



U.S. Department of Justice

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May 12, 2020

Sent via electronic mail

Mr. Dan Brophy
dbrophy@tenco-inc.com

Mr. Maurice W. Jones
jonesyjacksonhole@gmail.com

Re: Teton County Public Health Restrictions

Dear Mr. Brophy & Mr. Jones,

Thank you for your email and letter regarding the constitutionality of the Teton County public health orders addressing COVID-19. I can tell you have given this matter a great deal of thought, and you raise some very important and challenging legal questions.

I share your frustration with the duration and impact these measures are having on many of our basic freedoms, but I am also mindful of the countervailing concerns about health risks. The current pandemic is truly an unprecedented test of our ability to find a balance between protecting public health and preserving constitutional rights and economic livelihood.

The basic legal framework for evaluating the constitutionality of emergency public health orders is highly deferential to the states. Emergency measures may “curtail constitutional rights so long as [they] have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’” *In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (*internal citations omitted*) (*quoting Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)). In evaluating these actions, “Courts may ask whether the state’s emergency measures lack basic exceptions for ‘extreme cases,’ and whether the measures are pretextual—that is, arbitrary or oppressive,” but they “may not second-guess the wisdom or efficacy of the measures.” *Id.*

While the inquiry is deferential, the power of the states is not unlimited. If a public health authority is “exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner,” or goes “so far beyond what was reasonably required for the

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safety of the public,” the courts may be compelled to “interfere for the protection of such persons.” *Jacobson*, 197 U.S. at 28.

As you note, the Attorney General has recently issued a memorandum directing the Department of Justice to monitor state orders to ensure they do not unduly infringe on constitutional rights and civil liberties of individual citizens. Consistent with that direction, the Department has filed Statements of Interest in support of private litigants in two cases involving potential infringement of First Amendment religious free exercise rights. The state health orders at issue in these cases appeared to subject religious organizations to less favorable treatment than similarly situated organizations, implicating a heightened level of constitutional scrutiny.

While we are actively monitoring for similar potential constitutional violations, the Department is also being careful not to unduly interfere in the judgment of the various states when it comes to public health, particularly where they are exercising authorities expressly reserved to them. Private citizens are free to pursue their own avenues for redress, and the Department will consider involvement in such suits as appropriate, but the Department is mindful of the legitimate role of the states in responding to the public health challenges posed by COVID-19.

Let us hope risk indicators continue to show improvement here in Wyoming and restrictions are lifted soon. In the meantime, my office will continue to monitor the situation as directed by the Attorney General.

I appreciate your vigilance in raising these issues and demanding accountability from elected leaders. There is a danger in blindly assuming exercises of authority that infringe upon constitutional rights are categorically justified in the name of emergency pandemic response. We must cast a critical eye to ensure that any such actions do not unjustifiably violate the Constitution. The Department is committed to that effort.

Sincerely,



Mark A. Klaassen

United States Attorney

cc: Erin E. Weisman
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