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

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF WASHINGTON

CLINT DIDIER, LISA THOMAS, TIM EYMAN, LAWANDA JOY HATCH, DEAN WELLSFRY, PATTY DETRO, and JASON BERNICA, and OTHER NONESSENTIAL WASHINGTONIANS SIMILARLY SITUATED, Plaintiffs, v. JAY INSLEE, in his capacity as Governor of the state of Washington, Defendant,	NO. 3:20-cv-5408 **PLAINTIFFS' MEMORANDUM ON ORDER TO SHOW CAUSE** [Oral Argument Requested]

PLAINTIFFS' RESPONSE ON ORDER TO SHOW CAUSE

Plaintiffs assert the following in response to the Court's Order to Show Cause why this case should be sustained, and the defendant Jay Inslee enjoined as requested by plaintiffs.

"[T]he general doctrine of *Osborn v. Bank of the United States*, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State,

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from. *Ex Parte Young*, 209 US 123, 154 (1908). The same principle is decided in *Scott v. Donald*, 165 U.S. 58, 67. *And see Missouri &c. v. Missouri Railroad Commissioners*, 183 U.S. 53.

"Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Ex Parte Young*, 209 US 123, 155-56 (1908).

Inslee is just such a party. Inslee has claimed the authority found in RCW 38.08, 38.52 and 43.06. (Proclamation 20-25, Dec. of S Pidgeon, Ex. 2). Further, Inslee then deployed the National Guard (and retains the right to deploy again, including to deploy contact tracers).

> I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak.
> (Proclamation 20-25, Dec. of S Pidgeon, Ex. 2).

RCW 38.08.030 provides as follows:

> The governor may by proclamation declare the county or city in which troops are serving, or any specific portion thereof, to be under either complete or limited martial law to the extent, in his or her opinion, that the reestablishment or maintenance of law and order may be promoted.
>
> "Limited military law" is a partial subordination of civil authority by the setting up of an additional police power vested in the military force which shall have the right to try all persons apprehended by it in such area by a military tribunal or turn such offender over to civil authorities within five days for further action, during which time the writ of

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

habeas corpus shall be suspended in behalf of such person.

RCW 38.52.050 provides for the Governor's general powers and duties. The statute in applicable part states as follows:

(1) The governor, through the director, shall have general supervision and control of the emergency management functions in the department, and shall be responsible for the carrying out of the provisions of this chapter, and in the event of disaster beyond local control, may assume direct operational control over all or any part of the emergency management functions within this state.
(2) In performing his or her duties under this chapter, the governor is authorized to cooperate with the federal government, with other states, and with private agencies in all matters pertaining to the emergency management of this state and of the nation.
(3) In performing his or her duties under this chapter and to effect its policy and purpose, the governor is further authorized and empowered:
(a) To make, amend, and rescind the necessary orders, rules, and regulations to carry out the provisions of this chapter within the limits of the authority conferred upon him [or her] herein, with due consideration of the plans of the federal government;
(b) On behalf of this state, to enter into mutual aid arrangements with other states and territories, or provinces of the Dominion of Canada and to coordinate mutual aid interlocal agreements between political subdivisions of this state;
(c) To delegate any administrative authority vested in him [or her] under this chapter, and to provide for the sub-delegation of any such authority;
(d) To appoint, with the advice of local authorities, metropolitan or regional area coordinators, or both, when practicable;
(e) To cooperate with the president and the heads of the armed forces, the emergency management agency of the United States, and other appropriate federal officers and agencies, and with the officers and agencies of other states in matters pertaining to the emergency management of the state and nation.

