

HON. BENJAMIN SETTLE  
NOTE ON MOTION CALENDAR: JUNE 10, 2020

UNITED STATES DISTRICT COURT  
WESTERN DIVISION OF WASHINGTON

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CLINT DIDIER, LISA THOMAS, TIM )	<b>CASE NO. 3:20-cv-5408-BHS</b>
EYMAN, LAWANDA JOY HATCH, )	
DEAN WELLSFRY, PATTY DETRO, )	PLAINTIFFS' REPLY ON
JASON BERNICA, S. ROWAN WILSON, )	MOTION FOR PRELIMINARY
BOBBI RANSIER and OTHER )	INJUNCTION
WASHINGTONIANS SIMILARLY )	
SITUATED, )	
)	
)	
Plaintiffs, )	
)	
JAY INSLEE, in his capacity as Governor )	
of the state of Washington, )	
)	
Defendant, )	
)	

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**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs set forth this Reply notwithstanding the lack of response from the Governor.

Plaintiffs will deal with the issue of 11<sup>th</sup> Amendment, immunity, and of substantive due process.

**ARGUMENT AND AUTHORITIES**

Defendant has raised the issue of 11<sup>th</sup> Amendment immunity, sovereign immunity, and qualified immunity in its affirmative defenses. As to a preliminary injunction to prevent Defendant

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from further abuses of the Rights held by Plaintiffs pursuant to the First, Fifth, and Fourteenth Amendments to the United States Constitution, Defendant's affirmative defenses fail.

As the Supreme Court stated in *Ex Parte Young*, 209 US 123, 144 (1908):

[T]he Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature. *Chicago &c. R.R. Co. v. Minnesota*, 134 U.S. 418; *Reagan v. Farmers' &c. Co.*, 154 U.S. 369, 399; *St. Louis &c. Co. v. Gill*, 156 U.S. 649; *Covington &c. Turnpike Road Company v. Sandford*, 164 U.S. 578; *Smyth v. Ames*, 169 U.S. 466, 522; *Chicago &c. Railway Co. v. Tompkins*, 176 U.S. 167, 172.

“[T]he Eleventh Amendment does not bar claims for prospective injunctive relief against state officials in their official capacities.” *Ex parte Young*, 209 U.S. 123 (1908), citing *Negron-Almeda v. Santiago*, 579 F.3d 45, 52 (1st Cir. 2009). In *Ex parte Young*, 209 U.S. 123 (1908), (plaintiff permitted to sue a state official acting in his or her official capacity for prospective injunctive relief for continuing violations of federal law. *Id.* at 155-56).

Further, Defendant is not deserving of Qualified Immunity. The facts as alleged by plaintiffs “taken in the light most favorable to the party asserting the injury,” show that the Defendant has violated the rights of plaintiffs protected by the First, Fifth, and Fourteenth Amendments. *Saucier v. Katz*, 533, U.S. 194, 201 (2001). These rights are well established rights of free association and free assembly protected by the First Amendment, rights of due process and just compensation protected by the Fifth and Fourteenth Amendments, and the right to equal protection established under the Fourteenth Amendment. The body of law supporting these rights is enormous and represent what it means to be a free American. Citations omitted.

These rights have been “clearly established” prior to the adoption of the 11<sup>th</sup> Amendment, and every Washingtonian had an expectation that these rights would be recognized by a Governor who took an oath to protect and defend the same.

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Defendant's Stay Home – Stay Safe orders are unreasonable and beyond the scope of his constitutional authority to so act. The entirety of the Governor's authority in an emergency is set forth in Article II, Section 42 of the Constitution of the State of Washington:

SECTION 42 GOVERNMENTAL CONTINUITY DURING EMERGENCY PERIODS. The legislature, in order to insure [sic] continuity of state and local governmental operations in periods of emergency resulting from enemy attack, shall have the power and the duty, immediately upon and after adoption of this amendment, to enact legislation providing for prompt and temporary succession to the powers and duties of public offices of whatever nature and whether filled by election or appointment, the incumbents and legal successors of which may become unavailable for carrying on the powers and duties of such offices; the legislature shall likewise enact such other measures as may be necessary and proper for insuring the continuity of governmental operations during such emergencies. Legislation enacted under the powers conferred by this amendment shall in all respects conform to the remainder of the Constitution: Provided, That if, in the judgment of the legislature at the time of disaster, conformance to the provisions of the Constitution would be impracticable or would admit of undue delay, such legislation may depart during the period of emergency caused by enemy attack only, from the following sections of the Constitution: Article 14, Sections 1 and 2, Seat of Government; Article 2, Sections 8, 15 (Amendments 13 and 32), and 22, Membership, Quorum of Legislature and Passage of Bills; Article 3, Section 10 (Amendment 6), Succession to Governorship: Provided, That the legislature shall not depart from Section 10, Article III, as amended by Amendment 6, of the state Constitution relating to the Governor's office so long as any successor therein named is available and capable of assuming the powers and duties of such office as therein prescribed; Article 3, Section 13, Vacancies in State Offices; Article 11, Section 6, Vacancies in County Offices; Article 11, Section 2, Seat of County Government; Article 3, Section 24, State Records. [AMENDMENT 39, 1961 House Joint Resolution No. 9, p 2758. Approved November 1962.]

The only remaining power conferred on the governor during an emergency is found in Article VIII, Section 12(i):

If the governor declares a state of emergency resulting from a catastrophic event that necessitates government action to protect life or public safety, then for that fiscal year moneys may be withdrawn and appropriated from the budget stabilization account, via separate legislation setting forth the nature of the emergency and containing an appropriation limited to the above-authorized purposes as contained in the declaration, by a favorable vote of a majority of the members elected to each house of the legislature.

A reasonable government official holding the office of Governor pursuant to an oath to support and defend the Constitution of the State of Washington and the Constitution of the United

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States would recognize that the Stay Home – Stay Safe Proclamations exceed the governor’s constitutional authority to so act. Qualified Immunity therefore does not lie.

The Governor of Washington is charged by the state constitution with the duty to “take care that the laws are faithfully executed.” As was decided in *Socialist Workers Party v. Rockefeller* (S.D.N.Y.1970) 314 F. Supp. 984, 988 n. 7 (three judge court), aff’d, 400 U.S. 806, 91 S.Ct. 65, 27 L. Ed.2d 38, and *Johnson v. Rockefeller* (S.D.N.Y.1973) (Lasker, J.) 58 F.R.D. 42, this constitutional mandate, without more, provides a sufficient connection with the enforcement of the statute to make the Governor a proper defendant.

The governor has not argued that a compelling state interest exists for terminating the First, Fifth, and Fourteenth Amendment rights of plaintiffs. Substantive due process requires the State to show that its regulation is necessary to serve a compelling state interest and that *it is narrowly drawn* to achieve that end. *Carey v. Brown*, 447 U. S. 455, 461 (1980).

As Justice Harlan stated in *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958): “[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *Anderson v. Celebrezze*, 460 US 780, 787 (1983). Also see *Williams v. Rhodes*, 393 U. S. 23, 30-31 (1968),

The court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. (In this case, no justifications have been set forth). In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only

after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams v. Rhodes*, *supra*, at 30-31; *Bullock v. Carter*, 405 U. S., at 142-143; *American Party of Texas v. White*, 415 U. S. 767, 780-781 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U. S. 173, 183 (1979). Also see, *Anderson v. Celebrezze*, *op. cit.* at 789-90. *Storer v. Brown*, *supra*, at 730; *American Party of Texas v. White*, *supra*, at 780-781; *Illinois Elections Bd. v. Socialist Workers Party*, *supra*, at 188-189; cf. *Mississippi University for Women v. Hogan*, 458 U. S. 718, 724 (1982).

The governor has made no argument. His proclamations allow hundreds to gather in Walmart, Costco, Lowes, or Fred Meyer, but not in churches. His proclamations allow customers at marijuana dispensaries, but not at hair salons. His orders prohibit political gatherings, and act to take the property interests of small businesses in favor of large businesses. His edicts impermissibly restrict expression protected by the First Amendment, unlawfully deprive Washingtonians of due process, openly discriminate against one class of Washingtonians in favor of another class, and deny Washingtonians due process and equal protection. His proclamations are not “narrowly drawn” nor does such deprivation of rights further any state interest. See Declaration of Richard Hjelte demonstrating no cognizable emergency.

Respectfully submitted this 6th day of July 2020.

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### CERTIFICATE OF SERVICE

The undersigned now certifies that a true and correct copy of the foregoing was served upon the following attorneys of record by means of the electronic filing system as provided by the United States District Court, Western Division of Washington, commensurate with its filing on this 6th day of July 2020.

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