


Resuming In-Person Religious Activities - Legal and Practical Considerations



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1

Today's Presenters

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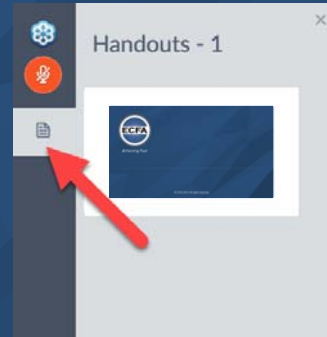
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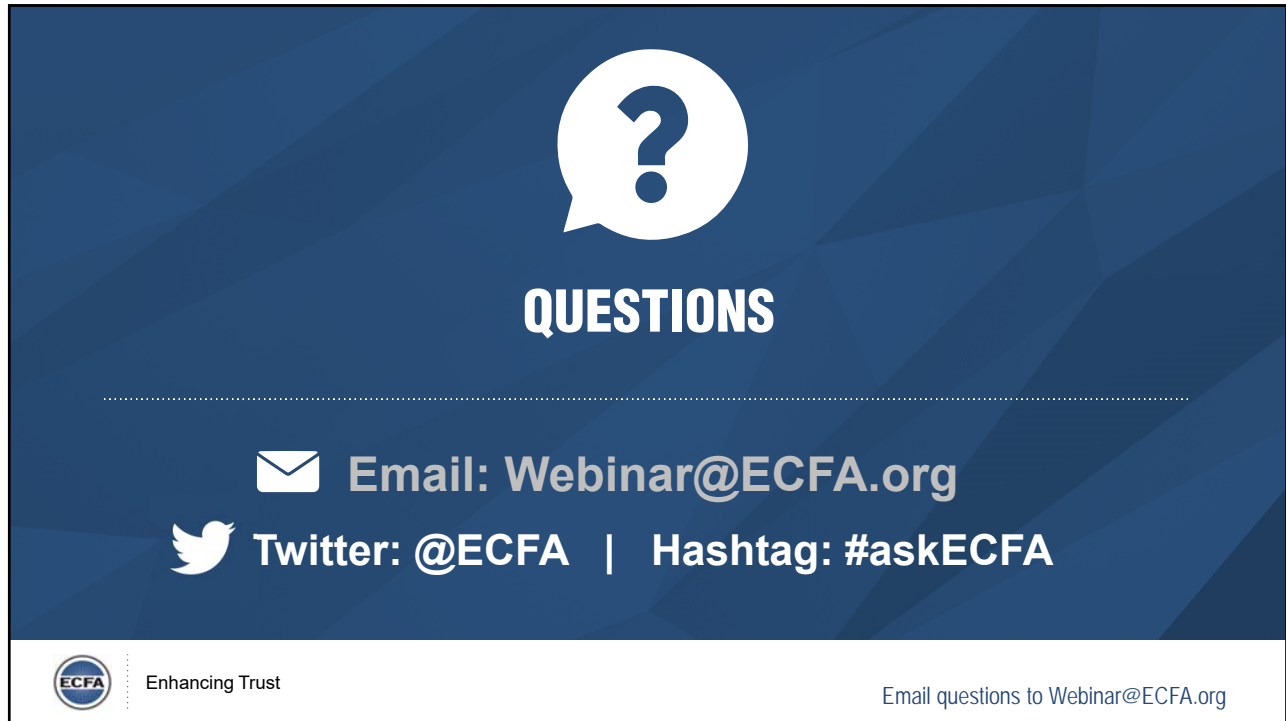
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A banner for the Christian Legal Society Center for Law and Religious Freedom. The top section is a dark blue navigation bar with the organization's logo and name on the left, and a series of menu items (ABOUT, OUR WORK, ISSUES, NEWS, RESOURCES, JOIN CLS, CLS HOME, DONATE) on the right. The "DONATE" button is highlighted in green. Below the navigation bar is a large image of a person wearing a face mask, with a semi-transparent dark blue box overlaid on it. Inside this box, the text "CHURCH AND MINISTRY RESOURCES FOR RESUMING ACTIVITIES" is written in white, bold, sans-serif capital letters. Below the image box, the website address "www.religiouslawguidance.org" is displayed in white. At the bottom left is the ECFA logo and the text "Enhancing Trust". At the bottom right is the text "Email questions to Webinar@ECFA.org".

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Reed Smith

RELIGIOUS LIBERTY IN THE TIME
OF COVID-19

Email: rsmith@clsnet.org

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Key Religious Liberty Issues

Over twenty suits filed regarding church reopenings.