RCW 43.06 provides in relevant part as follows:

(1) The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting:
(a) Any person being on the public streets, or in the public parks, or at any other public place during the hours declared by the governor to be a period of curfew;
(b) Any number of persons, as designated by the governor, from assembling or gathering on the public streets, parks, or other open areas of this state, either public or private;
(c) The manufacture, transfer, use, possession or transportation of a Molotov cocktail or any other device, instrument or object designed to explode or produce uncontained combustion;
(d) The transporting, possessing or using of gasoline, kerosene, or combustible, flammable, or explosive liquids or materials in a glass or uncapped container of any kind except in connection with the normal operation of motor vehicles, normal home use or legitimate

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

commercial use;

(e) The sale, purchase or dispensing of alcoholic beverages;

(f) The sale, purchase or dispensing of other commodities or goods, as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace;

(g) The use of certain streets, highways or public ways by the public; and

(h) Such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.

(2) The governor after proclaiming a state of emergency and prior to terminating such may, in the area described by the proclamation, issue an order or orders concerning waiver or suspension of statutory obligations or limitations in the following areas:

(a) Liability for participation in interlocal agreements;

(b) Inspection fees owed to the department of labor and industries;

(c) Application of the family emergency assistance program;

(d) Regulations, tariffs, and notice requirements under the jurisdiction of the utilities and transportation commission;

(e) Application of tax due dates and penalties relating to collection of taxes;

(f) Permits for industrial, business, or medical uses of alcohol; and

(g) Such other statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, unless (i) authority to waive or suspend a specific statutory or regulatory obligation or limitation has been expressly granted to another statewide elected official, (ii) the waiver or suspension would conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, or (iii) the waiver or suspension would conflict with the rights, under the First Amendment, of freedom of speech or of the people to peaceably assemble. The governor shall give as much notice as practical to legislative leadership and impacted local governments when issuing orders under this subsection (2)(g).

(3) In imposing the restrictions provided for by RCW 43.06.010, and 43.06.200 through 43.06.270, the governor may impose them for such times, upon such conditions, with such exceptions and in such areas of this state he or she from time to time deems necessary.

(4) No order or orders concerning waiver or suspension of statutory obligations or limitations under subsection (2) of this section may continue for longer than thirty days unless extended by the legislature through concurrent resolution. If the legislature is not in session, the waiver or suspension of statutory obligations or limitations may be extended in writing by the leadership of the senate and the house of representatives until the legislature can extend the waiver or suspension by concurrent resolution. For purposes of this section, "leadership of the senate and the house of representatives" means the majority and minority leaders of the senate and the speaker and the minority leader of the house of representatives.

(5) Any person willfully violating any provision of an order issued by the governor under this section is guilty of a gross misdemeanor.

[Bold and underline added].

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

All power and authority to execute and enforce the laws of Washington are currently residing exclusively in the hands of Jay Inslee, and to the extent that Labor & Industries, or the National Guard, or the Department of Health enforce his edicts against citizens of Washington such as plaintiff, they do so pursuant to his sub-delegation and as agents of his acts.

In case of an injury threatened by the illegal action of a government officer, the officer cannot claim immunity from the injunction process. The principle has frequently been applied with respect to officers seeking to enforce unconstitutional enactments. *Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868; *Davis v. Gray*, 16 Wall. 203; *Pennoyer v. McConnaughy*, 140 U.S. 1, 10; *Scott v. Donald*, 165 U.S. 107, 112; *Smyth v. Ames*, 169 U.S. 466; *Ex parte Young*, 209 U.S. 123, 159, 160; *Ludwig v. Western Union Telegraph Co.*, 216 U.S. 146; *Herndon v. C., R.I. & P. Ry. Co.*, 218 U.S. 135, 155; *Hopkins v. Clemson College*, 221 U.S. 636, 643-645. And it is equally applicable to an officer acting in excess of his authority or under an authority not validly conferred. *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 171, 172; *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94. If an order exceeds the authority conferred by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. *Garfield v. Goldsby*, 211 U.S. 249, 261, 262*; Lane v. Watts*, 234 U.S. 525, 540; *Payne v. Central Pacific Railway*, 255 U.S. 228, 238; *Santa Fe Pacific Railroad v. Fall*, 259 U.S. 197, 199; *Colorado v. Toll*, 268 U.S. 228, 230.

