelling. For example, in [Wisconsin Legislature v. Palm](#), the Wisconsin Supreme Court struck down the state's newest stay-at-home order. While the opinion focused on a technicality of how the order was issued, several justices wrote about their general dismay over the restrictions.

In summary, without a serious and clearly-articulated justification, policies that force lists to be kept and turned over to the government violate the First Amendment and are not likely to be upheld by the courts.

CONCLUSION

There is minimal risk that churches will be forced to produce lists of attendees. This risk is even lower when considering (1) the public relations concern governments might have about intrusively targeting churches, and (2) the growing likelihood that as time goes on, courts and other authorities are less likely to uncritically accept government justifications for restrictions in the face of the coronavirus.

If you encounter a situation in which the government may be forcing churches to turn over lists of attendees, or any other religious freedom violation, please let us know at stories@frc.org.

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