1. How should courts balance the rights of churches to meet against stay-at-home orders designed to prevent the spread of disease?
2. At what point does an emergency stop being an emergency?

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What Are The Court's Considerations In A Church Reopening Suit?

- What types of activities are allowed under the stay-at-home order?
- What precautions has the congregation indicated it will take?
- Is there a state RFRA?
- What are the prescribed limits of emergency authority?

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Jacobson v. Massachusetts, 197 U.S. 11 (1905)

- Case involving mandatory smallpox vaccinations
 - Government order must bear a “real and substantial relation” to protecting public health
 - Government order cannot constitute “a plain, palpable invasion of rights secured by the fundamental law.”

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Courts Are Very Deferential To Declarations Of National Emergency

[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.

***Korematsu v. United States*, 323 U.S. 214 (1944)**

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A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead



Skagit Valley Chorale members Mark Backlund and his wife, Ruth Backlund, sing choir music Friday at their home in Anacortes, Wash., while convalescing from COVID-19. (Karen Ducey / For The Times)

CORONAVIRUS >

Not everyone hates being stuck at home. Some people are thriving

134 pregnant women in L.A. tested positive coronavirus, but none of their babies

L.A. County jail inmates trying to infect themselves with coronavirus, sheriff says

Tracking California's path to reopening, plus news, advice and distractions (free)

Coronavirus live updates: Pelosi unveils \$3 trillion coronavirus aid package

Cases statewide >>

69,715
confirmed

2,802
deaths

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In Contrast, The Free Exercise Clause Generally Gives Way To “Neutral, Generally Applicable” Laws

- “The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.’”
- “The right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”

Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990)

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Courts Differ On How “Generally Applicable” A Law Must Be

- Compare church services to other business and organizations that are exempted from the order

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. “The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”

“In circumstances in which individualized exemptions from a general requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

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Sometimes The Court Just Gets It Wrong

“Although these businesses may not be essential, the exception crafted on their behalf is essential to prevent joblessness at a time when people desperately need to retain their incomes and healthcare, and at a time when unemployment is drastically rising.” – Lighthouse Fellowship v. Northram

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The Supreme Court Weighs In

In a 5-4 vote, the Supreme Court denied a California church's request for an injunction against California's religious gathering restrictions

- Prior to the Court's decision, California changed its order to allow religious gatherings with a cap of the lesser of 25% capacity or 100 congregants
- Illinois, facing a similar suit, dropped all restrictions on religious gatherings
- No majority opinion from the Court

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The Chief Justice's Concurrence

- “Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment”
- “[T]he Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”

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Justice Kavanaugh's Dissent

- To justify its discriminatory treatment of religious worship services, California must show that its rules are “justified by a compelling governmental interest” and “narrowly tailored to advance that interest.”
- “That raises important questions: ‘Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?’”

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At What Point Does An Emergency Stop Being An Emergency?

- Emergency powers generally don't have exceptions depending on the type of expression at issue
 - “When you see...an entire nation, simultaneously grappling with an extraordinary crisis seated in 400 years of American racism, I'm sorry, that is not the same question as the understandably aggrieved store owner or the devout religious person who wants to go back to services.”

-NYC Mayor Bill DeBlasio

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19



Thank You!

For more information about the status of church reopening litigation, please visit

www.clsreligiousliberty.org/covid19freedom


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Theresa Sidebotham

COVID-19 and Tort Liability


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What Is a Tort?

- A wrongful act that results in damage to someone else
 - The type of tort we'll be talking about is negligence.
 - Negligent or reckless action ➡ an injury.
 - Most lawsuits against churches are for negligence.
 - Ex: Someone slips on an icy sidewalk and breaks a hip

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Elements of Tort Liability

- Standard of care (your duty)
 - Making sure sidewalks are clear
- Breach of the standard of care
 - Forgetting to clear and salt sidewalk
- Causation
 - Person falls on the ice
- Injury or damage
 - She breaks a hip

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Liability for COVID-19

- What would happen if someone who attended a church service contracted COVID-19 and died? Could loved ones claim the church is legally liable?
- Is this far-fetched?
 - Lawsuits have been filed against cruise ship operators, nursing homes, and entertainment venues.

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Duty of Care

- Violating a regulatory order is likely a breach of the standard of care.
- If there isn't a regulatory order, then you look at what is considered reasonable care at the time.

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Ministries and Regulatory Orders

- An individual sued a Christian school for asbestos exposure based on violation of a statute.
- An individual who fell from a High Ropes course sued based on the ministry's supposedly not complying with state safety regulations.

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Ministries and Regulatory Orders

- The asbestos case was resolved because no one had gotten sick.
- The High Ropes case was resolved because the ministry was not in violation of state regulations and the person had signed a waiver.