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

to a mandamus if he refused to do an act which the law plainly required him to do. As observed in *Board of Liquidation v. McComb,* 92 U.S. 531, 541: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.'" *Noble v. Union River Logging R. Co.*, 147 US 165, 171-172 (1893).

Thus, an officer who acts outside the scope of his jurisdiction and without authorization of law may be liable even in damages for injuries suffered by a citizen as a result thereof. *Lukens Steel Co. v. Perkins,* 107 F. 2d 627, 635, Court of Appeals, Dist. of Columbia Circuit (1939), *citing Bradley v. Fisher,* 13 Wall, U.S., 335, 351, 352, 20 L.Ed. 646. *Cooper v. O'Connor,* 69 App.D.C. 100, 102, 103, 99 F.2d 135, 137, 138, 118 A.L.R. 1440, *certiorari denied* 305 U.S. 643, 59 S.Ct. 146, 83 L.Ed. 414. *Cf. Johnson v. Lankford,* 245 U.S. 541, 38 S.Ct. 203, 62 L. Ed. 460.

And the Supreme Court has in numerous instances approved the use of injunction process in clear cases of illegal action or threatened illegal action by public officers. *Ickes v. Fox,* 300 U.S. 82, 97, 57 S.Ct. 412, 81 L.Ed. 525; *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed. 90; *Waite v. Macy,* 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892; *Gegiow v. Uhl,* 239 U.S. 3, 36 S.Ct. 2, 60 L.Ed. 114 (habeas corpus); *Philadelphia Co. v. Stimson,* 223 U.S. 605, 620, 32 S.Ct. 340, 56 L.Ed. 570; *Goltra v. Weeks,* 271 U. S. 536, 545, 46 S.Ct. 613, 70 L.Ed. 1074; *Adams v. Nagle,* 303 U.S. 532, 541, 542, 58 S.Ct. 687, 82 L.Ed. 999;

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

Colorado v. Toll, 268 U.S. 228, 230, 45 S.Ct. 505, 69 L.Ed. 927; *Lane v. Watts,* 234 U.S. 525, 540, 34 S.Ct. 965, 58 L.Ed. 1440; *Proctor & Gamble Co. v. Coe,* 68 App. D.C. 246, 249, 250, 96 F.2d 518, 521, 522, *certiorari denied,* 305 U.S. 604, 59 S.Ct. 65, 83 L.Ed. 384:

"The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws: (1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government (*Philadelphia Co. v. Stimson, supra* [223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570]); (2) where an officer attempts to enlarge his power, or to usurp power (*Waite v. Macy, supra* [246 U.S. 606, 38 S.Ct. 395, 62 L. Ed. 892]); or (3) where his act is based upon a clear mistake of law (*American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 109, 110, 23 S.Ct. 33, 47 L.Ed. 90); (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute (*Interstate Commerce Commission v. Northern Pacific R. Co.,* 216 U.S. 538, 30 S.Ct. 417, 54 L.Ed. 608. *See Lane v. Watts,* 234 U.S. 525, 540, 34 S.Ct. 965, 58 L. Ed. 1440; *Santa Fé Pacific R. Co. v. Lane,* 244 U.S. 492, 497, 37 S.Ct. 714, 61 L.Ed. 1275); (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner (*Commercial Solvents Corp. v. Mellon,* 51 App.D.C. 146, 277 F. 548, 550, and cases there cited); (6) where the act of the officer, `under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority (and) he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.' *Noble v. Union River Logging R.* Co., 147 U.S. 165, 171, 172, 13 S.Ct. 271, 273, 37 L. Ed. 123; *Board of Liquidation v. McComb,* 92 U.S. 531, 541, 23 L.Ed. 623."

