



OFFICE OF THE GUNNISON COUNTY ATTORNEY

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April 10, 2020

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VIA ELECTRONIC MAIL ONLY

Dear Mr. Hacker,

This office represents Joni Reynolds in her capacity as Public Health Director for Gunnison County, Colorado, which is a subdivision of the State of Colorado. Your letter of April 9, 2020 regarding Gunnison County's Fifth Amended Public Health Order ("Order") was forwarded to our office for a response. Please direct all future communications to Gunnison County, its elected officials and its staff to this office.

Before responding to the substance of your letter, we want to be abundantly clear that Gunnison County cherishes and welcomes visitors to its County, including visitors and non-resident homeowners from Texas. Texans, in particular, have a long and appreciated history of traveling to our County to vacation and recreate. In these extraordinary and unprecedented times, Gunnison County was forced to take dramatic measures to save lives and protect not only its own residents, but citizens from across the nation and the world who, if they continue to visit here, could risk the safety of themselves and their families. Gunnison County has therefore taken the steps it is authorized under Colorado law to protect the public health; although some of those steps are undoubtedly unpopular, we consider them unfortunately necessary.

As a threshold matter, please 1) identify your client(s), and 2) please provide us the authority under which you make your inquiry. Do you purport to represent the State of Texas, the Governor of the State of Texas, or some other person or entity? Please disclose the person(s) for whom you are making your inquiry and the legal authority that you contend empowers you to make such an inquiry of Gunnison County.

In addition, we are unclear whether the Attorney General of the State of Texas is considering litigation against Gunnison County and, if so, what authority he would have to bring

such litigation against a foreign local government. Colorado law provides the exclusive remedy for persons allegedly aggrieved by a Colorado county public health order. *See* C.R.S. § 25-1-515. Please provide us the authority that you contend permits the attorney general of a foreign state to come to a Colorado court to seek judicial review of a Colorado county's public health order.

Furthermore, C.R.S. § 25-1-515 provides standing to a "person aggrieved and affected by a decision of a county[.]" Please explain how the Attorney General of the State of Texas is such a person or purports to represent such person(s).

Regardless, and contrary to the assertions contained in your correspondence, Gunnison County's Order, along with the orders it previously issued, are authorized by Colorado and federal law and are fully constitutional. Gunnison County's Public Health Director is given broad authority and delegation of the State of Colorado's police powers to, among other things, "exercise . . . control over property and over the persons of people" within the jurisdiction of Gunnison County that the Director "may find necessary for the protection of the public health[.]" to "prohibit gatherings of people when necessary to protect public health[.]" and to "control the causes of epidemic or communicable diseases or conditions affecting public health." *See* C.R.S. § 25-1-506(b)(V)-(VI). There simply is no reasonable basis to contend that the Public Health Director lacks authority to issue the orders that she has.

Nonetheless, you contend that the orders, particularly those directed at non-residents, are unconstitutional under the Privileges and Immunities Clause. Your correspondence makes sweeping and generalized arguments about the rights of visitors to Colorado, but appears to all but ignore not only the unprecedented public health crisis this County is facing, but also the law that establishes the constitutionality of the County's Order. It is well established that, although in ordinary circumstances a visitor to Colorado and Gunnison County is at liberty to remain or otherwise stay at a place of his or her choosing, this liberty interest gives way to the paramount government interest in protecting public safety when the community faces a disaster. *See, e.g., Jacobson v. Mass.*, 197 U.S. 11, 26-27 (1905) (upholding a Massachusetts law requiring mandatory small pox vaccinations); *Miller v. Campbell County*, 945 F.2d 348 (10th Cir. 1991) (upholding county's order of evacuation for a subdivision infiltrated by lethal gas); *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) (upholding a 3-month-long curfew as a result of Hurricane Andrew that required people to stay in their homes); *see also Yakus v. United States*, 321 U.S. 414, 422-23, 431-49 (1944); *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 285 (E.D.N.Y. September 24, 2010) (rejecting claim that the Constitution provides exemption from public health laws). As the Supreme Court has explained:

This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted.

See Mo. P. R. Co. v. Omaha, 235 U.S. 121, 127 (1914).¹

Even in non-emergent situations, the United States Supreme Court recognized long ago that non-residents' rights under the Privileges and Immunities Clause are not absolute, and that a government can treat non-residents differently where "there is a substantial reason for the difference in treatment" and the different treatment "practiced against nonresidents bears a substantial relationship to the State's objective." *See Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284, 105 S. Ct. 1272, 1278 (1985).² As your letter acknowledges, Gunnison County has identified such reasons:

- "Non-residents, visitors and non-resident homeowners from lower altitudes are at a greater risk for complications from COVID-19 infection than residents, who are acclimatized to the high-altitude environment of Gunnison County.
- [N]on-residents, regardless of whether they own a residence in Gunnison County, are imposing unnecessary burdens on health care, public services, first responders, food supplies and other essential services.
- [Non-residents] are also creating issues with regard to enforcement of Gunnison County's public health orders."