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A COVID-19 Tort Claim

- The standard/duty of care would be set by state orders or mandatory guidance (or reasonableness).
- If the church was unreasonable or failed to follow orders, that would be a breach.
- Causation would be quite hard to establish—could they have caught it elsewhere?
- Damages—the illness or death
- Also the implication of the person's own choices

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Liability Protections?

- Congress is considering liability protections from claims.
- Several states have adopted protections for businesses, premises owners, or medical malpractice.
- Typically, such protections require that you comply with safety and health regulations and/or have no willful misconduct or reckless behavior.
- Insurance may usually cover such claims, but you could also void coverage if you violate regulations.

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Recommendations

- For liability protection, comply with existing regulations and safety recommendations, or show a good-faith effort.
- If regulations are untenable, ask for a variance, engage in political process, or consider litigation.
- A waiver may help. But you usually cannot have liability waived for intentional misconduct.
- Check with your insurance company about what you must do to maintain coverage.

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Spiritual Perspective

- Looked at another way, a duty of care is just how you care for people.
- Sanitizing, wearing masks, etc. should be encouraged as a way of protecting the vulnerable and showing Christian charity.
- Think of it more as love than liability.

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Scott Ward

Resuming In-Person Religious Activities: Practical Considerations

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Practical Risk Management

- In light of what has gone before:
 - Religious Liberty Considerations ...
 - Tort Liability Considerations ...
- How then shall we resume in-person activities?
 - Practical Risk Management Considerations

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Prepare with Prayer

- “All godly action begins with prayer.”
 - Prayer is the firm foundation and a prudent part of all church (and life) risk management
- Have prayer teams bathing in prayer ...
 - Your planning and preparations
 - Your people
 - Your services
 - Your outreach

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Build Your Team

- “Standard of Care” includes acting as a reasonable person would act *in similar circumstances*
 - Relying on expert advice is **evidence** of reasonableness
- Engage available expertise
 - Medical and Health
 - Legal
 - All forms of service –cleaning teams, ushers, etc.

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Know Your Communities

- Know who is in your communities of care:
 - Your staff & volunteers
 - Your members & attendees
 - Your surrounding community
- Know who may have more vulnerabilities
 - Elderly
 - Specific communities
 - Children (secondary factors)

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Do Your Homework: *Identify Your Authorities*

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- Identify relevant SOURCES of authority:
 - Federal
 - State
 - Local
- Identify relevant FORMS of authority:
 - Statutes and Regulations
 - Regulatory Orders
 - Provide the controlling legal requirements
 - May provide the primary Standard of Care
 - Regulatory “Guidance”
 - May provide the most practical information

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Do Your Homework: *Intelligently Interpret Authorities*

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- Understand structures of authority

DEFAULT:

- Federal
- State
- Local (County)

LEGALLY:

- State
- Federal
- Local (County)

PRACTICALLY:

- Local (County)
- State
- Federal

- Reconcile apparent inconsistencies in principled and defensible ways
- Prioritize the most stringent standards

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Do Your Homework: *Identify Your Authorities*

- Identify helpful (RE)SOURCES of authority:
 - State
 - Governor's Offices (Executive Orders & Web Sites)
 - <https://web.csg.org/covid19/executive-orders/>
 - State Health Departments
 - <https://www.cdc.gov/publichealthgateway/healthdirectories/healthdepartments.html>
 - Local
 - County Health Departments
 - <https://www.naccho.org/membership/lhd-directory>
 - Federal
 - Centers for Disease Control
 - www.CDC.gov

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Do Your Homework: *Ask If Your Authorities Address...*

- Regulatory Orders may address ...
 - Timetables for resuming in-person activities
 - When?
 - Phases?
 - Maximum capacity (percentages or numbers)
 - Social distancing minimums
 - Cleaning requirements
- Correctly identify whether state standard is:
 - Required = Standard of Care
 - Recommended = **Probably** Standard of Care
 - Suggested = *Possibly* Standard of Care

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Do Your Homework: *Reference Reliable Resources*

- Reference Other *Reliable Resources*
 - Medical and health information
 - Church-specific information
 - General information
 - News
- Separate the SIGNAL from the NOISE
- See Directory at: **www.religiouslawguidance.org**

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Do Your Homework: *Update Often*

- Assume information will change
 - Often, Quickly, and With Minimal Notice
- Assign individual responsibility to monitor
- Update regularly (e.g., every few days)
 - Do it again... and again... and again

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Recognize Your Risks

- **Primary** = spreading COVID-19 infections
- Potential **Secondary** Risks include:
 - Secondary spreading
 - Unintended consequences from changes in operations to address COVID-19 risks
 - Protection of children

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Recognize Your Risks: *The COVID-19 Calculus*

“The more an individual interacts with others, and the longer the interaction, the higher the risk of COVID-19 spread.”