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

By reason of their illegality, the acts or threatened acts of such officers are personal and derive no official justification from their being done in asserted agency for the Government, and should not be granted protection under the Eleventh Amendment. *Goltra v. Weeks,* 271 U.S. 536, 544, 46 S.Ct. 613, 70 L.Ed. 1074. *See Ryan v. Chicago, B. & Q.* R. Co., 7 Cir., 59 F.2d 137, 144, 145; *Haskins Bros. & Co. v. Morgenthau,* 66 App.D.C. 178, 185, 85 F.2d 677, 684, *certiorari denied,* 299 U.S. 588, 57 S.Ct. 118, 81 L.Ed. 433. *See also, Allen v. Regents,* 304 U. S. 439, 444, 58 S.Ct. 980, 82 L.Ed. 1448. Inslee's action, done under the color of law, exceed his authority to act. He exceeds the limits of the state constitution, he exceeds the limits of his statutory authorization (to set curfews or restrict entry in public parks (RCW 38.08.08)), and he has not authority from any source to violate federal criminal statutes.

As was set forth in Plaintiffs' Reply in Support of Motion for Preliminary Injunction:

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,

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

> 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.]

Not only is Inslee not authorized to abrogate any of the freedoms protected under the Constitution of the State of Washington, he is also prohibited by criminal statutes from depriving Washingtonians of their constitutionally protected freedoms under the Bill of Rights. 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.

Inslee's Proclamation 20-25, 20-25.1, 20-25.2, 20-25.3, 20-25.4 and 20.25.5 remain in effect and the exacting Stay Safe, Stay Home edict is valid in all Phase I counties in Washington currently. Equally, important, Inslee reserves the self-appointed right to return any county into a Phase I status based upon his mere whim or singular conclusion based on data he alone has weighed and determined sufficient to deprive defendants of their rights to liberty. For instance, in Inslee's Proclamation 20-25.5 he states as follows:

> "I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim and order that a State of Emergency continues to exist in all counties of Washington State, that Proclamation 20-05 and all amendments thereto **remain in effect** [bold added] as otherwise

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

> amended, and that, to help preserve and maintain life, health, property or the public peace pursuant to RCW 43.06.220(1)(h), Proclamations 20-25, et seq., are amended to extend all of the prohibitions and each expiration date therein to 11:59 p.m. on July 9, 2020, and that except as otherwise provided in this order, the Safe Start Washington Phased Reopening County-by-County Plan found here, the Order of the Secretary of Health 20-03, issued on June 24, 2020, found here, and **all other provisions of Proclamations 20-25, et seq., shall remain in full force and effect**." [Bold added].

Inslee's orders include the following:

"All people in Washington State shall immediately cease leaving their home or place of residence except: (1) to conduct or participate in essential activities, and/or (2) for employment in essential business services." (20-25; Dec. of S Pidgeon, Ex. 2).

"All people in Washington State shall immediately cease participating in all public and private gatherings and multi-person activities for social, spiritual, and recreational purposes, regardless of the number of people involved, except as specifically identified herein. Such activity includes, but is not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition also applies to planned wedding and funeral events." (20-25; Dec. of S Pidgeon, Ex. 2).

"Violators of this of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5)." (20-25.1; Dec. of S Pidgeon, Ex. 2).

The limitations imposed by Inslee violate Plaintiffs rights protected by the Bill of Rights and amount to criminal violations of federal law, to wit:

18 U.S. Code § 241.Conspiracy against rights

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
> . . .

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

> They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.
>
> (June 25, 1948, ch. 645, 62 Stat. 696; Pub. L. 90–284, title I, § 103(a), Apr. 11, 1968, 82 Stat. 75; Pub. L. 100–690, title VII, § 7018(a), (b)(1), Nov. 18, 1988, 102 Stat. 4396; Pub. L. 103–322, title VI, § 60006(a), title XXXII, §§ 320103(a), 320201(a), title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 1970, 2109, 2113, 2147; Pub. L. 104–294, title VI, §§ 604(b)(14)(A), 607(a), Oct. 11, 1996, 110 Stat. 3507, 3511.)

