



DELAWARE GENERAL ASSEMBLY
LEGISLATIVE HALL
DOVER, DELAWARE 19901

May 19, 2020

The Honorable William P. Barr
Attorney General of the United States
Of America
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: Balancing Public Safety with the Preservation of Civil Rights

Dear Attorney General Barr:

Let us begin by thanking you for your leadership in directing Eric Dreiband, Esquire, (Assistant Attorney General of Civil Rights) and Matthew Schneider, Esquire, (U.S. Attorney for the Eastern District of Michigan) to oversee efforts to monitor state and local policies, paying particular attention to those actions which impact the civil and constitutional rights of all citizens of these United States. It is in this vein that we write to you today.

We currently serve as members of the Delaware General Assembly, in the Senate and House of Representatives. We have been unable to meet in session since a March 11 report of the first COVID case in Delaware, despite the fact that the legislative session is constitutionally required to run until June 30 of each year. The delay in calling the legislative branch into session does not negate the real and substantial unconstitutional infringements on federal rights guaranteed us all.

Governor John Carney issued an Executive Order on March 12, 2020 citing as the basis the threat of COVID, the need for social distancing and the mitigation of exposure of citizens, wherein he limited public gatherings to no more than fifty (50) persons for the *next eight weeks* (emphasis added). In the original State of Emergency the Governor (a) impermissibly delegated his Executive authority to declare said emergency and implement the orders to administrative agencies, rather than preserve this responsibility for the three branches of government, equally: (b) activated the Delaware National Guard without proper state or federal mandate; (c) closed certain businesses and imposed isolation and quarantines; (d) limited public gatherings; (e) and restricted travel out of the State of Delaware. Each of these steps was taken without legislative or judicial consent and without due process for the citizenry. We believe these actions violate the First,

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Second, Fourth, Fifth, Sixth, Fourteenth and Fifteenth Amendments to the United States Constitution, as they apply to the citizens of Delaware.

On March 16, 2020, the Governor signed the First Modification to the Declaration of State of Emergency. This modification (a) further restricted the size of public gatherings; (b) carved out an exception to the business closings to permit “state licensed establishments” serving food and alcoholic beverage to permit service for take-out only – including the service of alcoholic beverages as a take-out (violating Title 4 of the Delaware Code); (c) limited gatherings in senior centers, nursing home/ retirement facilities; (d) delegated the power to cancel gatherings to administrative agencies; and, (f) modified the unemployment insurance system without input or legislative action. Each of these actions was taken without legislative or judicial consent and without due process for the citizenry. Further, the closing of all businesses with piece-meal exceptions being made for certain entities and the provision for take-out alcohol service violates the Commerce Clause of the United States Constitution. We believe these actions violate the First, Second, Fourth, Fifth, Sixth, Fourteenth and Fifteenth Amendments of the United States Constitution. Further, these actions deprived citizens of the State of Delaware equal protection based on their age, status or gender.

On March 18, 2020, the Governor signed the Second Modification to the Declaration of State of Emergency. This modification further restricted public gatherings and closed certain businesses and facilities. These actions were taken without legislative or judicial consent and without due process for the citizenry. We believe these actions violate the amendments to the United States Constitution as mentioned herein.

On March 21, 2020, the Governor signed the Third Modification to the Declaration of Emergency. In this modification, the Governor took the unprecedented step of closing public *and private* beaches of Delaware to access by the citizenry, permitting only walking dogs. This action was delegated to an administrative agency of the State of Delaware. This action was taken without legislative or judicial consent and without due process for the citizenry. With this sweeping action, the Governor denied all citizens not only access to private beaches (a taking pursuant to the Fifth Amendment) but further discriminated access to public beaches only to people with dogs. There is no rational basis or relationship to any public health concern with this arbitrary and capricious action by the Governor. We believe these actions violate the amendments to the United States Constitution as mention herein. This amounts to an unconstitutional taking.