See 5th Am. Public Health Ord. (April 3, 2020) at 2. Your letter attempts to dispute these reasons, but you provide no basis -- only your own unsupported arguments -- that the provisions of the Order are not based on the facts. If forced to defend the Order in litigation, we will bring to bear the appropriate public health bases and supporting facts for each and every provision of the Order that is challenged. Given that we fail to see how the Texas Attorney General even has the authority to challenge a Colorado county's local public health order, and the weakness of your legal arguments, we see no need to provide this information in response to your correspondence. It is suffice to say that these reasons are substantial and therefore constitutional, especially given the unprecedented public health disaster this County continues to face.

Your letter also gives short shrift to the Order's exceptions to the non-resident provisions, which include: 1) Non-residents permitted to remain under the express terms of the Order; 2) non-residents necessary to allow the businesses, events or activities permitted by the Order to continue (e.g., delivery drivers to grocery stores or gas stations, medical personnel to assist in hospital operations, law enforcement to assist in the enforcement of this Order); and 3) non-residents who receive an express, written exemption from the Public Health Director. Thus, under these provisions, a non-resident is potentially eligible to remain in Gunnison County should the Public Health Director determine that it is consistent with the Order and the County's public health objectives. Indeed, the Public Health Director has already granted the majority of the exemption requests she has received. Your letter's statement that the Order "entirely prohibits" non-residents is, therefore, inaccurate. You also claim that these exceptions do not further establish the constitutionality of the Order, but provide no legal or factual support for this argument. Again, given the extraordinary public health crisis our citizens face, and given that

¹ Colorado, through CRS § 25-1-506 and other provisions of law, has delegated its police power to the Gunnison County Public Health Director in this instance.

² We emphasize that *Piper* was not decided in the context of a public health crisis or the exercise of a government's police powers to protect against communicable disease. *See id.*

the Order permits the Public Health Director to make exceptions if, in her discretion, it would still protect the public health, there simply is no proper basis for your claim that the Order does not pass constitutional muster.

Your letter also ignores the fact that the Order treats residents of Colorado and residents of other states equally, thus illuminating a fatal flaw in your argument. As your letter concedes, the Privileges and Immunities Clause generally protects the right to travel from one state to another and otherwise from treating the citizens from a foreign state differently from state citizens. *See* U.S. Const. art. IV, § 2, cl. 1. The case you cite, *Saenz v. Roe*, 526 U.S. 489, 500 (1999) states:

The ‘right to travel’ discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

See id. Here, Gunnison County does not purport to tell non-residents that they cannot come to Colorado, nor does it place conditions upon non-residents who desire to come to Colorado. More importantly, residents of Colorado who live outside of Gunnison County are restricted in the same manner as residents of other states. States that “regulate even-handedly to effectuate a legitimate local public interest” do not violate the Constitution. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). Here, the Order even-handedly treats Colorado citizens the same as it does the citizens of any other state to effectuate the local public interest of protecting the public health.

Finally, we note that by executive order, the Governor of Texas has imposed freedom of movement and travel restrictions on certain out-of-state residents but apparently allowing complete freedom to other visitors. *See* Tx. Gov. Exec. Ord. GA-11 (March 26, 2020); GA-12 (March 30, 2020). Although we take no position on the legality of these orders, the flawed rationale contained in your correspondence would suggest that the Texas Attorney General should view these orders as unconstitutional.

We also note that the Texas Attorney General recently recognized that Texas law “allow[s] municipal and county officials to **control the movement of persons and the occupancy of premises** in a local disaster area.” *See* Tx. Atty. Gen. Op. KP-0296 (March 27, 2020) at 2 (emphasis added). This is precisely what Gunnison County is attempting to accomplish with its Order under Colorado law.

Gunnison County will welcome the return of non-residents once this crisis is over, including the citizens of Texas. But in the face of the worst pandemic in over a century, in which almost a hundred thousand people around the world have succumbed to this disease (including almost 200 people in Colorado and a similar number in Texas), we can and will continue to employ the authority granted to us by the Constitution of the United States, the

Constitution of Colorado, and Colorado law to protect the health, safety and welfare of Gunnison County's citizens, visitors and property owners.

Please do not consider this letter to be a complete recitation of the arguments and authorities that Gunnison County will rely upon if forced to defend the Order in litigation; Gunnison County reserves the right to avail itself of every available defense and argument if required to do so.

Regards,

/s/ Matthew Hoyt

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