Jay Inslee, in his Proclamation 20-25.4 (SP Dec. Ex. 4), admits, without limitation, conspiring with health professionals, epidemiological modeling experts, and modelers to limit the rights of plaintiffs protected by the First, Fifth, and Fourteenth Amendments on the basis of legally non-cognizable criteria he calls "a careful, phased, and science-based approach."

> **WHEREAS**, the health professionals and epidemiological modeling experts predict that although we have passed the peak of the first wave of COVID-19 in the State and we have made adequate progress as a state to modify some of the initial community mitigation efforts, the nature of COVID-19 viral transmission, including both asymptomatic and symptomatic spread as well as the relatively high infectious nature, suggests it is appropriate to slowly re-open Washington State only through a careful, phased, and science-based approach. Modelers continue to agree that fully relaxing social distancing measures will result in a sharp increase in the number of cases. (Proclamation 20-25.4; SP Dec. Ex. 4).

Inslee's proclamations violate 18 U.S. Code § 241, and therefore Eleventh Amendment immunity does not (or should not) protect criminal activity. *Ex Parte Young, op. cit. And see Osborn v. Bank of United States,* 9 Wheat. 738, 843, 868; *Davis v. Gray,* 16 Wall. 203; *Pennoyer v. McConnaughy,* 140 U.S. 1, 10; *Scott v. Donald,* 165 U.S. 107, 112; *Smyth v. Ames,* 169 U.S. 466; *Ex parte Young,* 209 U.S. 123, 159, 160; *Ludwig v. Western Union Telegraph Co.,* 216 U.S. 146; *Herndon v. C., R.I. & P. Ry. Co.,* 218 U.S. 135, 155; *Hopkins v. Clemson College,* 221 U.S. 636, 643-645. *Noble v. Union River Logging R.R. Co.,* 147 U.S. 165, 171, 172; *School of*

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

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Further, the ongoing edicts of Inslee also violate 18 U.S. Code § 248. This statute provides in part that "Whoever, by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship . . . shall be subject to the penalties provided in subsection (b) and **the civil remedies** provided in subsection (c) . . ." 18 U.S. Code § 248(a)(2).

Criminal penalties are applicable under section (b), providing that whoever violates this section shall "(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and (2)in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life."

On March 23, Inslee prohibited "all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants, and all non-essential businesses in Washington State from conducting business," within the limitations provided therein. (Proclamation 20-25; SP Dec, Ex. 2). Under all of these provisions, there is no opportunity to be heard, no effective notice on a person-by-person, or business-by-business basis, no opportunity to cross examine witnesses, or to present witnesses or evidence on behalf of the person effected, and no right to an appeal.

The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Eleventh Amendment jurisprudence construes the State as the State and its agencies, to include the officers of the State in their official capacities. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

Yet Inslee has made laws which on their face abridge the privileges or immunities of citizens of the United States; and which on their face deprive Washingtonians of liberty and property, without due process of law; and which on their face deny to Washingtonians within the

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

State's jurisdiction the equal protection of the laws and has done so outside the authority confirmed to him by the Constitution of the State of Washington and in violation of federal law.

Inslee has unlawfully injured, oppressed, threatened, and intimidated plaintiffs from exercising their right of free assembly. The Constitution protects the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs which foster diversity and act as critical buffers between the individual and the power of the State. *Roberts v. United States Jaycees*, 468 US 609, 618-19 (1984), *citing E. g., Pierce v. Society of Sisters*, 268 U. S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923); *Zablocki v. Redhail*, 434 U. S. 374, 383-386 (1978); *Moore v. East Cleveland*, 431 U. S. 494, 503-504 (1977) (plurality opinion); *Wisconsin v. Yoder*, 406 U. S. 205, 232 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 482-485 (1965); *Pierce v. Society of Sisters*, *supra*, at 535. *See also Gilmore v. City of Montgomery*, 417 U. S. 556, 575 (1974); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 460-462 (1958); *Poe v. Ullman*, 367 U. S. 497, 542-545 (1961) (Harlan, J., dissenting). *Quilloin v. Walcott*, 434 U. S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U. S. 816, 844 (1977); *Carey v. Population Services International*, 431 U. S. 678, 684-686 (1977); *Cleveland Board of Education v. LaFleur*, 414 U. S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U. S. 645, 651-652 (1972); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