On March 22, 2020, the Governor signed the Fourth Modification to the Declaration of Emergency. The Governor arbitrarily and capriciously set about

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designating businesses in Delaware as “Essential Businesses” and others as “Non-Essential Businesses”. Those arbitrarily-designated “Essential Businesses” enjoy relative immunity from the prohibitive and punishing impact of the State of Emergency, with Modifications. Those businesses arbitrarily designated as “Non-Essential Businesses” were not provided any such exemption and were immediately subject to an ordering closing their doors. These “Non-Essential Businesses” include hospitality and recreation facilities (indoor or outdoor), concert halls and venues (indoor or outdoor); theatres and performing arts venues (indoor or outdoor), sporting event facilities, golf ranges (but not golf courses?), real estate professionals, business support services, shopping malls and retail stores. There is no rational basis or nexus between the designations of “essential” and “non-essential” and the purported public health crisis. For instance, how is it permissible to walk your dog on the beach but not exercise outdoors? Here again, there was no legislative nor judicial consent. We believe these actions violate the amendments to the United States Constitution, the Taking Clause and the Commerce Clause of the United States Constitution.

Later on March 22, 2020, the Governor signed the Fifth Modification to the Declaration of Emergency. Beginning an increasing level of draconian measures, the Governor issued a “shelter in place of residence” order. “All individuals” currently living in Delaware were ordered to shelter in place – to stay home. There was no provision for those who were not infected with the virus nor those with legitimate property and personal interests. The Governor limited travel to “Essential Travel”, which was defined with a strange patchwork of acceptable and unacceptable reasons to leave home. The Governor stated in this modification: “This Order has the force and effect of law. Any failure to comply with the provisions .. shall constitute a criminal offense.” This order strips the important constitutional rights of the citizens of Delaware, denying procedural and substantive due process, an unconstitutional restriction on travel liberties and imposes criminal penalties for actions not approved by the General Assembly. We believe these actions violate the amendments to the United States Constitution, the Taking Clause, the Commerce Clause and fundamental notions of due process.

On March 24, 2020, the Governor signed the Sixth Modification to the Declaration of Emergency. In this modification, the Governor unilaterally moved the date for the Delaware Presidential Primary, modified the requirements and qualifications for absentee balloting, and further impacted the rights of Delawareans in free, fair and impartial elections. This modification also summarily stayed evictions and other landlord/tenant actions, clearly abrogating the contractual rights of the citizens of Delaware. This modification also stayed mortgage foreclosures, again interfering with contractual rights and depriving the people of their property interests without due process of law. The modification required utilities to continue to provide services, insurers to continue to insure and business to continue, in essence, to offer their goods and services

without compensation. No due process guarantees were included in this modification. These actions were taken without legislative or judicial consent and violate the amendments to the United States Constitution, the Taking Clause, the Commerce Clause and the contracts clause of the Constitution, as amended,

For purposes of brevity, the balance of the Modifications shall be addressed summarily:

Seventh Modification. March 29, 2020. Requires those who travel into Delaware to “self-quarantine” for fourteen days (without monitoring). Continues the criminal sanctions for violating an Executive Order.

Eighth Modification. March 30, 2020. Suspends child care services in Delaware, abrogating parental contracts with care providers and centers. Permitting surf fishing on the heretofore “dogs-only closed beaches”.

Ninth Modification. April 1, 2020. A modification of earlier orders. Denies gatherings of ten or more persons until after May 15, 2020. Limiting the number of consumers permitted in any premises. Designates certain private persons and entities as “public employees” thereby violating numerous public contracting and bidding requirements. Continues the criminal penalties.

Tenth Modification. April 6, 2020. Modifies earlier orders, without a finding of causal or rational relationship to the purported public health crisis. Designating further certain businesses as “Non-essential”, with no relationship to a public health nexus. Closing all “Non-essential businesses” until May 15, 2020 without due process of law. Closing commercial lodging in the State of Delaware, thereby depriving public and private citizens and entities in Delaware from contractually renting, offering or otherwise contracting for provision of services. Automobile, dentistry, repair shops, bicycle repair facilities (?), firearms dealers, shooting ranges and gold course – open only by appointment. Continues the prohibition on real estate professionals other than working from home. Continues the criminal penalties.