[U.S. Centers for Disease Control]

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The COVID-19 Calculus

- Components of the Calculus:
 - Controllable: *Character* of Interactions
 - Space – Proximity of exposure
 - Time – Duration of exposure
 - Intensity – Types of exposure
 - NOT Controllable: various “X Factors”
 - *Individual* Transmission and Susceptibility Variations
 - *Early, Evolving, and Still Being Tested* scientific info
 - “*Dark Matter*” – observable but not (yet) understood

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The COVID-19 Calculus: Control the Controllable

- Remember the Basic COVID-19 Calculus:

SPACE * TIME * INTENSITY * X-Factors
 = [sort of]
Primary Controllable Risks of Transmission

- Control All Variables Within Your Control

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Manage Your Time

- **Duration** of Service – *How Long?*
- **Number** of Services – *How Many?*
- **Structure** of Service – *What Happens?*
- **Other Activities** – *What Else Happens?*
- **After** the Service – *What Next?*
- Search for **GAPS** – *What Are We Missing?*
 - *E.g., Times Between Services*
 - *E.g., Preparation Times*

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Structure Your Space

- Consider Your **Complete** Campus
 - **All** Buildings (Not Just the Sanctuary)
 - Entrance, Exit, and Access Points
 - Parking and Approaches
 - Other Spaces – Nursery, Classrooms
 - Search for **GAPS** – *What Are We Missing?*
 - *E.g., Rest Rooms; Storage*
- Don't Overlook **Outdoor** Opportunities

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Structure Your Space

- Implement Social Distancing
 - Plan and Mark
 - Test and Adjust
 - Model and Encourage
 - Monitor and Enforce
 - with gracious firmness

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Find Your Flow

- Discern Directions
 - Entering and Exiting
 - Within a Space or Activity
- Brainstorm Movements and Changes
 - E.g., Person arriving or leaving during service
 - Search for **GAPS** – *What Are We Missing?*
- Establish Principles and Practices
 - Emphasize one-way flows
 - Distinct and clear entrances and exits
 - Eliminate choke points
 - Solve for all reasonably foreseeable issues

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Control Closer Contacts

- Communion and Collections (Offerings):
 - Extend spacing and flows
 - Emphasize one-time uses and Eliminate (suspend) riskier touch points
 - e.g., common cups, collection plates, etc.
 - Evaluate from all angles
 - During Service – Congregation
 - During Service – Servers and Ushers
 - After Service – Cleaners and Counters

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Train Your Teams

- Essential but Not Easy
- Reinforces Your Reasonableness
- Reduces Risks and Likely Liability

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(Over)Communicate Clearly

- Before You Resume
 - Web sites, Emails, Social Media, etc.
- When You Resume
 - Signage, Announcements, Videos
- At All Times
 - Model and Encourage Best Behavior
 - Welcome and Prepare for Questions
 - Ongoing FAQs, etc.

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Clean and Re-Clean

- Cleaning Is **Essential**
 - Detailed guidance available from
 - CDC and other Federal Agencies
 - State Health Departments
 - Private companies
 - Easier to Prove Causation in Lawsuit?
- Cleaning Is **Ongoing**
 - Repeat Regularly After Each Service and Use

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Process Your Post-Game

- After each iteration, consider
 - What worked well?
 - What would you have done differently?
 - What else have you learned?
 - What opportunities are there?
- Don't overlook ministry impact
- Rinse, Lather, Repeat ... Again and Again

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Pray for and Pursue
Humility, Grace, and Love

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Talk to Your Elephants

- “When there is an elephant in the room, Talk to the Elephant!”
- At minimum, **Identify** your Elephants
 - “Elephants” = difficult or divisive issues
 - *Failure to address reasonably* leads to liability
- Possible Elephants:
 - Singing – Choral AND Congregational
 - Masks – potential for differences

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Carefully Choose Mt. Carmels

- Choose the right hills to die on
- Dare to be the *right* Daniel
 - Daniel 1 – Offer Options of Obedience
 - Daniel 5 – Be Ready, Waiting, and Faithful
 - Daniel 3 & 6 – Follow in Unflinching Faith
- Call Christian Legal Society first!

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59



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Uncertainty**

COVID-19 Financial Impact Report
for Churches and Other Nonprofits

By Warren Bird, Ph.D.

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62