Inslee has unlawfully injured, oppressed, threatened, and intimidated plaintiffs from exercising their right to ordered liberty. The due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress. *Palko v. Connecticut*, 302 US

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

319, 324-35 (1937); *De Jonge v. Oregon,* 299 U.S. 353, 364; *Herndon v. Lowry*, 301 U.S. 242, 259; or the like freedom of the press, *Grosjean v. American Press Co.,* 297 U.S. 233; *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 707; or the free exercise of religion, *Hamilton v. Regents,* 293 U.S. 245, 262; *cf. Grosjean v. American Press Co., supra; Pierce v. Society of Sisters,* 268 U.S. 510; or the right of peaceable assembly, without which speech would be unduly trammeled, *De Jonge v. Oregon, supra; Herndon v. Lowry, supra;* or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama,* 287 U.S. 45. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Inslee has unlawfully injured, oppressed, threatened, and intimidated plaintiffs from exercising their right of right to obtain a livelihood. The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Truax v. Raich,* 239 US 33 (1915), *citing Butchers' Union Co. v. Crescent City Co.,* 111 U.S. 746, 762; *Barbier v. Connolly,* 113 U.S. 27, 31; *Yick Wo v. Hopkins,* 118 U.S. 356, 369; *Allgeyer v. Louisiana,* 165 U.S. 578, 589, 590; *Coppage v. Kansas,* 236 U.S. 1, 14.

Inslee has unlawfully injured, oppressed, threatened, and intimidated plaintiffs from exercising their right to freely practice religion. “There are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.” *Wisconsin v. Yoder,* 406 US 205, 220 (1972); E. g., *Sherbert v. Verner,* 374 U. S. 398 (1963); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943);

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

Cantwell v. Connecticut, 310 U. S. 296, 303-304 (1940). "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." *Schneider v. State,* 308 U.S. 147, 160. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. *Cantwell v. Connecticut,* 310 US 296 (1940).

Inslee has unlawfully injured, oppressed, threatened, and intimidated plaintiffs from exercising their right of equal protection under the law. Inslee's distinguishing between essential and non-essential businesses has unlawfully created a class of citizens (business owners not qualifying) subject to manifest discrimination and summary orders of closure. Such a regulation bears no rational interest to the concept of the emergency identified by Inslee, and therefore denies the due process and equal protection rights held by plaintiffs as protected under the Fourteenth Amendment. *City of Boerne v. Flores,* 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If compelling interest really means what it says ..., many laws will not meet the test...."); *Burson v. Freeman,* 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (reaffirming that it is the rare case in which we have held that a law survives strict scrutiny "); *United Food,* 163 F.3d at 355 (The compelling interest test is "historically stringent").

As the Court said in *Gideon v. Wainwright,* 372 US 335, 341-342 (1963): "[T]his Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

"fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. *Gitlow v. New York,* 268 U. S. 652, 666 (1925) (speech and press); *Lovell v. City of Griffin*, 303 U. S. 444, 450 (1938) (speech and press); *Staub v. City of Baxley,* 355 U. S. 313, 321 (1958) (speech); *Grosjean v. American Press Co.*, 297 U. S. 233, 244 (1936) (press); *Cantwell v. Connecticut,* 310 U. S. 296, 303 (1940) (religion); *De Jonge v. Oregon*, 299 U. S. 353, 364 (1937) (assembly); *Shelton v. Tucker,* 364 U. S. 479, 486, 488 (1960) (association); *Louisiana ex rel. Gremillion v. NAACP*, 366 U. S. 293, 296 (1961) (association); *Edwards v. South Carolina,* 372 U. S. 229 (1963) (speech, assembly, petition for redress of grievances)." *Gideon, supra* at 341.