Eleventh Modification. April 10, 2020. The State of Emergency, as modified, is extended “until terminated in accordance with State law.

Twelfth Modification. April 23, 2020. Activating those persons who have held a license to practice medicine in any jurisdiction in the United States (including physicians, pharmacists, respiratory therapists, physician assistants, paramedics, emergency medical technicians, practical nurses, registered nurses, advanced practice registered nurses and

certified nursing assistants) are authorized to practice in Delaware, without further statutory requirements being fulfilled.

Thirteenth Modification. April 25, 2020. Requires all persons over the age of two years of age, to wear a “face covering” and requiring all businesses to enforce this order. There is no rational relation or nexus between the public health concerns and the wearing of said masks. This provision deprives citizens of liberty interests.

Fourteenth Modification. April 30, 2020. Modifies statutory and contractual relationships between landlords and tenants without due process to either party.

Fifteenth Modification. May 7, 2020. Moves, yet again, the Presidential Primary Election and further modifies the statutory provisions for absentee ballots and qualifications. This modification authorizes “Non-essential businesses” to open for business only with curbside service. There is no explanation as to why certain retail establishments have been open all the time and others shuttered or limited to curbside service only.

Second Extension of Declaration of State of Emergency. May 8, 2020. This extension states all provisions currently in place shall remain operational until terminated in accordance with state law.

Sixteenth Modification. May 10, 2020. Suspends the requirement for educators to submit school transcripts for any purpose. Waives attendance requirements in public education, thus depriving students of free and public education. Suspends the days to be worked by school employees, suspends continuing licensure requirements, suspends notification by certified mail, waiving evaluations, waiving student testing (in accordance with both state and federal regulations), suspending school bus contracts and waives clinical education requirements.

Seventeenth Modification. May 14, 2020. Modifies closing of state and private beaches. Imposes requirements upon towns to implement these modifications. Requires face covers and distancing for anyone using a public or private beach. Permits ice cream, water ice, custard or similar shops and ice cream trucks to operate, but limits purchase to those over the age of twelve.

Eighteenth Modification. May 18, 2020. Modifies closing of Houses of Worship and other places of religious expression or fellowship, however restricts attendance to thirty percent (30%) of capacity. However, official guidance issued by the delegated executive agency directs individuals 65 years of age or older not to enter the House of Worship.

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Additionally, the Governor is implementing a tracing system, whereby persons are required to disclose personal, private information about their comings and goings and individuals with whom they come into contact with, in violation of the privacy guarantees of the Constitution and the federal HIPAA statute.

The Supreme Court of Delaware has summarily suspended the provisions of the Speedy Trial Act, in violation of the Delaware and United States Constitution. Further, Courts of Delaware have been closed and remain so until June 15, 2020, thus denying citizens of the State of Delaware due process and legal protections.

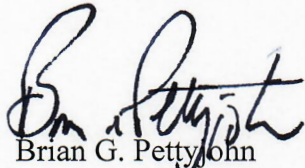
As you may see from the foregoing, the Governor of Delaware has usurped the authority of the citizens of the State of Delaware and the legislative and judicial branches of government.

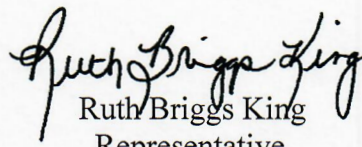
It must be noted that the determinations made by the Governor are not supported by a rational connection or nexus to the proclaimed state of emergency. The exercise by the Governor of his power has been done in violation of the protections guaranteed by the United States Constitution.

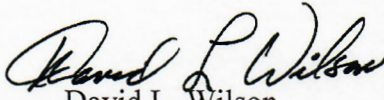
We would respectfully request your immediate attention to this broad, unconstitutional overreaching by the Governor of Delaware and the wholesale violation of the important rights guaranteed all citizens of these United States.

Thank you for your time and consideration of this lengthy request for review, assistance and relief.

Respectfully,


Brian G. Pettyjohn
Senator


Ruth Briggs King
Representative


David L. Wilson
Senator

enc.: Executive Orders