"For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation. *Gideon, supra,* at 342, *citing Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 235-241 (1897); *Smyth v. Ames,* 169 U. S. 466, 522-526 (1898).

Under 18 U.S. Code § 248(c), the court may award appropriate relief, including temporary, preliminary, or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

Further, Inslee does not have absolute immunity. Absolute immunity "depend[s] on the particular function performed rather than on whether the state officer's position had a general relationship to a judicial proceeding." *Miller v. Gammie*, 335 F.3d 889, 892 (9th Cir. 2003) (en banc). "The burden is on the official claiming absolute immunity to identify the common-law counterpart to the function that the official asserts, is shielded by absolute immunity." *Id.* at 897.

Absolute immunity shields only those who perform a function that enjoyed absolute immunity at common law. Even actions taken with court approval or under a court's direction are not in and of themselves entitled to quasi-judicial, absolute immunity. Instead, to enjoy absolute immunity for a particular action, the official must be performing a duty functionally comparable to one for which officials were rendered immune at common law. *Id.* (*citing Kalina v. Fletcher*, 522 U.S. 118 (1997), and *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993)).

Inslee's trampling of the Bill of Rights with his Proclamations based on a medical emergency has no basis in common law – and further, no basis in United States' history - and is therefore without absolute or quasi-judicial immunity. Furthermore, there is no authority for the granting of immunity when the state officer is violating federal law.

To the extent that plaintiffs have sought monetary relief from the defendant in his official capacity, such claims are now waived. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *Quern v. Jordan*, 440 U.S. 332, 342 (1979). Plaintiffs however continue to act as class representative of persons similarly situated whose civil rights are being violated by the orders of defendant Inslee.

For these reasons, the Eleventh Amendment does not shield Inslee from the injunction plaintiffs seek, which would bar him from any further violations of the First, Fifth, and Fourteenth Amendments, as he and his health professionals, epidemiological modeling experts,

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

and modelers, continue to conspire even now to injure, oppress, threaten, or intimidate Washingtonians in the free exercise or enjoyment of rights or privileges secured to them by the Constitution or laws of the United States, as he is threatening violators of his Proclamations with "criminal penalties pursuant to RCW 43.06.220(5)" (Any person willfully violating any provision of an order issued by the governor under this section is guilty of a gross misdemeanor).

Respectfully submitted this 28th day of July 2020.

// Stephen Pidgeon
Stephen Pidgeon, WSBA#25265

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513

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 28th day of July 2020.

Zachary Pekelis Jones, WSBA No. 44557
Assistant Attorney General
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 474-7744
zach.jones@atg.wa.gov

Jeffrey T. Even, WSBA No. 20367
Deputy Solicitor General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(360) 586-0728
jeffrey.even@atg.wa.gov

PAUL M. WEIDEMAN, WSBA No. 42254
Deputy Solicitor General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(360) 753-7085
paul.weideman@atg.wa.gov

Brendan Selby, WSBA No. 55325
Assistant Attorney General
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 254-4270
brendan.selby@atg.wa.gov

Emma S. Grunberg, WSBA No. 54659
Deputy Solicitor General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 521-3222
emma.grunberg@atg.wa.gov

Attorneys for Defendant Jay Inslee

//Stephen Pidgeon
Stephen Pidgeon, WSBA #25265
Attorney for Plaintiffs

STEPHEN PIDGEON
Attorney at Law, P.S.
1523 132nd Street SE, Suite C350
Everett, Washington 98208
Stephen.pidgeon@comcast.net
425-347-7513